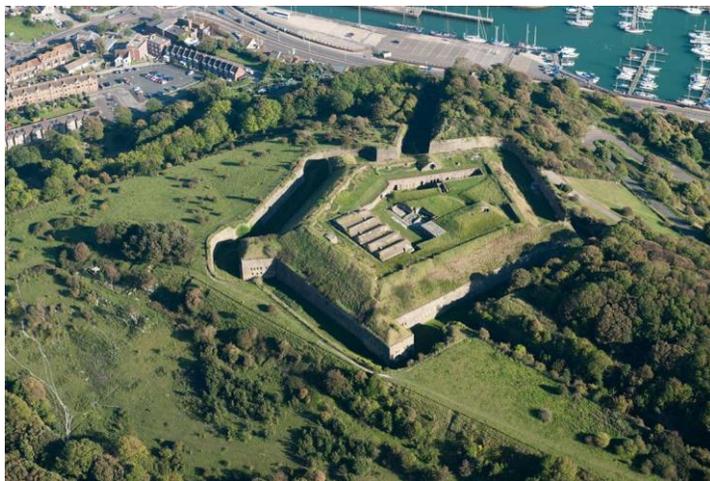


Dover v CPRE
The Developer Perspective

Neil Cameron QC

Background (1)



Background (2)



OUTLINE



Reasons

- (a) Whether a duty to give reasons arises
- (b) The adequacy (or standard) of reasons
- (c) The remedy

Developer's Perspective

- (a) Does a duty arise?
- (b) Are the reasons adequate?
- (c) Members disagree with officers

Reasons (a)- Whether a duty arises (1)



EIA Cases

The duty imposed by regulation 30(1)(d) of the T+CP (EIA) Regulations 2017

The Supreme Court declined to follow the reasoning in ***Richardson v. North Yorkshire*** [2004] 1 WLR 1920

48. With respect to the judges concerned, I would decline to follow that reasoning. I find the distinction drawn between notification of the decision, and of the reasons on which it is based, artificial and unconvincing. In the regulations (as in the Aarhus Convention, which is now expressly referred to in the Directive) the provision of reasons is an intrinsic part of the procedure, essential to ensure effective public participation.

Reasons (a)- Whether a duty arises (2)



- In EIA Cases the duty to provide reasons cannot be fulfilled by producing a statement of reasons at some time after the decision has been made, or by a court ordering that such a statement be provided.
- The Supreme Court regarded the provision of reasons as being an intrinsic part of the procedure (the provision of reasons in public law is seen as being the analogue of the common law requirement that justice should not only be done but be seen to be done).

Reasons (a) whether a duty arises (3)



The Common Law duty

The starting point (paragraph 51 in the SC Judgment):

Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed.

Reasons (a) whether a duty arises (4)



59. As to the charge of uncertainty, it would be wrong to be over-prescriptive, in a judgment on a single case and a single set of policies. However it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in Oakley and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as the “specific policies” identified in the NPPF - para 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases.

Reasons (a) – whether a duty arises (5)



If a decision to grant planning permission is made by an officer under delegated powers there is a duty to make a written record of the decision together with reasons for the decision

Regulation 7(2) and (3) of the Openness of Local Government Bodies Regulations 2014



Reasons (b) – the adequacy of reasons (1)



The SC rejected the argument that the standard should vary according the decision making process.

41. I am not persuaded that the difference between the two processes bears such significance. In both the decision-maker may have to take into account and deal fairly with a wide range of differing views and interests, and reach a reasoned conclusion on them. Where there is a legal requirement to give reasons, what is needed is an adequate explanation of the ultimate decision. The content of that duty should not in principle turn on differences in the procedures by which it is arrived at. Local planning authorities are under an unqualified statutory duty to give reasons for refusing permission. There is no reason in principle why the duty to give reasons for grant of permission should become any more onerous.

Reasons (b) the adequacy of reasons (2)



How can the duty be fulfilled?

Paragraph 42

...If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However the essence of the duty remains the same, as does the issue for the court: that is, in the words of Sir Thomas Bingham MR, whether the information so provided by the authority leaves room for "genuine doubt ... as to what (it) has decided and why".

Reasons (b) the adequacy of reasons (3)



- If the members accept the advice of officers it is likely to be sufficient for the members to adopt the reasoning set out in the report.
- If the members reject the advice of officers, some statement of reasons will be required.
- It is unlikely to be sufficient to rely on the minutes alone.
- If a duty arises, prudent courses of action include:
 - To approve a statement of reasons as part of the committee resolution;
 - To resolve to grant planning permission and to authorise officers to draw up a statement of reasons to be issued with the decision notice; or
 - To resolve to grant planning permission subject to the officers drawing up a statement of reasons to be approved at the next meeting of the committee.

Remedies (1)



In **Dover** the Supreme Court rejected the submission that a declaration would be an adequate remedy, and held (at paragraph 68):

This is a case where the defect in reasons goes to the heart of the justification for the permission, and undermines its validity. The only appropriate remedy is to quash the permission.

In **R (oao Rogers) v. Wycombe DC** [2017] EWHC 3317 (Admin) (at paragraph 71) Lang J rejected the submission that **Dover** was authority for the proposition that a decision to grant planning permission must be quashed when reasons are found to be inadequate.



The Developer's Perspective



1. Does a common law duty to give reasons arise?
2. Are any reasons set out in an officers' report adequate?
3. What action should an applicant take in the following circumstances?
 - (a) The officers advise that planning permission be refused and the members decide to grant permission.
 - (b) The officers advise that planning permission be granted subject to conditions, the members decide to grant permission without imposing the relevant condition/s.
 - (c) The officers advise that members grant planning permission for a different development to that which was applied for (e.g. reducing the number of residential units) but members decide to grant permission for the scheme as applied for.

Developer's Perspective (1) – does a duty to give reasons arise?



- Does the case fall into the category described at paragraph 59 in **Dover**?
- If in doubt it would be wise for the LPA to adopt a statement of reasons in any case where officers disagree with members.
- If members follow the officers' recommendation in a case where the duty arises, the adequacy of reasoning set out in the report should be considered.

Developer's Perspective (2) – are the reasons adequate?



In **Rogers** Lang J (at paragraph 56) appeared to hold that a different standard applies when considering the adequacy of an officers' report, and the adequacy of any reasons given (in a case where a duty to give reasons applies).

In a case where a duty to give reasons applies, an applicant for planning permission should consider whether the reasoning set out in an OR, if adopted by members, or by an officer exercising delegated powers is adequate when considered against the **Dover** standard.

Developer's Perspective (2) – are the reasons adequate?



If the reasoning in an officers' report is not adequate the decision maker (whether an officer or committee) should be invited to adopt a statement of reasons.

If a delegated decision is to be made it would be unwise for an officer to merely rely upon the report made to him or her, s/he should prepare a statement of reasons (**Rogers** at paragraph 58)

Developer's Perspective (3) – members disagree with officers



- Should the members defer consideration of the application (**Dover** at paragraph 63)?
- Should members seek to draw up their own statement of reasons?
- Should members delegate to officers the task of drawing up a statement of reasons? (this could be in consultation with the chair)
- Should any statement of reasons be approved by the committee at its next meeting?

What action can an applicant take? (1)



If an officers' report to a committee, which contains a recommendation in favour of granting permission, provides inadequate reasons to justify the grant of planning permission

1. Invite the committee to adopt a statement of reasons.
2. A draft statement of reasons could be provided to the LPA for consideration.

If a decision is to to be made under delegated powers

1. Consider whether any report contains adequate reasons.
2. Even if the reasons in the report are adequate, urge the officer exercising the delegated power to draw up a statement of reasons.
3. A draft statement of reasons could be provided to the LPA for consideration.

What action can an applicant take? (2)



When members disagree with officers (as to whether to grant permission or in relation to conditions)

1. If an applicant writes to all members urging them to grant permission against officer advice, s/he could set out reasons in that letter (so as to allow members to adopt them).
2. If the disagreement is not anticipated, and arises at committee, an applicant may seek to persuade officers to recommend that the committee delegate to officers the task of drawing up a statement of reasons.
3. If, it is apparent that members are about to make a decision based upon inadequate information, the applicant should urge the committee to defer consideration of the application.

