

## PLANNING LAW

### Case Law Update<sup>1</sup>

#### Introduction

1. For the purposes of this seminar the coverage of case law is necessarily selective and it does not seek to address every interesting case from the past year or so. Other papers today will cover additional authorities to which reference is not made here.
2. The year has been characterised by a sense of flux and uncertainty in the planning system, due not only to the ongoing effects of the recession but also to the anticipated structural alterations in the regime. The courts have heard a number of planning cases which reflect these times.
3. The headlines have been dominated by the Cala Homes litigation; and it seems likely that further changes, including the eventual enactment of the Localism Bill and the promulgation of the National Planning Policy Framework, will bring forward other cases. Other cases underline the effect of the downturn on developers wishing to secure existing permissions, to test the boundaries of policy compliance or to move away from previously offered obligations. Environmental impact assessment continues to develop through the courts; and habitats assessment has gained greater prominence, all of which is explained in more detail below.

#### Cala Homes and Material Considerations

***Cala 1: R (Cala Homes (South) Ltd) v. Secretary of State for Communities and Local Government*** [2010] EWHC 2866 (Admin)

#### Facts

4. Cala Homes sought to judicially review the decision of Eric Pickles, the Secretary of State for Communities and Local Government, to abolish Regional Strategies (“RSSs”) which had been announced in a Parliamentary Statement on 6 July 2010. The challenge was brought because Cala feared

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<sup>1</sup> I am grateful to Emma Harling-Phillips in chambers for her contribution to the preparation of this paper.

that the abolition would materially affect its case on an appeal against the refusal of planning permission for a proposed residential development.

### Issues

5. Whether:
  - a. the Secretary of State had the power to abolish RSSs;
  - b. that decision was in breach of the Secretary of State's obligations under the Environment Assessment of Plans and Programmes Regulations 2004.

### Determination

6. The power of the Secretary of State - under s. 79(6) of the Local Democracy, Economic Development and Construction Act 2009 - did not extend to effecting the practical abrogation of RSSs as a complete tier of planning policy guidance by executive action. The decision of 6 July 2010 fell to be quashed on that basis.
7. Sales J also went on to consider the Claimant's second ground of challenge – that the revocation was in breach of obligations in the Environment Assessment of Plans and Programmes Regulations 2004 (implementing Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment – the SEA Directive). Sales J agreed that before introducing his decision to revoke RSs the Secretary of State should have reviewed whether that change in the planning regime was likely to have significant environmental effects by conducting a screening assessment under Regulation 9.

### Implications

8. The abolition of RSSs was a matter for Parliament and legislation was required to effect their revocation. Consequently the Coalition Government inserted a clause into the Localism Bill abolishing this tier of planning policy.

***Cala 2: R (Cala Homes (South) Ltd) v. Secretary of State for Communities and Local Government*** [2011] EWCA Civ 639 (Court of Appeal); ***R (Cala Homes (South) Ltd) v. Secretary of State for Communities and Local Government*** [2011] EWHC 97 (Admin)

## Facts

9. The decision in ***Cala 1*** prompted the Secretary of State to immediately issue a statement on 10 November 2010 referring to his letter of 27 May 2010 to all local planning authorities and the Planning Inspectorate in which he informed them of the Government's intention to abolish RSSs and that he expected them to have regard to that intention as a material consideration in any planning decisions being taken. The statement concluded, *"to illustrate the clear policy direction of the Coalition Government, the proposed clause of the Localism Bill that will enact our commitment to abolish regional strategies is being placed in the Library. The Bill is expected to begin its passage through Parliament before Christmas."* Shortly after the statement and letter, the Secretary of State introduced the Localism Bill to Parliament which included clause 89 which provided for the abolition of RSs.
  
10. At the same time, the Chief Planner sent a letter to all local planning authorities and the Planning Inspectorate. In that letter he noted that the effect of the decision in ***Cala 1*** was to re-establish RSs as part of the development plan. He also referred to the Secretary of State's letter of 27 May 2010 and concluded that *"Local Planning Authorities and the Planning Inspectorate should still have regard to the letter of 27 May 2010 in any decisions they are currently taking."*
  
11. In response, Cala Homes issues judicial review proceedings challenging the legality of the statement of the Secretary of State and the letter of the Chief Planner.

## Issues

12. Whether the Government's intention to abolish RSSs was a material consideration to which regard was to be had when taking planning decisions.

## Determination

13. The Court of Appeal upheld the decision of the Lindblom J that the intention to abolish RSSs could amount to a material consideration for the purposes of

section 70(2) of the Town and Country Planning Act 1990<sup>2</sup> and section 38(6) of the Planning and Compulsory Purchase Act 2004.

14. Sullivan LJ noted that Cala did not dispute the general proposition that a prospective change to planning policy was capable of being a material consideration for the purposes of sections 70(2) of the 1990 Act and 38(6) of the 2004 Act. The weight to be given to a prospective change in policy would be a matter for the decision maker's planning judgment in each case and that the stage reached in the legislative process of any reform went to the weight and not the materiality of the proposed change. Given the early stage that the proposal had reached in the legislative process, and the fact that revocation of any individual RSS would be subject to the SEA process, many Inspectors would consider that they should give little, if any weight to the proposed abolition.
15. However, Sullivan LJ was persuaded by the Secretary of State that 'never say never' was the appropriate response and that it was not the case that the proposed abolition could not be given any weight at this stage. There might be finely balanced cases where the very slight prospect of a very substantial policy change might just tip the balance in favour of granting or refusing planning permission.
16. Sullivan LJ also commented on the materiality of the intended abolition of RSSs in relation to the preparation by local planning authorities of their Development Plan Documents ("DPDs"). He contrasted the flexibility given to authorities by sections 70(2) of the 1990 Act and 38(6) of the 2004 Act when taking decisions on planning applications with the lack of flexibility when planning authorities are preparing their DPDs when they must have regard to the relevant RS and when the adopted DPDs must be in general conformity with that RS. In light of those requirements, Sullivan LJ stated that *"it would be unlawful for a local planning authority preparing, or a Planning Inspector examining, development plan documents to have regard to the proposal to abolish regional strategies. For so long as the regional strategies continue to exist, any development plan documents must be in general conformity with the relevant regional strategy."*

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<sup>2</sup> S.70(2) requires local planning authorities when determining planning applications to "have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

## Implications

17. The intended abolition of RSSs is a material consideration which local authorities and Inspectors should take into account when making planning decisions. Around the time of the Cala Homes 2 decision, many Inspectors were not giving much weight to the prospective abolition of the relevant RSS. In housing cases some authorities had sought to use the prospective abolition to revise housing targets downwards in draft DPDs, however before any examination into those targets the RSS figure could be regarded as carrying greater weight notwithstanding the prospective abolition.
  
18. For many authorities this highlighted the more significant issue raised by the Localism Bill – how it affected the preparation of DPDs. Local planning authorities cannot simply take the intended abolition as giving them a free reign to re-determine the housing figures in their development plans and proceed immediately to examination, as this could lead to challenge due to lack of conformity with the relevant RSSs for as long it remains in place. Nonetheless, some authorities have considered pausing preparation until the outcome of the Localism Bill was known, to avoid what could be substantial abortive work. The uncertainty in this area seems likely to continue with the National Planning Policy Framework, which could potentially cause authorities to either review DPDs that have recently been adopted or think again about the direction of travel that emerging documents are taking.

## ***R(Hinds) v. Blackpool Council*** [2011] EWHC 591 (Admin)

### Facts

19. The Cala Homes litigation has been supplemented by this decision, where in March 2010 the Council had approved, in principle, an application for permission for a residential development of 584 dwellings. The Committee report had noted that the relevant part of the Local Plan which suggested that permission should be refused was in conflict with the relevant RSS which was said to be a more recent expression of policy than the Local Plan. Following the July 2010 announcement the Claimant's advisors wrote to the Council urging that the intended abolition was highly relevant and that the Committee should reconsider whether in principle permission should be granted. That reconsideration did not take place and permission was granted.

### Issues

20. Whether the Government's stated intention to revoke RSSs was capable of being a relevant consideration such that it ought to have been considered by the planning committee before the decision notice was issued.

### Determination

21. Langstaff J noted that, for a court to take an objective view of materiality it was required to have regard to all the facts and circumstances viewed broadly. Theoretical relevance to a planning decision could be excluded as insufficiently material adopting a *de minimis* approach. That was not to confuse materiality and weight, but to recognise the true scope of materiality. Further, as the Claimant had been obliged to accept, materiality has regard to practical effect. A planning authority is not obliged to take account of considerations which objectively viewed would have no practical effect upon the decision as to land use to which it has to come.
22. Langstaff J concluded that legislative intent may be a material consideration for planning officers, although his preference was to see it as an immaterial consideration in the particular circumstances of this case. He stated that he considered *"it open, and often wise, for a local authority making decisions which will affect the distant future to take into account those matters which it may reasonably be supposed will alter the planning landscape in the intermediate future."*
23. The decision which had been taken in this case was based on locally driven factors, in line with the purpose behind abolishing RSSs. It could not logically be suggested that the abolition of the RSS would have any effect on that decision. Consequently, there was no reason to suppose that the revocation would have been a material consideration to which the Council would have had to have regard in reviewing its decision.

### Implications

24. Confirmed the potential for legislative intent to be a material consideration, although care will also be required in particular cases to assess whether the abolition of RSSs can properly be regarded as material.

***Health and Safety Executive v. Wolverhampton County Council*** [2010] EWCA Civ

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Facts

25. Wolverhampton had granted planning permission for the erection of 4 blocks of student accommodation close to a liquefied petroleum gas facility. The HSE had advised the local authority that permission should not be granted on safety grounds. Despite this, when considering the planning application Wolverhampton failed to consult further with the HSE, failed to obtain its own advice as to the safety implications of permitting the development and despite being obliged to do so, failed to give the HSE advance notice of its intention to grant planning permission for the development, and failed to notify the HSE that it had granted permission. By the time the HSE learnt that permission had been granted, three out of the four blocks were almost complete. The HSE asked the local authority to issue an order under s.97 of the TCPA 1990 to revoke or modify the planning permission to disallow the development and completion of student accommodation, particularly those buildings in the inner and middle zone of the facility, but it refused.

26. HSE sought to judicially review that refusal on the basis that the decision not to revoke the permission was, *inter alia*, unlawful because the Council had had regard to the cost of having to pay compensation under section 107 of the 1990 Act.

Issues

27. Whether the local planning authority entitled to consider the requirement to pay compensation when deciding whether to revoke the planning permission.

Determination

28. The Court of Appeal concluded (Lord Justice Pill dissenting) that the obligation to pay compensation was material to a decision whether to revoke. the Court agreed with Ouseley J.'s conclusion in ***R (Usk Valley Conservation Group) v Brecon Beacons National Park Authority*** [2010] EWHC 71 (Admin) that ***Alnwick DC v Secretary of State for the Environment, Transport and the Regions*** (2000) 79 P. & C.R. 130 had been wrongly decided.

29. Sullivan LJ stated (at para. 50): *“When deciding whether or not to take action under a particular provision in the 1990 Act, the local planning authority would be expected to be familiar with the content of the 1990 Act as a whole. It would have to consider what would be the consequences under the Act of taking action under a particular provision and whether action under some other provision in the Act would be more appropriate. The 1990 Act must be read as a whole for the purpose of ascertaining Parliament's intention. Since Parliament expressly provided that the local planning authorities will be liable to pay compensation if they decide that action should be taken under certain powers conferred by the Act, it must be inferred, in the absence of clear words to the contrary, that Parliament expected that a local planning authority would have regard to its liability to pay compensation under one part of the Act when deciding whether or not to exercise a power under another part of the Act. A decision under section 97 is not taken in isolation, it is taken within the statutory framework of the 1990 Act. If that statutory framework imposes a liability to pay compensation if a certain course of action is taken, there is no sensible reason why that liability should be ignored (in the absence of an express instruction to do so) when a decision is reached under the Act as to whether that action should be taken.”*

30. However, the Court of Appeal introduced safeguards including the following:

- (1) that the desire to avoid paying compensation should not be the ‘sole factor’ in deciding not to revoke a permission; and
- (2) the local planning authority should set out clearly why it is expedient for that sum not to be paid in circumstances in which modification or revocation might otherwise be appropriate.

#### Implications

31. Given the difference of judicial opinion, an appeal to the Supreme Court will be heard and this is expected to take place in February 2012. It is unclear whether the decision will be upheld (note Longmore LJ’s acknowledgement that the issue *“divides acknowledged experts”*), but if so, it will underscore the traditional reluctance of local planning authorities to revoke planning permissions.

#### **Enforceability of Planning Obligations**

***R (Millgate Developments) v. Wokingham Borough Council*** [2011] EWHC 6 (at first instance)

#### Facts

32. The Council refused Millgate planning permission for the erection of 14 dwellings for a number of reasons, one of which was that “the proposal fails to make satisfactory provision of adequate services, amenities and infrastructure needs and consequently would have an unacceptable adverse impact upon the amenities of the area.” It was noted that this reason for refusal could be overcome through the submission of an acceptable unilateral undertaking
33. Millgate duly entered into a unilateral undertaking in order to meet the authority’s infrastructure concerns. Millgate’s subsequent appeal against the refusal of planning permission was allowed, but the decision letter stated that the Council had produced nothing to show that the contributions in the unilateral undertaking were necessary in order to satisfy planning policy.
34. In light of the Inspector’s finding Millgate sought to have the obligations in the undertaking discharged. The Council refused on the basis that the Inspector's decision did not affect the enforceability of the obligations. Millgate sought judicial review of that decision.

#### Issues

35. The extent to which the Council had to consider whether a contribution was justified when deciding whether to enforce it; and whether in the light of the Inspector’s decision, it was reasonable to enforce the unilateral undertaking.

#### Determination

36. HHJ David Pearl found that the undertaking was enforceable. It was an undertaking entered into voluntarily by the Claimant, and was conditional on two events only, namely the grant of planning permission, and the commencement of the development, both of which had by that point occurred. There was no condition to the effect that the Inspector had to indicate that the contribution was necessary to make the development acceptable.
37. Prior to its decision to enforce the unilateral undertaking the Council had conducted an investigation and had sought full justification of the

contributions from its officers in the form of written statements. Consequently, the decision was not solely a decision based on enforceability but it was also based on whether the undertaking served a useful planning purpose – the Council’s conclusion that it did was one which it was entitled to reach.

38. In so far as it was also argued that the Council acted unreasonably in embarking upon an enforcement exercise in a situation where there is no legal obligation to repay unexpended sums, it was held that s. 111 of the Local Government Act 1972<sup>3</sup> would enable the refund of unexpended sums and the fact that there might be a credit cannot render the decision to uphold the obligation unlawful.

39. This decision was affirmed by the Court of Appeal on 5 July 2011. The transcript of the Court’s decision is currently being awaited. It is understood that the Court of Appeal agreed that the local planning authority was entitled to enforce and to find that the obligations were imposed for a planning purpose.

#### Implications

40. This decision has prompted developers to consider whether obligations submitted on appeal should be drafted so that they are contingent upon not only the grant of planning permission and the commencement of development but also upon the Inspector finding that the obligation is necessary to mitigate any adverse effects of the scheme.

41. Some may regard this approach as difficult in practice in that it imposes a specific burden on the Inspector to set out in the decision letter which of the obligations are binding upon the developer; and this would have to be done clearly in a way which leaves no room for debate about the extent to which evidence on the need for the obligation has been accepted by the Inspector.

#### ***R (Renaissance Habitat Ltd) v. West Berkshire District Council* [2011] EWHC 242**

#### Facts

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<sup>3</sup> Which provides that a local authority has the power “to do anything...which is calculated to facilitate, or is conducive or incidental to, the discharge of their functions”.

42. In 2005 Renaissance was granted planning permission for residential development and entered into a s.106 agreement to contribute toward infrastructure costs, including education provision. The s.106 specified the sums payable which had been calculated on the basis of Supplementary Planning Guidance (“SPG”) which had been produced by the Council in 2004.
43. Development began in 2007 at which point the sums became due. Renaissance failed to pay all the contributions so the Council issued proceedings for their recovery. Renaissance challenged the decision to bring those proceedings on the grounds that since the s.106 had been entered into in 2005 the Council had changed its SPG upon the basis of which it calculated developers’ contributions towards infrastructure. In most cases this change led to significantly lower sums and it had been introduced as a result of a number of rejections by Inspectors of the Council’s contentions as to what proper contributions should be. Renaissance further argued that circumstances had changed since 2005 in relation to the need for education provision.

#### Issues

44. Whether the enforcement of a s.106 agreement was unlawful in light of a change in the way contributions was calculated, due to a subsequent change in the Council’s SPG and an alleged change in the need for education provision.

#### Determination

45. Ouseley J concluded that the decision to enforce the s.106 agreement was not unlawful because of the subsequent changes to the SPG or due to changes in circumstances. The Council was seeking to enforce an agreement which was incontestably lawful when entered into. Renaissance could have contested the merits had it wished before an Inspector, so it was not forced to enter the agreement (which it had done successfully on two other occasions). It did not challenge its lawfulness before starting development; nor at any subsequent stage when payments were due, or when the SPG or educational circumstances changed. Nor did it avail itself of the statutory means of seeking a variation or discharge, and challenging as unlawful any refusal of variation or discharge. It was also noted that the parties could have agreed provisions which enabled obligations to be adjusted with changes to SPG or in specified circumstances, but did not do so.

46. In rejecting an argument that the s. 106 agreement did not serve a useful planning purpose, such that it would be unreasonable to enforce it, Ouseley J held that the following considerations were relevant to assessing whether there is such a useful purpose:
- a. a surplus from one contribution will serve a useful purpose if attributed to another;
  - b. the useful purpose may be different to that which was originally entered into;
  - c. the useful purpose does not need to relate to the development to which the agreement was related;
  - d. it is not without doubt that the useful purpose must be a useful planning purpose (given the drafting of s. 106A).

#### Implications

47. This decision has restricted the scope for developers to rely upon changed circumstances to argue for a reduction on previously agreed contributions. As Ouseley J intimated, there will always be the scope to making a s.106A application, or to judicially review any decision not to modify, or to submit another application and go to appeal if the local planning authority is not prepared to accept the scheme in the absence of the previously agreed contributions. For those negotiating obligations there may well be some benefit in introducing review mechanisms to respond to potential changes in policy or where particular circumstances indicate that a review could be beneficial.

#### ***Hampshire County Council v Beazer Homes Ltd* [2010] EWHC 3095 (QB)**

##### Facts

48. The highway authority, the local planning authority and the owners of land were signatories to a section 106 agreement, in respect of which most of the financial contributions were instalments of contributions towards the Fleet Inner Relief Road.
49. The eventuality of that scheme not proceeding was envisaged by a clause which allowed for the monies to be devoted to alternative transportation improvements in Fleet. The claimant decided not to proceed with the construction of the relief road and chose to carry out a number of

improvements to the road transport system in Fleet town centre. A dispute arose about the application of the funds to purposes that were regarded by Beazer to fall outside the scope of “alternative transportation improvements”. Particular concerns were addressed to various environmental improvements.

50. After completion of the development Beazer demanded a refund of expenditure made. Whilst some refunds were made, there remained substantial differences between the parties, including the following issues.

### Issues

51. Whether terms should be implied to the effect that:
- a. the claimant's expenditure of the defendant's contributions must be “reasonably” (in the “common law sense”) and “properly” incurred by reference to “industry standards”;
  - b. the claimant should be required to refund to the defendant that part of its financial contributions for which no sufficient account and/or evidence had been provided.
52. The Judge was not prepared to imply a term under the first issue on the basis that such a duty was clearly wider than the claimant’s ordinary public law obligations; any such term would have been unlikely to be agreed to if suggested and in any event uncertain. The judge also considered that the phrase requiring the authority to “account” to Beazer “for the cost of alternative schemes” did not oblige the authority to disclose information designed to explain the reasons why various decisions underlying the works were taken and to justify those decisions. However, in relation to the second issue it was held that there was an obvious lacuna in that no provision was made for what should happen in the event a part of the financial contribution remained unexpended after the necessary highway works had been completed. The Judge gave business efficacy to the true meaning of the agreement by implying that any such sum should be refunded.

***Milebush Properties Ltd v. Thameside MBC*** [2011] EWCA Civ 270

### Facts

53. Milebush owned property affected by the grant of planning permission to Tameside. That permission was subject to a condition requiring the construction of a service road. A clause in the s.106 agreement between the local planning authority and Tameside provided for the grant of a right of way over the service road in favour of Milebush's property. Milebush argued that the right of way covered a pedestrian emergency exit whereas Tameside was only willing to grant a right of way in more limited terms. The point to emphasise is that the proceedings were not brought by the local planning authority as had been contemplated in the s.106, but were instead brought by Milebush, which was not a party to the s.106.

#### Issues

54. Whether Milebush was entitled to take private law proceedings against Tameside for a declaration on the construction of a s.106 agreement to which it was not a party and which was consequently not enforceable by it.

#### Determination

55. A majority of the Court of Appeal (Lord Justice Moore-Bick dissenting) concluded that, although the caselaw demonstrated that a declaration may be granted in private law proceedings about the disputed construction of a document affecting the claimant even where the claimant was not a party to it, nevertheless, there were no grounds for disturbing the decision at first instance to refuse a declaration.

56. The most important factor was, in reality, that this was not a private law dispute about the construction of a deed for the grant of a private right of way or the legal enforcement of an agreement, but was about the planning objectives of the local planning authority and the performance of planning obligations on which the decisions resting with the planning authority were important, even paramount. Those were public law planning matters which ought to be decided in judicial review proceedings to which the local planning authority was a party.

#### Implications

57. This case underlines the need for parties affected by a s. 106 agreement to ensure as far as possible that the drafting is sufficiently precise to reflect their concerns.

### **Affordable housing**

***Vannes Kft v Royal Borough of Kensington and Chelsea*** [2010] EWCA Civ 1466

#### **Facts**

58. This case concerned an appeal in respect of a refusal of planning permission for a change of use of an hotel and its re-development as nine self-contained residential units. The developer made offer to provide affordable housing either on site, off site or by way of a financial contribution to the local planning authority. Evidence was called by experts using different inputs and deriving different outputs arising from the use of the Three Dragons viability toolkit, which resulted in different conclusions about the ability of the development to deliver affordable housing and remain economically viable. The position of the developer was that if the provision of affordable housing was a condition of the grant of planning permission then it was unlikely that the re-development would go ahead. In the decision letter the Inspector was unable to arrive at firm conclusions in relation to the toolkit results:

*“Given the number of uncertain input values noted above, the inability of the professional witnesses to reach agreement on them at the inquiry, and their significant cumulative value, I consider that, in this case, none of the toolkit results is sufficiently robust to enable any significant weight to be attached in determining the provision of affordable housing that could be expected from the appeal proposal, I turn, therefore, to the other considerations in Policy 3A.10 and paragraph 3.52 [in the London Plan]”.*

59. His conclusions, including the consideration of London Plan policy, were later summarised by the Court of Appeal in this way:

*“The Inspector concluded, therefore, that it would be unreasonable to require “affordable housing” in the appeal proposal. One of the reasons for this conclusion is “the lack of reliance that can be placed on the toolkit results” . However, that is not the only reason given. The others are: (i) the need to encourage rather than restrain residential development; (ii) the need to take account of the particular circumstances of the site; (iii) the need to apply targets flexibly, taking into account individual sites costs and other scheme*

*requirements; and (iv) the specialised nature of the area in which the building is situated“.*

60. The Inspector allowed the appeal.

#### Issues

61. The decision of the Inspector was challenged on the grounds that inadequate reasons had been given for granting permission without any requirement to provide affordable housing.

#### Determination

62. The Secretary of State did not defend the challenge to the High Court which came before Sir Michael Harrison, who concluded that the Inspector had erred in law by failing to decide a “principal important controversial issue” at the Inquiry. It was held that it was incumbent on the Inspector to reach a conclusion on the issue of whether or not the appeal scheme could support provision for affordable housing and that the inspector had not made any real attempt to grapple with the issues.

63. The Court of Appeal disagreed. Aikens LJ regarded the issue of economic viability of providing affordable housing to be a:

*“40... sub-set of the principal important controversial issue” of whether there should be a provision for “affordable housing” in the scheme proposed....*

*43. But it does not follow that the Inspector had to reach a decision that he must choose one or other of the figures proposed as input values and then follow through with those figures to a conclusion that the proposed development was, or was not, economically viable. In my view if the Inspector concluded that none of the rival input figures could be regarded as reliable or likely to produce a useful result when fed into the “Three Dragons” software, he was duty bound to say so. It would have been irrational for him to have reached a conclusion that none of the input figures were reliable but he nevertheless felt obliged to decide which was the “least unreliable”.*

64. The Court of Appeal approved the decision of the Inspector and allowed the appeal.

#### Implications

65. This decision may be regarded as encouraging developers to propose further schemes without affordable housing, however much will depend on the facts of any individual case.

#### Implementation of planning permissions

***Greyfort Properties Limited v. Secretary of State for Communities and Local Government*** [2010] EWHC 3455 (Admin); [2011] EWCA Civ 908

#### Facts

66. Planning permission was granted for the development of 19 flats in 1974, subject to conditions which stated that development had to start within 5 years and that the ground floor levels for the block had to be agreed in writing with the local planning authority before any work could commence. In 1978, some initial work was carried out on the site. In 2005, the claimant applied for a lawful development certificate for the development of the now outmoded flats, with a view to using the certificate to improve its bargaining position in negotiations with the local planning authority relating to a permission. The local planning authority failed to make a decision.

67. On appeal the Inspector applied the test that had previously been set out in ***Hart Aggregates*** [2005] EWHC 840 (Admin) (see too ***Bedford Borough Council v. Secretary of State for Communities and Local Government and Murzyn*** [2008] EWHC 2304 (Admin)) where it had been held that a distinction had to be drawn between conditions which required something to be done before development commenced and conditions precedent which go to the heart of a planning permission. Failure to comply with the former would involve a breach of condition; failure to comply with the latter would mean the development carried out was unlawful (subject to exceptions specified in ***Whitley & Sons v. Secretary of State for Wales and Clwyd County Council*** (1992) 64 P&CR 296; see too ***Leisure Great Britain plc v. Isle of Wight Council*** (1999) 80 P&CR 370). In the ***Hart Aggregates*** case the following condition was held to fall within the former category: "The worked out areas shall be progressively backfilled and the areas restored to levels shown on the submitted plan or to a level to be agreed by the Local Planning Authority in

accordance with a restoration scheme to be agreed by the Local Planning Authority before extraction is commenced”.

68. In the present case the Inspector refused to grant the certificate, finding that the condition relating to ground levels was fundamental to the scheme and had not been discharged given the absence of approval by the local planning authority.

#### Issues

69. Whether the works carried out were properly characterised as a breach of a condition which went to the heart of the permission and could not have lawfully commenced development.

#### Determination

70. Mitting J was content to apply the **Hart Aggregates** formulation and, in rejecting arguments that the available information and construction of the condition meant that this was not a condition precedent, held as follows (at 24):

*“Plainly, having possession of the plans, the local authority must be taken to have regarded the setting of and agreement of floor levels of the flats as a matter of considerable importance. Accordingly, unless, as a matter of language, the condition can be relegated to the category in respect of which breach does not prevent the commencement of lawful operations, it plainly does”.*

71. The Court of Appeal upheld this judgment, endorsing the **Hart Aggregates** approach and finding that the Inspector was entitled to regard the condition as going to the heart of the permission such that the works carried out were unlawful.

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#### Implications

72. Conditions which are intended to genuinely act as a condition precedent to the development should be carefully drafted to achieve this effect.

#### EIA/Screening

73. This topic is covered in more detail elsewhere, however notable recent cases are as follows.

***R (Save Britain's Heritage) v. Secretary of State for Communities and Local Government*** [2011] EWCA Civ 334

Facts

74. The Secretary of State and the local planning authority had reached a decision allowing for the demolition of a redundant brewery as part of the redevelopment of the Lancaster Canal area without a screening opinion under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the EIA Regulations") implementing Directive 85/337, the EIA Directive.

75. Save sought to judicially review that decision claiming that the Directive required an EIA to be carried out prior to the demolition of a building and sought a declaration that (1) demolition of buildings was capable of constituting a project falling within Annex II of the EIA Directive and (2) the Town and Country Planning (Demolition – Description of Buildings) Direction 1995 (para. 2(1)(a)-(d)) was unlawful and should not be given effect. The Direction has been given by the Secretary of State on the premise that in most circumstances demolition did not amount to development or need planning permission. This obviated the need for planning permission for the demolition works and since, the environmental impact assessment regime here was based upon a requirement for planning permission is needed, demolition escaped that regime.

76. Save's challenge had been dismissed at first instance by Judge Pelling QC. However, after that judgment the European Court of Justice issued its decision in ***Commission of the European Communities v. Ireland C-50/09*** (judgment of 3 March 2011) in which it found that demolition works came within the scope of the EIA Directive and therefore may constitute a project within the meaning of Article 1(2) of the Directive. The ECJ therefore declare that by excluding demolition works from the scope of its legislation transposing the EIA Directive, Ireland had failed to fulfil its obligations under the Directive.

Issues

77. Whether demolition was capable of constituting a project for the purposes of the EIA Directive.

## Determination

78. Lord Justice Sullivan noted that the Directive must be interpreted in a purposive manner and stated (at para. 17): *“if it is accepted that works are capable of having significant effects on the environment, the definition of “project” in art.1.2 should, if possible, be construed so as to include, rather than exclude, such works. Applying this approach to the first limb of the definition in art.1.2, it seems to me that the execution of demolition works falls naturally within “the execution of ... other ... schemes...”.* Further, if demolition could amount to a scheme (and therefore a "project"), it was also capable of being an “urban development project.”
79. Sullivan LJ rejected the submission that that approach was contrary to the decision of the House of Lords in ***R(Edwards) v. Environment Agency (No. 2)*** [2008] UKHL 22. The observations of Lord Hoffman and Lord Hope in that case that the first limb of Article 1(2) appeared to contemplate the creation or construction of something new had to be considered in the context of the particular proposal under consideration in that case and they were not attempting to provide a definitive interpretation of the first limb of Article 1(2) for all purposes. Sullivan LJ therefore granted the two declarations sought.

## Implications

80. Developers will now need to consider specifically whether planning permission (including possibly an environmental impact assessment) is required for the demolition phase of a development. Those with unimplemented permissions should ensure that demolition is expressly anticipated by the permission.

***R (Friends of Basildon Golf Course) v. Basildon District Council*** [2010] EWCA Civ 1432

## Facts

81. As part of plans for the development of Basildon Golf Course landscaping works were proposed which involved substantial amounts of waste material being brought to the site to create large bunds. A screening opinion produced by the Council which, it emerged, underestimated the quantity of waste being brought onto the site by two-thirds, had concluded that an EIA was not required. The claimant challenged the adequacy of the screening opinion.

### Issue

82. The proper approach to be taken to issuing screening opinions.

### Determination

83. The gross understatement of the amount of waste being imported in the screening opinion had resulted in it being seriously misleading and the impact on the local environment of large quantities of waster forming massive and extensive bunds had not been mentioned or considered. Further, on the information that should have been available to the officer on the ecological aspect of the application the brevity of the consideration of those issues reflected an insufficient analysis. Pill LJ noted that *“the decision taken in a screening opinion must be carefully and conscientiously considered and it must be based on information which is sufficient.”* He consequently quashed the planning permission which had been granted.

84. Pill LJ found that the local planning authority had displayed a “psychological barrier” to finding that an EIA was necessary. Despite the fact that the need for an EIA may involve delay, on any view it had been arguable that an EIA was required and the sensible and convenient course might well have been to require one. Pill LJ went on to note that *“it may not always be in the interests of the parties or the public if a tough stance against requiring an EIA is readily accepted”*.

### Implications

85. Decision makers must ensure that they give adequate consideration to all aspects of a development proposal when considering whether an EIA is required and ensure that the information on which their decision is based is correct. Local authorities should be well aware of the risks of adopting a negative screening opinion in circumstances in which it is arguable that an EIA is required, even where that will involve delay. Developers may not be aiding their own cases by encouraging local authorities to take robust lines when EIAs are arguable necessary. If in doubt, submit an EIA.

## ***R (Bateman) v. South Cambridgeshire District Council* [2011] EWCA Civ 157**

### Facts

86. The Claimant challenged the rationality and sufficiency of the reasons of a screening opinion to the effect that the extension of a grain store was not

likely to have significant effects on the environment. The reasons stated that the site was not within the floodplain or in an area of high-medium flood risk, that no public right of way would be affected by the proposal, and that there were no Tree Preservation Orders within the site. In addition, it was found that the proposals would not affect a Scheduled Ancient Monument and would not lie within an environmentally sensitive area. The reasons went on to state that “the main impacts of the development are likely to be: increase in traffic movements, landscape impact, and noise disturbance to nearby residents. Transport, Landscape and Noise Assessments are to be provided with the application”.

87. It was argued that the statement giving the reasons for the decision failed to demonstrate that the office had considered the likely effect of the development in relation to traffic movement, the landscape and noise or, if she had considered those matters, had failed to explain why an EIA was not required.

#### Issue

88. The extent of reasoning required for issuing a particular screening opinion.

#### Determination

89. The Court of Appeal (Lord Justice Mummery dissenting) found that a screening opinion was not intended to involve a detailed assessment of factors relevant to the grant of planning permission which was something that came later and would ordinarily include an assessment of environmental factors, among others. Nor did a screening opinion involve a full assessment of any identifiable environmental effects. It involved only a decision, almost inevitably on the basis of less than complete information, whether an EIA needed to be undertaken at all. The court should not impose too high a burden on planning authorities in relation to what was no more than a procedure intended to identify the relatively small number of cases in which the development was likely to have significant effects on the environment, hence the term "screening opinion".
90. However, the Court stated that it was clear that when adopting a screening opinion the planning authority had to provide sufficient information to enable anyone interested in the decision to see that proper consideration

had been given to the possible environmental effects of the development and to understand the reasons for the decision.

91. In the present case there had been no clear statement of the planning officer's reasons for her conclusions. Although there was nothing to suggest that the planning officer's decision that an EIA was not required was not carefully and conscientiously considered, the reasons given for her decision did not make it sufficiently clear why she reached that conclusion. The decision to grant the permission was consequently quashed.

#### Implications

92. Care is required when drafting screening decisions, to ensure that the precise basis for the decision is apparent on the face of the decision.

***R (Loader) v. Secretary of State for Communities and Local Government*** [2011]  
EWHC 2010

#### Facts

93. The Claimant sought judicial review of a screening direction by the Secretary of State that the re-development of a former bowls club into 41 sheltered apartments for the elderly did not require an EIA on the grounds that the Secretary of State had misdirected himself as to the meaning of "significant effects on the environment" in Article 2(1) of the EIA Directive. The Claimant relied on Commission Guidance which stated: *"Those responsible for making screening decisions often find difficulties in defining what is 'significant'. A useful simple check is to ask whether the effect is one that ought to be considered and to have an influence on the development consent decision"*.

#### Issue

94. The correct interpretation of 'significant effects on the environment' for the purposes of Article 2(1) of the EIA Directive.

#### Determination

95. Lloyd Jones J stated that he was unable to accept that the Commission Guidance intended to substitute a test of general application for a case-by-case expert evaluation. He noted that the concept of "significant effects on the environment" depends on an assessment of the future impact of a development in a particular case and is pre-eminently a matter for expert

judgment in the context of the particular case. The judge expressed agreement with the obiter remarks of the Court of Appeal in ***R (Bateman) v. South Cambridgeshire District Council*** [2011] EWCA Civ 157 in which Lord Justice Moore-Bick rejected a similar reliance on the Commission Guidance.

96. Lloyd Jones J rejected the Claimant's contention for three reasons:

- (1) it would transfer the focus from whether a project was likely to have significant effects on the environment to whether the effect is one that it is relevant to consider and which might influence the development consent decision. A wide range of matters may be relevant to the latter decision and might influence it notwithstanding that they are not capable of having significant effects on the environment;
- (2) it would have the effect of substituting a new and much lower test for that set out in the Directive and the Regulations. If that were correct an EIA would be required in virtually all cases in which a development might possibly have some effects on the environment. The EIA Directive was drafted so as only to apply where projects were likely to have significant effects on the environment. It was not intended that EIA be required in respect of any development that might have any effect on the environment. The fact that the EIA Directive has been said to have a wide scope and broad purpose does not mean that it is permissible to re-cast the test laid down in the Directive and to substitute the lesser test for which the Claimant contends;
- (3) it was accepted that it would not be appropriate for the court to try to lay down a single defined test of "significant effects on the environment" for application in all cases and noted that the Commission and the ECJ had not attempted to do so. The test of "significant effects on the environment" is intended to confer discretion on expert decision-makers to take decisions on a case-by-case basis. There is no single, hard-edged test appropriate for application in all cases.

#### Implications

97. The question of whether a proposal will have significant effects on the environment should be approached on a case by case basis and not by reference to whether the effect might influence the decision.

***Renfree v Secretary of State for Communities and Local Government*** [2011] EWCA Civ 863

## Facts

98. A local planning authority issued a screening direction that a proposed wind turbine was EIA development. The developer asked the Secretary of State to issue a screening direction to the contrary, which was forthcoming. At an inquiry into the proposals, a third party raised objections to the proposal on the grounds of impact on a World Heritage site that had been designated following the screening decision of the Secretary of State. However it was not suggested that the Inspector should ask the Secretary of State to reconsider the earlier screening decision. The Inspector concluded that there would be no unacceptable impact on the World Heritage site.
99. It was held at first instance that the World Heritage Site designation was potentially material such that the Inspectorate should at least have considered whether or not to refer the screening direction back to the Secretary of State for reconsideration.

## Issue

100. The proper approach to be taken to an alleged failure to refer a screening decision back to the Secretary of State.

## Determination

101. The Court of Appeal held as follows (Sullivan LJ):

*“27 The inscription of the WHS in 2006 was undoubtedly a change in circumstance, but whether it was a material change in the sense that it was a change that could realistically lead to the Secretary of State deciding that the proposed wind turbine was EIA development was a matter for the hypothetical “reasonable Inspector” to decide. I do not accept that one can simply bypass the Inspector's planning judgment on that matter and say, as Mr Kolinsky submitted, that if a change of circumstance is capable of being a material change as found by the court then there must be a reference back by the Inspector to the Secretary of State for reconsideration. Effectively Mr Kolinsky's submission cuts out the Inspector and makes the Inspector's view of the matter entirely redundant...I do not accept that that is the correct approach.*

*31 ...The Inspector's conclusion that the proposed development would have no detrimental impact on the WHS would necessarily have informed any reasonable Inspector's view as to whether there was a realistic prospect of the Secretary of State coming to a different screening conclusion as to the likely*

*environmental effects of the proposed development...*

*32. I do not see how it could sensibly be said that any reasonable Inspector who had concluded that the proposed development would have no detrimental impact upon the WHS and who had not been asked to invite the Secretary of State to reconsider the screening direction would nevertheless have concluded that there was "a realistic prospect" that the Secretary of State might now decide that the proposed development was likely to have significant effects on the environment because there had been a change of circumstances by reason of the inscription of the WHS and so issue a new screening direction to that effect...*

*36 The judge did not ask whether any reasonable Inspector who had reached the same conclusions as this Inspector had as to the impact of the wind turbine on the WHS would have answered that question in the affirmative, notwithstanding the fact that he or she had not been asked to do so. For the reasons set out above, it is not possible to say that any reasonable Inspector would in those circumstances have referred the matter back to the Secretary of State.*

### Implications

102. The test applied by the Court of Appeal means that it will often be difficult to challenge a decision not to refer a screening decision back to the decision maker.

### SEA

***Save Historic Newmarket v. Forest Heath District Council*** [2011] EWHC 606 (Admin)

### Facts

103. This challenge sought to quash policies in a core strategy which provided for an urban extension to the north-east of Newmarket of approximately 1200 dwellings as part of a mixed use development. The SEA prepared to accompany the core strategy identified five options for development, including directing the majority of new developments to Newmarket; spreading development more evenly between the three market towns of Brandon, Mildenhall and Newmarket; and spreading development between the three market towns and some or all of the sustainable villages in the area.

### Issues

104. It was alleged that the SEA did not meet the requirements of Regulation 12 of the Environmental Assessment of Plans and Programmes Regulations 2004 by not identifying the reasonable alternatives of implementing the proposed extension.

### Determination

105. It was held that the SEA accompanying the proposed Core Strategy was flawed. It was not possible for the consultees to know from it what were the reasons for rejecting any alternatives to the urban development where it was proposed or to know why the increase in the residential development made no difference. The previous reports did not properly give the necessary explanations and reasons and in any event were not sufficiently summarised nor were the relevant passages identified in the final report. There was thus a failure to comply with the requirements of the Regulations.

### Implications

106. This case highlights the difficulties with a system where local planning authorities are encouraged by guidance to prepare SEAs and sustainability appraisals in the same document by reference to sustainability criteria, from which it is not always clear how the requirements of the Regulations are met. It is important when finalising any document to ensure that there is a clear audit trail which establishes how the requirements of the Regulations have been complied with.

### Nature Conservation

***R (Morge) v. Hampshire County Council*** [2011] UKSC 2

#### Facts

107. This was “*a case about bats and badgers, Beeching and bus-ways*” (Ward LJ in the Court of Appeal). The local planning authority granted permission for a 4.7km guided bus route along a disused railway line. The Claimant had objected to the scheme due to its potential impact on bats living nearby after a bat survey had identified 6 European protected bat species that would be affected. Potential impacts were considered to be the loss of foraging habitat, the loss of potential roosts and collisions between bats and buses.

108. Regulation 9(5) of the Habitats Regulations 2010 requires a competent authority, in exercising any of its functions, to have regard to the requirements of the Habitats Directive (92/43/EEC) so far as they may be affected by the exercise of those functions. Article 12(1) of the Directive provides that Member States shall take the requisite measures to establish a system of strict protection for animal species including bats, prohibiting a range of activity including the deliberate disturbance of the species. Where there is no alternative but to disturb the species, certain derogations are provided for at Art. 16, on grounds including public health, public safety, or other imperative reasons for overriding public interest. There must be beneficial consequences of primary importance for the environment.

### Issues

109. Two issues were before the Supreme Court:
- a. the interpretation of “disturbance” in Art. 12(1)(b); and
  - b. the extent of the local planning authority’s obligations under Reg. 9 of the Habitats Regulations

### Determination

110. Lord Brown of Eaton-under-Heywood gave the leading judgment and concluded that certain broad considerations must clearly govern the approach to Article 12(1)(b):
- a. it is an article affording protection specifically to species and not to habitats, although obviously, as here, disturbance of habitats can also indirectly impact on species;
  - b. the prohibition encompassed in article 12(1)(b) relates to the protection of “species”, not the protection of “specimens of these species”;
  - c. whilst the word “significant” is omitted from article 12(1)(b) that cannot preclude an assessment of the nature and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a “disturbance” of the species;
  - d. it is implicit in article 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute prohibited “disturbance” than activity at other times;

- e. it was difficult to take the proper interpretation and application of Article 12(1)(b) further than it was taken in the Commission's guidance document which advocated a case by case approach. The "more than de minimis" definition proffered by the appellant was rejected. A deliberate disturbance is "*an intentional act knowing that it will or may have a particular consequence, namely disturbance of the relevant species*" (at 14).

111. On the second issue the Court concluded (Lord Kerr dissenting) that a planning committee was only obliged to have regard to the Directive's requirements so far as they might be affected by its decision. As implementation of a planning permission was no longer a defence to the criminal sanctions imposed by the Regulations, Lord Brown could not see "*why a planning permission... should not ordinarily be granted save only in cases where the planning committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty... Where Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so*" (see paras. 29-30).

### Implications

112. Although the Supreme Court sought to tackle the two issues identified above, the decision does not actually make matters much clearer, particularly on the interpretation of disturbance. It would appear that disturbance need not be significant; nor need it be direct, however there will be many cases where it will be difficult to predict or ascertain whether this prohibition would be violated.

113. Local authorities, apart from considering this issue, ought to ensure that the issue of whether a derogation is likely to be granted is considered. They will be able to place reliance on the views of Natural England in this respect. It will in many cases be prudent to consider whether a derogation would be

granted in cases where there is some doubt over whether a prohibition would be violated (the provisos in Art. 16(1) must also be considered ie the absence of satisfactory alternatives must also be considered; and the derogation must not be detrimental to the maintenance of the populations of the species at a favourable conservation status in their natural range).

### **Enforcement/lawfulness**

***Welwyn Hatfield Borough Council v. Secretary of State for Communities and Local Government*** [2011] UKSC 15

#### **Facts**

114. The Beesley saga made its way to the Supreme Court. Mr Beesley was granted planning permission to build a barn with a condition attached limiting its use to the storage of hay, straw and agricultural products. He constructed the barn externally in accordance with the permission, but internally fitted it out as a fully functioning four-bedroomed house. He occupied the barn continuously for four years, during which time no enforcement was taken and at the end of the four years duly applied for a certificate of lawfulness of existing use, relying on s.171B(2) of the TCPA 1990 (the provision which stipulates a four-year time limit on the taking of enforcement action against a breach of planning control consisting in the change of use of any building to use a single dwelling house). That application was refused by the local planning authority, but granted on appeal. The local planning authority appealed to the High Court and ultimately to the Supreme Court.

#### **Issues**

115. Whether there had been a change of use to use as a single dwelling house and, more generally, whether Mr Beesley could avail himself of the immunity provided under s.171B given the factual circumstances of the case.

#### **Determination**

116. In his leading judgment Lord Mance found that the scheme of the legislation involved new development as in this case fell more naturally under s. 171B(1); changes of use of an existing building to use as a single dwelling house would be dealt with under s. 171B(2); and all other breaches of planning control would fall under s. 171B(3). Lord Mance regarded it as artificial to say – as the Court of Appeal had found - that a building has no use

at all (ie a change from a nil use to use as a single dwelling house) such that the activity in this case would fall within s. 171B(2).

117. Therefore, this was not a case of a change of use from a hay barn to a dwelling house because there had in fact been built not a hay barn but a dwelling house in light of the fact that, aside from its appearance, the building was in every respect designed and built as a house.

118. The second ground on which the appeal succeeded involved an evolution of planning law. The Council had argued on public policy grounds that Mr Beesley should not be allowed to benefit from the deception that Lord Mance set out as follows:

*“Mr Beesley intended to deceive the council from the outset, that is (at least) when he made each of his successive planning applications in March 2000 and January 2001; in each application he described the proposed building as a hay barn, said that the application involved no change of use of land, and, in relation to sewage disposal, answered not applicable. Secondly, when building his house, he deliberately refrained from giving the notice under the building regulations, applicable to a house but not an agricultural barn, so committing an offence triable summarily and punishable by a fine. Thirdly, he did not register for council tax or on the electoral register at the building. Fourthly, he gave the council as his address his office, whereas all other correspondence was to and from the house. Fifthly, he lived a low key existence, the house being at the end of a lane or track apparently accessible from the road only by a locked gate.*

119. These elements Lord Mance found to be ancillary to the plan of deception involved in obtaining false planning permission which Mr Beesley never intended to implement. He stated that, *“by themselves, these are, I suppose, aspects of conduct not uncommon among those who build or extend houses or convert buildings into houses without planning permission; they do not bear directly on the planning process and I am prepared to assume, for the purposes of this case at all events, that they would not, at least without more, disentitle reliance upon section 171B(1) or (2) or section 191(1)(a) or (b).”*

120. However, in relation to the main deception he concluded:

*“Here, the four-year statutory periods must have been conceived as periods during which a planning authority would normally be expected to discover an*

*unlawful building operation or use and after which the general interest in proper planning control should yield and the status quo prevail. Positive and deliberately misleading false statements by an owner successfully preventing discovery take the case outside that rationale.”*

121. Positive deception in matters integral to the planning process would not entitle Mr Beesley to resist enforcement.

#### Implications

122. It would now appear that there is some scope for the intentions of developers to be relevant in planning law. This case opens up the possibility of further cases which circumscribe the extent to which deception prevents reliance on enforcement action, however such cases are unlikely to be frequent. This may mean that local authorities are less willing to accept that immunity as arisen and could result in an increase in enforcement cases.

#### ***Britannia Assets (UK) Ltd v. Secretary of State for Communities and Local Government*** [2011] EWHC 1908 (Admin)

#### Facts

123. This case concerned enforcement notices issued in respect of an unauthorised business/industrial estate use and associated operational development including a roadway. Appeals against the notices were dismissed by an Inspector. The appellant sought to challenge those decisions, on grounds including an allegation that the original decision by the local planning authority to issue the notices had been unlawful, because matters relevant to the consideration of whether enforcement action was expedient under s. 172 of the Town and Country Planning Act 1990 had been overlooked.

#### Issue

124. Whether the Court had jurisdiction under s. 289 of the Act to determine whether the local planning authority had complied with its duty under s. 172 to consider the expediency of taking enforcement action.

#### Determination

125. Wyn Williams J accepted submissions from the Secretary of State and local planning authority that it was not open to the Inspector to consider on appeal whether the local planning authority had properly discharged its duty

under s 172; rather the task of the Inspector (after considering any points raised as to the nullity of the notice on its face) was to consider whether any of the grounds of appeal under s. 174 were made out. Further, the proper course would have been to bring an application for judicial review of the decision to issue the notices (although such a challenge would be out of time).

### Implications

126. This decision confirms the need to understand the basis of objections to enforcement action being taken by the local planning authority and applying for judicial review on grounds that do not fall within the scope of an appeal under s. 174.

### ***Avon Estates Ltd v Welsh Ministers Ceredigion County Council* [2011] EWCA Civ 553**

#### Facts

127. Planning permissions were granted between 1964 and 1973 for the erection of holiday bungalows/chalets subject to conditions stating that the permission shall expire and the site be restored to its former use on or before a date in either 1985 or 1995. Each permission then contained a condition requiring the proposed bungalows to be maintained to the satisfaction of the planning authority “throughout this period”. Then in each case there was a condition limiting occupancy to only part of the year.

128. The bungalows remained in existence long after the date specified for the expiry of the permissions. No enforcement action was taken to secure their removal and the restoration of the site to its former use, and at a public inquiry in September 2009 it was agreed between the appellant and the local planning authority that the bungalows, of which there were by now 42 in number, were immune from enforcement action. It was also agreed that they had been occupied seasonally for more than four years but also that they had not been occupied outside the periods in the year referred to in the permissions. The appellant sought a certificate of lawfulness of existing use for use of the buildings as dwelling houses.

129. An Inspector concluded that the buildings were dwelling houses and that though the “temporary conditions” on the planning permissions had become spent over 14 years earlier, the seasonal use condition in each permission had not been breached and so those conditions remained extant.

## Issue

130. The status and effect of conditions attached to a planning permission granted for a limited period, once that limited period has expired.

## Determination

131. Keene J, reversing the decision below, held as follows:

*“28 It is very difficult to conceive of a condition on a temporary permission under [section 72](#) which could sensibly relate to a development, once that development has ceased to be authorised by the permission. The time limit and restoration condition itself does not provide an example which goes beyond its own scope, since that condition is expressly and precisely provided for by [section 72 \(1\) \(b\)](#) . One cannot derive a general approval from that for conditions which bind the land once the development itself has ceased to be authorised and has become immune from enforcement action. Such enduring conditions would, to be lawful, still have to relate fairly and reasonably to the permitted development, which was and is to be seen as a temporary development. So although I would not wish to be categorical as to the impossibility of such enduring conditions, I do regard it as very unlikely that the statutory scheme allows for what can be described as a permanent condition on a temporary permission, other than the time limit condition itself. The latter is a very different animal: as Mr Warren put it, such a condition circumscribes the entire authorisation of the use. It is quite unlike a condition limiting in a certain respect a use which has become an unauthorised use...*

*31 There is no doubt that, when construing a permission and its conditions, the document must be read as a whole and in such a way as to avoid, if possible, internal inconsistency. In the present case, I accept Mr Warren's submission that it would be illogical and internally inconsistent when construing these permissions to give the seasonal use condition in each permission a life after the specified date... The first condition in each permission makes it clear that permission is only being granted at all for a limited and specified period. To have a condition which contradicts that by assuming that development is being authorised for a longer period, albeit on a seasonal basis, would give rise to major problems of interpretation as to the duration of the authorisation”.*

## **Delay**

132. Again this is a matter that is covered elsewhere, however the following cases are noteworthy.

***R (Knowles-Fitton) v. Craven District Council*** [2011] EWHC 212 (Admin)

Facts/determination/implications

133. An officer who granted planning permission under delegated powers intended to make the permission subject to a condition which would restrict chalet use to holiday purposes and prohibit use as a permanent residence. By mistake no such condition was attached to the permission. In April 2010 the developer claimed that the permission was unrestricted; advice from Counsel to apply for judicial review of the decision was received in July 2010 but the claim was not filed until October 2010. This delay after April 2010 was considered to be inordinate and gave rise to prejudice in the circumstances. To allow the claim to proceed would be to reward poor administration and relief was denied. This clearly illustrates the need for challenges of this nature to be made promptly.

***R (U and Partners (East Anglia) Ltd v. Broads Authority*** [2011] EWHC 1824 (Admin)

Facts/determination/implications

134. A judicial review claim form must be filed promptly and in any event no later than 3 months after the grounds of claim first arose: CPR 54.5. In recent cases it has been argued that the “promptly” requirement is inconsistent with principles of European law and cannot be applied where a breach of European law is alleged.

135. This argument was successfully raised in relation to the provisions of the Public Contracts Regulations 2006 (not CPR 54.5) in ***Uniplex (UK) Ltd v. NHS Business Services Authority*** [2010] PTSR 1377, and the same principles have been held to apply to cases concerned with alleged breaches of the EIA Directive. In this case Collins J held that the limitation of this principle was not limited to the circumstances of the ***Uniplex*** case (at 44):

*“The Court was making the point that the principle of effectiveness was breached by a limitation provision which lacked certainty and so such a provision could not represent a proper transposition of a Directive which required that a person who claimed that action adversely affecting him was in breach of the Directive could take proceedings to challenge it. That was the conclusion reached by HH Judge Thornton QC in *R (Buglife) v. Medway Council* [2011] EWHC 746 (Admin): see paragraph 63 of his judgment. Miss Busch unsurprisingly did not feel able to put forward any submissions to the contrary”.*

136. In cases where a breach of European law is alleged, the limitation period for judicial review claims is effectively 3 months.

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