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ROYAL INSTITUTION OF CHARTERED SURVEYORS

THE ENVIRONMENTAL AND PLANNING LAW ASSOCIATION FOR NORTHERN IRELAND

THE 17TH ANNUAL PLANNING AND DEVELOPMENT CONFERENCE

THE CONTEMPORARY DOMINANCE OF ENVIRONMENTAL LAW

The Honourable Mr Justice Bernard McCloskey

Chairman, Northern Ireland Law Commission

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Belfast City Hall

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I INTRODUCTION

[1] There has been a veritable explosion of planning and environmental legislation in the United Kingdom during the past couple of decades. It is worth remembering that planning legislation did not exist in Northern Ireland until 1931, when the Planning and Housing Act (NI) 1931 was passed. The first statutory intervention in England and Wales occurred earlier, in the form of the Housing, Town Planning (etc.) Act 1909. Bearing in mind the current "RPA", it is particularly noteworthy that under the 1931 Act, responsibility for planning decisions was conferred on local authorities, who had the function of preparing and adopting "planning schemes". There was also a role for the Ministry of Home Affairs. Those whose land was injuriously affected by a planning scheme acquired a right to compensation from the local authority concerned. Both the 1931 Act and the statute which amended it, in 1944, were singularly ineffective, mainly because of the failure of local authorities to exercise their statutory power to adopt planning schemes. The failure of the legislation was condemned, in muscular terms, by Sir Robert Matthews in his report to Government in 1963[1] and, following the report on the reorganisation of local government in 1970[2], resulting in the centralisation of planning administration under the Planning (NI) Order 1972.[3] Some modernisation and modest reform was then effected by the Planning (NI) Order 1991 and, as subsequently amended, this remains the main instrument of legislation in Northern Ireland twenty years later.

[2] However, the regulatory environment in which the 1991 Order operates today differs radically from that which existed when this legislation was first made. One of the main reasons for this is the proliferation of European legislation, with its marked emphasis on the protection of the environment.

[3] First principles are always an instructive starting point. At its heart, planning law regulates, controls and limits **land use**. The central concept in planning law is that of "***development***". [4] Unsurprisingly, this is defined in both domestic and European legislation. Leaving to one side intellectual and philosophical debates, environmental law has the same essential character: fundamentally, this branch of the law is concerned with what we do on, in, over and under land, in particular the use of buildings and other structures

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[1] Belfast Regional Survey and Plan 1963 (CMD 451).

[2] Report of the Review Body on Local Government in Northern Ireland (1970 CMD 546 – the McCrory Report).

[3] One of the first Westminster Orders in Council following the prorogation of the Stormont Parliament.

[4] "*In this Order, subject to paragraphs (2) to (4), 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land*": per Article 11(1) of the 1991 Order.

erected on land and the emissions from and product of land based activities – noise, smoke, gases, waste, smell and so forth. In short, all of this affects the environment in which we live.

[4] Historically, for many centuries, the law relating to the use of land and how land use impacted on the environment developed in the sphere of **private law**, frequently in disputes between private landowners in which the tort of private nuisance normally featured. However, this was unsatisfactory, as it entailed the provision of legal solutions which were piecemeal, local and limited. The industrial age dawned, society was changing rapidly and the law was lagging badly behind. The need for comprehensive and uniform parliamentary legislation became progressively acute.

[5] The link between land use and human health was gradually recognised and, as a result, the first statutory intervention occurred, in the form of the Public Health Act 1875. During the same era, the first statutory attempts at pollution control materialised in the Smoke Nuisance Abatement (Metropolis) Act 1853 and the Alkali Act 1863. This latter statute was considered revolutionary. Later writers hailed it as the first national statutory pollution control regime in the world. It also established the first state environmental agency, the Alkali Inspectorate. During the one hundred and twenty years which followed, statutory control was piecemeal and normally reactive. This is illustrated in the Clean Air Act 1956, which was a reaction to the deaths of almost four thousand citizens following the London smog in 1952.[5] This legislation brought into operation controls on smoke emissions. The impetus which brought about this Act did not differ in principle from that which stimulated the Public Health Act 1875, which established a statutory regime for municipal sewerage systems in response to frequent cholera and typhoid epidemics.

[5] Atmospheric Pollution: A Global Problem (Elsom, 2nd Edition 1992).

II SOME GENERAL CONSIDERATIONS

[6] The judicial forum in which environmental protection legislation issues arises with greatest frequency is the High Court, in applications for judicial review. The typical scenario is triangular in nature: the Department grants planning permission (normally full planning permission with conditions, or outline planning permission) to a developer, resulting in the initiation of judicial review proceedings by some interested third party – for example, an affected resident or businessman or, not infrequently, a commercial rival. Occasionally, the relevant district council may bring the proceedings. In some cases, the legal action is pursued by a group of interested parties – a pertinent and very recent example being the self-styled "Campaign Against Lough Neagh Incinerator". This group, as its title suggests, challenged the Department's grant of planning permission to a developer to install a poultry waste incinerator and related water pumping plant in close proximity to the shore of Lough Neagh. Ironically, one of the justifications invoked by the Department for its action was a requirement of European legislation[6], giving rise to the spectre of infraction [ie. enforcement] proceedings by the European Commission against the UK Government.

[7] Interestingly, this application for judicial review did not have any judicial outcome. After almost two days of hearing, the court suggested to all parties that judicial intervention at this stage of the process might not be appropriate, given that a further series of highly significant landmarks in the development process would inevitably materialise in the future. These include:

- The issue of the final, formal "Notice of Opinion to Approve" by the Department[7].
- A possible appeal against the Notice by the developer to the PAC, exercising his statutory right, challenging the planning conditions.
- In the event of such an appeal, a PAC hearing and determination.
- A possible judicial review challenge to the PAC determination.
- [Inevitably] a future application for planning permission authorising the connection of the incinerator and water pumping station to the NIE grid – with consequent possible judicial review challenges or appeal to the PAC.

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[6] …

[7] See Article 31(3), 1991 Order.

I venture to suggest that, until comparatively recently, this judicial review hearing would have run its full course and the court would have produced its judgment subsequently. However, the outcome which occurred – an order of the court staying (i.e. adjourning) the proceedings (the strong probability being that they will be overtaken by other events in the development process) – is a reflection of one of the more interesting trends of recent years, mainly the progressively proactive and "hands on" role of the court in all forms of litigation.[8]

[8] This new judicial control of litigation is in marked contrast to previous practices. Now, the court is particularly concerned with a number of matters – reducing the cost and length of litigation; dealing with individual cases in a manner which is proportionate to (*inter alia*) the importance of the case, the amount of money involved, the complexity of the issues and the financial position of each party; minimising delay in the litigation process; allocating to each case an appropriate share of the court's resources; and taking into account the need to allocate resources to other cases in the system. All of this has given rise to the phenomenon known as "case management", which entails the court frequently reviewing and updating the progress of individual cases, setting strict timetables for various steps to be taken and, increasingly, exercising its inherent jurisdiction in giving the parties directions.

[8] Expressed most fully and clearly in the "over-riding objective" enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature.

III THE ROLE OF THE HIGH COURT

[9] The intensive activity in the field of environmental protection legislation during recent years has also resulted in a group of cases which have a particular focus on how the High Court operates in judicial review proceedings. I shall elaborate on this presently. It is appropriate to recall, at this juncture, that in applications for judicial review the High Court is not a court of appeal. This is sometimes expressed in the proposition that the High Court does not substitute its view for that of the decision maker. It does not inquire into the merits of the decision under challenge. The constraints within which the High Court operates in judicial review cases are also captured in the proposition that the High Court is concerned mainly with the *decision making process*. Furthermore, the principle that, in judicial review applications, the High Court exercises a *supervisory* jurisdiction remains unaltered.

[10] Thus, in judicial review cases, the High Court exercises a limited jurisdiction. This has a notable resonance in planning cases, in two respects in particular. The first is that the court respects matters of planning judgment – relating to, for example, issues of neighbourhood compatibility and loss of amenity. The court generally defers to the experience and expertise of the qualified planning officers who consider all the evidence, visit the site and form their judgment accordingly. The second relates to *planning policies*. The courts have repeatedly recognised that documents of this kind possess an intrinsic flexibility and adaptability *and* are expressed in terms that are not to be construed in the same way as the exercise of interpreting a statute or some legal instrument.

[11] The first of these principles is expressed with particular force in ***Tesco Stores –v- Secretary of State for the Environment***[9]. In that case, both Tesco and another developer wished to construct a retail food superstore on their respective out of town sites. Each submitted a planning application accordingly. The relevant highway authority formed the view that the development would not be viable in the absence of a new road connecting it with the nearby town, at a cost of £6.6 million. The funds for this were not available to the highway authority. Tesco offered to finance the new road in full if planning permission were granted. Following an inquiry, the inspector recommended that Tesco, but not the other developer, should be granted planning permission, but formed the view that this could not, as a matter of law, be conditional on Tesco financing the new connecting road, in light of the evidence that the new superstore would not significantly increase the existing traffic congestion in the nearby town centre. The inspector concluded that there was only a tenuous connection between the proposed new development and the envisaged new road. The inspector, while

[9] [1995] 2 All ER 636

acknowledging that the two new superstore applications were finely balanced, concluded that Tesco's was the better site. She added the observation (non-binding) that the Council would be acting perversely were it to refuse Tesco's offer to fund the proposed new link road. As a small, but important, point of detail, during the course of the public Inquiry Tesco had entered into an agreement with the Council (the planning authority) under the English statute[10] committing itself to pay the Council £6.6 million if planning permission for the development was granted. The Secretary of State exercised his statutory power to "call in" the Tesco planning application, while the other planning application became the subject of an appeal to him on account of non-determination. The Secretary of State rejected the inspector's recommendation and preferred the other planning application, granting permission accordingly. His reasoning was based on the well established policy that planning permissions cannot be bought and sold. As a result, any planning obligation not directly related to the proposed development could not permissibly be imposed to extract payments in cash or kind from a developer. A further aspect of the policy in play was that planning obligations concerning roads should relate directly to the planning permission *and* be necessary.

[12] Tesco's application for judicial review was ultimately unsuccessful. The thrust of Tesco's case was that its offer to fund the new connecting road was a material consideration (a question of law) *and* that the Secretary of State had failed to have regard to it (a question of fact).[11] The opinion of Lord Keith in the House of Lords reiterated, firstly (in terms), the principle that what constitutes a material consideration is a question of law. He stated:[12]

> "*An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not* ***de minimis****, then regard must be had to it.*"

This is an orthodox formulation of principle. What follows immediately thereafter is noteworthy:

> "*But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision maker and in exercising that discretion he is entitled to have regard to his established policy*".

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[10] The Town and Country Planning Act 1990, Section 106.

[11] The statutory obligation to have regard to all material considerations is contained in Section 70(2) of the 1990 Act – mirrored in Article 25(1) of the 1991 Order, in Northern Ireland.

[12] At p. 647

In other words, the *weight* to be accorded to any material consideration is a matter for the decision maker, rather than the court – and is challengeable only on the limited ground of *irrationality*.

[13] Lord Hoffmann, for his part, made some interesting observations about the dilemma confronting a planning decision maker in cases where two developers are in competition for a grant of planning permission. As his Lordship noted, in such cases the presumption in favour of development "*does not yield an easy answer*".[13] He continued:

> "*I do not think anyone would doubt that in such a case of competition, it would be legitimate to take into account that one developer was willing, for example, to employ the finest architect, use the best materials, layout beautiful gardens and so forth, whereas the proposal of the other developer, though not unacceptable if it had stood alone, was far inferior.*"

Thus a "beauty contest" will ensue. However, as Lord Hoffmann observed, the problem arises when developer X seeks to tilt the balance in his favour by offering off site benefits which developer Y is not dangling before the deciding authority. His Lordship then reiterated the well known ***Newbury principles***[14] viz the planning obligation must be for a planning purpose; it must fairly relate to the proposed development; and it must not be unreasonable in the ***Wednesbury*** sense (i.e. irrational). His Lordship continued:

> "*The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given.* ***The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority****. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into* ***Wednesbury*** *irrationality to give them whatever weight the planning authority thinks fit or no weight at all.*"[15]

Lord Hoffmann further observed:

> "*This distinction between whether something is a material consideration and the weight which it should be given is*

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[13] At p. 654.

[14] ***Newbury DC –v- Secretary of State for the Environment*** [1981] AC 578.

[15] At p. 657 – emphasis added.

> *only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision making process and not with the merits of the decision.* ***If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State***".[16]

In short, provided that a decision to give a material consideration limited weight – or no weight at all – is based on rational planning grounds, it is beyond challenge.

[16] At p. 657 – emphasis added.

IV THE IMPACT OF EUROPEAN LAW

[14] Notably, the protection of the environment did not feature in the Treaty of Rome 1957. Notwithstanding, the European Community developed certain environmental protection initiatives in various Directives, even though the jurisdictional basis of these measures was somewhat opaque, even dubious.[17] The prominence which European environmental protection legislation has recently assumed can be traced to the Treaty on European Union in 1992, which amended Article 2 of the Treaty of Rome. Ultimately, further amendments were made by the Treaty of Nice in 2002. As a result, Article 2 of the TEU (as it is now known) contains a list of "tasks" for the EC, one of which is to implement common policies for – "*a high level of protection and improvement of the quality of the environment*". This is reiterated in Article 3 and it also occupies a separate chapter (or "Title"), in Article 174.

[15] Article 174 of the TEU states, in part:

> "*1. Community policy on the environment shall contribute to the pursuit of the following objectives:*
>
> *Preserving, protecting and improving the quality of the environment;*
>
> *Protecting human health;*
>
> *Prudent and rational utilisation of natural resources;*
>
> *Promoting measures at international level to deal with regional or worldwide environmental problems.*"

Article 174(2) enshrines the so-called "precautionary principle", which is –

> "*… that preventive action should be taken, that environmental damage should as a priority rectified at source and that the polluter should pay*".

In short, prevention is deemed better than cure. As of today, as a direct result of European legislation, there is a bewildering series of statutory measures – regulating fields as diverse as waste, water, sewerage systems, beaches, birds, natural habitats and fresh water fish.

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[17] Articles 100 (The Removal of Trade Barriers Between Member States) and 235 (whereby Member States could confer additional powers on the EC to achieve the Treaty objectives) were invoked.

[16] I have directed attention to the well established principles expressed so clearly in the ***Tesco Stores*** decision with a view to contrasting the task and approach of the High Court in one particular category of environmental cases. The cases belonging to this group typically have the following ingredients:

(a) A European Directive (or, in current terminology, "Framework Decision").

(b) Transposing domestic law regulations.

(c) A debate about the true meaning and effect of the domestic regulations.

(d) Finally, the question of whether an application for planning permission and a consequential positive decision are in compliance with the regulations in question.

It is readily seen that, in such cases, the court is not obviously concerned with questions relating to the identification of material considerations, weighting processes and exercises of planning judgment. Rather, the task of the court falls within the boundaries of **legality**: has there been any infringement of the regulation/s under consideration? Furthermore, in some of the cases belonging to this territory, the court sometimes has to decide whether the United Kingdom Government has correctly and faithfully transposed the European Directive. However, in environmental law litigation, this discrete group of cases probably constitutes a minority, particularly during the last couple of years.

[17] It is probably correct that the environmental regulations which the High Court has had to consider with greatest frequency are the Planning (Environmental Impact Assessment) Regulations (NI) 1999 as amended.[18] These constitute the domestic law implementation of Council Directive 85/337/EEC[19] "*on the assessment of the effects of certain public and private projects on the environment*". What lies at the core of this measure of European legislation can be readily ascertained from the following recital in the Directive:

> "*Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out.*"

[18] The EIA Regulations, in shorthand.
[19] As amended by Council Directive 97/11/EC.

The environment impact assessment, where required, is based on information provided by the developer. The question for the court, not infrequently, relates to the adequacy of the information supplied. Faithful to the Directive, the EIA Regulations distinguish between two types of development:

(a) All "Schedule 1" developments invariably require assessment in the form of an Environmental Statement, in the terms specified.

(b) In contrast, "Schedule 2" developments are subject to the same requirement *only* if the development "*… is likely to have significant effects on the environment by virtue of factors such as its nature, size or location*".

How is this "probability" to be determined? The answer is that it requires an exercise of judgment on the part of the planning authority. A judgment of this kind must withstand scrutiny by reference to well established barometers: viz. it must be formed on the basis of all material considerations, it must not be contaminated by any immaterial factors and it must be capable of withstanding a rationality audit. Here, the conventional approach, expressed in the ***Tesco Stores*** principles applies. In contrast, in the case of proposed airports, nuclear power stations, crude oil refineries (and the other members of the Schedule 1 list) there is no scope for discretion or judgment: such proposed developments **must** by definition, be accompanied by an Environmental Impact Statement fully compliant with the EIA Regulations. In passing, this absolute obligation does not apply where the proposed development is a quarry, underground mining or an agricultural water management project (or any other project in the Schedule 2 list).

[18] There is also scope for the formation of judgment as regards the contents of the Environmental Statement, by virtue of its definition:

> "*A statement that contains such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the Applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but which includes at least the information referred to in Part II of Schedule 4*".[20]

The Environmental Statement, where required, must *always* contain the following information:

(a) A description of the development comprising information on the site, design and size thereof.

[20] Regulation 2(2).

(b) A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.

(c) The data required to identify and assess the main effects which the development is likely to have on the environment.

(d) An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.

(e) A non-technical summary of all of the above information.

This is known as the "Part II" information.[21] In contrast, there is clear scope for planning judgment and discretion as regards the list of information requirements contained in "Part I": this follows inexorably from the statutory language.[22] The information required under Part I relates to *inter alia*, those aspects of the environment likely to be significantly affected by the development – including in particular population, fauna, flora, soil, water, air, climatic factors, architectural and archaeological heritage, landscape *and how all of these factors inter-relate with each other*. Thus, to take an example, where it is proposed to construct a development on contaminated land, it is unlikely, in the abstract, that there will be any significant impacts on population, fauna, flora, soil or water.

[19] Against this backcloth, it is instructive to consider some of the decided cases, of which there is something of an abundance. In ***R (Jones) –v- Mansfield District Council,***[23] Dyson LJ stated:

> "*Whether a proposed development is likely to have significant effects on the environment involves an exercise of judgment or opinion. It is not a question of hard fact to which there can only be one possible correct answer in any given case …*
>
> *The role of the court should be limited to one of review on* ***Wednesbury*** *grounds*".

In concrete terms, this statement of principle applies to Part I of Schedule 4 to the EIA Regulations. In ***R (Dicken) –v- Aylesbury DC,***[24]it fell to the Court of Appeal to consider whether a local authority had erred in concluding that an EIA assessment was not required. Laws LJ stated:

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[21] EIA Regulations: Regulation 2(2) and Schedule 4.
[22] See Regulation 2(2), *supra*.
[23] [2004] 2 PCR 14, at paragraph [17].
[24] [2008] ENV.L.R. 20, paragraph [16]

> "*It has to be borne in mind that the test for the judicial review court is the irrationality test. Provided the local planning authority asked themselves the right question and arrived at an answer within the bounds of reason and the four corners of the evidence before them, then it seems to me their decision cannot be categorised as unlawful …*
>
> *Much has been made of the suggested impact of EU law, but in my opinion I think there is a real risk of over complicating what in essence is a relatively straight forward matter. If on the question whether the proposed development is likely to have significant environmental effects there is anything of substance to argue, then the process of the Directive and the Regulations requires democratic public participation in that argument.*"

This statement tends to confirm that Sullivan J was correct in the approach which he had adopted in ***R (Blewett) –v- Derbyshire County Council.***[25]

[20] In ***Edwards –v- Environment Agency***,[26] a challenge was made to a decision of the Environment Agency to authorise the operation of a cement works. The issue concerned compliance with the relevant pollution control Regulations which had been made to implement Council Directive (EC) 96/61, which was concerned with integrated pollution, prevention and control. Two aspects of the decision of the House of Lords are noteworthy. The first is their Lordships' conclusion that the duty to make information available to the public applied only to new installations or substantial changes to existing installations. The duty did not apply in this case, as the cement works was an existing plant and the proposal to change to the use of tyres as fuels did not constitute a "*substantial change*". Secondly, their Lordships considered the Environmental Impact Regulations. They held that the application had contained sufficient information about the proposal to burn tyres to satisfy the requirements of an Environmental Statement. In so doing, they distinguished their earlier decision in ***Berkley –v- Secretary of State for the Environment,***[27] where they held that no valid Environmental Statement existed in circumstances where there was a range of separate, fragmented documents emanating from different sources. Lord Hope, for his part, made a distinction between the *purpose* of the installation (viz. the manufacture of cement) and the fuel to be used to provide the necessary power. He noted that the scope of the Council Directive was very wide, embodying very broad purposes. Lord Hoffmann explicitly approved the

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[25] [2004] ENV. L.R. 29, paragraphs [39] – [42] and [68] - *infra*.
[26] [2009] 1 All ER 57
[27] [2001] 2 AC 603

view expressed by Sullivan J in ***Blewett*** that, in an imperfect world, the Regulations –

> "*… recognise that an environmental statement may well be deficient and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible*".

Sullivan J distinguished this from a fundamentally flawed Environmental Statement – which, by definition, is incapable of redemption.

[21] One of the most recent decisions of note is ***R (Brown) –v- Carlisle City Council and Stobart Air***[28]. It is instructive to dwell a little on this particular decision. Here, the context was shaped by a grant of planning permission which authorised the development of a freight storage and distribution facility at Carlisle Lake District Airport, coupled with a series of related works (offices, canteen, staff welfare facilities, landscaping, new vehicular access, parking and other infrastructure works). The planning application also involved the proposed repairs and resurfacing of the existing airport runway and the utilisation of an extant building as an additional passenger terminal, the developer's position being that these would constitute so-called "permitted development".[29] The application was accompanied by an Environmental Statement which was confined to the likely significant effects on the environment arising out of the proposed freight distribution centre works only, excluding the proposed airport works. The Council's grant of planning permission incorporated a planning agreement, pursuant to which works could not commence until the Council had approved the specification and programme for the project. An application for judicial review, in which the grant of planning permission was challenged, ensued. In the judicial review proceedings, it was contended that the Environmental Statement was defective as it did not address the environmental effects of the works to which the planning agreement related viz. the repairs and renewal of the existing main runway and the completion of a terminal building with an area of not less than 400 square metres. The essence of the argument was that the development of the freight distribution centre (with all its ancillary works) the restoration of the runway and the construction of the passenger terminal building constituted a unified project within the terms of the Directive. It was argued, in the alternative, that the airport works were part of the cumulative effects of the freight facility. It was submitted that, on both counts, the Environmental Statement was flawed.

[22] The contrary argument was that these were two quite separate projects, with no significant functional link. The Court of Appeal held that

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[28] [2011] ENV. L.R. 5

[29] See the Town and Country Planning (General Permitted Development) Order 1995.

the measurement of the cumulative effects of a proposed development is a question of fact in every case. The finding of a functional link between two proposed developments is not a pre-requisite to a finding of cumulative environmental effects.[30] The court also endorsed the view (in terms) that a planning authority's assessment of whether a proposed development is an integral part of a larger scheme is a matter of judgment, challengeable on irrationality grounds only.[31] The gist of the court's main conclusion was that the freight centre works and the airport works were in truth and in reality a single project, with the result that the EIA Regulations[32] had been infringed as the ES had failed to assess the likely significant effects on the environment arising out of the airport works. Noting that in ***R (Barker) –v- London Borough of Bromley,***[33] the House of Lords had emphasized that the underlying purpose of the Directive is that the environmental effects of any development, including cumulative effects, are considered at the earliest possible stage in the decision making process,[34] the Court of Appeal reasoned and concluded as follows:

> "*Since the object of both the Directive and the Regulations is to ensure that any cumulative environmental effects are considered before any decision is taken as to whether permission should be granted, an assurance that they will be assessed at a later stage when a decision is taken as to whether further development should be permitted will not, save perhaps in very exceptional circumstances, be a sufficient justification for declining to quash a permission granted in breach of Regulation 3(2) and/or the Directive.*"

[23] The final noteworthy feature of the decision in the Carlisle Airport case is the remedy granted. Members of this audience should be aware that in judicial review proceedings the grant of remedies lies within the discretion of the court. Even where a challenge succeeds, a remedy does not follow as a matter of right. In the Carlisle Airport case, the court made an order quashing the planning permission, which was found to be unlawful on account of the breach of the Regulations. In granting this remedy, the court rejected the developer's contention that an undertaking to the court, to be incorporated in the planning agreement, that the freight centre development would not be commenced until both developments had been properly assessed under the EIA Regulations, leaving the impugned planning intact in the interim. Sullivan LJ stated:

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[30] Per Sullivan LJ, paragraph [21].
[31] See paragraph [25].
[32] Regulation 3(2).
[33] [2007] 1 AC 470.
[34] Per Lord Hope, paragraph [22].

> "*A planning permission is a public document. Third party rights e.g. the rights of agricultural tenants on the land may be affected by the existence or otherwise of a planning permission. There would have to be some very good reason to persuade the court that acceptance of an undertaking that an unlawful permission would not be implemented, or would be implemented only on certain terms, would be a more appropriate course than a decision to quash an unlawful permission*".[35]

This passage is a reflection of the principle to which I have just alluded. However, it should be noted that in cases involving infringements of the EIA Regulations, there is at most very limited scope for the exercise of judicial discretion declining to grant an appropriate remedy. In reality, the remedy will normally be an order quashing the grant of planning permission. Properly analysed, this flows from two considerations. The first is that full compliance with the EIA Regulations is an aspect of the United Kingdom's obligations under the EC Treaty and that the court has a duty to ensure fulfilment of such obligations. This is an interesting illustration of the impact which European law has had on domestic law. The applicable doctrine is that of the supremacy of European law. The duty of Member States to take all appropriate measures to ensure the fulfilment of obligations arising under the EC Treaty is prescribed by Article 10 thereof – and this duty devolves directly upon national courts where directly effective provisions of Community law are involved.[36] The second consideration is that even in a pure domestic law context, the discretion of the court to refuse to quash a decision that is found by the court to be *ultra vires* is conventionally considered to be very narrow.[37]

[24] In its well known decision in ***Berkeley***[38]**,** the House of Lords that an environmental statement must be a single, composite compilation, containing all of the relevant environmental information and a summary in non-technical language. Its preparation may require substantial elements of expertise, spanning more than one professional discipline. This reflection occurred to me particularly after reading the recent decision in ***R (Buglife – the Invertebrate Conservation Trust) –v- Thurrock Thames Gateway Development Corporation***,[39] where a conservation trust brought an application for judicial review challenging a grant of planning permission which authorised the construction and operation of a distribution depot on

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[35] See paragraph [42].

[36] International law by its nature binds the State in its executive, legislative and judicial activities and the same is true of EC law "*… over which no appeal to provisions of internal law of any kind whatever can prevail*". Thus stated the ECJ in **Commission –v- Italy** [1972] ECR 527, at p. 535. See, generally, Wyatt and Dashwood, European Union Law (5th Edition), Chapter 5.

[37] Berkeley –v- Secretary of State for the Environment [2001] 2 AC 603 – per Lord Hoffmann especially, p. 616.

[38] Ibid.

[39] [2009] 2 PCR8.

the site of a former power station. The aim of the conservation trust was to protect the flower rich grassland for the conservation of invertebrates. This was claimed to be one of the most important sites in Britain where rare and endangered invertebrates existed, three species in particular: the brown banded carder bee, the five banded weevil wasp and the salt marsh short spur beetle. These were but three of 900 invertebrate species thriving on the site. The proposed development would destroy about 50% of the habitat and around 70% of the herb rich grassland which provided a foraging area for many insects, such as bees and wasps.

[25] The challenge to the grant of planning permission failed. The court was satisfied that the significant adverse effects had been properly addressed by a combination of phasing and mitigation measures. Each of these mechanisms had been sufficient for Natural England to withdraw its objection. The Court of Appeal approved the statement of Sullivan J in ***R –v- Rochdale Metropolitan DC, ex parte Milne:***[40]

> "*[110] The question whether such information does provide a sufficient 'description of the development proposed' for the purposes of the assessment regulations is, in any event, not a question of primary fact, which the court would be well equipped to answer. It is pre-eminently a question of planning judgment, highly dependent on a detailed knowledge of the locality of local planning.*"

The weight to be attributed to the views of an expert consultee features prominently in the judgment of the Court of Appeal:

> "*[49] … the* [planning authority] *were entitled to take the mitigation proposed and the assessment of its effect into account when making their decision. They were entitled to give considerable weight to the representations of Natural England, the expert statutory consultees. Indeed, it would have been surprising if, having regard to the public interests involved, they did not give them such weight. The planning conditions imposed and the detailed Section 106 agreement were, as Natural England accepted, a valuable safeguard …*
>
> *[50] As to phasing there will be cases, as with mitigation, in which a permission cannot properly be granted in the absence of appropriate, and enforceable, proposals for mitigation, or a predetermined phasing plan, or both. Further consultation procedures may also be required. That will depend on the circumstances, as does a decision whether an environmental statement is required at all or a decision*

[40] [2001] ENV. L.R. 22, paragraphs [107] – [110].

> *whether the planning authority have sufficient information. In this case, the respondents were entitled not to require a complete blueprint of phasing in advance of the grant of permission …*
>
> *[52] … In analysing this planning decision, consideration of the larger picture, the main issues, should not be defeated by over attention to detail, with the risk of thereby losing, in common parlance, the wood for the trees*".[41]

Within these passages one can identify two of the main recurring principles which I have highlighted in this brief excursus viz. planning judgment (on the part of decision makers) and, correspondingly, supervisory review , not appeal (on the part of the court).

[26] In the most recent decided cases, the EIA Regulations continue to dominate. In the ***Basildon Golf Course*** case,[42] the main issue was whether the relevant planning authority (Basildon District Council) had erred in law in deciding that an environmental impact assessment was not required. The Council's grant of planning permission permitted the development of a golf club house, a driving range, a maintenance building and ancillary facilities. This would entail the tipping of a very substantial amount of waste ("inert material") on to the site to facilitate some remodelling of the golf course by creating landscaped bunds and mounds, sourced from local construction sites. On the particular facts, there was a progressively expanding fund of relevant information. The planning officer concerned initially expressed his views in written form and, later, provided further reasoning. The Court of Appeal highlighted "*… the care with which post-decision claims by a decision maker by way of rationalisation should be considered and the caution with which they should be scrutinised*".[43] In particular, the organisation "Natural England" had initially adopted the stance that an EIA was not required, but altered its view when it discovered subsequently that its comments had not been informed by the full extent of the overall development proposed. The Court of Appeal concluded that the planning permission must be quashed. Pill LJ stated:

> "[55] *The Opinion was in my judgment legally defective in its treatment of the imported fill. I accept the submissions made on behalf of the appellants. The amount of waste to be deposited on the site was grossly understated in the Opinion which, as a result, was seriously misleading. Moreover, the impact on the local environment of the deposit of large quantities of waste forming massive and extensive bunds*

[41] Per Pill LJ.
[42] R (Friends of Basildon Golf Course) –v- Basildon District Council [2010] EWCA. Civ 1432.
[43] Paragraph [40].

was not mentioned or considered in the Opinion. Mr Simpson issued the Opinion on the same day as the planning application was submitted. If he was aware of the impact of the development at that time, which I respectfully doubt, his consideration of it was legally inadequate. This aspect of the proposed development was not specifically evaluated as required.

[56] *I add that lack of consideration of the issue is reflected in the form in which planning permission was granted in September 2007. At that stage, there was awareness of the amount of waste involved, an Environmental Health Service Report of 11 September 2007 noting that a clause in the agreement for a lease stipulated that "not more than 312,000 cubic metres of inert material can be brought in". The grant of permission did not even mention the "associated landscaping/engineering works" for which permission had been applied and the conditions imposed do not refer to or regulate the scale of deposit involved.*

[57] *I would quash the planning permission on this ground, there having been no sufficient consideration as to whether an EIA was required.*

[58] *On the ecological aspect of this application, I have also come to the conclusion, though acknowledging the limited circumstances in which the court may intervene, that the Opinion was legally defective. On the information that should have been available to Mr Simpson, fuller treatment was required. I bear in mind the respondent's own statement, on 25 May 2006, that an ecological survey was "an absolute must" and the breaches of legislation associated with protected species contemplated in the report of July 2006. Further, the view was expressed in the January 2006 report in the possession of the respondents that Vange Hill could provide an extremely valuable biodiversity resource for the district and that the golf course itself has considerable wildlife value. Mr Simpson has accepted in his statement that he had been informed that there was need for further survey work in relation to a number of species and that need for further survey work led to the decision to split the application into two phases. The additional survey work required for certain species had to be undertaken at specific times of the year which would have delayed the assessment.*

[59] *This was not a case in which ecological considerations could be dismissed with the single sentence in the Opinion: "The application is to be supported by a*

detailed ecological report which will include a survey of the wild life on the site and details of a mitigation strategy". That brevity reflects what appears to me to have been an insufficient analysis of the issues which had arisen. Further analysis and specific evaluation were required. On this evidence, an assumption that an EIA was not required because concerns could be left to appropriate mitigation measures was not in the circumstances justified. I am far from saying that an EIA will always or routinely be necessary when protected species such as great crested newts are found on a site.

[60] *I would quash the Opinion and it follows that the planning permission must be quashed. The decision that an EIA was not required was not lawful and the respondents should reconsider whether the application was one to which regulation 3 of the 1999 Regulations applies."*

[27] There is one further recent decision of note, in which the English Court of Appeal has made the following statement relating to the EIA Regulations:

"[40] *…… the decision not to have an EIA is a significantly different kind of decision from a refusal or grant of planning permission. The reasons for a preliminary administrative decision whether or not to have an EIA do not have to satisfy the same standards of information and reasoning as would apply to a substantive decision on a planning application. The degree of "grappling" is different, more provisional and less exacting. What matters with a decision of this character is that the reasons for it that were made available to the claimants suffice to satisfy the criteria in the passage cited from Mellor. In my view, they do. The submission by Savills that no EIA was required set out their position the size of the development and its impact and stated that the likely impact in landscape and transport terms would be addressed through the necessary landscape and transport assessments when the planning application was submitted. The Council accepted that approach. The overall position was that enough reasons were available to the claimants for them to know the basis of the decision not to have an EIA and to mount a challenge to it.*

[41] *In those circumstances the screening opinion was not, in my judgment, contrary to law for want of reasons or*

reasoning. I would dismiss the claimants' application for judicial review."[44]

Thus the court dismissed a challenge to the Council's decision to grant planning permission for the extension of a grain storage and handling facility without requiring an EIA. In so concluding, the court provided a convenient summary of another recent significant decision, that of the European Court of Justice in the case of ***Mellor***:

> "[9] *Regulation 4(6) requires a local planning authority which decides that a development requires an EIA to provide a written statement giving clearly and precisely the full reasons for that conclusion, but the Regulations impose no comparable duty in a case where the authority decides that an EIA is not required. However, in R (Mellor) v Secretary of State for Communities and Local Government (Case C-75/08), [2010] Env. L.R. 18 the European Court of Justice confirmed that a decision that a development did not require an EIA must contain or be accompanied by sufficient information to make it possible to check that it was based on adequate screening carried out in accordance with the directive. The court held that it is necessary for third parties, as well as the administrative authorities concerned, to be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary and for them to have sufficient information to enable them to challenge the decision by legal proceedings, if that is thought appropriate.*
>
> [10] *The following passages in the judgment are of particular relevance:*
>
> > *'59. . . . effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the*

[44] R (Bateman) –v- South Cambridgeshire District Council [2011] EWCA. Civ 157.

competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request . . .

60. That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made.

. . .

63. While as is clear from the reply to the first question, the reasons need not necessarily be contained in the determination not to carry out an EIA itself, the competent administrative authority can, under the applicable national legislation or of its own motion, indicate in the determination the reasons on which it is based.

64. In that case, the determination must be such as to enable interested parties to decide whether to appeal against the determination in question, taking into account any factors which might subsequently be brought to their attention.

65. It cannot, in those circumstances, be ruled out that in the case in the main proceedings the Secretary of State's reasons might be considered sufficient, taking into account, in particular, factors which have already been brought to the attention of interested parties, provided that the latter can ask for and obtain from the competent authorities, subject to judicial review, the necessary supplementary information to fill any gaps in that reasoning'."[45]

In summary, the legal requirement which applies to a so-called "screening" opinion is that it must be the product of a process of careful and conscientious consideration; it must be based on information which is sufficient and accurate; and it must ***demonstrate*** that the issues have been both considered and understood by the decision maker.

[28] Finally, a judicial review challenge involving consideration of the EIA Regulations provided the stimulus for the court to wax lyrical (a rare self-indulgence). I quote from the opening words of the judgment:

[45] Mellor –v- Secretary of State for Communities and Local Environment [2011] ENV. L. R. 18.

> "[1] *Walking in the Wye Valley in the late 18th century William Wordsworth observed as follows:*
>
> *'How oft, in spirit, have I turned to thee,*
>
> *O sylvan Wye! thou wanderer thro' the woods,*
>
> *How often has my spirit turned to thee!'*
>
> [2] *I doubt that the great English nature poet Wordsworth would have had much truck with the prosaic and sometimes arid debate about legal definitions which has preoccupied the court in this case. It does, however, address two issues which were a concern of his poetry: the natural landscape and those who tend it and earn their living from it."*[46]

This judgment also recorded the judicial resolution, in another case, of the intriguing question of whether polytunnels constitute development: the answer is affirmative![47]

[46] R (Wye Valley Action Association Limited) –v- Herefordshire Council [2009] EWHC 3428 (Admin).

[47] R (Hall Hunter Partnership) –v- First Secretary of State (etc) [2006] EWHC 3482 (Admin). A polytunnel, in passing, is a statutory term of art not readily found in dictionaries. For those thirsting to know , it is "an elongated polythene covered frame under which seedlings or other plants are grown outdoors"[per The New Oxford Dictionary of English].

V CONCLUSION

[29] My overall conclusion is as follows. The law in this sphere has two constituent elements: legislation and judicial decisions. In a number of cases, it has been necessary for the judiciary to construe the legislation. This is, for the judge, an exercise properly described as clinical, detached and objective. It represents, for some, one of the purest forms of decision making. In some instances, this exercise has been undertaken at the highest levels – by the Court of Appeal and the Supreme Court. Such cases are, by definition, comparatively rare. Most of the cases belonging to this field in recent years are illustrations of the *application* of [a] the legislation and [b] the principles contained in the decisions of superior courts. Such decisions can, not infrequently, present difficult and challenging tasks for the court. Moreover, decisions of this kind undoubtedly have a significant impact on members of society. However, it is important to recognise that the court is operating within well defined boundaries within which radicalism, and revolution, are alien invaders. Sadly, the judicial function rarely provides an opportunity for the appreciation of, or quotation from, poetry or literature, although both Kafka and Shakespeare have made occasional appearances in judgments in recent years. The judicial function is essentially a mundane one, unseasoned by the thrills and excitement of revolution and radical change. I apprehend that most members of this audience will be more comforted than disappointed by the confident forecast that this is unlikely to alter significantly in the foreseeable future.