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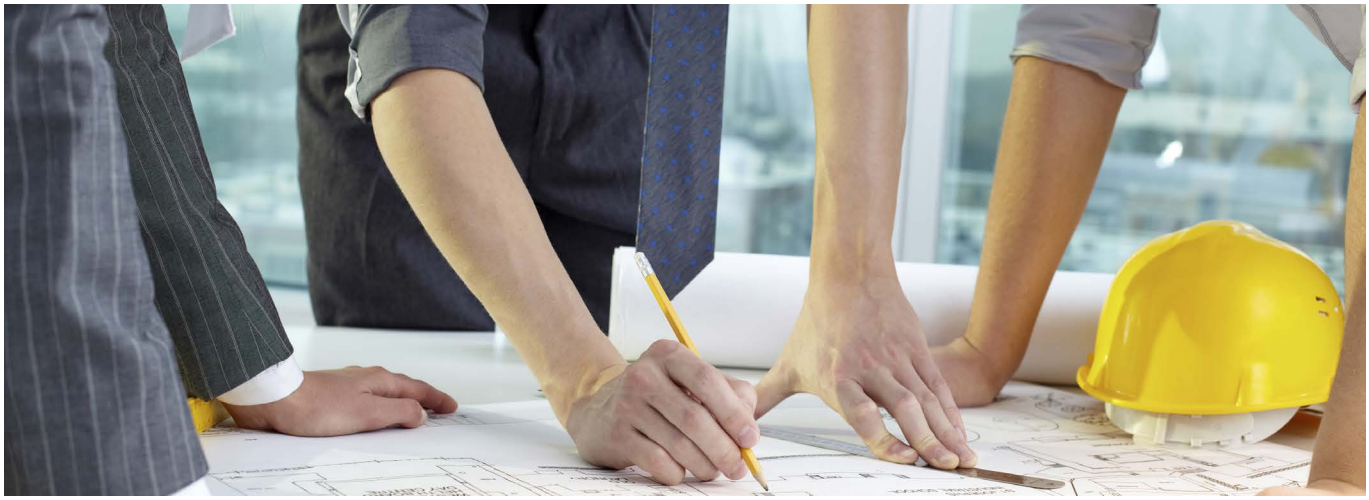

EDITORIAL COMMENT
The Editorial Board

In this month's double issue of the 39 Essex Chambers' Planning and Environmental Law Newsletter, we have a range of contributions that bear out Lewison LJ's comment in *Savage v Mansfield DC* [2015] EWCA Civ 4 that "environmental considerations are playing an ever greater role in the determination of planning applications." Justine Thornton examines recent cases which have looked at the Habitats and Birds regulatory regime. Stephen Tromans QC writes about the difficulties that the courts are having in striking an appropriate and predictable balance when imposing pollution fines on sometimes very large multi-million pound operators. Peter Village QC and Ned Helme report on some welcome clarity from the court on the meaning of "not inappropriate" in the context of Green Belt policy in the NPPF.

Finally, the newsletter includes two articles on two subjects with important implications for procedure in England and Wales. First, Jonathan Darby has been involved in the latest skirmish in an ongoing war for the future of London's South Bank. He details the Court of Appeal's significant judgment on the issue of apparent or actual bias in planning inquiries in *Turner v SSCLG* [2015] EWCA Civ 582. Second, Richard Harwood OBE QC updates us about important reforms that have been introduced to the planning application and appeals process in Wales this month.

Thanks for your interest. We hope you enjoy this month's newsletter.

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HABITATS AND BIRDS – DEVELOPMENTS IN CASELAW

Justine Thornton

> "It is well known that, partly as a result of European legislation, environmental considerations are playing an ever greater role in the determination of planning applications" *Savage v Mansfield District Council* [2015] EWCA Civ 4.

The Court of Appeal has considered the habitats/birds regime on four occasions this year. Habitats law appears to have replaced environmental impact assessment as the area of environmental law undergoing the most development. This is a marked contrast to the position in 2010 when the High Court consideration of the regime in *R(Akester) v Department of Food Environment and Rural Affairs*[1] was one of the few judicial reviews of the regime. Issues considered by the CA this year include:

- Interpretation of the conservation objectives of a protected European site.
- Consultation and advice with/from Natural England.
- The timing of any screening for a habitats assessment and the appropriate stage for any mitigation.

Conservation objectives

The Court of Appeal has considered the approach to interpretation of the conservation objectives of a protected site in *Royal Society for the Protection of Birds v Secretary of State for Environment, Food and Rural Affairs*.[2] At issue was the special protection area (SPA) in the Ribble Estuary. BAE Systems sought consent from Natural England for a cull of gulls to avoid the risk of birds striking their military planes. Natural England considered the request under s 28E of the Wildlife and Countryside Act 1981 and consented to the culling of a proportion of the numbers sought. BAE appealed. Following a public inquiry, the Secretary of State allowed additional culling. The decision was challenged by the Royal Society for the Protection of Birds (RSPB). In consenting to the cull, the Secretary of State had concluded that the cull would not adversely affect the integrity of the SPA, pursuant to Art 6(4) of the Habitats Directive. The RSPB challenged this conclusion as unlawful on the basis it was based upon a misinterpretation of the conservation objectives for the gulls at the SPA.

Sullivan LJ relied on the EU case of C-258/11 *Sweetman v AN Bord Pleanala*[3] for the approach to construing the reference to the integrity of the site for the purposes of Art 6(3). He quoted from the opinion of Advocate General Sharpston that:

> ...it is the essential unity of the site that is relevant...the notion of integrity must be understood as referring to the continued wholeness and soundness of the constitutive characteristics of the site concerned. ...The constituent characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus in determining whether the integrity of the site is affected the essential question the decision maker must ask is 'why was this particular site designated and what are its conservation objectives?'...[4]

The Judge also referred to the European Commission's publication 'Managing Natura 2000 Sites' and the guidance on the concept of 'integrity of the site'.

> The integrity of the site involves its ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the site's conservation objectives.[5]

In light of the caselaw and guidance he agreed that the conservation objectives for the SPA were 'fundamental' to the Secretary of State's consideration of whether the cull would have a significant and adverse effect on the site.[6]

Sullivan LJ set out the correct approach to interpretation of conservation objectives:

> The 2011 and 2012 conservation objectives are not enactments and should not be construed as such. However it was common ground that they mean what they say and do not mean what the Secretary of State or for that matter Natural England or the RSPB might wish that they had said. The conservation

1 [2010] EWHC 232.
2 [2015] EWCA Civ 227.
3 EU:C:2013:220.
4 [7] quoting from [54]-[56] of AG Sharpston Opinion, EU:C:2012:743.
5 [6].
6 [7].

> objectives must be read in a common sense way and in context. They are conservation objectives for an area that has been classified as being of European significance under the Wild Birds Directive.[7]

The Judge considered the conservation objectives in detail and disagreed with the Secretary of State's interpretation with the result that the Secretary of State's decision to direct Natural England to give consent for the cull was fatally flawed.[8]

Natural England – consultation and advice

In *Savage v Mansfield DC*[9] the Court of Appeal considered the requirements for consultation between a local planning authority and Natural England. Outline planning permission had been granted by the local planning authority (LPA) for a large mixed use development close to a wood which was part of the Sherwood Forest region in which there are substantial breeding populations of nightjar and woodlark. The site in question was of conservation interest and a site of special scientific interest (SSSI) was nearby. Sherwood forest was not however designated as a Special Protection Area under the Wild Birds Directive,[10] although there was some suggestion this might change in the future.

The local planning authority had consulted with Natural England (NE) who had recommended a 'risk based assessment' of the impact of the development on the Forest on the basis that the site might be designated in the future.[11] The developer proposed mitigation which NE had no objection to, but which they would be unable to support in the event the site was designated as an SPA because standard protection measures would then be required. Having given this advice NE considered that the LPA had not understood it so sent an email to clarify its position. The email was not shown to the planning committee but the substance of it was conveyed orally. The Council's main concern was that it would have to revoke or modify planning permission in the event the forest was designated and that could lead to the payment of compensation so it made provision to avoid this risk when granting permission. It did not require a habitats assessment.[12]

The main grounds of challenge focused on alleged defects in the consultation process. In particular:

i) The Council did not follow NE's advice to carry out a 'risk-based assessment' and by not doing so failed to comply with its legal duty under reg 61(3) of the Conservation of Habitats and Species Regulations 2010 which requires a planning authority to consult NE.

ii) The Council's officers misled the Council's planning committee about NE's true position and their decision might have been different but for that fact.

The CA dismissed the appeal. Lewison LJ gave the leading judgment. He noted that under the Habitats Regulations, a site did not qualify for protection until it had actually been designated as an SPA. The National Planning Policy Framework (NPPF) had widened the obligation to consult NE to 'potential and possible' SPAs which are defined as sites on which the Government has initiated public consultation on the scientific case for designation as an SPA. The local authority was not therefore obliged to consult NE about the impact of the development because the woodland was not included in an SPA. Similarly, there was no duty to consult NE under the NPPF because the site was not a potential SPA. Whilst NE had the power to give advice under Regulation 129 of the 2010 Regulations and

> ...no doubt that advice, coming as it did from an expert body, would have been a material consideration. But I do not consider it goes any further than that. The weight to be given to such advice was a matter for the decision-maker. Accordingly a ground of appeal based on the LPA's failure to take account of the results of a consultation which it was not obliged to undertake was ill-founded.[13]

Lewison LJ then considered the content of NE's advice and why it was given. In his view it was given because of the risk of a change in the legal rather than the physical landscape, namely that Sherwood Forest might be proposed as an SPA. The purpose of adopting a risk based assessment recommended by NE was to 'future

7 [21].
8 [31].9 (n 2).
10 (n 3)
11 [20].
12 [29]-[30].
13 [40].

proof' but this had nothing to do with the impact on the habitat of the birds but on what the future might hold for the Council if it had already granted planning permission.[14] Accordingly, Lewison LJ considered that the risk to which NE referred in advising a 'risk based assessment' was ultimately a financial risk to the Council of having to pay compensation if the planning permission had to be revoked or modified.[15] Moreover, the NE had specifically said 'How each local authority actually chooses to confront this issue is a matter for them'.[16] Here the Council had chosen to meet the risk by accepting the developer's mitigation proposals and by inserting a provision into the section 106 agreement whereby the developer could not claim compensation in the event the permission had to be modified/revoked:

> that is what the Council chose and as NE had advised, the choice was for the Council to make.[17]

Furthermore it was not seriously arguable that the Council failed to comply with its duty under reg 9A(8) of the 2010 Regulations to 'use all reasonable endeavours' to avoid any pollution or deterioration of habitats of wild birds'.[18] The Council had adopted the mitigation protocol proposed by the developer.

As regards the second ground about whether the Council members had been misled, the starting point was that NE accepted that nothing in the planning officer's report was factually incorrect. Whilst it was true that NE's email was not placed before the committee, if the substance of NE's comments were fairly relayed to the Committee, its decision would not be vitiated by the failure to place the email before them.[19] The Court followed *R v Selby DC ex p Oxton Farms*[20] that an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken.

The timing of any screening assessment and mitigation

In *No Adastral New Town Ltd v Suffolk Coastal District Council,*[21] a core strategy adopted by Suffolk Coastal District Council setting the framework for development within the district until 2027 was under challenge. The particular focus was the allocation of land for 2000 houses. The land was close to an SPA. The Core Strategy had been drawn up over a six year period with several 'appropriate assessments'.

The appellant argued that the Council had failed to appreciate the significance of any impact on the SPA until some way down the decision making process and there was a legal obligation to conduct a screening assessment early in the decision making process.

The Court of Appeal rejected the existence of a legal obligation to screen early in the decision making process. Having considered the wording of art 6 of the Habitats Directive[22] and the CJEU decision of *Sweetman v An Bord Pleanala,*[23] Richards LJ concluded that:

> in none of this material do I see even an obligation to carry out a screening assessment let alone any rule as to when it should be carried out. If it is not obvious whether a plan or project is likely to have a significant effect on an SP, it may be necessary in practice to carry out a screening assessment in order to ensure that the substantive requirements of the Directive are ultimately met. It may be prudent and likely to reduce delay, to carry one out at an early stage of the decision making process. There is however no obligation to do so (emphasis supplied).[24]

The appropriate assessment provided that mitigation would ensure no adverse effect on the integrity of the site, including a country park. In particular it would deflect householders from taking dogs to the SPA.[25] An area action plan would provide further detail in due course.[26]

14 [42].
15 [43].
16 [44].
17 [45].
18 [47]-[51]
19 [52].
20 [1997] EGCS 60.
21 [2015] EWCA Civ 88.
22 (n 3).
23 (n 8).
24 [68].
25 [31].
26 [37].

The Appellant argued that it was contrary to the scheme of the Directive to leave matters of mitigation to lower tier plan making on specific project stages (eg. an area action plan or planning application) if the relevant information was known at the prior stage. This proposition was also rejected:

> In my judgment, the important question in a case such as this is not whether mitigation measures were considered at the stage of CS [Core Strategy] in as much detail as the available information permitted but whether there was sufficient information at that stage to enable the Council to be duly satisfied that the proposed mitigation could be achieved in practice. The mitigation formed an integral part of the assessment [of] no adverse effect on the integrity of the SPA. The Council therefore needed to be satisfied as to the achievability of the mitigation in order to be satisfied that the proposed development would have no such adverse effect. As Sullivan J expressed the point in *R (Hart District Council) v Sec of State* [2008] EWHC 1204 'the competent authority is required to consider whether the project as a whole including [mitigation] measures if they are part of the project is likely to have a significant effect on the SPA'.[27]

Finally, in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, Lord Justice Sales considered the habitats regime at length, helpfully drawing together the case law. Space prevents detailed analysis but readers grappling with the habitats regime are advised to read his judgment

This is an extract from an annual review of environmental caselaw which will be published in the July 2015 edition of the Journal of Environmental Law. Justine Thornton is the case law editor of the Journal.

THE BRAVE NEW WORLD OF POLLUTION FINES

Stephen Tromans QC

It has been recognised since the House of Lords' decision in Alphacell Ltd v. Woodward in 1972 that there are good policy reasons why pollution offences should be strict liability, as it may often be difficult to prove fault. However, the "no fault" badge has undoubtedly led some courts to regard such offences as not "proper crime" and to impose unduly low fines by way of sentence. In a number of cases, both in the health & safety and environmental areas, the Court of Appeal Criminal Division has emphasised and re-emphasised the importance of fines large enough to "bring home" the "appropriate message" to directors and shareholders of corporate offenders: see e.g. R v. Sellafield Limited [2014] EWCA Crim 49. As from 1 July 2014 courts have been required to apply the Sentencing Council's Definitive Guideline on environmental offences, which categorises offences according to culpability, the seriousness of impacts, the financial size of the offender, and states starting points and ranges of fines. The Guideline says that in sentencing "very large organisations" – those whose turnover exceeds £50 million – it may be necessary to move outside the range of fines suggested by the Guideline.

This leaves courts somewhat undirected as to how to sentence companies whose turnover may be in the hundreds of millions, or billions, and whose profitability may be measured in millions per week. In some cases applying the Guideline, recorders and circuit judges began to apply some sort of multiplier (of perhaps 4 or 5 times) to the suggested ranges, which looks like an arbitrary process.

In *R v Thames Water* [2015] EWCA Crim 960, handed down on 3 June 2015, the Court of Appeal has considered the Guideline. As in many cases, most of which involve sewerage undertakers, this case involved a very large number of previous offences, and failure to attend to recurrent problems in a sufficiently timely fashion. The Court provided some further guidance which has certainly increased the expectation of the level of fines. So for example, in the worst cases of deliberate action (rare in such cases) and the most serious harm,

27 [72].

a fine may need to be sufficient to represent a sizeable proportion of pre-tax profit, even if this means a fine of hundreds of millions. Even for lesser harm in such cases the fine may need to be measured in millions of pounds. However, the lower the culpability, the less justification there may be to ramp up the fine just because of the size of the company.

In this case there was a long record of previous convictions, which the Court said left room for substantial improvement, though it did not suggest routine disregard of environmental obligations. The Court indicated that if it had not been for the evidence from the defendant's External Affairs and Sustainability Director, that the defendant took its environmental responsibilities seriously, the facts and the defendant's past record would have required a starting point for a fine "significantly into seven figures". As it was, the Court regarded the starting point adopted by the Recorder (which it inferred must have been not less than £500,000, given the final sum after mitigation and discount for prompt plea of guilty was £250,000) as lenient, and indicated it would have had no hesitation in upholding a very substantially higher fine.

The Court also stressed that sentencing large corporate offenders, with a turnover exceeding £1 billion, sentencing should in general be undertaken by a High Court Judge (Criminal Practice Direction PD XIII).

It is therefore clear that companies which have a record of offending and which are perceived by the courts as having failed to respond to past fines, can expect to receive much higher fines than in the past, in order to drive home the message of the imperative for better performance. Thames Water's annual profit for the year ending 2014 was £346 million. The Court's reasoning is plainly that a fine should make a sufficient dent in that profit to make the directors and shareholders take notice (of course however it also needs to be borne in mind that with a major sewerage company there are literally thousands of assets which could cause pollution and, as the Court acknowledged "no amount of management effort can ensure that no unauthorised discharge will ever occur".

The day after the *Thames Water* judgement was handed down, another company, Ineos Chlor Vinyls Limited, appeared for sentence at Chester Crown Court – the first case to grapple with the Guideline following *Thames Water.* The facts were very different. Ineos Chlor Vinyls had caused a discharge of caustic soda into the Manchester Ship Canal. A filter unit, which was being used to filter caustic soda being loaded onto a ship, failed – one of the welds retaining its lid was inadequate, the lid blew off, and caustic soda escaped for under a minute before being stopped. Any harm caused was minor, within category 3 of the Guideline. The Environment Agency agreed that there was no systemic failure on the part of the defendant and that it had a good approach to environmental safety. There were no previous offences, and this was an isolated episode. The defendant fully co-operated with the Agency and entered a guilty plea at the first opportunity.

The case was heard at Chester Crown Court before HH Judge Shetty (the turnover of the defendant was just below £1 billion so that the Practice Direction did not apply). Following a short Newton hearing, the Judge rejected the defence submission that the correct categorisation was "low culpability" and found there was negligence, albeit towards the lower end. The problem was that the defendant had purchased the filter unit which it had previously hired. There had been a failure to inspect the unit upon its purchase and to register it on the computer system which would have logged it for regular inspection.

For a large company of up to £50 million turnover, the starting point for a negligent/category 3 case would be £60,000, with a range between £35,000 and £150,000. In this case the harm was at the lower end of category 3 and the negligence at the lower end. The turnover was £904 million, though for reasons related to the global market for its main products, the company was making a loss (£37 million in the most recent published accounts).

The Judge, without any reasoning other than saying that the fine had to be large enough to "bring home the appropriate message", arrived at a fine of £250,000 (after applying the mitigating factors) which with the discount for early plea resulted in a figure of £166,650.

Stephen Tromans QC appeared for Ineos Chlor Vinyls and is advising the company on an appeal against sentence, instructed by Paul Bratt of Symmetry Law.

THE MEANING OF "INAPPROPRIATE DEVELOPMENT" – R (LEE VALLEY REGIONAL PARK AUTHORITY) V EPPING FOREST DISTRICT COUNCIL AND VALLEY GROWN NURSERIES LTD

[2015] EWHC 1471 (ADMIN)

Peter Village QC and Ned Helme

Lee Valley Regional Park Authority brought judicial review proceedings challenging the grant of planning permission to the Interested Party for a 92,000 square metre glasshouse extension on a site lying within both the Park and the Green Belt.

Under the first Ground, Mr Justice Dove considered the important issue of what it means for something to be "not inappropriate development" in the Green Belt. The Claimant accepted that the Interested Party's proposal was for a "building for agriculture" and that therefore it was "not inappropriate" in the Green Belt pursuant to paragraph 89 of the NPPF. The Claimant also accepted that, as a result of it being "not inappropriate", the proposal did not have to satisfy the "very special circumstances" test under paragraph 87 of the NPPF. However, the Claimant contended that "not inappropriate" development could still cause harm to the Green Belt and that any such harm was required to be given (but had not been given by the Council) "substantial weight" under paragraph 88 of the NPPF.

Mr Justice Dove rejected the Claimant's submissions. Adopting the approach of the Interested Party, he utilised the word "appropriate" as being synonymous with "not inappropriate". The crux of his analysis is found at paragraph 62 of his Judgment, where he stated as follows: "The question is: what is the development appropriate to? The answer must be: appropriate to the Green Belt. It follows that appropriate development is deemed not harmful to the Green Belt and its principal characteristic of openness in particular; it is appropriate to it".

As a building for agriculture, the glasshouse was therefore deemed not to cause Green Belt harm and the Council had not erred in its application of NPPF Green Belt policy. The Judge also rejected a range of other subsidiary criticisms by the Claimant under the first Ground concerning development plan policy and the presumption in favour of sustainable development.

By its second Ground, the Claimant criticised the process followed in relation to the environmental impact assessment screening undertaken on the Interested Party's application. The Judge accepted that there may have been a breach of Regulations 4(7) and 23 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 but considered (paragraph 73) that any such breach was "aridly technical and has caused no material prejudice to the claimant and is not grounded in the substance of the decision which is under challenge". On that basis (applying the sort of pragmatic approach to discretion that has routinely found favour in environmental challenges since *Walton v Scottish Ministers* [2012] UKSC 44) the Judge dismissed the second Ground.

The third and final Ground consisted of a series of criticisms of the Council's decision that appropriate assessment (pursuant to Article 6(3) of the Habitats Directive and Regulation 61 of the Conservation of Habitats and Species Regulations 2010) had not been required. Natural England had been satisfied that appropriate assessment was not required so long as the mitigation measures proposed were implemented. Following the approach in cases such as *R (Prideaux) v Buckinghamshire CC* [2013] EWHC 1054 (Admin) the Judge considered that the Council had been entitled to rely on the views of Natural England. He rejected the Claimant's criticism that Natural England's view was not based on sufficiently up-to-date data. He also rejected the Claimant's contention (based on Case C-521/12 *T.C. Briels v Minister van Infrastructuur en Milieu* [2014] ECR 0) that the mitigation measures were in fact "compensatory measures" which should not have been taken into account in deciding whether appropriate assessment was required. Finally, he rejected the Claimant's contention that an Inspector's views on a previous application had not been taken into account. The Judge was satisfied that Natural England had considered the Inspector's views and was not required to give reasons for rejecting them (beyond setting out their own views).

The Claim therefore failed. The Claimant's application for permission to appeal to the Court of Appeal on the Green Belt and Habitats Grounds is outstanding at the time of writing.

Peter Village QC and Ned Helme acted on behalf of the Interested Party, Valley Grown Nurseries Ltd.

THE BATTLE FOR WATERLOO

Jonathan Darby

The recent Court of Appeal decision in *Turner v Secretary of State for Communities and Local Government* [2015] EWCA Civ 582 generated a fair amount of interest, not least because it concerned controversial proposals for a significant scheme on the site surrounding the Shell Tower on the South Bank. The original s288 challenge was brought by campaigner, George Turner, and alleged various errors of law in the report and conduct of an Inquiry by an Inspector appointed by the Secretary of State for Communities and Local Government. The original challenge alleged procedural unfairness, apparent bias and various other grounds including those relating to open space, heritage and the non-disclosure of viability assessments. Having had permission to appeal granted on the apparent bias ground by Lord Justice Sullivan, the Court of Appeal (comprising Lord Justices Longmore, Davis and Sales) dismissed the appeal having reserved judgment.

The law applicable to the challenge was largely uncontroversial; a challenge brought on the grounds of apparent bias will succeed if a fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the decision maker was biased (see *Porter v Magill* [2001] UKHL 67 at [103], per Lord Hope). It is not necessary to demonstrate real or actual bias; the test is met if there is a reasonable perception that bias was a real possibility. It was common ground between the parties that it is the cumulative appearance that needs to be considered; apparent bias is concerned with overall appearances rather than individual outcomes.

The Appellant's allegations as to the appearance of bias essentially fell into three chronological categories. First, those related to the Inspector's pre-inquiry conduct, decision-making and treatment of the parties. Second, those related to the Inspector's conduct during the inquiry. Third, those related to the Inspector's reporting of the inquiry to the Secretary of State. As to the first category, it was alleged that the Inspector made a number of procedural decisions that favoured the promoters of the scheme but which were not within his powers. It was acknowledged that some of these decisions were eventually reversed, but this only occurred after sustained protests from the objectors. Further, it was alleged it was the nature of the decisions that gave and contributed to the appearance of bias in combination with the manner in which a number of those decisions were made, including that the Inspector was quick to accept a number of requests from the promoters to modify the procedure without asking for the views of the other parties.

When the Inquiry opened, it was alleged that the Inspector consistently treated objectors unfairly and in a manner that gave and contributed to the appearance of bias in terms both of the acceptance of evidence and also the matter of time estimates. It was further alleged that the Inspector's report indicated that he failed, or failed properly, to listen to and report accurately upon the evidence of the objectors.

Whilst it was acknowledged on behalf of the Appellant that planning inspectors are required to manage inquiries in a sensible and responsive manner, it was alleged that the nature and manner of the Inspector's conduct in this instance went far beyond that which could properly be described as his efforts to run the Inquiry in an efficient and fair manner. On this point, Collins J in the High Court had recognised that there was "no doubt" that *"the inspector's conduct was such as to give rise to a real concern that he was unfair to the objectors. He seriously mismanaged his conduct in the inquiry"* (at [63]). Furthermore, Collins J had stated [at 63]:

> *"It may well be that the individual decisions he made were justifiable, but the way in which he made them was unacceptable. Observations which are against a party's interests may be reasonable, but care has to be taken to ensure that they do not give rise to the wrong impression. It is of course essential that parties to an inquiry feel that they have had a fair hearing and that their case has been properly taken into account. That did not happen in this inquiry so far as the claimant is concerned."*

Not only did Collins J's findings appear to meet the test of apparent bias as posited by Woolf J in *Halifax Building Society v Secretary of State for the Environment* (1983) 267 EG 679 (specifically, Woolf J's statement that the court

had to intervene if reasonable people could take the view that they were not being given *"a fair crack of the whip"*) but they also appeared to – at the very least – come close to satisfying the test as set out in *Porter v Magill:*

> At [65]: "The essential requirement is that whatever preliminary views [the inspector] may have formed, he keeps an open mind and is prepared to be persuaded by the evidence produced if it shows his preliminary views are wrong. It is clear that in this case the inspector's conduct fell short of that which should have been displayed."
>
> At [66]: "His conduct in appearing to favour the applicants' counsel against the claimant was most unfortunate."
>
> At [67]: "I have no doubt that the claimant reasonably considered, and that any fair minded observer would equally have considered that the inspector's conduct fell below that which was to be expected."

In light of those conclusions, it was alleged that Collins J erred in not finding that the test as set out in *Porter v Magill* to have been met on the facts. However, the Court of Appeal held that a neutral observer (i.e. the "fair-minded and informed observer") would appreciate that an inspector's role had a strong inquisitorial dimension, meaning that it was fair and appropriate for him to perform robust case management and to focus debate by making interventions and giving clear indications as to areas or topics that he wanted to be focused upon during questioning.

Jonathan Darby appeared in the Court of Appeal on behalf of the Appellant, George Turner.

SOMETHING OLD, SOMETHING NEW, SOMETHING BORROWED, SOMETHING BLUE

Richard Harwood OBE QC

22nd June 2015 saw a series of changes to planning application and appeal procedures in Wales. In large part these implemented provisions in the Planning and Compulsory Purchase Act 2004, including one which is still not in force in England. The changes are mostly contained in the Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2015.

A duty on public bodies consulted under Article 14 of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 ("DMPO Wales") to reply has been introduced (DMPO Wales, article 15A), deriving from the Planning and Compulsory Purchase Act 2004 provisions. Those bodies now have to report annually to the Welsh Ministers on their responses (DMPO Wales, article 15B). The period for responding to consultation requests has been increased from 14 to 21 days, matching the English provisions (DMPO Wales, article 14(4)).

The most important change is the introduction of a householder and minor commercial appeals service in Wales, on similar principles to the English system. Following determination, those applications would have to be appealed within 12 weeks (DMPO Wales, article 26). If these appeals are dealt with by written representations then the new appeal procedure is in the Town and Country Planning (Referrals and Appeals) (Written Representations Procedure) (Wales) Regulations 2015. As with the English process, the appeal is determined on the basis of the documents before the local planning authority on the application and the appellant's notice and documents. Notices of householder and minor commercial planning applications will now have to point out that there would be no further opportunity for comment on such appeals (DMPO Wales, article 12(7)).

An entirely new reform is to remove the time limit on appealing against the non-determination of a planning application. Previously, and in England, appeals have had to be brought within six months of the expiry of the time for determination or the expiry of any extended period, which sometimes causes problems if applications are allowed to drift. Appeals may now be brought at any time after the expiry of the period (DMPO Wales, amended article 26(2),).

One of the 2004 Act provisions which has not been introduced in England is the creation of a dual jurisdiction when an appeal against the non-determination of a planning application is made. This would give the local planning authority a period from the making of the appeal to decide whether they would have refused it. They could decide to grant the application, in which case a permission would be issued (see Town and Country Planning Act 1990, section 78A), although the appeal could continue as an appeal against the conditions imposed. If they refuse the application then the appeal would proceed, with any revisions to the grounds, as an appeal against refusal. These changes are now brought into force in Wales, with a 28 day period for decision (DMPO Wales, article 26A).

Finally internal alterations to retail buildings which increase the floorspace by more than 200 m² are no longer excluded from the definition of development (DMPO Wales, article 2A, made under the Town and Country Planning Act 1990, section 55(2A)).

These various changes apply to work undertaken and planning applications made from 22nd June 2015. Ongoing applications and appeals are dealt with under the previous provisions.

Richard Harwood OBE QC will be considering these changes further in ***Planning Permission*** *which is to be published by Bloomsbury Professional later this year.*

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Philippa undertakes a wide range of planning and environmental work, including planning and enforcement appeals, public examinations into development plan documents, and challenges in the High Court. She has been listed for the past two years as one of the top planning juniors under 35 by Planning Magazine. Recent cases include Stratford on *Avon District Council v SSCLG & Ors* [2013] EWHC 2074 and *R (Church Commissioners for England) v Hampshire County Council & Anor* [2013] EWHC 1933. Recent inquiries include acting successfully, as sole counsel, for a Local Planning Authority in resisting a proposed supermarket in a conservation area (March 2014). To view full CV click here.

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Daniel specialises in planning and environmental law and regularly acts in public inquiry, High Court and Court of Appeal proceedings. He is the co-editor of Sweet & Maxwell's Planning Law: Practice and Precedents and a contributory editor of The Environmental Law Encyclopedia. He is also a contributor to Shackleton on the Law of Meetings. Daniel also practices in public, regulatory and competition law, with a particular emphasis on the energy sector. He was ranked amongst best junior planning barristers under 35 nationwide in the Planning Magazine Guide to Planning Lawyers 2013-2014. To view full CV click here.

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Stephen is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear power stations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case. To view full CV click here.

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