Landmark CHAMBERS

19th Bristol Planning Law and Policy Conference

Planning Infrastructure - Frameworks for Growth?

Infrastructure planning: Legal update

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Landmark Chambers

Introduction

- (1) Habitats: including ***People Over Wind, Grace*** and ***Langton***;
- (2) EIA case-law update;
- (3) Air quality: the next big development blocker?
- (4) CIL Regulations case-law update: including ***Oates*** and ***Good Energy***;
- (5) Escaping s. 106 obligations: ***Mansfield***;
- (6) Reasons: ***Save, Historic England*** and ***Dover*;**
- (7) Amending schemes: ***Holborn Studios***;
- (8) Round-up of other cases;
- (9) Forthcoming legislative changes/proposals.

(1) Habitats 1 - introduction

- What a year it has been for important, but frankly "*ludicrous*", CJEU decisions on the Habitats Directive, chiefly:
  - (1) Case C-323/17 ***People over Wind v Teoranta*** [2018] P.T.S.R. 1668 and
  - (2) C-164/17 ***Grace v An Bord Pleanala*** [2018] Env. L.R. 37.
- Both concern Art 6(3) and (4) of the Habitats Directive, and its 3 stages:
  - (i) "screening"/threshold stage: are there likely significant effects ("LSE") on European site? If no can proceed, if not …
  - (ii) Appropriate Assessment stage: if LSE must carry out an Appropriate Assessment ("AA") and can only grant consent if AA concludes not adversely affect the integrity of the European Site; or
  - (iii) IROPI stage: despite negative AA may grant consent if: (i) no alternative solutions, (ii) plan or project must be carried out for imperative reasons of overriding public interest; and (iii) compensatory measures taken.

(1) Habitats 2 – *People Over Wind*

- Prior to ***People Over Wind***, very well-established in domestic case-law that in undertaking the trigger or "screening" stage assessment – e.g. deciding if LSE - it was legitimate for the decision-maker to take into account "*mitigation*" which would prevent LSE arising, e.g. SANG see: ***R (Hart DC) v SSCLG*** [2008] 2 P&CR 16 and ***Smyth v SSCLG*** [2015] PTSR 1417.
- ***Hart*** "*it would have been "ludicrous" … to disaggregate the different elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered without the SANGS, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment*"
- ***Hart*** - "*common sense*" result

(1) Habitats 3 – *People Over Wind*

- ***People Over Wind*** – the issue - "*Whether, or in what circumstances, mitigation measures can be considered when carrying out screening for appropriate assessment under Article 6(3) of the Habitats Directive?"*
- Proposal: connection cable connecting wind farm to the electricity grid.
- Subject to condition imposing construction management plan - to be submitted and approved - and which had to "*ensure that surface water run-off is controlled such that no silt or other pollutants enter watercourses*"
- Concern was river pollutants resulting from the laying of the connection cable, such as silt and sediment, would have a harmful effect on European Sites.
- A report provided by the developer concluded that there would be no LSE, on the basis of the distance between the proposed grid connection and the European sites, and because of "*protective measures that have been built into the works design of the project*" .

(1) Habitats 4 – *People Over Wind*

- CJEU ruled cannot have regard to mitigation measures at screening stage;
- *"Taking account of [avoidance/mitigation] measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive."*
- So CJEU have ruled that the law requires what Sullivan J. rightly said in ***Hart*** would be simply "*ludicrous*" and contrary to "*common sense*".
- The decision was made by a single Chamber of the CJEU and without any Advocate General's opinion.
- A new low point in CJEU environmental jurisprudence …

(1) Habitats 5 – *People Over Wind*

- If the issue were to come before the Supreme Court:
  - (1) Prior to Brexit: quite possible that they would refer issue back to the CJEU questioning whether the decision in ***People Over Wind*** can possibly be correct (see by analogy what Supreme Court said in ***R (Buckinghamshire County Council) v Secretary of State for Transport*** [2014] 1 W.L.R. 324).
  - (2) Post Brexit: Under the European Union (Withdrawal) Act 2018 the Habitats Regulations, transposing Habitats Directive, will remain in force but can be amended: see s. 2. Moreover, case-law of the CJEU decided before exit day (so including sadly ***People Over Wind***) will be retained EU case-law, binding on all Courts below Supreme Court. Supreme Court can overrule.
- Unless and until this happens English Courts will in my view try and arrive at as pragmatic a solution as it can to these issues within the constraints of the decision in ***People Over Wind***.

(1) Habitats 6 - *Langton*

- ***R (Langton) v Secretary of State for Environment, Food and Rural Affairs*** [2018] EWHC 2190 (Admin)
- JR of guidance relating to licensing of supplementary badger culling, and the grant of certain licences by Natural England.
- C argued conditions which Natural England had attached to the cull licences because of the ***People Over Wind*** case should not have been taken into account at the Habitats Directive screening/threshold stage
- Conditions:
  - (i) no culling activity in certain locations (e.g., Severn Estuary SPA) or
  - (ii) at certain times of the year (e.g., bird-breeding season with Dorset Heathlands SPA and Poole Harbour SPA).

(1) Habitats 7 - *Langton*

- Sir Ross Cranston ruled:
- "*the licence conditions which Natural England attached … are not the mitigating or protective measures which featured in the* ***People Over Wind*** *ruling. They are properly characterised as integral features of the project which Natural England needed to assess under the Habitats Regulations. I accept Natural England's submission that it would be contrary to common sense for Natural England to have to assume that culling was going to take place at times and places where the applicants did not propose to do so"* (emphases added)
- So suggestion is of distinction between: (i) the "*integral features*" of the project which may themselves have the effect of mitigating the impacts of other part of the project (and which can be taken into account at the screening stage) and (ii) proposed additional measures intended to "*avoid or reduce harmful effects*" which cannot.

(1) Habitats 8 – *Langton*

- Real difficulties:
- (i) Is this reconcilable with ***People Over Wind***? Difficult …
- (ii) Must be true that some measures are so integral to the project in terms of its design, layout and physical characteristics that these can be considered at screening stage, e.g. a large development site close to a protected site on one side where the decision is made only to develop only the far side of the development site well away from the protected site. But beyond this a very difficult line to draw.
- (iii) ***Langton*** appears to suggest that in drawing line may be relevant to consider the intent behind measure. Was it imposed for design reasons unrelated to Habitats or to avoid Habitats impacts. How can this be judged? Is this really a proper basis for distinction?
- There will be more case-law …

(1) Habitats 9 – Consequences

- ***People Over Wind*** – some consequences:
  - (1) NPPF2018 para. 177 provides that where a proposed development requires an AA the presumption in favour of sustainable development in para. 11 is disapplied. Therefore, the presumption is clearly disapplied where an AA is required. The position is thus clear. But Government consulting on amending.
  - (2) Impacts on legislation on neighbourhood plans and LDOs – which cannot be made if AA required. Legislation likely. NB not affect GPDO as this allows reliance on PD rights if either no LSE or AA concludes no effect on integrity.
- PINS NOTE 05/2018 on ***People Over Wind***: http://www.edp-uk.co.uk/assets/pins-note-052018.pdf. Dealing with impact on: (i) planning appeals; (ii) Local Plan examinations.

(1) Habitats 10 – Consequences

- In ***R (Champion) v North Norfolk District Council*** [2015] 1 WLR 3710 the officers looked at mitigation and concluded very briefly no LSE, Lord Carnwath said: "*Although this was expressed by the officers as a finding that no appropriate assessment under article 6(3) was required, there is no reason to think that the conclusion would have been any different if they had decided from the outset that appropriate assessment was required, and the investigation had been carried out in that context"* (per Lord Carnwath).
- Supreme Court noted that for AA "*no special procedure is prescribed*" and that ""*Appropriate" is not a technical term*".
- Indeed, the point being made is that the undertaking and outcome of an AA *could* to all intents and purposes look exactly like, and involve the same or at least a very similar exercise, as an assessment of whether there were likely significant effects.

(1) Habitats 11 – Consequences

- Why is para. 42 of ***Champion*** potentially so important?
- Effect of ***People Over Wind*** is to limit ability of decision-maker to have regard to "*mitigation*" measures in order to reach a view at screening stage no LSE.
- Instead where mitigation is relied on there will normally now be a need for an AA.
- The observations of Lord Carnwath at para. 42 are thus important because they suggest that undertaking an AA can in circumstances – e.g. where well-known mitigation put forward such as SANGS – the AA need not necessarily be a more onerous or difficult task than would considering such matters at the earlier stage.

(1) Habitats 12 - Consequences

- So ***Champion*** para. 42 the answer to ***People Over Wind***?
- It may well be in some cases;
- But is there anything in ***People Over Wind*** which potentially undermines para. 42 of ***Champion***? 3 things to consider:
  - (1) The whole thrust of the CJEU's logic is that the AA is a more detailed and involved process than the screening stage.
  - (2) The CJEU in that case seems to have been influenced by the fact that AA, unlike the screening stage, can (but does not always) involve public participation.
  - (3) ***Grace*** – see below - seems to have further heightened the certainty requirements under Article 6(3).
- Thus while there is nothing that directly undermines Lord Carnwath's analysis there is an argument (but query how strong?) that ***People Over Wind (and Grace)*** may be seen as not entirely consistent with it.

(1) Habitats 13 - *Grace*

- ***Grace:***
- Proposed wind turbines in a European Site;
- Would directly cause loss of protected habitat;
- Species and Habitat Management Plan proposed which would aim to restore a far larger area of land in European Site to provide more additional habitat than would be lost by proposal itself – so net gain;
- Proposal was that the site would be managed '*dynamically*' in order to preserve the habitat, *"in the sense that the areas suitable for that habitat will vary geographically and over time, according to how the SPA is managed"* (referring Court though this important);
- CJEU ruled – following earlier cases such as ***Briels*** and ***Oerlemans*** that this was to be classed as compensation, not mitigation, so could not be considered under Article 6(3) at all and only via Article 6(4)
- ***Grace*** particularly dismissive (in a quite sweeping way) of relying on in an AA "*any positive effects of the future creation of new habitat*".

(1) Habitats 14 – *Grace*

- This is an unnecessarily restrictive view of the Habitats Directive:
  - (1) Pushes many cases out of Article 6(3) and consideration in AA and into Article 6(4) and IROPI;
  - (2) The difficulty is that the Article 6(4) tests are notoriously difficult to satisfy (despite Advocate-General Sharpston's suggestion to the contrary in ***Sweetman***);
  - (3) CJEU is thus condemning to refusal many, many projects that would ultimately actually have had a net benefit in terms of amount of habitat;
  - (4) To make matters worse the decision seems to be suggesting the need for complete scientific certainty: meaning there would be an obligation to refuse many, many projects under the Habitats Directive based on very minor remaining uncertainties;
- Again domestic Courts will rightly, in my view, seek to resist such nonsense, and find ways around this.

(1) Habitats 15 - *Grace*

- To be mitigation under Art. 6(3) ***Grace*** suggests 3 conditions:
  - (i) they must be measures forming part of a project;
  - (ii) they must be intended avoid or reduce any direct adverse effects that may be caused by the project in order to ensure that the project does not adversely affect the integrity of the area; and
  - (iii) it must be sufficiently certain that the measures will make an effective contribution to avoiding harm.
- So excludes measures which do not prevent harm to a protected site but rather seek to make up for (compensate) for this by adding to or improving habitat elsewhere within the protected site;
- To be within Article 6(3) necessary for measures to themselves act so as to actually prevent or reduce (so that it is no longer significant) any harm arising from the project itself e.g. SANG.
- If do that then can consistently with ***Grace*** consider at AA stage (not screening stage though – see ***People Over Wind***).

(1) Habitats 16 – more cases ….

- 2 other CJEU cases to mention:
  - (1) C-294/17 ***Cooperatie Mobilisation for the Environment UA v College van gedeputeerde staten van Limburg*** (opinion of Advocate General Kokott dated 25 July 2018); and
  - (ii) Case C-441/17 ***Commission v Poland*** (17 April 2018).
- Enough of the horrors of the recent CJEU case-law, highlight two domestic cases – both Court of Appeal - where Habitats issues defeated development:
  - (1) ***R. (Mynnyd y Gwynt Ltd) v Secretary of State for Business Energy and Industrial Strategy*** [2018] P.T.S.R. 1274; and
  - (2) ***DLA Delivery Ltd v Baroness Cumberlege of Newick*** [2018] Env. L.R. 34

(1) Habitats 17 - *Mynnyd y Gwynt Ltd*

- DCO refused for windfarm;
- Site adjoined a SPA, one of the conservation objectives of which was to support breeding pairs of red kite.
- S/S requested information from the developer and from the appropriate nature conservation body about red kite mortality rates in combination with other wind farms.
- The developer responded to that request only in part.
- S/S accepted advice from the conservation body that it had not been proved beyond reasonable doubt that red kites using the project site did not come from the SPA; that there was no certainty that mitigation proposed by the developer would be effective; that there were concerns about the methodology of surveys relied upon by the developer; and that the developer had provided no information about the in-combination impact of the project with other wind farms.

(1) Habitats 18 - *Mynnyd y Gwynt Ltd*

- JR by developer failed in High Court, and Court of Appeal;
- Argued the S/S erred in requiring certainty in relation to each element of the data instead of making a reasoned judgment on the available information and had reached an inconsistent conclusion about the in-combination level of risk to the red kite population in the SPA in question to those reached in relation to other wind farm proposals in the area.
- NB para 8 of CA judgment very useful summary of law under Habitats Directive – pre ***Grace*** and ***People Over Wind*** – but remains useful.

(1) Habitats 19 – *DLA Delivery*

- PP granted by S/S where part of site was within the 7km zone of influence of European Sites and there were no conditions or restrictions imposed to prevent the erection of buildings on that land.
- The designation of the 7km zone was the means by which the precautionary principle was given effect.
- It ensured that development would not adversely affect the integrity of the European Sites.
- Regulation 68(3) provided that outline planning permission "must not be granted" unless the competent authority was satisfied that no development likely to affect the integrity of the site could be carried out. The test was stringent.
- The S/S's mistake had led him to decide the appeal in breach of this and Habitats Directive.
- That would have been enough on its own to justify an order quashing the planning permission.

(2) EIA - introduction

- Once the weapon of choice in legal challenges to grants of PP:
- Challenges based on:
- (1) failure to screen/ defects in screening, and reasoning;
- (2) Defects in Environmental Statement;
- (3) Defects in reasons for decisions on EIA development.
- Very hard to win on EIA now …
- Challengers moved on to habitats (see above) and air quality (see below).
- Round-up of recent cases demonstrate not easy to win on EIA anymore ….

(2) EIA 1

- (1) ***R (Crematoria Management Ltd) v Welwyn Hatfield BC*** [2018] P.T.S.R. 1310
- LPA granted PP for development on the site of a cemetery
- Proposal: demolition of existing chapel, machinery store, lodge house and central colonnade and erection of new chapel, machinery store and crematory, with new car parking provision and enhanced landscaping.
- C, operator of a nearby crematorium, judicially reviewed –challenge to the lawfulness of the grant of PP on grounds that, inter alia, there was no screening opinion under EIA Regulations.
- Issue: was the proposal an infrastructure project constituting an "*urban development project*" including more than one hectare of urban development, within paragraph 10 in the table in Schedule 2

(2) EIA 2

- Although interpretation of regulations or policy was question of law for the court, where words to be construed were: (i) wide in ambit; or (ii) imprecise in their meaning judgment would necessarily be involved in applying them to the facts of the particular case.
- Therefore occasions when different decision-makers, confronted with same or similar facts, might legitimately apply the statutory provision or policy statement differently: applying ***R (Goodman) v Lewisham London Borough Council*** [2003] Env LR 28
- The phrase "*urban development project*" could not be given a precise meaning, a useful starting point was the dictionary definition of "urban" as "*in, relating to or characteristic of a town or city",* although a variety of other factors would also usually be relevant to that assessment, including the nature, size, and location of the development and the use to which it would be put.
- JR refused, LPA entitled to decide not an urban development project.

(2) EIA 3

- **(2) *R (Cairns) v Hertfordshire CC* [2018] EWHC 2050 (Admin)**
- JR of PP for new secondary school;
- Archeological report stated part of site contained graves tentatively ascribed to Anglo-Saxon period;
- EIA screening opinion failed to refer to archeological matters at all;
- Judge concluded screening opinion defective;
- But Lang J. did not quash, applying ***Champion***, as decision would be the same;
- The development proposed was away from site of remains and conditions imposed to deal with archeology.

(2) EIA 4

- (3) ***Norman v Secretary of State for Housing, Communities and Local Government*** [2018] EWHC 2910 (Admin)
- C sought to challenge grant of PP for intensive poultry farm on appeal by an Inspector on EIA grounds;
- Under s. 288 must be a "*person aggrieved*"
- C lived 10 miles away from the development site. She did not have a private interest that is affected by the proposed development. She did not participate in the appeal before the Inspector. She did not submit representations.
- *Obiter* applying ***Walton v Scottish Ministers and Ashton v Secretary of States for Communities and Local Government –*** not person aggrieved.

(2) EIA 5

- **(4) *Squire v Shropshire Council* [2018] Env. L.R. 36:**
- PP for (another) intensive poultry farm development.
- C alleged the EIA was flawed because it had focused on the regulation of the development instead of undertaking a proper assessment of the direct and indirect effects;
- JR fails – useful reminder of difficulty of such challenges:
  - (A) applying ***Burkett*** [2003] EWHC 1031 (Admin) *"The objective of the Directive and the Regulations, namely the making of the requisite assessment before the grant of permission, is to be achieved through a dynamic process, which starts with the statement from the developer but it does not end with the statement. The statement can be supplemented by the authority, and the environmental information includes the representations from members of the public, where they have been provided"…"*

(2) EIA 6

- (B) "*The starting point is that it is for the local planning authority to decide whether the information contained in the ES is sufficient to meet the definition in the Regulations. That decision is subject to review on normal* ***Wednesbury*** *principles but information capable of meeting the requirements of the Regulations must be provided. A local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects: see Sullivan J, as he then was, in* ***R. (Blewett) v Derbyshire CC*** *[2004] Env. L.R. 29 at [31]–[40].*"

Air quality - Introduction

- ***R. (Shirley) v Secretary of State for Communities and Local Government*** [2018] J.P.L. 298 – per Dove J.
- On appeal: heard by Court of Appeal 18 – 20 September 2018.
- Court: Peter Jackson LJ, Singh LJ and Coulson LJ.
- ISSUE: when, if ever, can Directive 2008/50 – the Air Quality Directive – require that planning permission be refused?

The legal context (1) – the Air Quality Directive

- Sets limit values for the protection of human health (see Art 13 and Annex XI) for SO2, PM10, CO, NO2 and benzene;
- Focus tends to be on NO2 – limit values *"throughout their zones and agglomerations*"* to be met by 1 January 2010:
  - One hour: 200 µg/m3, not to be exceeded more than 18 times a calendar year; and
  - Calendar year (focus tends to be on this): 40 µg/m3.
- In UK 43 zones. In all but two zones, the UK is achieving the statutory hourly mean limit value for NO.
- However, 37 zones exceeded the statutory annual mean limit value for NO in 2015.

* Agglomeration: "*a zone that is a conurbation with a population in excess of 250 000 inhabitants or, where the population is 250 000 inhabitants or less, with a given population density per km2 to be established by the Member States*"

The legal context (2) – the Air Quality Directive

- Art 23 requires where exceedances that
  - (1) "*air quality plans are established for those zones and agglomerations in order to achieve the related limit value*"; and
  - (2) *"[i]n the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible*"
- AQ Directive transposed in UK by the Air Quality Standards Regulations 2010.
- Responsibility for making air quality plans lies with the Secretary of State for Environment Food & Rural Affairs.
- Been subject of lots of high profile litigation, notable for repeated Government defeats ….

Client Earth litigation

- (1) ***R. (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs*** [2013] UKSC 25; [2013] 2 All E.R. 928 - reference made to CJEU;
- (2) Case C-404/13 ***R. (ClientEarth) v SSEFRA*** [2015] 1 C.M.L.R. 55; [2015] Env. L.R. 17 – CJEU rule;
- (3) ***R. (ClientEarth) v SSEFRA*** [2015] UKSC 28; [2015] 4 All E.R. 724 - mandatory order requiring the Secretary of State to prepare new air quality plans under article 23(1)
- (4) ***R (ClientEarth) v SSEFRA*** [2017] P.T.S.R. 203 [2017] Env. L.R. 16 –new air quality plan December 2015 pursuant to SC order - found to be unlawful by Garnham J.
- (5) ***R. (ClientEarth) v SSEFRA*** [2018] EWHC 315 (Admin) [2018] Env. L.R. 21 – third attempt at air quality plan – July 2017 - also found unlawful by Garnham J. NB limited grounds based on lack of provision for 45 particular authorities.

Interesting but …

- Focus in ***ClientEarth*** cases is on what an air quality plan requires.
- Not focussed on issue of impact of the AQ Directive and Regulations on any individual planning application, e.g. for development that will or might increase emissions in a zone/agglomeration that is already non-compliant, or make compliant zone non-compliant
- Does the AQ Directive in such circumstances or any other require refusal of planning permission?

Department for Environment Food & Rural Affairs

Department for Transport

Improving air quality in the UK: tackling nitrogen dioxide in our towns and cities

3 ways AQ potentially relevant

- (1) Air quality a material consideration, as is fact that area is in non-compliance with AQ Directive or AQ Directive limit values, and proposal will add to emissions;
- (2) Policy (local or national) can require compliance with AQ Directive or AQ Directive limit values, so if development in area where not met and will contribute emissions vs policy to grant;
- (3) But can AQ Directive itself require refusal of PP?

How can AQ Directive be relevant on a planning application? (1)

- **(1) Air quality a material consideration, as is fact that area non-compliance, and proposal will add to emissions. Can justify refusal:**
- See ***Gladman Developments Ltd v SSCLG*** [2017] EWHC 2768 (Admin), [2018] P.T.S.R. 616 per Supperstone J.
- Proposed development of 330 dwellings plus 60 care units. Appeal dismissed: AQ.
- The inspector took into account the fact that the Government's air quality plan (the December 2015 version) found unlawful; said unsafe to rely on vehicle emissions falling 2015 - 2020 to extent assumed in the models relied on by the developer and despite proposed mitigation measures, the proposals would have an adverse effect on AQ.
- Challenge by developer failed: (i) the duty to produce and implement an air quality plan did not mean that local planning authorities, or the inspector, had to presume that the UK would become compliant with the Directive in the near future; (ii) absent a national Inspector could not reach view as to whether compliance would be secured by any particular date.
- Subject to application for permission to appeal to Court of Appeal.

How can AQ Directive be relevant on a planning application? (2)

- **(2) Policy (local or national) can require compliance with AQ Directive or AQ Directive limit values, so if development in area where not met and will contribute emissions vs policy to grant:**
- See as an example, the National Networks NPS at para 5.13:

  " … The Secretary of State should refuse consent where, after taking into account mitigation, the air quality impacts of the scheme will:

  result in a zone/agglomeration which is currently reported as being compliant with the Air Quality Directive becoming non-compliant; or

  affect the ability of a non-compliant area to achieve compliance within the most recent timescales reported to the European Commission at the time of the decision."
- NB there are arguments this test does not go far enough …

How can AQ Directive be relevant on a planning application? (3)

- **(3) Can the AQ Directive itself require refusal of permission as a matter of law?**
- That is the issue in ***Shirley* –** Dove J. holds "no";
  - "*the question of air quality and the exceedance of any limit values or thresholds is clearly and obviously a material consideration in the decision as to whether or not to grant planning permission*" (see para. 63);
  - Dove J. examines the remedies available under the Directive where a Member State is in breach of its requirements as regards limit values (see para. 49).
  - Finds the remedy in such circumstances is the production and implementation of an air quality plan.
  - Held that there was no *"freestanding responsibility to take any specific actions [e.g. to call-in a planning application or to refuse consent] in relation to permits or development consents as a consequence of the AQD's requirements"* (ibid.).

How can AQ Directive be relevant on a planning application? (4)

- ***Shirley*** was challenge to refusal by the Secretary of State to call in planning application, comprising some 4,000 dwellings together with a variety of other forms of complementary development;
- On appeal argued:
  - (1) The Secretary of State* is in a special position regarding issues arising with compliance with the AQ Directive and so this obliged him to call it in (and presumably any other case raising such issues?); and
  - (2) The Secretary of State was required by the AQ Directive to refuse it or impose conditions that prevented adverse impact on AQ.

* For Environment, Food and Rural Affairs but NB ***Shirley*** vs Secretary of State for HCLG. Legal point: Secretaries of State are one.

How can AQ Directive be relevant on a planning application? (5)

- NB ***Shirley (No. 2)*** – challenge to adoption of Canterbury Local Plan on similar grounds (CO/3841/2017)
  - Holgate J refused permission on papers saying that that he "*entirely agree[d]"* with Dove J's decision, "*and with the submission that ground 1 is accordingly unarguable".* Holgate J saw "*nothing in any of the European case law which undermines or in any way casts doubt on his reasoning with regard to the effect of the AQD in the planning context".*
  - Application for permission renewed: adjourned pending first ***Shirley*** case going to CA.

Watch this space …

- Soon have CA views in ***Shirley …***
- Cs seeking reference to CJEU
- Further appeal to Supreme Court?
- Then ***Shirley (No. 2) …***
- Also NB 6 JRs of the Airports NPS lodged and two of these raise AQ Directive issues.

(4) CIL Regulations: case-law (1)

- **(1) *Forest of Dean DC v Wright*** [2018] J.P.L. 672:
- Application for development proposed to be undertaken by a community benefit society with a proposed donation to the community of a proportion of the turnover derived from the development.
- Issue: is this a material consideration?
- Dove J. ruled no;
- Matter went to Court of Appeal, which determined:
  - (1) Neither the source of the funds nor the fact that a matter is to be regarded as beneficial to the public makes a matter material consideration for planning purposes.
  - (2) The donation was distinct from the other benefits of the development, and an immaterial consideration cannot be made material by simply aggregating it with other considerations, some of which are or may be material.

(4) CIL Regulations: case-law (2)

- (3) There is no clear distinction between donations to the community made by a commercial developer and those made by a community developer.
- (4) Planning policy cannot convert something immaterial into a material consideration for planning purposes.
- (5) No matter how well-intentioned the proposed donor might be, and no matter how publicly desirable such a donation might be, it will not be material for planning purposes unless it satisfies the ***Newbury*** criteria.
- (6) A planning purpose is one which relates to the character or use of the land. The community fund would be administered by local people for the benefit of the community, but there was no limitation or restriction that required it to be used for a planning purpose. Although the concept of materiality may be broad, it is not without limit.

- NB ***Forest of Dean*** case going to Supreme Court.

(4) CIL Regulations: case-law (3)

- **(2) *Good Energy Generation Ltd v Secretary of State for Communities and Local Government* [2018] J.P.L. 1248**
- C applied for windfarm development;
- Proposed a suite of community benefits within a s. 106 obligation: including a community benefit contribution to be paid into a community benefit fund, a community investment scheme open to local residents, and a reduced electricity tariff that would be available to local residents;
- S/S and Inspector held failed reg. 122 of CIL Regulations tests and disregarded;
- Prior to the claim being determined, CA held in ***Wright*** (see above) that a community fund did not serve a planning purpose or fairly and reasonably relate to the development proposed. So claim proceeded in relation to the investment scheme and reduced tariffs only.

(4) CIL Regulations: case-law (4)

- Lang J. held:
  - (1) What is "*necessary*" for the purposes of the CIL Regulations is now a test in law, which it was not prior to the commencement of the CIL Regulations.
  - (2) The investment scheme and reduced tariffs did not comply with reg.122 of the CIL Regulations.
  - (3) The local tariff was essentially an inducement to make the proposal more attractive to local residents and to the LPA.
  - (4) The scheme was not necessary to make the development acceptable in planning terms under reg. 122.
  - (5) The investment scheme was not a community-led initiative, it was merely a potential investment opportunity and was not necessary to make the development acceptable.

(4) CIL Regulations: case-law (5)

- **(3) *R. (Oates) v Wealden DC* [2018] EWCA Civ 1304**
- Officer report advised that developers could not be required via s. 106 or s. 278 to provide highway improvements that were going to be funded by CIL.
- Report considered the likely effects of traffic generated by the proposed development on the local road network.
- Found that reg.123 restricted the use of planning obligations in respect of items appearing on an authority's CIL list, and that any necessary improvements to local roads would be covered by the payment of CIL from the development.
- Advised that the cumulative effect of traffic from the proposed development was not, in fact, going to exceed the impact anticipated in the Development Plan before the CIL-funded junction improvements were in place.
- Held: unassailable conclusions.

(4) CIL Regulations: case-law (6)

- ***(4) Amstel Group Corp v Secretary of State for Communities and Local Government*** [2018] J.P.L. 1013
- Appeal dismissed by Inspector.
- A hybrid application seeking full planning permission for an initial phase of 71 dwellings and associated works, and outline planning permission for up 129 dwellings and various facilities including a new primary school.
- The Inspector concluded that the new school was not necessary to make the development acceptable in planning terms because that could be achieved by the proposed financial contribution towards additional places and that it was being offered instead as an inducement to make the proposal more attractive.
- C challenges alleging failure to have regard to a main public benefit, namely the provision of a new primary school to meet the present and future requirements of the Diocese of Norwich.

(4) CIL Regulations: case-law (7)

- Gilbart J. held:
- Once the Inspector had reached the view school not needed to make development acceptable he was prevented by reg.122(2) of the CIL Regulations from treating it as *"a reason for granting planning permission for the development*".
- But the Inspector also had to give separate consideration to the benefits of the new school, as it was part of the proposed development.
- Inspector had failed to weigh the benefits of a new school – as opposed to contribution for additional places - and which, on the evidence, could provide improved and enlarged facilities, thus benefiting existing pupils as well as new ones.
- Once he had decided that the new school did not come within reg.122(2), he excluded it entirely from consideration, instead of also assessing it as a benefit when applying the overall assessment.
- So school was not a reason to grant planning permission but benefits must be weighed in balance ???!!!

(4) CIL Regulations: case-law (8)

- One other issue in ***Amstel***:
- The undertaking was for the land for the school and a financial contribution to building it (15% of the cost); the rest provided by the Norwich Diocesan board.
- The obligation included a commitment by the Board to construct a new primary school.
- The Inspector did not decide that the unilateral undertaking was invalid because the Diocese did not have an interest in the land.
- He did air his concerns about this matter.
- The Judge shared these concerns.
- But found it unnecessary to resolve the issue.

(4) CIL Regulations: case-law (9)

- **(5) *Hillingdon LBC v Secretary of State for Communities and Local Government*** [2018] EWHC 845 (Admin)
- JR of PINS decision to accept an appeal against the imposition of surcharges under the CIL Regulations.
- Court held that a demand notice under reg.69 of the CIL Regulations was invalid where it:
  - (i) failed to give details of the surcharges imposed; or
  - (ii) to refer to the recipient's rights of appeal.
- If there was no valid demand notice no useful purpose would be achieved by quashing PIN's decision to accept the appeal.
- The parties could either proceed with the appeal on the basis that any defect in the notice was waived or the local authority could give a compliant notice.

(5) Escaping s. 106 obligations (1)

- ***R. (Mansfield District Council) v Secretary of State for Housing, Communities and Local Government*** EWHC 1794 (Admin)
  - In determining whether a planning obligation should be modified under the Town and Country Planning Act 1990 s.106A on the basis that it no longer served a useful purpose, is the term "useful purpose" within s.106A(6) confined to a "useful planning purpose“?
  - Garnham J holds no.
  - In ***R (Batchelor Enterprises Ltd) v North Dorset District Council*** [2003] EWHC 3006 (Admin) it was common ground between the parties, and Sullivan J. appears to have accepted, that a useful purpose in this context meant a useful planning purpose.
  - But …

(5) Escaping s. 106 obligations

- In ***R (Renaissance Habitat Ltd) v West Berkshire DC*** [2011] J.P.L. 1209 Ouseley J. cast some doubt on this and expressed a reluctance to narrow the range of public interest purposes that an obligation may serve to purely planning purpose, and was reluctant to enable debate as to whether a purpose served was indeed a planning purpose.
- Garnham J. holds:
  - (i) The critical question was whether the obligation served some useful function, the absence of which made the maintenance of the obligation pointless; and
  - (ii) A useful purpose could include the recovery of expenses incurred by a local authority in building a highway, because public money expended to facilitate a development should be recovered where possible.

(6) Reasons

- Big year for reasons:
  - (1) ***Dover DC v Campaign to Protect Rural England*** [2018] 1 W.L.R. 108 – reasons for grant of PP by LPAs;
  - (2) ***R (Historic England) v Milton Keynes Council*** [2018] EWHC 2050 (Admin) – reasons under the EIA regulations – duty to provide main reasons and considerations for decision where EIA development;
  - (3) ***R (Save) v SSCLG*** [2018] EWCA Civ 2137 – no statutory or common law duty to give reasons for a call-in decision but there was a legitimate expectation of reasons as an express promise had been given in 2001 that reasons would be given for decisions not to call in an application under s.77. That promise was reiterated in 2010. It had not been withdrawn.

(7) Amending schemes, *Holborn Studios* 1

- Issue: when does amendment of a proposed scheme require further consultation? When is amendment allowed? And when not?
- Hugely important case;
- Leading case for a long time been: ***Bernard Wheatcroft Ltd v Secretary of State for the Environment*** (1982) 43 P. & C.R. 233;
- In ***Holborn Studios*** that case questioned – held it had conflated: (1) the substantive and (2) procedural constraints on a LPA to grant permission for alternative development, ruling that the only criterion was whether the development was so changed that to grant permission would deprive those who should have been consulted the opportunity of such consultation.
- Held that conflagration of substantive and procedural constraints was flawed, obscuring their different public interests which pulled in different directions

(7) Amending schemes, *Holborn 2*

- A number of points:
- (1) It was in the public interest that the substantive constraint on the changes that might be made to a planning application which a LPA had the power to consider should not be too strict: a liberal approach might enable PP to be granted without the need for a further application, without further delay.
- (2) However, a relaxed approach to the procedural constraint would subvert the requirements for notification and publicity, and the need to take the representations duly made into account.
- (3) The question whether further consultation was required following changes to the planning proposal depended on, inter alia, the nature and extent of those changes and their potential significance to those who might be consulted.

(7) Amending schemes, *Holborn 3*

- (4) Although a local authority had a discretion whether to accept an amendment to a planning application and grant permission, the question of what fairness might require it to do in the circumstances was ultimately one for the court to determine; it was not the court's function merely to review the reasonableness of a local authority's judgment of what fairness required. The test for reviewing the grant of permission for alternative development without further consultation was whether the process had been so unfair as to be unlawful.

(7) Amending schemes, *Holborn 4*

- Facts: Owner of a canal-side development which they wanted to redevelop, including an operational photographic studio within it. After making an initial application, various changes were made to it, but did not notify anyone about them, in particular the leaseholder and operator of the photographic studio and another person interested in canal-side development, although those two (the eventual claimants) did learn of the changes shortly before they were debated and decided.
- On facts the PP quashed.
- The changes to the application may have fallen short of ‘substantial’ or ‘fundamental’ changes to the project, but nevertheless at least the claimants would have had something to say about them had they had a proper opportunity to do so, which might have influenced the decision on the amended application.

(7) Amending schemes, *Holborn 4*

- Concerned a LPA grant of PP, but also relevant on appeal and under 2008 Act

  - (1) PINS Procedural Guide still referring to ***Wheatcroft*** in Appdx M despite being last amended September 2018: https://www.gov.uk/government/publications/planning-appeals-procedural-guide
  - (2) On 2008 Act though PINS Advice Note 13 updated: https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2015/07/Advice-note-16.pdf

(8) Other cases 1

- (1) Fracking - series of failed challenges:
  - (A) ***Preston New Road Action Group v Secretary of State for Communities and Local*** [2018] Env. L.R. 18
  - (B) ***R. (Dennett) v Lancashire CC*** (12 October 2018, unrep).

(8) Other cases 2

- ***(2) Waterstone Estates Ltd v Welsh Ministers*** [2018] EWCA Civ 1571
- Refusal of PP for petrol filling station and two fast-food restaurants outside a town;
- Inspector held did not amount to "*infrastructure*", which was one of the criteria listed in the local plan as permissible development.
- Cs alleges Inspector should have considered if development was "*associated with infrastructure*", namely a main road;
- Point not raised and not so obvious Inspector needed to consider.

(9) Other cases 3

- **(3) *Buick's Application for Judicial Review*, Re [2018] NICA 26**
- Grant of PP for a waste treatment centre and incinerator was overturned where the decision had been made by senior civil servants of a Northern Ireland Department during a period when no minister was in office.
- Northern Ireland Act 1998 did not confer ministerial power on civil servants – this would be contrary to the spirit of the Act and the Belfast Agreement, to which the Act was intended to give effect.

(10) Legislative changes

- (1) The Infrastructure Planning (Water Resources) (England) Order 2018 – changes to water NSIP thresholds imminent;
- (2) Consultation on bringing shale into NSIP (July 2018);
- (3) Compulsory community pre-application consultation for shale gas development (October 2018)
- (4) Consultation on amending CIL Regulations: includes removing pooling restrictions, removing restriction on use of s. 106 for matters covered by CIL charging schedule, simplifying the approach to production and review of CIL charging rates; allowing combined authorities to have a Strategic Infrastructure Tariff; amendments to indexation (October 2018);
- (5) Planning Reform: Supporting the high street and increasing the delivery of new homes (October 2018): proposals for reforms to PD rights.

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