Reasons Challenges and the Impact of *Dover*

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Landmark Chambers

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Dover- a reminder of the facts

- *Dover District Council v CPRE Kent; CPRE (Kent) v China Gateway International Limited* [2017] UKSC 79, [2018] 1 WLR 108
- Application for PP for major new housing development (categorised as EIA development) on 2 sites:
  - Farthingloe in Kent Downs AONB
  - Western Heights, a scheduled monument, a prominent hilltop overlooking Dover, dominated by a series of fortifications dating from the Napoleonic wars.
- 135-page officers' report. Officers regarded the level of **harm to the AONB** as significant, particularly to the SW sector of Farthingloe.
- Proposed **reduction in number of houses** from 521 to 365. LPA's advisers concluded that would not jeopardise the **viability of the scheme** or the intended financial contributions: "…offsetting the landscape harm by the modifications outlined in this report would shift the planning balance in favour of the economic and other national benefits of the application".
- The local economic issues and specific circumstances of the case were considered to provide a finely balanced exceptional justification for "this major AONB development".
- Recommendation made for grant of conditional PP, with the 365 limit at Farthingloe.

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- The applicant, who had not yet been given a chance to comment on the proposed changes, wrote after receipt of report expressing own consultants' fundamental disagreement with LPA's advisers' appraisal of viability: Removal of 156 units would turn a positive land value of £5.85m to a negative land value of -£3.03m, so scheme would not secure funding and could not proceed.
- At Planning Committee meeting on 13th June 2013, amendment proposed to change 365 houses back to 521. Motion carried and re-amended recommendation approved. PP granted on 1st April 2015 after s106 Agreement signed.
- 50-page notification contained no reference to any obligation to give reasons under the EIA Regulations nor any formal statement of the reasons for the grant.

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When must a LPA give reasons for granting PP?

- Question posed at outset Carnwath JSC's judgment: When a LPA grant PP, against the advice of its own officers, for a controversial development, what legal duty does it have, if any, to state the reasons for that decision, and in how much detail?

- Is the duty to be found in statutory sources (European or domestic) or in the common law?

- What are the legal consequences of a breach of the duty?

- *Dover*: Conceded breached the specific duty under EIA Regs to set out 'the main reasons and considerations' for the decision.
- What though was the remedy to be?

Looking for the source of a duty to give reasons

- Main categories:
  - SoS decisions following an inquiry/hearing or on written representations
  - Decisions by LPAs *refusing* PP or imposing *conditions*: Development Management Procedure Order 2015, Art 35(1)(b) (LPA must state "**clearly and precisely** their **full reasons**")
  - *Delegated officer decisions*: Openness of Local Government Bodies Regulations 2014, Reg 7 (duty to produce a **written record** of the decision **along with reasons** for it)
  - Decisions at any level on applications for *EIA* development: EIA Regs 2017, Reg 30(1)(d) (must not grant PP unless have first taken the 'environmental information into consideration: Reg 3(4), and when an EIA application is determined, must ***inform the public*** and ***make available for public inspection a statement*** containing the **content** of the decision, any **conditions** attached, and the ***main reasons and considerations*** on which it is based: Reg 24(1)(c))

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- But no longer statutory duty to give summary of reasons following *grant* of PP
- Only existed between 2003 and 2013
- Then suggested to be burdensome and unnecessary in view of the logic and reasoning provided in officer reports; the summary added little to the transparency or quality of the decision-taking process

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- Statutory rules relating to the giving of reasons therefore all to be found in subordinate legislation
  - (TPCA 1990 and PCPA 2004 themselves saying nothing about the giving of reasons for planning decisions- decision maker not required to spell out the material considerations taken into account/which justify departure from the development plan, respectively)
- *But* Lord Carnwath JSC noted (important later) that it is: "…hard to detect a coherent approach in their development"

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Going back to basics for a moment:

- Why give reasons?
- *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153, 170 Lord Bridge.
- Giving reasons is:

  – A salutary safeguard
  – To enable interested parties to know
  – The decision has been taken on relevant and rational grounds
  – And that any applicable statutory criteria have been observed

"…It is the analogue in administrative law of the common law's requirement that justice should not only be done, but also be seen to be done".

And to *Porter* (*South Bucks DC v Porter (No 2)* [2004] 1 WLR 1953 para 36 Lord Brown)

- Reasons for a decision must be:
- **Intelligible** and **adequate** and **enable the reader to understand**
  - why the matter was decided as it was
  - what conclusions were reached on the **principal important controversial issues** (need refer only to the main issues in dispute, not every MC)
  - disclose how any issue of law or fact was resolved
- Can be briefly stated (degree of particularity depending entirely on the nature of the issues)
- Must not give rise to substantial doubt as to whether decision maker erred in law (but such adverse inference will not readily be drawn; and decision letters must be read in a straightforward manner recognising that they are addressed to parties well aware of the issues involved and arguments advanced)
- Should enable **disappointed developers** to assess their prospects of obtaining some **alternative** permission
- Or **unsuccessful opponents** to understand how the **policy or approach underlying the grant** of PP may impact upon future such applications
- Reasons challenge will only succeed if court satisfied party genuinely **substantially prejudiced** by failure to provide adequately reasoned decision

And *Clarke Homes Ltd v Secretary of State for the Environment* [2017] PTSR 1081

- Does the decision (the information provided by the authority) leave room for **genuine**- as opposed to forensic- **doubt** as to **what has been decided and why**?
- Lord Carnwath JSC confirmed that this *does* apply to a decision by a LPA as much as to the SoS or an Inspector
- This is the essence of the duty, and the issue for the court.

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Was the reference in the EIA Regs to the 'main reasons' of relevance?

- No- that did not materially limit the ordinary duty. *Porter* is equally relevant in the EIA context.

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What about the difference in process applied by a planning inspector and a LPA?

- No, there was significance in this.
- Both may require the decision-maker to take into account and deal fairly with a wide range of differing views and interests, and reach a reasoned conclusion on them.
- The content of a duty (pursuant to a legal requirement) to give reasons should not in principle turn on differences in the procedures by which it is arrived at.

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- But it was acknowledged that there is an important difference between a DL of SoS/Insp (designed as a stand-alone document setting out all the relevant background material and policies before reaching a conclusion) and a LPA decision- where that function will normally be performed by the officer's report.

  > "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."

- But the essence of the duty remains the same- is there room for genuine doubt as to what has been decided and why.

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So is there a common law duty?

- Easy disposal in *Dover* due to the clear breach of the specific duty under the EIA Regs- but Lord Carnwath dealt also the issue of the common law duty
- 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)
- *R v SSHD, ex p Doody* [1994] 1 AC 531:
  - Ability to mount an effective attack
  - Need for effective **means of detecting/revealing** the kind of **error which would entitle the court to intervene-** a means of ascertaining whether the decision making process had gone astray

CA in *R (Oakley) v South Cambridgeshire DC* [2017] 1 WLR 3765: common law duty *did* arise

- Facts included:
  - Committee disagreement with careful and clear recommendation from a highly experienced officer
  - A matter of potential significance to very many people
- Elias LJ: the "dictates of good administration and the need for transparency" were "particularly strong" and "reinforce the justification for imposing the common law duty"
- Sales LJ concerned the imposition of such duties might deter otherwise public-spirited volunteers from council duties and/or introduce an unwelcome element of delay into the planning system
- Submitted in *Dover* that the factors identified by Elias LJ **could arise in many cases and lead to the common law duty becoming a general rule**. Instead the duty should arise only exceptionally. The requirements of fairness would be met by public access to the material available to the decision maker.

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Oakley was rightly decided

- Lord Carnwath JSC- *Oakley* "consistent with the general law as established by the House of Lords in *Doody*".
- Although planning law is a creature of statute, the proper *interpretation* of statute is underpinned by general principles, derived from the common law. In *Doody* "…the giving of reasons was seen as essential to allow effective supervision by the courts".
- Fairness was the link between the common law duty to give reasons for an administrative decision and the right of the individual affected to bring proceedings to challenge its legality.
- There was nothing novel or unduly burdensome about requiring members' reasons for departing from their officers' recommendations to be capable of articulation and open to public scrutiny. (The debate was not about LPA's making decisions on rational grounds, but about when they are required to disclose the reasons for them, beyond the documentation already existing as part of the process).

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No inconsistency with the abrogation of the specific duty to give reasons for grant

- The explanatory memorandum abolishing that rule made clear that it was not intended to detract from the general principle of **transparency**, but was a **practical acknowledgment** of the different ways that objective could be normally be attained without adding unnecessarily to the administrative burden. “In circumstances where the objective is not achieved by other means, there should be no objection to the common law filling the gap”.
- Lord Carnwath JSC noted the special circumstances of *Oakley*:
  - Widespread public controversy surrounding the proposal
  - The departure from development plan and Green Belt policies
  - *Combined with* members’ disagreement with the officers’ recommendation- making it impossible to infer, from the report or other material available to the public, what the reasons were

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So why should the duty be limited at all, and what factors are sufficient to trigger it?

- The present system of rules has "…developed piecemeal without any apparent pretence of overall coherence".
- It is appropriate for the common law to **fill the gaps**, but to limit that intervention to circumstances **where the legal policy reasons are particularly strong**.
- 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 *Dover* itself) permission has been **granted in the face of substantial public opposition** and **against the advice of officers**, for projects involving **major departures from the development plan** or other policies of recognised importance (eg the specific policies identified in the NPPF)
- "Such decisions call for public explanation, not just because of their immediate impact; but also because…they are likely to have lasting relevance for the application of policy in future cases"

Clues from the factual circumstances in *Dover*

- NB elements of case highlighted by Lord Carnwath JSC:
- The officers' report arrived only a few days before the meeting, introduced into the debate a new element of potentially crucial significance (the proposed reduction in the number of houses) on which there was a sharp difference of view between the expert advisers
- Members could have deferred discussion of the officers' proposed modifications (including the contentious issue of viability)- bearing in mind the decision maker's *Tameside* duty to take reasonable steps to acquaint themselves with the relevant information to enable them to answer the question (having identified the right one)
- The *Tameside* obligation includes the need to allow the time reasonably necessary not only to obtain the relevant information but also to understand and take it properly into account

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- Timing: it was submitted that a declaration was sufficient as reasons could be supplied retrospectively
- The court could not accept that in relation to the EIA duty.
- 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 provision of reasons is an intrinsic part of the procedure
- In any event 3 years had passed since the grant and no attempt had been made to formulate the reasons to make good the *admitted* breach:
  - "This perhaps underlines the difficulty of reconstructing the operative reasons of the committee on the basis simply of what is in the minutes".

Outcome on the facts in *Dover*

- It was not possible to rely on the views attributed to 3 members who were recorded as supporting the proposal.
- That assumed that their views were shared by the majority, whereas the required statement under the EIA Regs is of the reasoning of the Committee as a whole.
- Even making that assumption, serious gaps remained.
- How did members feel able without further investigation to reject the view of their own advisers that the viability of the scheme need not be threated?
- It was not enough to rely on the possibility of the scheme being jeopardised, simply on the say-so of the applicant's advisers without any reference to the expert view to the contrary.
- Neither had the committee detailed what were the 'main measures to avoid, reduce and, if possible, offset the major adverse effects of the development' (as required by the EIA Regs)- there was no explanation of how members' belief that there could be effective screening was reconciled with the officers' view that there could not be.

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- The failure to address those points raised a substantial doubt as to whether the members had properly understood the key issues or reached a rational conclusion on them on relevant grounds. The defect in reasons went to the heart of the justification for the permission and underlined its validity. The only appropriate remedy was to quash the permission.
- A mere declaration was not sufficient.

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Academic reaction

- The question has been posed- why do the courts continue to resist the idea of embracing a general common law duty to give reasons?
- Dr Joanna Bell (whose earlier work was cited by Lord Carnwath JSC in his judgment): the idea that all public authorities should be regarded as under a general common law duty' to provide adequate reasons could not help the judges to find answers to the really difficult legal questions at the heart of the case.
- "Perhaps one reason why the courts have so far failed to embrace the idea of the general common law duty of reason-giving…is that it is not an intellectual tool which offers meaningful guidance as to how to navigate the sorts of legal question which tend to arise in reasons challenges".

Questions raised by *Dover*

- Bearing in mind the factors identified by Lord Carnwath JSC: substantial public opposition, a decision made against officer advice, a major departure from the development plan-
  - Are these cumulative?
  - Is one alone (eg public opposition) enough?
  - What exactly might ‘major’ mean?

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Has the subsequent caselaw elucidated any of these questions?

- *R (Paul Rogers) v Wycombe DC* [2017] EWHC 3317 Lang J
- Reasons for the decision (to grant PP for a new house and garage despite an agreement under s52 of the 1971 Act covenanting not to carry out additional residential development) were provided 5 months later
- The report recommending permission found that the s52 agreement was obsolete and no longer served a useful planning purpose: although it had to be taken into account, the blanket prohibition of development was itself not in compliance with the NPPF
- The reasons stated that the s52 agreement was given little weight due to its age and the supersession of its restrictions by the NPPF
- The **retrospective reasons** had to be disregarded, as it had been prepared to plug a gap in the context of the litigation and was not contemporaneous.
- But *Dover* did not mean that a quashing order *had to* follow wherever reasons were found to be inadequate. It was clear on the evidence that the outcome would be the same even if the PP was quashed (s31(2A) Senior Cts Act 1981).
- Court also (para 56) appeared to hold that a different standard applies when considering the adequacy of an officers' report, and the adequacy of any reasons given (where the duty applies).

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- *R (Timothy Steer) v Shepway DC* [2018] EWHC 238
- Decision to grant PP for a holiday park (12 lodges) in an AONB and SLA
- Officer's report recommended refusal, Committee resolved to grant
- Only record of decision was in the minutes- no recording and no contemporaneous note taken
- One ground of challenge was that the Committee was under a common law duty to give reasons, as it was **not following the OR's recommendation** and the **application was controversial**, concerning a protected AONB
- Conceded common law duty to give reasons in this case
- The defect in reasons went to the heart of the justification for the PP and undermined its validity
- Another case in which Lang J refused to admit *ex post facto* evidence "intended to plug the gap in the Defendant's contemporaneous documentation" (NB on the facts, the accounts were inconsistent with each other, not supported by any contemporaneous notes, and hotly contested by other Cllrs who had been present and opposed the application)

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- *R (Lancashire County Council) v SSEFRA and Bebbington* [2018] EWCA Civ 721
- Common law duty to give reasons found in context of decision to register the land as a town/village green
- The *Oakley* and *Dover* principles were applied in the context of that statutory regime (but the reasons were ultimately found adequate)
- On the facts, the application for registration had been contested at a non-statutory inquiry, the inspector had supported the objection on a potentially decisive point, his conclusions and recommendation had been supported by the authority's professional officers in their advice to committee, but the members resolved to depart from it.

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- *Lancashire* para 101:
  - "…There is no universal standard. The intelligibility and adequacy of the reasons provided will always depend on the nature of the issue they are intended to address. Some issues will be essentially a matter of straightforward judgment on ascertained facts, which is not within the realm of any particular expertise, on which divergent conclusions may reasonably be held, and for which a simply and clearly stated disagreement with an inspector's or officer's conclusions may often be enough. Others will compel a more thorough explanation to demonstrate the decision-maker's grasp of 'the key issues' and that a 'rational conclusion' has been reached 'on relevant grounds'…"

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- *R (Tate) v Northumberland CC* [2018] EWCA Civ 1519
- PP for a house in a Green Belt village
- LPA erred in not giving reasons for its conclusion that it would be 'limited infilling' under the NPPF (this being contrary to an Inspector's previous view)
- There was no attempt to distinguish the Inspector's decision on its facts, even though the situation on the ground had not materially changed and the proposal was essentially the same. The policy context had changed, but to become more restrictive, thus making the importance of establishing whether the development was in fact infill- that had become the crucial question
- It was not clear what approach the officer had adopted- there were no reasons in either the report, the committee meeting minutes or the decision notice itself
- The grant of PP was vitiated and there was substantial prejudice

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- *R (Historic England) v Milton Keynes Council and St Modwen Developments Ltd* [2018] EWHC 2007
- Application for redevelopment of a site within a conservation area (historically significant because of its critical role in the development of the world's earliest railway)
- Concluded that the development would cause substantial harm to the significance of the CA, but that would be outweighed by the substantial and significant public benefits that would arise
- There was no statement of the main reasons for the decision, contrary to the EIA Regs
- Court decided that reasons for the decision (for the purposes of Reg 24(1)(c) EIA) were provided in the form of the officer's report supporting the recommendation that PP be granted→

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- Para 49: "…The reasoning set out in the officer's report will be part and parcel of the decision-making process, and thus the important discipline of requiring reasons so as to ensure that the decision-maker understands and follows through with rigour a structured and well considered decision-making process will have been achieved. The provision of reasons will have been an intrinsic or integral part of the decision-making procedure if those reasons are the officer's reasons, and they are adopted by members in reaching their decision."
- There should not be an enquiry into the committee members' individual reasons for supporting the resolution; little useful purpose- absent bad faith- would be served by a forensic enquiry into the particular reasons why individual members may have voted in a particular way- whatever the comments they may have made during the debate. The committee reaches a collective decision.

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- *R (Save Britain's Heritage) v SSCLG and Westminster CC* [2018] EWCA Civ 2137-
- Called-in applications- no general duty on the Secretary of State to provide reasons when he decided not to call an application in
- But there was a Ministerial promise made in 2001 and repeated in 2012, that reasons would be given- that created a legitimate expectation
- Application to redevelop a landmark site next to Paddington station, controversial and widely opposed
- S77 only a procedural decision, so no express requirement for reasons to be given, and there was no authority for the proposition that reasons were required
- There was therefore no general duty on the SoS to give reasons for not calling in under s77 (nor did one arise in this particular case)

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- *Pearl v Maldon* [2018] EWHC 212 John Howell QC
- Decision (on application for approval of reserved matters) taken by Chief Executive of the Council, who was required (2014 Regs) to produce a written record of the decision including its reasons
- Contended D provided no reasons for rejecting C's representations about removal of trees and the damage to them that had already occurred
- Judge had asked parties day before hearing for copy of any document recording CE's decision
- Not provided until half way through hearing, after completion of C's submissions
- When produced showed that CE had effectively rubberstamped request of planning officer to grant PP. The report to the CE did not attach the application documents or plans and drawings she was being asked to approve, nor did it describe them or the representations made in relation to them or address the key issue of the validity of the application. The only substantive information was a statement that legal services did not consider there needed to be any more consultation, and a comment from one member that he was content for PP to be granted.
- No reasons were given for the decision either.

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Practical considerations

- To avoid JR: give reasons for grant of PP, unless no real opposition, no breach of policy and following advice of the officer's report.
- But then the adequacy of the reasoning in the report should still be considered- should members draw up their own statement of reasons?
- Ideally, there should be agreement about the reasons and a resolution accordingly. Deferral should be considered as an option. Reliance on minutes alone likely to be dangerous.
- Where a grant is made for the reasons given in the officer's report, safest to formally resolve to do that, and identify which parts of the officer's report are specifically relied on as constituting the committee's reasons.
- Is there a material departure from officer's reasoning in the decision taken/minutes? Has any departure from the officer's recommendation been adequately explained?