LANDMARK SEMINAR – 19 October 2010

HIGH COURT PLANNING CHALLENGES

PROCEDURAL UPDATE

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1. The purpose of this talk is to consider recent developments in procedure in the last year or so, of relevance to practitioners bringing or defending challenges (by judicial review or statutory application / appeal) in planning cases in the High Court.

2. I propose to cover the following today, where I think there have been developments of some importance:

   (i) Standing: meaning of 'person aggrieved'
   (ii) Strike out and summary judgment
   (iii) Delay / promptness in judicial review:
   (iv) Discretionary refusal of remedies
   (v) The test for granting permission
   (vi) Permission costs
   (vii) Remittal following a successful s.289 appeal
   (viii) Lawyers' remuneration in unarguable cases
   (ix) Appeal bundles

(i) *'Person Aggrieved'*

3. Section 288(1) TCPA 1990 provides that:

> "If any person–
> ...
> (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action, on the grounds –
> (i) that the action is not within the powers of this Act, or
> (ii) that any of the relevant requirements have not been complied with in relation to the action,
> he may make an application to the High Court under this section."

4. As is well know, the courts now give a very wide interpretation to who has "sufficient interest" to bring a claim for judicial review. However, the courts have not been willing to give such a generous interpretation to who is a person aggrieved for the purposes of a statutory challenge. In particular in *Eco-Energy (GB) Ltd v First Secretary of State* [2004] EWCA Civ 1566, Buxton L.J. laid down a very restrictive test. He concluded that there were three main categories of persons who qualified as persons aggrieved. They were:
   (i) the appellant in the planning process; or
   (ii) someone who took a sufficiently active role in the planning process--that is to say, probably a substantial objector, not just somebody who objected and did no more about it; or
   (iii) someone who has a relevant interest in the land.

5. The past 12 months have shown that there is still uncertainty as to the correct meaning of the expression 'person aggrieved'. In *William Ashton v Secretary of State for Communities and Local Government and Coin Street Community Builders Ltd* [2010] EWCA Civ 600, the applicant was a local resident who had taken no part in the objections to a 43 story building near Waterloo Bridge, but whose dwelling was 260m away from the proposed tower.

6. At first instance, HHJ Mole held that Mr Ashton was not a person aggrieved. He considered that Buxton L.J. did not mean that the person challenging had to be an objector but rather that he or she had to have taken a "sufficiently active role in the planning process", which could be as an active objector or possibly an active interested person. Mr Ashton was not a "person aggrieved" as not only had he not objected but he

had not taken an active role. HHJ Mole also noted that although Mr Ashton would be adversely affected by the development, his grounds for challenge had nothing to do with the impact on him personally.

7. This last point is questionable. The liberal approach to standing in judicial review has developed because the courts have begun to see the purpose of judicial review as upholding the rule of law and the general public right to lawful administrative decisions, rather than as a means to protect individual rights and interests. Arguably statutory review shares the same purpose. HHJ Mole disagreed however. He rejected the argument that the same liberal approach that is taken to standing in judicial review should apply to statutory challenge. He stated that:

> "110. There is a temptation to equate the test of 'standing' in judicial review, as illustrated in *Kides* and the test of being a person aggrieved. In my judgment that would be wrong. Parliament has chosen to use the word 'aggrieved' as setting the threshold for being able to bring a statutory challenge to certain planning acts or orders. There are sound reasons for setting the threshold higher than on a judicial review. The right of statutory challenge comes at the end of a complex and formal series of opportunities for consultation, objection and hearing. It is understandable that Parliament should intend to limit the right of appeal to those who have played an active part in the process that is designed to ensure that the important issues are identified and properly examined as early in the process as possible, as Lord Rodger said in *Lardner.* I do not see that there is anything in Article 10(a) or in the Aarhus Convention that suggests that such an approach and the interpretation that the courts have given to the word 'aggrieved' needs to be modified."

8. This reasoning is questionable given that under the old judicial review procedure the remedies of certiorari and prohibition were available to a person aggrieved. Therefore it is strongly arguable that Parliament did not intend to differentiate between standing in statutory challenges and judicial review and that a more liberal approach to standing should also apply to statutory challenges.

9. The Court of Appeal upheld HHJ Mole QC's judgment. Pill LJ giving the judgment of the court summarised (at [53]) the key principles governing standing in s.288 appeals.

10. First, Pill LJ emphasised that "wide access to the courts is required under section 288". He explained that the English courts had for many years sought to facilitate access to

justice, for example in *Attorney General of Gambia v N'Jie* [1961] AC 617, at 634, Lord Denning held that:

> "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

11. Moreover, access to justice is now recognised and mandated at the European Union level. In cases such as *Ashton* where an EIA has been conducted, domestic requirements on standing must conform with Article 10a of the Environmental Impact Assessment Directive (85/337/EEC) which provides:

> "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concern:
> (a) having a sufficient interest, or alternatively,
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires of a precondition,
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
> ...
> What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2),[1] shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article."

12. Secondly, Pill LJ held that "normally, participation in the planning process which led to the decision sought to be challenged is required. What is sufficient participation will depend on the opportunities available and the steps taken".

13. Thirdly, "there may be situations in which failure to participate is not a bar".

14. Fourthly, "a further factor to be considered is the nature and weight of the person's substantive interest and the extent to which it is prejudiced".

15. Fifthly, the sufficiency of the interest "is to be assessed objectively" and "there is a difference between feeling aggrieved and being aggrieved".

[1] Article 1(2) provides that non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest under Article 10a.

16. Sixthly, “what might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a status under section 288”.

17. Seventhly, “the participation factor and the interest factor may be interrelated in that it may not be possible to assess the extent of the person’s interest if he has not participated in the planning procedures”.

18. Finally, “while recognising the need for wide access to the courts, weight may be given, when assessing the prior participation required, and the interest relied on, to the public interest in the implementation of projects and the delay involved in judicial proceedings". Pill LJ cited and approved of the following comments of Advocate General Kokott in *Harding v Cork County Council* [2008] IESC 27, at [69]:

> “However, in order to determine what constitutes a sufficient interest to bring an action, a balance must necessarily be struck. Effective enforcement of the law militates in favour of wide access to the courts. On the other hand, it is possible that many court actions are unnecessary because the law has not been infringed. Unnecessary actions not only burden the courts, but also in some cases adversely affect projects, whose implementation can be delayed. Factors such as an increasing amount of legislation or a growing litigiousness of citizens, but also a change in environmental conditions, can affect the outcome of that balancing exercise. Accordingly, it cannot automatically be inferred from more generous access to the courts that was previously available that a more restrictive approach would be incompatible with the objective of wide access.”

19. On the facts, the applicant was held not to be a person aggrieved because his participation in the planning process had been minimal. He was not an objector to the proposal and did not make representations at the inquiry. His mere attendance at parts of the hearing, and his membership of a group which had objected to the proposals at inquiry, were held to be insufficient to confer standing.

20. In an important paragraph ([55]) Pill LJ suggested that where an applicant’s interest is said to derive from a loss of amenity it will be necessary for that interest to be established as a matter of fact at inquiry because the court hearing the s.288 application is in no position to assess the extent of the applicant’s alleged loss:

> “Moreover, the absence of representations before or at the Inquiry about the loss of amenity at his property, either personally or by [the Waterloo Community Development Group], deprived [the developer] and the local planning authority of the opportunity to test the extent of the alleged loss and to call evidence in response. That being so, the inspector, the

> fact-finding tribunal, was not in a position to assess the extent of the loss and whether it amounts to a sufficient interest. This court cannot make good that deficiency."

21. The decision in *Ashton* appears to place much weight on the policy reasons for restricting access to court and only pay lip service to the importance of facilitating access to justice. It will certainly not be the last word on the subject.

(ii) Strike Out and Summary Judgment

22. An application to strike out or enter summary judgment is not the usual way of disposing of s.288 applications. However, the Court of Appeal had indicated in *Evans v First Secretary of State* [2003] EWCA Civ 1523, that where a s.288 application was doomed to fail and there was no other compelling reason for a trial, a summary disposal would be appropriate.

23. The test when considering an application to strike out under CPR Part 3.4(2)(a) is whether the claim has no realistic prospect of success. If the claim does have a realistic prospect of success, then summary disposal is not appropriate: see e.g. *R(South Gloucestershire Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1047 (Admin), *per* Collins J.

24. The decision of Simon J in *Wiltshire Council v Secretary of State for Communities and Local Government and Robert Hitchins Limited* [2010] EWHC 1009 (Admin), is a rare example of a s.288 application being dismissed summarily. The claimant planning authority refused permission for a development of 350 houses, but the Inspector allowed the developer's appeal and granted planning permission. The planning authority appealed against the Inspector's decision pursuant to s.288 TCPA 1990. Instead of waiting for the hearing of the s.288 appeal, the developer applied to strike out the planning authority's s.288 application.

25. Simon J held that he did have the power to strike out a s.288 application and additionally he held that he could treat an application to strike out as if it were an application for summary judgment under CPR Part 24.

26. On the facts he held that it was indeed appropriate to dispose of the s.288 application by way of summary judgment because it had no real prospect of success. The claimant planning authority had argued that the Inspector had "erred in law by disregarding the policies of the statutory development plan", but as Simon J recognised at [37] "the basis of the Claim is in effect based on a disagreement with the conclusions of the inspector, dressed skilfully and persuasively by [Counsel for the Claimant], as an error of law". Accordingly, the application was bound to fail and it was appropriate to dispose of it summarily.

(iii) Time Limits

27. CPR rule 54.5 states that a judicial review claim must be filed "*promptly and in any event not later than three months of the date when grounds for making the claim first arose*". It is well established that this time limit runs from the date when grounds of challenge arose and not from the date when the claimant first learned of the decision under challenge: see eg. ***R v. Secretary of State for Transport, ex p Presvac Engineering Ltd*** (1991) 4 Admin L.R. 121.

28. So far as the domestic courts are concerned, the requirement for "promptness" means that a claim brought within three months of the contested decision may nonetheless be out of time. Due to the need for speed and certainty and the relevance of third party interests, it is not uncommon for planning/environmental judicial review claims to fail because of a lack of promptness: see e.g. *R (Finn-Kelcey) v. Milton Keynes Council* [2009] Env. L.R. 4.

29. However, in *R v Hammersmith and Fulham LBC ex p Burkett* [2002] UKHL 23 [2001] Env LR 684, Lord Steyn doubted whether the promptness requirement was sufficiently certain to satisfy the ECHR. He made the following observations:

> "53. This case has not turned on the obligation of a judicial review applicant to act 'promptly' under the rules. In these circumstances I confine my observations on this aspect to two brief matters. First, from observations of Laws J in R v Ceredigion County Council, Ex p McKeown [1998] 2 PLR1 the inference has sometimes been drawn that the three months limit has by judicial decision been replaced by a 'six weeks rule'. This is a misconception. The legislative three months limit cannot be contracted by a judicial policy decision. Secondly, there is at the

> very least doubt whether the obligation to apply 'promptly' is sufficiently certain to comply with European Community law and the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). It is a matter for consideration whether the requirement of promptitude, read with the three months limit, is not productive of unnecessary uncertainty and practical difficulty. Moreover, Craig, Administrative Law, 4th ed, has pointed out, at p 794:
>
> 'The short time limits may, in a paradoxical sense, increase the amount of litigation against the administration. An individual who believes that the public body has acted ultra vires now has the strongest incentive to seek a judicial resolution of the matter immediately, as opposed to attempting a negotiated solution, quite simply because if the individual forbears from suing he or she may be deemed not to have applied promptly or within the three month time limit'.

Similarly Lord Hope stated**:**

> "59. I share my noble and learned friend's doubt as to whether the provision in CPR r 54.5(1) that the claim form must be filed 'promptly' is sufficiently certain to comply with the right to a fair hearing within a reasonable time in article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) and, in that respect, also with European Community law. But, as his point may have some implications for the law and practice of judicial review in Scotland and as the current state of the law and practice in Scotland might be of some interest if rule 54.5(1) were to be reformulated, I should like to add these comments.
>
> 60. The principle of legality, which covers not only statute but also unwritten law, requires that any law or rule which restricts Convention rights must be formulated with sufficient clarity to enable the citizen to regulate his conduct: Sunday Times v United Kingdom (1979) 2 EHRR 245 , 270-271, paras 47, 49. He must be able, if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The problem is that the word 'promptly' is imprecise and the rule makes no reference to any criteria by reference to which the question whether that test is satisfied is to be judged."

30. These warnings have now been proved to be accurate.Two recent cases –one ECJ decision and one decision of the Aarhus Convention Compliance Committee –call into question whether it is permissible for a claim to be dismissed during the currency of the three month time limit for a lack of promptness.

31. First, the European Court of Justice has ruled that the requirement to bring public procurement proceedings "promptly and in any event within three months" offends against the procurement legislation. The decision is in C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority* concerned reg.47(7)(b) of the Public Contracts Regulations 2006 which applies the usual judicial review timescale to the bringing of proceedings by disappointed tenderers. Directive 89/66 requires effective review of procurement decisions. The decision clearly has important implications for applications for judicial review generally, at least where European Union law, is concerned as with Environmental Impact Assessment.

32. The ECJ held that:

> "Article 1(1) of Directive 89/665, as amended by Directive 92/50, precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly."

This was because:

(a) the effectiveness of the public procurement regime can only be realised if the periods for bringing proceedings start to run from the date when the claimant knew, or ought to have known, of the alleged infringement; and

(b) the ability of the Court to dismiss a claim brought within 3 months on the basis that it was not brought *'promptly'* was contrary to the principle of certainty, which is enshrined in EU law.

33. The ECJ's reliance on general principles of EU law (effectiveness and legal certainty) in reaching these conclusions suggested that it might well take the same approach to CPR r 54.5 in the context of planning/environmental judicial review claims involving directly effective EU law such as the EIA directive.

34. Secondly, in September 2010, a similar position was taken by the Aarhus Convention Compliance Committee in its draft findings in respect of the Port of Tyne communication. At paras. 136-137 the ACCC observed that:[2]

> "136. The Committee finds that the three months requirement specified in Civil Procedure Rule 54.5(1) is not as such problematic under the Convention, also in comparison with the time limits applicable in other Parties to the Convention. However, the Committee considers that the courts in E&W have considerable discretion in reducing the time limits by interpreting the requirement under the same provision that an application for a judicial review be filed 'promptly' (see paragraphs 111-114). This may result in a claim for judicial review not being lodged promptly even if brought within the three months period. The

[2] See further http://www.unece.org/env/pp/compliance/C2008-33/DRF/C33DraftFindings.pdf.

> Committee also considers that the courts in E&W, in exercising their judicial discretion, apply various moments at which a time may start to run, depending on the circumstances of the case (see paragraph 115). The justification for discretion regarding time limits for judicial review, the Party concerned submits, is constituted by the public interest considerations which generally are at stake in such cases. While the Committee accepts that a balance needs to be assured between the interests at stake, it also considers that this approach entails significant uncertainty for the claimant. The Committee finds that in the interest of fairness and legal certainty it is necessary to (i) set a clear minimum time limit within which a claim should be brought, and (ii) time limits should start to run from the date on which a claimant knew, or ought to have known of the act, or omission, at stake.
>
> 137. As was pointed out with regard to the costs of procedures (see paragraph 31 above), the Party concerned cannot rely on judicial discretion of the courts to ensure that the rules for timing of judicial review applications meet the requirements of article 9, paragraph 4. On the contrary, reliance on such discretion has resulted in inadequate implementation of article 9, paragraph 4. The Committee finds that by failing to establish a clear minimum time limit within which a claim may be brought and to set a clear and consistent point at which time starts to run, i.e. the date on which a claimant knew, or ought to have known of the act, or omission, at stake, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, that procedures subject to article 9 be fair and equitable."

35. It can be confidently predicted that it will not be long before these decisions are be relied upon by a claimant in High Court judicial review proceedings when faced with an assertion by the defendant that his claim was not brought promptly.

(iv) Discretionary Refusal of Remedies

36. Planning permission granted in breach of the EIA directive is liable to be quashed. Section 288 TCPA 1990 provides the courts with a discretion whether to quash a planning permission following a successful statutory challenge, but in *Berkeley v Environment Secretary*,[3] Lord Hoffmann doubted whether the English courts could exercise that discretion not to quash in the face of a breach of binding EU law. He explained that:

> "the directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA. And an essential element in this procedure is what the regulations call the ' environmental statement' by the developer should have been 'made available to the public' and that the public should have been ' given the opportunity to express an opinion' in accordance with article 6.2 of this directive... I doubt whether, consistently with its obligations under European law, the court may exercise the discretion to uphold a planning permission which has been granted contrary to the provisions of the directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty".

[3] [2001] 2 AC 603.

37. This passage makes clear that the English courts recognise the dual importance of EIA: not only is it a technical means of assisting expert decision-making, it is also an important guarantee of the democratic right of the public to be informed about the potential environmental consequences of proposed development, how they may be avoided or mitigated and to participate in the planning process by expressing their views. As such it should not be possible for the obligation to carry out an EIA to be avoided.

38. Following *Berkeley*, it has become increasingly common for claimants to argue that, in planning/environmental cases involving directly applicable EU law, the court has no remedial discretion and it is obliged to quash any decision that is ultra vires. However, the Court of Appeal's decision in *R(on the application of Boggis) v Natural England* [2009] EWCA Civ 1061; [2010] Env LR 12, suggests that Lord Hoffmann's comments should be confined to the particular context of environmental assessment.

39. The case of *Boggis* concerned a challenged to the designation of an SSSI on the ground *inter alia* that the decision was in breach of the Habitats Directive. The Court of Appeal held that the claim should fail, but Sullivan LJ went on in his *obiter dicta* to consider the discretion to refuse relief. He stated that:

> "39 Since the question of discretion does not arise, I would merely say that I doubt that it was appropriate for Blair J. to apply Lord Hoffmann's reasoning on that issue in Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1) [2001] 2 A.C. 603 to this case. Berkeley was concerned with the EIA Directive and the opportunity for public debate about the possible environmental impact of projects subject to that directive prior to their authorisation is a vital part of the EIA process: see Lord Hoffmann's speech at 615. By contrast, art.6 of the Habitats Directive does not require the involvement of the public in the "appropriate assessment". It was for English Nature to decide whether an appropriate assessment was required. If it had decided that such an assessment was required, the opinion of the general public would have been obtained as part of the assessment process only if English Nature had considered that it was "appropriate" to do so: see art.6.3. As Lord Hoffmann said in the later case of R. (on the application of Edwards) v The Environment Agency [2008] UKHL 22 at [63], the speeches in Berkeley need to be read in context, and both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered."

40. Accordingly, whether or not the court has a discretion to refuse relief in cases involving breach of EU law depends upon the nature of the unlawfulness, the nature of the infringed provision and the reasons in favour of exercising such a discretion.

(v) Permission Costs

41. Following an unsuccessful application for permission to apply for judicial review, if the defendant(s) seek 'preparation costs' in addition to 'acknowledgment costs' (in the sense of settling a short form summary grounds of resistance), it is for the defendant(s) to justify these: *R(Roundham & Larling Parish Council) v Breckland Council* [2008] EWCA Civ 714 Costs LR 282, [26]-[31], *per* Buxton LJ; *R(Davey) v Aylesbury Vale District Council* [2007] EWCA Civ 1166, [21]-[22], Sedley LJ.

42. The decision of Flaux J in *R(on the application of English) v East Staffordshire Borough Council* [2010] EWHC 2744 (Admin), illustrates the grounds on which a defendant may persuade the court to award 'preparation costs' in addition to 'acknowledgement costs'. The claimant in *English* was a relatively wealthy solicitor who also owned a significant amount of local land. He sought permission for judicial review of the decision to grant planning permission for 28 detached houses at the National Football Centre in Staffordshire.

43. The background to the costs dispute was the claimant's delay in issuing proceedings. The claimant's counsel had drafted the statement of facts and grounds on 20 July 2010, but the claim had not in fact been issued until 26 August 2010 because the claimant had wished to obtain after-the-event insurance and his insurers had demanded to see the relevant documents and counsel's advice. Flaux J held that this did not excuse the claimant's lack of promptness:

> "55 That point might have some force coming from a litigant who did not have much in the way of financial resources, but I am not convinced that someone in the position of this Claimant who sold his company for a substantial sum of money and is a significant owner of local land needed the protection of ATE insurance before issuing proceedings. Of course he was entitled to obtain such insurance if he wished to, but in my judgment that should not have held up the issue of proceedings.
> 56 Accordingly, I consider that these proceedings were not issued promptly. There was certainly not the swiftness of action referred to at the end of the passage from the judgment of Keene LJ in the Finn-Kelcey case quoted above. It is irrelevant in that context whether or not that lack of promptness has caused specific prejudice to the defendant or an interested party, although despite the Claimant's arguments to the contrary, I do consider that any delay in commencing the construction may imperil the intended use of the NFC during the 2012 Olympics and that it follows that NFC Ltd can show prejudice caused by the lack of promptness of the Claimant in bringing these proceedings. It follows that I would have concluded in any event that this application for permission should not be allowed, because

> the claim form had not been filed promptly. The point is in fact academic because, for the reasons I have given, I do not consider that any of the grounds put forward by the Claimant is arguable."

44. The defendant local authority and the third party developer sought costs of £8,800 plus VAT and £28,000 plus VAT respectively. Flaux J held (at [59]) that the case was not the sort of "straightforward case" where the parties ought to limit themselves to summary grounds of resistance. Instead, the impugned planning decision was of national importance –being the National Football Centre which would be used as a venue for the 2012 Olympics. Moreover, he noted that the grounds raised by the claimant (concerning the procedural fairness and rationality of the decisions in respect of the funding of the development) "were ones which required some detailed analysis and dissection by both the Council and the FA/NFC Ltd if they were to be challenged effectively".

45. In these circumstances the local planning authority and the developer were both held to be entitled to their reasonable preparation costs in addition to their costs of acknowledging service. However, the developer was not permitted to recover the costs of preparing witness statements for the permission hearing because these were held to have been unnecessary ([60]).

(vi) The Test for Granting Permission at an Oral Hearing

46. The decision in *English* also clarifies the test to be applied when considering whether to grant permission for judicial review at an oral hearing. Counsel for the defendant relied on the judgment of Glidewell LJ in Mass Energy Limited v Birmingham City Council [1994] Env. LR 298 at 307–8, in order to argue that at oral permission hearings the test was more stringent –instead of asking whether the papers disclosed an arguable case, the judge should be satisfied that the claimant's case is not merely arguable, but strong and likely to succeed.

47. Flaux J rejected this as a uniform test to be applied to all oral permission hearings. He held that it was not necessary to apply the test on the facts because the claim failed to

cross even the lower hurdle of arguability. Moreover, in contrast to the *Mass Energy* case, it was not appropriate to apply the more stringent test because the court had not heard all the evidence or argument which might be adduced at a full judicial review hearing if permission were granted:

> "21 Before considering each of these grounds of challenge, I should deal with a preliminary question as to the appropriate test to be adopted by the Court in determining whether to grant permission to judicially review the Council's decision. The applicable test as set out in the commentary to CPR 54.4 at 54.4.2 of the White Book is that permission will be granted only where the Court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and all the relevant evidence.
> 22 Of course, in the present case, as a consequence of the Order of HHJ McKenna, the permission application was not dealt with on the papers but at a contested hearing at which all parties were represented. In those circumstances, Mr Village QC for NFC Ltd contends that a different and more stringent test applies as to whether permission should be granted, namely that permission should only be granted if the Court is satisfied that the Claimant's case is not merely arguable, but strong, that is to say likely to succeed. In support of that proposition he relies upon the judgment of Glidewell LJ in Mass Energy Limited v Birmingham City Council [1994] Env. LR 298 at 307–8.
> 23 Whilst I see the force of that argument, I do not consider that it is either necessary or appropriate to proceed on that basis in the present case; not necessary because, even applying the recognised lower threshold test of arguability, the application for permission fails for the reasons set out hereafter, not appropriate because, unlike in the Mass Energy case, I am not convinced that the Court has heard all the evidence or argument which might be adduced at a full judicial review hearing if permission were granted."

(vii) Rehearing planning appeals following remittal

48. The normal remedy awarded in a successful s.288 application is for the court to quash the impugned decision. However, the position differs markedly in respect of an appeal to the High Court against a decision of the Secretary of State on an enforcement notice. Section 289 TCPA 1990 provides that:

> "(1) Where the Secretary of State gives a decision in proceedings on an appeal under Part VII against an enforcement notice the appellant or the local planning authority or any other person having an interest in the land to which the notice relates may, according as rules of court may provide, either appeal to the High Court against the decision on a point of law or require the Secretary of State to state and sign a case for the opinion of the High Court."
> "(5) In relation to any proceedings in the High Court or the Court of Appeal brought by virtue of this section the power to make rules of court shall include power to make rules—(a) prescribing the powers of the High Court or the Court of Appeal with respect to the remitting of the matter with the opinion or direction of the court for rehearing and determination by the Secretary of State …"

49. The relevant rules of court are contained in CPR Part 52 and the supplementing practice direction. CPR r 52.20 provides that where the Secretary of State has given a decision in proceedings on an appeal under Part VII of the 1990 Act against an enforcement notice, the appellant, the local planning authority or another person having an interest in the

land to which the notice relates may appeal to the High Court against the decision on a point of law. Paragraph 22.6C of the Part 52 Practice Direction contains detailed provisions in respect of such appeals, including the following:

> "(14) Where the court is of the opinion that the decision appealed against was erroneous in point of law, it will not set aside or vary that decision but *will remit the matter to the Secretary of State for rehearing and determination in accordance with the opinion of the court* ."

50. The issue in *R(on the application of Perrett) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 1365; [2010] 2 All ER 578, was whether, following a successful s.289 appeal, the Secretary of State or his inspector was obliged to reconsider the whole of the enforcement appeal, including grounds that had not been the subject of the s.289 appeal.

51. Richards LJ held that the Secretary of State had discretion as to the manner in which an enforcement notice appeal was reheard following a remittal. There had to be a rehearing sufficient to enable the Secretary of State to remedy the error identified by the court, but he was not required to hear the entire enforcement appeal afresh.

52. In relation to the form of the court's order in a s.289 appeal, Richards LJ suggested *obiter* that the court could not or should not limit the rehearing only to those questions which gave rise to the s.289 appeal. To do so would rob the Secretary of State of his discretion:

> "28 I turn to consider a few additional points concerning the form and effect of the court's order. Mitting J, at para 35 of his judgment, had no doubt that "the court is entitled, on remitting the matter for rehearing and determination, in accordance with its opinion, to limit rehearing and determination only to those questions which gave rise to the appeal". A similar robust view about the power of the court to set the terms of a remittal was expressed by the court in the context of section 103B(4)(c) of the Nationality, Immigration and Asylum Act 2002 in ND (Guinea) v Secretary of State for the Home Department [2008] EWCA Civ 458 . For my part, I do have some doubt about the existence of such a power, or at least about the appropriateness of exercising it, in the present context, given what I have said about the discretion that the statute and rules leave to the Secretary of State as to the scope of the rehearing; but since the point does not arise for decision, it is unnecessary to say anything further about it."

53. Nevertheless, Richards LJ did suggest that the order might give guidance on the scope of the rehearing and that it could set out an agreement reached by the parties as to its scope:

> "29 It is of obvious importance that the order of the court (taken together with the judgment, if there is one) should define with clarity the error in the decision appealed against and thereby make clear what must be done in order to produce a determination in accordance with the opinion of the court (and, in so doing, also make clear what matters the parties are *entitled* to develop on the rehearing). Further, I see no reason why the order (or the judgment, if there is one) should not give guidance on, and set out any agreement between the parties in respect of, the scope of the rehearing: in that way the court can assist the process without fettering the Secretary of State's discretion."

(viii) Lawyers' remuneration in unarguable cases

54. Controversially, in contrast to the judicial review procedure, there is no permission requirement for s.288 applications. This means that the High Court is often faced with hopeless claims which do not disclose an error of law, but instead amount to no more than a disguised re-run of the merits of the competing planning arguments. It is not just the courts and defendants who are burdened by such unmeritorious claims. As is illustrated by the recent case of *Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owens* [2010] EWCA Civ 122, the determined applicant may also fall into dispute with his own lawyers if they rightly refuse to argue the unarguable.

55. In *Richard Buxton*, the respondent had wanted to argue four grounds in a s.288 application, three of which his solicitors and counsel considered to be unarguable. The lawyers refused to draft and lodge a skeleton argument advancing grounds (b)-(d), the respondent client would not accept their advice and the retainer was terminated. The client argued the application in person, but Ouseley J (and Waller LJ rejecting an application for permission to appeal) held that grounds (b)-(d) were indeed unarguable.

56. When it came to assessing costs, the Costs Judge held that the solicitors could not recover anything at all because there was an entire contract in place to the effect that they would represent the client to the end of the litigation, and they had, in effect, "not completed the voyage". This decision was supported by the suggestion in *Cook on Costs* that where instructions were considered to be unarguable a solicitor should continue to act but adopt the traditional coded message to the court that "I am instructed to say..."

57. The Court of Appeal in *Richard Buxton* firmly rejected that approach. Dyson LJ disparaged the use of "coded language" in the following terms:

> "45. For reasons that I am about to give, I consider that the appellants were entitled to terminate the retainer in this case. But I refer to this passage in *Cook* because I do not agree with the last sentence. In my judgment, if an advocate considers that a point is properly arguable he should argue it without reservation. If he does not consider it to be properly arguable, he should refuse to argue it. He should not advance a submission but signal to the judge that he thinks that it is weak or hopeless by using the coded language 'I am instructed that'. Such coded language is well understood as conveying that the advocate expects it to be rejected. In my judgment, such language should be avoided."

58. Dyson LJ also pointed out that both the Code of Conduct for Solicitors and the Bar Code of Conduct prohibit the drafting of any document that contains a contention that is not properly arguable. Therefore, once it has been decided that the retainer has been legally terminated the solicitor must be able to recover his costs for the work done and disbursements incurred up to the date of termination.

59. Although this case encourages lawyers to weed out unmeritorious applications, Dyson LJ did recognise that the nature of the grounds of challenge may make that a difficult task. There is a fine line between an argument that can be properly articulated and put forward that has little chance of success (e.g. an argument based on *Wednesbury* unreasonableness) and an argument which cannot be properly articulated and which is believed to be bound to fail.

(ix) Preparation of Hearing Bundles

60. Keith J's decision in *Leeds City Council v Secretary of State for Communities and Local Government and Libra Demolition Ltd* [2010] EWHC 1412 (Admin), contains a judicial Cri de Coeur for more user-friendly documentation in planning appeals. In three separate appeals, inspectors had granted planning permission for housing on greenfield sites. The local planning authority challenged these decisions as being inconsistent with its policies and the Regional Spatial Strategy. In dismissing the application, Keith J offered the following guidance in relation to hearing bundles:

> "60 Finally, I wish to make three comments about the hearing bundles. First, the bundles – admittedly for all three applications – ran to 2,316 pages in eight lever arch files. There was no core bundle. It was therefore necessary for me to create a core bundle as the hearing proceeded, so that the relatively few documents to which I was referred could be gathered together. The absence of a core bundle hampered my preparation of the case as well as making it necessary for counsel's submissions to be interrupted as I transferred the relevant documents into the core bundle I was creating. Secondly, one of the skeleton arguments did not identify where in the bundles the documents which were referred to could be found. That also hampered my preparation of the case as did the fact that the decision letters in the three applications, of course, did not state where in the hearing bundles the documents to

which they referred could be found. It would have been very helpful if the Council's legal team (since it was the Council which was making the applications) had annotated the decision letters to identify the pages in the hearing bundles so that the documents referred to could be readily located.

61 Thirdly, the structure of the bundles was that each witness statement was followed by the documents exhibited to it. The trouble was that many of the documents were relatively long, and the witnesses exhibited different parts of them. For example, extracts from the RSS were at pages 146–198 and pages 618–623 of the bundle. Similar considerations apply to the UDP. Moreover, this was a case in which it would have been helpful for the exhibits to have been divided up subject by subject – for example, for policy documents (whether national, regional or local) to have been included together. I do not wish to be judgmental, but in summary the preparation of the bundles should not simply be the mechanical reproduction of materials. Some thought should be given to the format which would be of greatest use to the judge."