# CHALLENGING (AND DEFENDING) INSPECTOR'S DECISIONS

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## Introduction

1. This Paper considers a range of procedural and tactical issues for those seeking to challenge and defend decisions on planning appeals under sections 288 or 289 of the Town and Country Planning Act 1990 ("the 1990 Act").

## Structure

2. The main body of this Paper is arranged in four parts:

   a. the statutory provisions;

   b. procedure (including recent issues and developments);

   c. the claimant's perspective – how to spot a good ground of challenge; and

   d. defending decisions and the role of the second defendant.

3. The issues are considered more from a practical rather than an academic viewpoint. It is of course difficult to avoid touching upon some issues of substantive law along the way, but for the most part I anticipate that the relevant authorities will be familiar territory.

4. Before turning to the first of those matters, there are three scene-setting points that are perhaps worth emphasising at the outset.

   a. The first relates to the relatively high quality of the decision letters and reports that are produced by the Planning Inspectorate. For those of us whose professional experience of administrative decision-making is largely confined to land use planning, it is easy to become accustomed to the fact that by and large the central government decisions we deal with are clearly, coherently and fully articulated. It is inevitable that the quality of the decision letters and reports will vary, and that in a number of cases each year the quality will be inadequate to pass muster. But in general the standard of decision-making is high, and it should therefore come as no surprise that (so far as I can tell) only a minority of the claims made each year are successful.

   b. The second concerns the practical implications of success. A successful challenge will result in the decision in question being sent back to the decision-maker for a second attempt. Save where the outcome of the appeal is likely to turn on the relevant point of law on which the challenge is based (which will be unusual, though not unheard of), a successful challenge is therefore unlikely to prove to be determinative of the appeal itself.

In that context it should be borne in mind that the first decision on the underlying appeal may survive to some extent as a material consideration for the purposes of the second. The second inspector, considering the matter in the wake of a successful statutory challenge, is entitled to have regard to the first inspector's decision save in so far as the earlier decision has been disapproved by the High Court (see e.g. per Jackson J in *Eid v. First Secretary of State and Westminster City Council* [2005] EWHC 3030 (Admin) at paragraph 55). Therefore, if there is an important adverse finding in the earlier decision which is unaffected by the successful ground of challenge, that finding may well affect the prospects of success next time around.

There will be cases where a successful challenge is worthwhile even if the ultimate result on re-determination is unlikely to be different (e.g. where delay is valuable as an end in itself). In all cases, however, in deciding whether a challenge is worth pursuing, attention must be paid to the client's ultimate objective and whether overturning the decision is likely to lead to that objective being achieved.

c. The third introductory point concerns the degree to which prospective challengers should be discouraged by the impression one gains that by far the majority of statutory challenges fail. I do not have access to any statistics on the Treasury Solicitor's success rate in defending these challenges in court, but in my experience only a small minority of the cases which make it to court each year are successful.

It must be remembered that many of the challenges which succeed are dealt with by consent before they reach court, and are therefore never reported. Far too many hopeless challenges are brought each year, and the obstacles in the way of such challenges are – quite rightly – formidable (see below). But if you have identified a clear substantive error you should not be discouraged from making an application. The hard part is distinguishing the good points from the bad, a matter which I address in more detail below.

**<u>The statutory provisions</u>**

**Section 288**

5. Section 288 provides the sole means by which the validity of the orders identified in section 284(2) of the 1990 Act may be challenged. In practice, it is most commonly used as the means for challenging decisions on appeal under s.78 to the Secretary of State, or in respect of applications for planning permission called in by her for her determination under s.77.

6. The grounds of challenge are set out in ss.(1)(a) and (b):

> "(1) If any person
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> (a) is aggrieved by any order to which this section applies and wishes to question the validity of that order, on the grounds;
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> (ii) <u>that the order is not within the powers of this Act,</u> or

(iii) <u>that any of the relevant requirements have not been complied with in relation to that order</u>; or

(b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action, on the grounds-

(i) <u>that the action is not within the powers of this Act</u>, or

(ii) <u>that any of the relevant requirements have not been complied with</u> in relation to that action" (emphasis added).

7. A liberal approach is taken to the requirement that the applicant be a "person aggrieved", though that does not include the party in whose favour the appeal has been decided, but who seeks to challenge the reasoning of the Inspector (*Greater London Council v. Secretary of State for the Environment* [1985] JPL 868). Such an application should be made by way of judicial review.

8. The grounds of challenge broadly equate with those for judicial review (see per Lord Clyde in *R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2003] AC 295 at paragraphs 157 and 169), and there is a substantial overlap between the two grounds. The general principles applicable to challenges under this section are summarised in the familiar and frequently cited passage from the judgment of Forbes J in *Seddon Properties v. Secretary of State for the Environment* (1978) 42 P&CR 26 (at pp. 26 to 28). Five broad (and to some extent overlapping) categories of challenge were identified in that case: (1) irrationality; (2) failure to take into account a material consideration or taking into account an immaterial consideration; (3) adequacy of reasons; (4) failure to comply with the rules of natural justice; and (5) where the Secretary of State differs from his Inspector on a finding of fact, or takes into account a new fact not canvassed at the inquiry, he should refer the matter back to the parties for further representations.

9. Where the ground of challenge relates to non-compliance with a procedural requirement, the applicant must show that he has been substantially prejudiced by the failure to comply with the provisions (ss.(5)(b)). Even under the first limb of challenge, the court retains a residual discretion whether or not to quash the decision, though it would only be in relatively exceptional cases that the court would not quash. Different matters will be relevant to the exercise of this discretion depending on the nature of the breach (see e.g. *Bolton MBC v. Secretary of State for the Environment* (1990) 61 P&CR 343 for cases concerning failure to take into account a material consideration, and *South Bucks CC v. Porter (No. 2)* [2004] 1 WLR 1953 for cases concerning failure to give adequate reasons). In cases involving breach of European law, the discretion is narrower still (see e.g. *Berkeley v. Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 603).

10. Where it is accepted by the defendant that there has been an error, but it is argued that the court should nevertheless exercise its discretion in the defendant's favour because the error would not have led to a different decision, the issue arises as to the point in time that should be considered in determining whether that argument is correct. Should the court consider the position as it was at the time of the decision, or should it

ask whether a different decision would be made now if the matter were sent back having regard to present circumstances?

11. In *Simplex G E (Holdings) Ltd. v. Secretary of State for the Environment* [1988] 3 PLR 25 at p. 42, Purchas LJ put the test in this way:

> "… I now turn to the test suggested by May LJ, namely would the minister have come to the same conclusion if the erroneous reason had been excluded altogether? If not, then on the approach adopted by May LJ the decision should be quashed … It is not necessary for Mr Barnes to show that the Minister would, or even probably would, have come to a different conclusion. He has to exclude only the contrary contention, namely that the minister necessarily would still have made the same decision" (emphasis added).

12. That test, echoed in what Staughton LJ said at pp. 43-44, requires the court to consider the position at the time of the impugned decision, and not as matters stand at the time the case comes before the court.

13. However, the test may not be as rigid as those words suggest. The issue arose in a recent decision of Collins J in *R (on the application of Fladgate LLP) v. Westminster City Council and LS Park House Limited (Land Securities)* (CO/5900/2008 and CO/934/2007) (transcript not yet available), involving two applications for judicial review.

14. Planning permission had been granted for a large redevelopment scheme on Oxford Street, and challenged by Fladgate LLP whose offices were nearby (a related claim by the Interested Party against Fladgate LLP for damages for the tort of abuse of process is currently before the courts and is being followed with interest in the legal press). Permission to bring the claim was granted on the papers, and so the Interested Party submitted a second identical application for planning permission in order to preserve its position. That second application was successful, but an application for permission to challenge the resulting planning permission was made. The only difference between the two permissions was in the sums to be paid under the associated section 106 obligations. The sums in the later obligation had been increased to reflect the City Council's annual uplift.

15. The two challenges were heard together in front of Collins J in February. No legal error was found to have existed in relation to the second permission, but the reasons given for granting the first permission were found to have been inadequate. The defendant and interested party argued that the decision to grant the second planning permission, for identical development, meant that the decision would have been the same if adequate reasons had been given and therefore the first permission ought not to be quashed as a matter of discretion. The claimant relied on the differences in the section 106 obligations to argue that the two permissions were not the same and that if the first permission were quashed it could not therefore be said that the result would be identical on re-determination. In response to that argument the defendant and interested party relied on the approach set out above in *Simplex*.

16. Collins J followed *Simplex*, and said that the assessment should be carried out by looking at the position at the time the decision had been made. However, he went on to say that in considering whether to exercise its discretion it was permissible for the court to consider what has happened since, which in some cases will be relevant to the exercise of discretion. Whilst this may not provide an entirely clear answer, the retention by the court of the ability to look at subsequent events does allow for a sensible degree of flexibility to achieve a just outcome on a case by case basis.

17. Where a decision by the Secretary of State is quashed, the matter is normally remitted to him for reconsideration. Where an order confirmed by the Secretary of State is quashed, the order is set aside altogether.

**Section 289**

18. Section 289 provides for a right of appeal to the High Court against a decision by the Secretary of State on an enforcement notice appeal, and also to decisions made by the Secretary of State in the course of such proceedings. The exception is a decision by the Secretary of State on such an appeal to grant planning permission, which should be challenged under *both* section 288 and section 289 (*R (Wandsworth Borough Council) v SSTLGR* [2003] EWHC 622 (Admin), [2004] 1 P&CR 32 per Sullivan J, *Oxford CC v SSCLG* [2007] EWHC 769 (Admin) per George Bartlett QC at paragraph 15). Otherwise, if the challenge is successful and the planning permission is quashed, there will be no power to reinstate the enforcement notice.

19. Appeals under section 289 are limited to a "point of law" (ss.(1)). In practice the grounds are essentially the same under sections 288 and 289.

**<u>Procedure</u>**

20. In this Paper I have of necessity focussed in detail only on a selection of procedural issues, and dealt briefly with others where the ground is well-trodden. In particular, I will discuss the Court of Appeal's very recent decision in *Bovale v. Secretary of State for Communities and Local Government* [2009] EWCA Civ 171, and the growing popularity of Protective Costs Orders ("PCOs") – likely to become yet more popular in the wake of the Court of Appeal's decision earlier this month in *Francis Morgan and Catherine Baker v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107. For those seeking a more detailed commentary on other aspects of the Civil Procedure Rules as they apply to applications under section 288 and 289, I would recommend the insightful article in the JPL entitled "*The new procedures for challenges under sections 288 and 298: All change or business as usual?*" written by Meyric Lewis ([2008] JPL 1721).

**Section 288**

21. Any challenge must be brought within six weeks of the decision (section 288(3)), and there is no power for the Court to extend the period.

22. The detailed procedural rules are contained in Part 8 of the Civil Procedure Rules and the Practice Direction thereto. Where the Secretary of State is the decision maker, the normal Part 8 procedure will be modified as set out in 8PD.22.

23. Application is by Part 8 Claim Form which must be both filed and served within the six-week period. The Claimant must file any written evidence at the same time as filing the claim form (r8.5(1)).

24. On the face of the rules, the Defendant's witness statements must be filed within 14 days of service of the claim form (r8.5(3) and r8.4(1)) or within 21 days if, as in these cases, the Defendant is a Minister or government department (8PD 22.9(1)).

*Bovale v. Secretary of State for Communities and Local Government*

25. The procedural rules governing the Defendant's response to claims have not proved entirely satisfactory in all cases. As Collins J noted in his judgment at first instance in *Bovale v. Secretary of State for Communities and Local Government* [2008] EWHC 2143:

> "The problem has been that in these cases, section 287 and 288, all too often it is not until the last minute, usually when the claim has a hearing date, that the defendant gets round to preparing a defence because if there is no need to file a defence and if, as is often I fear the case, no regard is paid to the obligation to serve evidence, the court is faced with a problem that at the last moment material is put forward, whether by way of detailed defence or evidence or both. That creates problems, not only for the court but also for claimants and other interested parties, and is certainly not an efficient way of managing the court's business.
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> It was in those circumstances, and as a result of representations made to me by interested parties, that I decided that the time had come to make standard directions in order to attempt to meet this problem and to ensure that evidence and at least an indication of what the real issues were should be given at a reasonably early stage" (paragraphs 11 and12).

26. This was a reference back to his own decision in the case of *Dinedor Hill Action Association v. SSCLG* [2008] EWHC 1741 (Admin), where he had said this:

> "The court's case management powers, in particular those contained in CPR 3.1(2)(m), enable the court to make any orders to achieve a just result. When initiating a claim under ss.287 or 288 or their successors, the claimant should, if he considers it appropriate, apply in the claim for an order for directions as to the filing of any evidence and defence by the defendant or any interested party. I recognise that there is no need for the defendant, who will normally be a planning authority or the Secretary of State, to be given advance notice of any claim; indeed, the requirement that it be brought within 6 weeks will often make such advance notice somewhat impractical. Thus a somewhat longer period than is appropriate in judicial review claims, where there will usually have been advance notice, an Acknowledgement of Service and a lapse of time before permission is granted so that the defendant or

interested party will have had time to prepare evidence and detailed grounds of defence, is required.

I am aware that the Treasury Solicitor needs some time to consider a decision letter (which may be lengthy and complicated) and must seek instructions from the inspector before advising the Secretary of State whether the claim should be conceded or resisted. Equally, no doubt, planning authorities will have to go through the same process with their legal advisors. Accordingly, the general rule will be if directions are sought that evidence and at least summary grounds of defence should be lodged within 10 weeks. If a shorter period is sought, it must be requested specifically and good reasons given for the shorter time. Equally, if the defendant or interested party wants a longer time, they should make a specific request, again giving good reasons for it."

27. In *Bovale,* the Secretary of State sought to overturn directions given by a Deputy Master in that case requiring the service of what amounted to a defence, and the position under the Civil Procedure Rules was considered in greater detail than it has been in the *Dinedor* case. Collins J expressed his dissatisfaction with the relevant provisions in the Rules in these terms:

> "It is utterly pointless, and indeed would be contrary to any sort of good administration, for the court to preclude itself from dealing with relevant evidence and then make a decision which is a wrong decision because that would only increase costs and may have a damaging effect upon the public. The difficulty, frankly, is that those responsible for Part 8 and the Practice Direction have failed properly to consider the special needs of the Administrative Court and the parties to claims such as this. I am afraid I am firmly of the view that the Rules and the Practice Direction are inappropriate, and do not satisfactorily deal with the situation in these cases." (paragraph 17)

28. Collins J acknowledged the submissions made to him on behalf of the Secretary of State that Part 8 does not provide for the lodging of a defence, and indeed specifically provides that a defence is not needed (paragraphs 20 and 21). One might have thought that to be a match winning point, but that did not prove to be the case.

29. Seeking to avoid this difficulty, the court distinguished between a defence and what it described as "an indication by the Defendant of the grounds of resistance" (paragraph 23). A requirement to produce the latter, though not the former, was held to be appropriate, relying on the general power of case management under rule 3.1(2) and the overriding objective.

30. Accordingly it was held that what was required was for the Defendant to file and serve both his grounds of resistance and any evidence within 10 weeks of receipt of the Claimant's evidence.

31. Collins J recorded the submission made by Treasury Counsel that in principle it was inappropriate to make such a general direction in this way and that such changes ought to be considered by the Rules Committee, taking account of any representations that might be made by the Treasury Solicitor and the many other parties with an interest in

these rules (paragraph 33). Whilst acknowledging the force of that submission, Collins J nevertheless proceeded to give the direction, apparently on the basis that that route would take too long and that experience suggested the Rules did not adequately reflect the particular needs and circumstances of the Administrative Court.

32. On the facts of the particular case, Collins J did not in fact maintain the Deputy Master's order because the hearing and exchange of skeleton arguments were both imminent. However, he reversed the order for filing skeleton arguments, requiring the Secretary of State to file hers first. He went on to say this:

> "40. It seems to me that where the defendant chooses not to put in any grounds for resisting and thus one assumes that the grounds as set out in the claim form represent the way in which it is to be put by the claimant, it must be for the defendant to put in the first skeleton. There is no point, as it seems to me, in requiring the claimant to put in a skeleton first. The claim form should and does set out, albeit it may be said in rather short form, the grounds upon which the claimant relies. Accordingly, I take the view that in this case, and I suspect in many cases, the obligation will be for the defendant to put in the first skeleton.
> ..
> 45. I should add that even if I were wrong about the court's power and Mr Blundell's argument in relation to no requirement for a defence were accepted, there is nothing in the Rules that prevents defendants from putting in grounds for resistance and in my view there is every reason why they should do so, voluntarily if necessary. The sanction if they do not may be that if as a result extra costs have been incurred because of a last minute indication as to what actually the issues were, the court has power under the costs rules to make orders which reflect that. It may well be that a defendant who does not voluntarily put in an appropriate case an indication of what the grounds of resistance are may find himself deprived, if he succeeds, of some part of his costs or ordered to pay extra costs in given circumstances."

33. The Secretary of State appealed against that decision. On 11th March 2009 the Court of Appeal gave judgment in favour of the Secretary of State.

34. The Court of Appeal first addressed itself to the question of the legal force of practice directions, the power of individual judges to issue such directions, and whether Collins J's judgment constituted a practice direction. Having done so, Waller and Dyson LJJ summarised their view of Collins J's position as follows:

> "Thus, to summarise the position of a judge in the position of Collins J, we suggest one can at least say the following:-
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> i) Since the rules have the force of delegated legislation, he has no power to alter them whether by judgment or practice direction; in

particular cases a judge will be free to exercise case management powers under CPR 3. Those powers are given by the statutory rules, but a judge cannot simply alter the rules or practice directions with general effect.

ii) If and in so far as a practice direction has been made under section 5(1) a judge would only have power to vary the same if he was a judicial officer nominated by the Lord Chief Justice and obtained the agreement of the Lord Chancellor (see section 5(4)(a) and Pt 1 of Schedule 2). This limitation would seem only to apply to a practice direction issued under the section 5(1) procedure since there does not appear to be any embargo on one practice direction being varied or replaced by another under section 5(2) but that can only be "with the approval" of the Lord Chief Justice and the Lord Chancellor.

iii) He has power to issue a practice direction under section 5(2) but only with the approval of the Lord Chief Justice and the Lord Chancellor."

35. A distinction was drawn between "directions, and guidance as to the way in which rules and practice directions will be interpreted" (paragraph 36), and on the basis it was said that:

> "The real question is whether he was delivering a judgment which was (i) providing guidance on interpretation of the rules and practice directions (which he could do) or (ii) was prescribing procedure in a "gap" case (which he could do) or (iii) whether he was seeking to vary the rules and/or PD8 (which he could not do)."

36. Before seeking to resolve that question, their lordships dealt with a preliminary point of practical importance, namely whether an Acknowledgement of Service is required in a part 8 case under sections 287 and 288 of the 1990 Act. It was held that an Acknowledgement of Service was required (paragraph 55).

37. At paragraph 69 it was emphasised that although the powers of the court to make orders in individual cases are very wide:

> "… a judge is not free, and indeed has never been free once rules were made by delegated legislation, to announce that without regard to the particular circumstances of individual cases, the court now intends generally to disapply or vary the rules. Nor is he free to announce that he will simply disapply or vary a practice direction, particularly one issued following the section 5(1) procedure [the relevant version of 8PD had come into force on April 6th 2007 – see note 8.0.4 and we assume was produced under that procedure]. Furthermore a judge is not free to seek to achieve that result by suggesting that, if parties do not voluntarily disapply the rules or the Practice Direction, cost consequences will follow. However well intentioned, it seems to us the judge, in purporting by his judgment to change the Rules under Part 8 and the Practice Direction generally, was doing something he was not entitled to do."

38. They went on to state that the right way to alter the rules is through the Rule Committee and the right way to alter a practice direction is under the section 5 procedure (paragraph 70). This, it was made clear, was not a "gap" case, and Collins J did not simply provide guidance as to the interpretation and application of the rules and practice directions; it attempted to vary the rules and practice directions and he had no power to do that (paragraph 72).

39. As to what Collins J had said about reversing the order for filing skeleton arguments, that too was found to have overstepped the mark:

> "We have serious doubts as to whether it was simply filling a gap so far as Part 8 was concerned, because an argument that there was a deliberate difference between Part 8 and Part 54 in relation to skeleton arguments would seem to be a strong one. It thus, in our view, probably needed the approval of the Lord Chief Justice and the Lord Chancellor. Whether that is right or not, what Collins J was not free to do by his judgment in this case was to seek to enforce his rule change by ordering a reversal of the sequence of skeleton arguments and costs consequences if defendants did not voluntarily do that which his rule change would have required."

40. Stanley Burnton LJ agreed that the appeal should be upheld, but in addition he took the view that Collins J's judgment did in fact amount to a practice direction, and that this should be determined on the basis of content rather than the occasion on which or the form in which it is issued (paragraphs 75 and 76).

41. Thus the Treasury Solicitor can breathe a sigh of relief, having been relieved (for the time being at least) of the burden of preparing summary grounds of resistance in every case. The Court of Appeal's judgment does not mean that in individual cases an order of the sort Collins J made will never be made, but the onus will once more be on the claimant to seek to justify a departure from the rules.

**Section 289**

42. Unlike challenges under section 288, a challenge under section 289 is an "appeal" and therefore governed by Part 52 of the Civil Procedure Rules.

43. Also unlike challenges under s.288, there is a requirement to obtain the permission of the court before the appeal can be brought. The absence of an equivalent filter stage in section 288 has been a source of judicial comment in a number of recent cases (see e.g. *Davies v. Secretary of State for Communities and Local Government* [2008] EWHC 2223; and see [2008] JPL 891), and has led to some interested parties seeking summary judgment under CPR rule 24.2, or to have section 288 applications struck out under CPR rule 3.4, as an alternative means of quickly disposing of obviously unmeritorious applications (see e.g. *South Gloucestershire Council v. Secretary of State for Communities and Local Government* [2008] EWHC 1047; and see [2008] JPL 1383).

44. An application for permission must be made within 28 days after the date on which notice of the decision was given to the applicant (CPR 52PD 22.6C(1)), rather than the

six-week period allowed under sections 287 and 288. A further distinction is that as this time limit is set by the CPR, it is subject to the Court's general case management power under r3.1(2)(a) to extend time. This discretion is exercised only sparingly.

45. The application must be made in writing, setting out the reasons why permission should be granted. It must be served on the relevant parties *before* it is filed with the Court. With it must be filed a copy of the decision appealed, a draft appellant's notice and a witness statement verifying the facts and a witness statement verifying service (52PD 22.6C(2)-(4)). The application for permission is heard in open court, rather than being dealt with on paper as in judicial review (52PD 22.6C(5)-(6)). A respondent who successfully resists the grant of permission will usually be entitled to the costs of doing so, in contrast the position in judicial review (see *Rozhon v. Secretary of State for the Environment* [1994] JPL 801).

**Protective Costs Orders**

46. An increasingly common feature in Administrative Court litigation is the Protective Costs Order ("PCO"). In broad terms, a PCO either specifies or constrains the costs outcome of the case at an early stage in the proceedings. Generally a PCO will be of relevance only to a potential claimant, but in appropriate cases they can be sought by those on the opposing side (e.g. *R (Ministry of Defence) v. HM Coroner for Wiltshire and Swindon* [2005] EWHC 889 (Admin).

47. A PCO can take a number of forms. It can simply specify that there will be no liability in costs for either side, or that liability will go in one direction only. Alternatively, a cap on liability may be imposed for one or both sides from the outset.

48. In part as a result of the Aarhus Convention (discussed below), the courts have been increasingly willing to make PCO's in environmental cases, including statutory challenges. A recent example is the PCO made in favour of members of the pressure group Stop Stansted Expansion in its unsuccessful application under section 288 to challenge the decision of the Secretaries of State for Communities and Local Government and Transport to allow an appeal by BAA and Stansted Airport Limited against the refusal of planning permission for the expansion of the capacity of Stansted Airport (*Barbone v. Secretary of State for Communities and Local Government and Secretary of State for Transport* [2009] EWHC 463 (Admin)). In that case the claimants were individual representatives of a local pressure group, Stop Stansted Expansion and the case raised what were felt to be important issues of principle concerning the effects of aviation on climate change and related issues. The PCO was ordered by consent, and the liability for costs on both sides was capped.

49. The initial approach of the courts to the making of such orders was very constrained. In *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 WLR 2600, the Court of Appeal made it clear that a PCO would only be made in exceptional circumstances, and that the following five criteria had to be satisfied:

a. The issues raised have to be of general public importance.

b. The public interest must require that those issues should be resolved.

c. The applicant must have no private interest in the outcome of the case.

d. It must be fair and just to make the order having regard to the financial resources of the applicant and respondent, and to the amount of costs likely to be involved.

e. If the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

50. In addition, it was indicated that it would be relevant if those acting for the claimant were doing so on a *pro bono* basis; that a capping order on the claimant's costs would also be likely, and that this would permit no more than modest representation.

51. Those requirements have since been loosened materially, by means of the court holding that a "flexible" approach should be taken to their application in individual cases (see *Francis Morgan and Catherine Baker v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, addressed in more detail below). There is a good deal of pressure from interested bodies for the courts to loosen them yet further. The following points are worth noting:

a. The Court of Appeal has emphasised that the relevant paragraphs of the *Corner House* judgment are not to be read as statutory provisions, nor to be read in an over-restrictive way (per Waller LJ in *R (Compton) v. Wiltshire PCT* [2008] EWCA Civ 749 at paragraph 23).

b. The requirement that the applicant should have no private interest in the proceedings has been contested. Although the Court of Appeal took a narrow approach to this requirement in *R (Goodson) v. Bedfordshire & Luton Coroner* [2005] EWCA Civ 1172, others have been less strict. In *R (Bullmore) v. West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin), Lloyd Jones J said this in relation to the "no private interest" criterion:

> "19. This particular requirement as formulated in Corner House has been diluted in the later case law. I have in mind particularly *Wilkinson v. Kitzinger* [2006] EWHC 835 (Fam), [2006] 2 FCR 537, [2006] 2 FLR 397 (Fam), where Sir Mark Potter P said at para 54:
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> "As to 1(iii), I find the requirement that the Applicant should have 'no private interest in the outcome' a somewhat elusive concept to apply in any case in which the Applicant, either in private or public law proceedings is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest. In such a case, it is difficult to see why, if a PCO is otherwise appropriate, the existence of the Applicant's private or personal interest should disqualify him or her from the benefit of such an order. I consider that, the nature and extent of the 'private interest' and its weight or importance in the overall context should be treated as a flexible element in the court's consideration of the question whether it is fair and just to make

> the order. Were I to be persuaded that the remaining criteria are satisfied, I would not regard requirement 1(iii) as fatal to this application.
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> I note that passage was approved by the Court of Appeal in *R (England) v. London Borough of Tower Hamlets* [2006] EWCA Civ 1742".

c. The *Tower Hamlets* decision referred to by Lloyd Jones J was a planning case, in which an unsuccessful claimant for judicial review sought permission from the Court of Appeal to appeal against a decision of Collins J. Because the Court touched upon issues of wider significance, it authorised reference to its judgment as an exception to the normal rules for judgments on permission applications (see paragraph 17). The issue of wider significance was in relation to the "private interest" criterion for a PCO. At paragraphs 14 and 15, Carnwarth LJ said this:

> "The recent report of a group chaired by Lord Justice Kay "Litigating the Public Interest" (July 2006) provides a valuable discussion of the issues arising from the *Cornerhouse* case. In particular, the report questions the requirement in the criteria there laid down that the applicant should not have any "private interest" in the outcome of the case. For our part we respectfully share the doubts expressed by Sir Mark Potter as to the appropriateness or workability of this criterion (*Wilkinson v. Kitzinger* [2006] EWHC 835), but we note that a restrictive approach has been taken by this court in other cases (e.g. *R (Goodson) v Bedfordshire and Luton Coroner* [2005] EWCA Civ 1172).
>
> Different considerations may in any event apply to a case such as the present where Mr England's "interest", as I understand it, is not a private law interest but simply one he shares with the other members of his group in the protection of the environment. In this context the provisions of the Aarhus Convention on access to justice in environmental matters (referred to in *R (Burkett) v. Hammersmith LBC* [2004] EWCA Civ 1342 para 74) may also be relevant. We hope that the Civil Procedure Rules Committee will take the opportunity in the near future to review these questions in the light of the findings and recommendations of the Kay Report."

d. The reference by Carnwath LJ to the relevance of the Aarhus Convention highlights an important consideration in cases concerning the environment. Article 9(4) of the Convention provides, amongst other things, that procedures for rights of access to justice in environmental matters shall not be "prohibitively expensive".

   For the purposes of domestic law, the Convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts, but may be taken into account in resolving ambiguities in legislation intended to give it effect. Furthermore, ratification

by the European Community itself gives the European Commission the right to ensure that Member States comply with the Aarhus obligations in areas within Community competence.

The provisions of Article 9(4) of the Convention are now reflected in Article 10A of the EC Directive on Environmental Impact Assessment (Directive 85/337/EEC as amended by Directive 97/11/EC and Directive 2003/35/EC) and Article 15a of the Directive on Integrated Pollution Prevention and Control (Directive 96/61/EC). This requirement of the Aarhus Convention featured strongly in the May 2008 report of the Working Group on Access to Environmental Justice, entitled "*Ensuring access to environmental justice in England and Wales*". It called for an end (in environmental cases) to the requirement that there be no private interest, and the disapplication of the "general public importance" test in cases falling within the scope of the Convention. So far the Courts have not shown any notable degree of enthusiasm for putting the report's recommendations into action. In *R (Buglife) v. Thurrock Gateway Development Corp* [2008] EWCA Civ 1209, reference was made to the Working Group's report, but the Master of the Rolls (in the judgment of the court) agreed with Waller LJ in *Compton* that there should be:

> "… no difference in principle between the approach to PCOs in cases which raise environmental issues and the approach in cases which raise other serious issues and vice versa" (paragraph 17).

e. All of these matters were considered by a powerfully constituted Court of Appeal in the *Morgan* case (Laws LJ, Carnwath LJ and Maurice Kay LJ), which gave a single judgment to which each of its members contributed. Although on the facts of the case the possibility of a PCO was not raised until it was too late (paragraph 35), the Court nevertheless felt it was appropriate to deal with the approach to such orders for the following reasons:

> "… the authorities to which we have been referred reveal considerable uncertainty in relation to what we have already identified as a controversial element in the *Corner House* guidelines, that is the requirement (1)(iii) that "the applicant should have no private interest in the case". Although the court must be cautious in offering guidance on matters not directly in issue, we think that, pending further clarification by the Rules Committee, it would be helpful for us to give our view as to where the law now stands" (paragraph 36).

The court referred to the *Goodson* case, and acknowledged that "at first sight" it represented a clear ruling on the issue. However, it was said to be necessary to take account of how the issue had been addressed subsequently in the various authorities and reports identified above (paragraph 38). Having summarised those points, the court continued as follows:

> "On a strict view, it could be said, *Goodson* remains binding authority in this court as to the application of the private interest

requirement. It has not been expressly overruled in this court. However, it is impossible in our view to ignore the criticisms of this narrow approach referred to above, and their implicit endorsement by this court in the last two cases [*Bullmore* and *Buglife*]. Although they were directly concerned with other aspects of the *Corner House* guidelines, the "flexible" approach which they approved seems to us to be of general application. Their specific adoption of Lloyd Jones J's treatment of the private interest element makes it impossible in our view to regard that element of the guidelines as an exception to their general approach.

The hope that the Rules Committee might be able to address these issues in the near future has not been realised. In the meantime, in our view, the "flexible" basis proposed by Waller LJ, and approved in *Buglife* should be applied to al aspects of the *Corner House* guidelines" (paragraphs 39 and 40).

At paragraph 47, under the heading "Drawing the threads together", the following points were made:

"i) The requirement of the Convention that costs should not be "prohibitively expensive" should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders.

ii) Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in the light of the Advocate-General's opinion in the Irish cases [see *Commission v. Ireland* Case C-427/07], the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.

iii) With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary "loser pays" rule and the principles governing the court's discretion to depart from it. The principles of the Convention are at most a matter to which the court may have regard in exercising its discretion.

iv) This court has not encouraged the development of separate principles for "environmental" cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The *Corner House* statement of those principles must now be treated as settled as far as this

court is concerned, but to be applied "flexibly". Further development or refinement is a matter for legislation or the Rules Committee.

v) The Jackson review provides an opportunity for considering the Aarhus principles in the context of the system for costs as a whole. Modifications of the present rules in the light of that report are likely to be matters for Parliament or the Civil Procedure Rules Committee. Even if were otherwise attracted by Mr Wolfe's invitation (on behalf of CAJE) to provide guidelines on the operation of the Aarhus convention, this would not be the right time to do so.

vi) Apart from the issues of costs, the Convention requires remedies to be "adequate and effective" and "fair, equitable, timely". The variety and lack of coherence of jurisdictional routes currently available to potential litigants may arguably be seen as additional obstacles in the way of achieving these objectives."

f. "Exceptionality" is not to be regarded as some additional criterion to the principles set out in paragraph 74, but rather as a prediction as to the effect of applying those principles (per Waller LJ in *R (Compton) v. Wiltshire PCT* [2008] EWCA Civ 749 at paragraph 24).

52. So far as the procedure for seeking a PCO is concerned, the Court of Appeal in the *Corner House* case held as follows:

a. A PCO should normally be sought on the face of the claim form, supported by evidence including a schedule of the claimant's future costs.

b. A defendant wishing to resist the PCO should set out his reasons in the Acknowledgment of Service.

c. The claimant will be liable for the defendant's costs in this respect if the application for a PCO fails, but these costs should be limited and the court would not normally expect them to exceed £1,000.

d. The application will be considered by a judge on the papers.

e. If the application is refused, it can be reconsidered at a hearing limited to an hour.

f. The claimant would be liable for the costs of such a hearing if the application is refused again. These costs too are likely to be limited and would not normally be expected to exceed £2,000.

53. In *R (Compton) v. Wiltshire PCT* the Court of Appeal gave some additional guidance for those seeking a PCO in the Court of Appeal (the terms of the PCO granted by the

court of first instance not applying to proceedings before the Court of Appeal). Waller LJ laid down the following procedure:

> "47. As to the procedures to be used in the Court of Appeal, having upheld the guidance in paragraph 79 of *Corner House* it seems to me that any procedure in the Court of Appeal should follow that guidance as far as possible. Let me deal first with cases where PCOs have been granted and the proceedings have been fought out. The governing principles identified in paragraph 74 can be taken to have been established so far as the case at first instance is concerned. If the person benefiting from a PCO is the would-be appellant, they may however have to be re-examined at the appellate stage. It may have become clear that no issue of general public importance arises or it may be clear that there is no public interest in bringing the case to the Court of Appeal. If the beneficiary of a PCO has succeeded in the court at first instance, it is difficult to think that some protection will not be appropriate in the Court of Appeal.
>
> 48. So far as procedure is concerned, if the recipient of the PCO in the court below is wishing to appeal, an application for a PCO should be lodged with the application for permission. The respondent should have an opportunity of providing written reasons why a PCO is now inappropriate. The decision will be taken on paper by the single Lord Justice. If a PCO is refused the applicant can apply orally. If it is granted then a respondent will need compelling reasons to set it aside.
>
> 49. What about PCOs on appeals from a refusal to grant a PCO or from the granting of a PCO? Again the matter should be dealt with by a single Lord Justice on paper and the normal order should be that there will be no order for costs save in exceptional circumstances, for example where the application is an abuse of process."

**<u>The claimant's perspective – how to identify a good ground of challenge</u>**

54. As I said in the introduction to this Paper, in my experience the majority of the challenges brought under sections 288 and 289 each year fail. In a limited number of cases the challenges are brought by litigants in person and betray a complete failure to understand the nature of the procedure, and I need not consider those any further here. Of the remaining unsuccessful challenges, by far the majority seen to fail because they are either (1) essentially concerned with the planning merits or (2) they fall into the trap of subjecting the decision letter to the sort of detailed textual analysis which the courts have consistently held to be inappropriate.

55. In order to determine whether a prospective ground of challenge might be worth pursuing in any individual case, it is necessary to have a good understanding of the formidable barriers to success that have been erected by the courts – and which are deployed by those seeking to defend decisions. Armed with an awareness of the sort of arguments which are likely to fail, it becomes easier to identify the sort of arguments that are likely to succeed.

56. At a relatively superficial level, even the least sophisticated of challenges display a recognition that a completely open full-frontal assault on the planning merits of the decision in question is certain to run into the sand. As Lord Hoffman explained in *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] 1 WLR 759 at 780:

> "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. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.
>
> The distinction between whether something is a material consideration and the weight which it should be given is 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."

57. Notwithstanding the prima facie universal acceptance of that clear and impeccable statement of authority, a significant proportion of the challenges made each year are – when properly analysed – a complaint that the Inspector and/or the Secretary of State reached the wrong decision on the merits. Such challenges are usually disguised (sometimes thinly, sometimes ingeniously) as complaints that the decision was unreasonable in the *Wednesbury* sense, that some factor or other was left out of account, a policy was misunderstood, that the reasons given for the decision were inadequate, and/or that the Inspector based his decision on an error of fact. I shall consider each of those matters in turn below.

**Wednesbury irrationality**

58. In *R v. Parliamentary Commissioner, ex parte Balchin (No. 1)* [1998] 1 PLR 1 at p. 13E-F, Sedley J (as he then was) provided the following pithy definition of *Wednesbury* irrationality:

> "What the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic."

59. In *Newsmith Stainless Ltd. v. Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74 – an authority frequently cited in skeleton arguments submitted on behalf of the Secretary of State – Sullivan J (as he then was) had these discouraging words to say:

> "6.An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision. An allegation that an Inspector's conclusion on the planning merits is *Wednesbury* perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits.
>
> 7. In any case, where an expert tribunal is the fact finding body the threshold of *Wednesbury* unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.
>
> 8. Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an applicant alleging an Inspector has reached a *Wednesbury* unreasonable conclusion on matters of planning judgment, faces a particularly daunting task. …"

**Relevancy**

60. The classic exposition of the law on relevancy in this field of administrative law is that provided by Glidewell LJ in *Bolton MBC v. SSE* (1990) 61 P&CR 343:

> "… the decision maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. Such a matter is relevant to his decision making process. By the verb "might", I mean when there is a real possibility that he would reach a different conclusion if he did take that consideration into account"

61. All too frequently, however, claimants assert that if a particular consideration has not been mentioned explicitly in the Inspector's report or decision letter, it has been left out of account. Without more, such an argument will be given short shrift by the courts. As Lord Lloyd put it in *Bolton MBC v. SSE* (1995) 71 P&CR 309:

> "… the duty on the decision maker is to have regard to every material consideration; he need not mention them all and it is only necessary for the decision maker to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the principal controversial issues."

62. The same approach applies to making explicit reference to the relevant policies. It is plainly desirable that the Inspector should refer to the main policies that guide the decision-making process on the principal controversial issues. But the simple absence

of reference to a particular policy is unlikely to be sufficient in itself to show that the policy has been left out of account. One of the circumstances to be taken into account in determining whether the decision-maker has had regard to a policy is the fact that Circulars and PPGs are understood to be read by those responsible for taking planning decisions, and they are likely to be familiar with them (see *Boulevard Land Ltd. v. Secretary of State for the Environment* [1998] JPL 983 (Mr George Bartlett Q.C., sitting as a Deputy Judge of the High Court) at p. 991).

63. A good example of that approach, albeit in the context of an application for judicial review, is the case of *R (on the application of Save Britain's Heritage) v. Westminster City Council and The Lord Chancellor* [2007] EWHC 807 (Admin). The Claimant in that case sought to challenge the decision of the City Council to grant planning permission and listed building consent for the works needed to convert the Middlesex Guildhall in Parliament Square to house the new Supreme Court. Collins J summarised the Claimant's main complaint at paragraph 8 of his judgment:

> "The claimant's case is essentially based on the alleged failure of the committee to have proper regard to government policy as set out in the relevant guidance, PPG15. It is clear that PPG15 was not referred to in terms in the officer's report to the committee, nor was it raised specifically in the discussions held by the committee, as appears from the transcript of the hearing. However, both the Council and the Lord Chancellor, as interested party, have submitted that its substance was clearly before the committee and their consideration of the matter shows that they had in mind and applied the relevant principles."

64. Ultimately Collins J accepted that the complete absence of any reference to PPG15 in the officer's report and the verbatim transcript of the committee's deliberations was not sufficient to establish that the guidance it contained was left out of account. He referred to the evidence before him that Westminster contains over 11,000 listed buildings and that approximately 20 per cent of all planning and related applications in the City are for or involve listed building consents. He also referred to the way the issues had been approach in the officer's report, which was found to be consistent with the approach in PPG15. Drawing these points together at paragraph 31 of the judgment, Collins J said this:

> "What is important is that the committee has in fact applied the correct approach, whether or not a specific document or report has been drawn to its attention. I have no doubt from what I have cited, and from my knowledge of the experience of this committee conveyed by the evidence before me in relation to listed building consents, that the committee was not only aware of the guidance in PPG15, but applied it."

65. The same principles apply to a decision of an inspector or the Secretary of State – see e.g. *Bromley LBC v. Secretary of State for Communities and Local Government* [2008] EWHC 3145; where HH Judge Curran QC, sitting as a Deputy Judge of the High Court, held that there was no need for an inspector expressly to refer to Circular 11/95 when the approach taken in his decision letter was entirely consistent with it.

**Rationality and the interpretation of planning policy**

66. Claimants will often challenge on the basis that some relevant policy was misunderstood by the decision-maker.

67. If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is for the court to determine as a matter of law what the words are capable of meaning. If in all the circumstances the wording of the relevant policy document is properly capable of more than one meaning, and the planning authority adopts and applies a meaning which it is capable as a matter of law of bearing, then it will not have gone wrong in law. The court will only intervene if the judgment on the meaning was demonstrated to be perverse or otherwise bad in law (see per Brooke LJ in *R v. Derbyshire, ex parte Woods* [1997] JPL 958 at pp. 967-968; citing as an example of this approach what was said by the deputy judge in *Cooper v Secretary of State for the Environment* [1996] JPL 945 – see in particular pp. 952-953 for the underlying rationale).

68. The approach taken by the Court of Appeal in *ex parte Woods* has been applied by the courts in many subsequent planning cases (see e.g. the Court of Appeal's decisions in *R (on the application of Springhall) v. London Borough of Richmond Upon Thames* [2006] EWCA Civ 19, per Auld LJ at paragraphs 7 and 29, and *First Secretary of State and West End Green (Properties) Limited v Sainsbury's Supermarkets Limited* [2007] EWCA 1083, per Keene LJ at paragraphs 51-53). As Carnwath LJ observed in *R (on the application of Heath & Hampstead Society) v. Vlachos* [2008] 3 All ER 80 at pp. 84g-85f, short of perversity, the court will respect a decision-maker's interpretation of words in its own policy.

69. Davies J did sound a note of caution in the case of *Cranage Parish Council v. First Secretary of State* [2004] EWHC 2949 (Admin):

> "The courts must be wary of an approach whereby decision makers can live in the planning world of Humpty Dumpty, making a particular planning policy mean whatever the decision maker decides that it should mean. I make the following observations:
>
> (1) First it is plain that *ex parte Woods* does not sanction such an approach. As Brooke LJ makes clear, the court will need to assess, as a preliminary mater, whether the interpretation propounded by the decision maker is one that the words used are in law **properly** capable of bearing.
>
> (2) Second, and following on from that, if in any particular planning case, one meaning is, on any viewpoint, highly probable but a counter meaning is advanced on behalf of the decision maker which can at best justify no epithet better than "tenuous", that, I apprehend, is not likely in the ordinary case to avail the decision maker; and in such a context the parties should not be surprised if the courts choose to adopt a robust approach. As stated by Mr George Bartlett QC (sitting as a deputy judge of the High Court) in *Virgin Cinema Properties Limited v. Secretary of State for the Environment* [1998] PLCR 1 at page 8, there

may be instances, on a point of interpretation in a relevant planning context, where the ambit of reasonableness is narrow or even nil.

(3) Third, there may be instances where, even if the words of the policy taken on their own prima facie support the interpretation of the decision maker, consideration of the purpose and underlying objective of the policy in question may show that such linguistic interpretation simply will not accurately represent the true policy: see *Patter and Harris v. Secretary of State for the Environment, Transport and the Regions* [2000] 79 P&CR 214 as an example of this.

(4) Fourth, decision makers will of course need to bear in mind that the adoption of a particular interpretation of a policy in a development plan in a particular case will make it difficult, at all events in the absence of convincing explanation, for them to adopt a different interpretation in another case without attracting a challenge on the ground of arbitrariness or collateral purpose or the like."

70. There have been arguments as to whether the approach to the interpretation of planning policy set out in *ex parte Woods* can be reconciled with two later decisions of the Court of Appeal (*First Secretary of State v. Sainsbury's Supermarkets Ltd* [2005] EWCA Civ 520, and *R (Raissi) v. Secretary of State for the Home Department* [2008] 3 WLR 375). Although those arguments have yet to be dealt with definitively by the Courts, for the moment it seems likely that at least at first instance the approach in *Woods* will continue to be followed, for the following reasons:

a. Both *Raissi* and the *Sainsbury's Supermarkets Ltd* case predate the decision of the Court of Appeal in *Vlachos*, a case concerning planning policy, in which Carnwath LJ applied the approach set out in *ex parte Woods*. Sedley LJ and Waller LJ both agreed with Carnwath LJ's judgment (see p. 90f).

b. Sedley LJ's judgment in *Sainsbury's Supermarkets Ltd* does not indicate any disagreement with what was said in *ex parte Woods*, which he cited, nor can it properly be read as advocating an approach inconsistent with the one accepted in that case. Indeed, as has been noted above, Sedley LJ has himself recently endorsed its application in *Vlachos*.

c. Judgment in *Raissi* was given on 14 February 2008, necessarily therefore without any consideration of the subsequent Court of Appeal decision in *Vlachos*, which was handed down on 19 March 2008. It was not a planning case. Indeed, it was a very different type of case on its facts. At issue in *Raissi* was the meaning of the Home Secretary's policy for compensation for detention under an ex gratia scheme introduced in a ministerial statement to Parliament, and whether the claimant fell within it. It was held that it was for the court to decide what the scheme meant on the basis of what a reasonable and literate person would understand the circumstances to be in which he could be paid compensation under it. Paragraph 107 of the judgment of the court makes plain that the court was considering how policy statements "such as this ex gratia scheme" should be interpreted. This was a scheme which created rights to compensation for qualifying individuals, and which qualifying individuals had a legitimate right to expect to receive. In the

particular circumstances of that case, such an approach is readily understandable. However, the context was quite different from that of a planning policy conceived and formulated for the pragmatic business of development control decision-making, an activity which requires the exercise of planning judgment on rational planning grounds. The court noted the different approach that has been taken in planning cases (see paragraph 119 at p. 406H), and in referring to the decision in *Sainsbury's Supermarkets Ltd* made clear that it appreciated this was a different stream of authority in a different type of context. Although it was remarked in *Raissi* that the courts had not been unanimous in planning cases (see paragraph 120 at p. 407A), one should remember that the Court of Appeal was not being asked to determine the correct approach in planning cases and did not therefore need to consider that jurisprudence in depth.

**Inadequate reasons**

71. In *South Bucks DC v. Porter (No. 2)* [2004] 1 WLR 1953 at 1964, Lord Brown of Eaton-under-Heywood set out his familiar (non-definitive and non-exhaustive) broad summary of the authorities governing the proper approach to reasons challenges with these words:

> "It should … serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge and <u>if generally its tendency is to discourage such challenges I for one would count that a benefit</u>" (emphasis added).

72. The summary Lord Brown provided was as follows:

> "The reasons given for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognizing that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

73. In *Clarke Homes Ltd. v. Secretary of State for the Environment* (1993) 66 P&CR 263, Sir Thomas Bingham MR described the issue as being whether the decision "leaves room for genuine as opposed to forensic doubt as to what he has decided and why". He said that this issue was to be resolved "on a straightforward down-to-earth reading of the decision letter without excessive legalism or exegetical sophistication" (pp. 271-272).

74. The same essential sentiment was expressed by May LJ in *ELS Wholesale (Wolverhampton) Ltd. v. Secretary of State for the Environment* [1988] 56 P&CR 69, who said that the proper approach to Inspector's decision letters was "… to look somewhat broadly at the findings of the inspector, his reasoning and his decisions, not sentence by sentence at the minutiae but at the real sense and basic content of the decision to which he has come" (p. 78).

75. It is quite unusual to read a decision letter and not to know, in broad terms at least, why the decision went the way it did. In my experience a challenge on the basis of inadequate reasons is only likely to be worth pursuing if there is some clear logical gap in an important part of the reasoning, so that one simply cannot tell either what the conclusion was, and/or how the Inspector reached the conclusion he did.

**Error of fact**

76. Material error of fact is now an established ground of challenge under both section 288 and section 289 (*Haringey LBC v. Secretary of State for Communities and Local Government* [2009] JPL 74 at paragraph 11). In order to establish that a decision is unlawful on the basis of an error of fact, four conditions must be satisfied. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning (*E v. Secretary of State for the Home Department* [2004] 2 WLR 1351).

**Disputes of fact**

77. It is not uncommon for statutory challenges to give rise to disputes of fact. These can often relate to what was said and by whom at an inquiry or hearing. In those circumstances the Court will sometimes be faced with two apparently irreconcilable witness statements, one from the claimant and one from the Inspector. The Administrative Court is understandably reluctant to subject quasi-judicial decision-makers such as inspectors to cross-examination, though it is not unheard of.

78. The approach that seems to be taken in practice is that disputes of fact should generally be resolved against the claimant: *R v. Reigate Justices, ex parte Curl* [1991] COD 66.

**Overview**

79. Time is not on the potential claimant's side. Whether 28 days under section 289 or 6 weeks under section 288, there is little time from receipt of the decision letter to the end of the period when any claim must have been made. If it is thought that there might be a good ground of challenge it is therefore imperative to seek expert advice as soon as possible.

80. The initial appraisal of the decision letter is therefore important, and should be undertaken as soon as it is received. Spotting a good ground of challenge is obviously easier if you are already familiar with the background to the appeal and the evidence that was before the Inspector, but that is not always the case. Many challenges relate to appeals conducted by written representations, where lawyers are often not involved until it all goes wrong (and in my view there seems to be a direct relationship between the degree of formality in the appeal process and the likelihood of legal error in the resulting decision). In such cases it is necessary to get hold of the written material that was before the Inspector in order to understand the decision letter in its proper context.

81. As I have sought to make clear, identifying good grounds of challenge requires a sound working knowledge of the approach taken by the courts to the categories of potential legal error, particularly the more common ones I have discussed above. Beyond that, I would offer the following five general pointers:

   a. Stand back and look at the decision broadly and as a whole – is the essential logic clear and does it add up? In my experience most good challenges spring from some form of more or less obvious gap or flaw in the Inspector's logic. If there is a step in the logical process leading to the decision which is either absent or inexplicable, that is a good sign that something has gone awry. In most cases, leaving aside quibbles over how felicitously or otherwise particular points have been dealt with, the losing side will understand in essence why the decision went the way it did. A useful reality check is to ask the question whether you are left in any *genuine* as opposed to forensic doubt as to why you lost.

   b. If there appears to be a flaw or a gap, ask yourself whether it goes to the heart of the decision. A slip in respect of a peripheral matter will not be likely to interest the court. If the Inspector has expressed himself so that it is apparent that the point in question has played a material role in determining the outcome, it may well be worth taking the point further.

   c. In circumstances where an important policy has simply not been mentioned, consider whether the Inspector's reasoning indicates an approach which is inconsistent with the policy. If it does not, the court is unlikely to conclude that the simple absence of reference to the policy shows that it was left out of account. Conversely, failure to refer to a policy coupled with an approach which is inconsistent with policy may well indicate an error. If the decision maker wishes to depart from policy, he needs to explain why (*EC Gransden & Co Ltd. v. Secretary of State for the Environment* (1987) 54 P&CR 86).

   d. Your client may tell you that the Inspector has simply got his facts wrong, but it is important to differentiate very carefully between circumstances where the

Inspector has formed a different view of disputed facts to that taken by your client, and where the Inspector has misunderstood an established fact. It is therefore necessary to determine whether the fact is uncontentious and objectively verifiable on the available material. New material submitted to attempt to undermine the Inspector's decision on the facts will not be welcomed. In the *Newsmith* case Sullivan J (as he then was) had this to say about just such an attempt:

> "9. … The assault commences with the witness statement of Mr Newton, the Claimant's managing director. The witness statement seeks to re-argue the planning merits, producing a great deal of additional material and argument that was not placed before the Inspector. For example, there are a large number of photographs of the site and surroundings marked-up to identify various features; there are additional plans and a series of photomontages contained in a report dated 17th October 2000. Such argument and evidence is wholly inappropriate in an application under section 288: see the notes contained in paragraph 288.21 of the Encyclopedia and *Glover v Secretary of State for the Environment* (1980) JPL 110.
>
> 10. There will seldom be a need for anything beyond purely formal evidence to produce the decision letter and the material before the Inspector relevant to the grounds of challenge in section 288 applications. In exceptional cases, as described in paragraph 288.21 of the Encyclopedia, it may be necessary to produce additional evidence, for example to show that "some matter of real importance has been wholly omitted from the Inspector's report." But such cases will be rare, and even in those cases applicants should firmly resist the temptation for their evidence to stray into a discussion of the planning merits. The court is sometimes prepared to stretch a point and look at, for example, an ordnance survey plan if the parties agree that it helpfully and, in an entirely non-controversial manner, illustrates an aspect of the grounds of challenge. But additional, contentious, illustrative material, of the kind produced by the Claimant in the present case, should not be produced in support of applications under section 288. To admit such material in evidence would merely open the door to challenges upon the planning merits.
>
> 11. On behalf of the Claimant, Mr Craig invited me to look at the maps, photographs, and photomontages because otherwise I would be unable to appreciate what the Inspector would or should have seen on her site inspection. This only goes to illustrate the difficulties inherent in the applicant's challenge. Maps and photographs may be helpful but they are no substitute for a site inspection. As those who attend planning inquiries know only too well, photomontages are often very far from being uncontroversial when produced in evidence and photographs not infrequently contradict the proposition that the camera cannot lie, particularly when questions of landscape impact are in dispute.
>
> 12. The use of the ordnance survey plan to get one's bearings in relation to the location of the application site and surrounding features does not

> present the same problems, and to that limited extent (but only to that extent) I am prepared to look at the ordnance survey plan."

Even when the complaint is based on some piece of written evidence that was in fact before the Inspector, the court may be reluctant to stray very far from the Inspector's decision and into the background material. As Ouseley J said in *Fewings v. Secretary of State for Communities and Local Government* [2008] EWHC 2401 (Admin) at paragraph 20:

> "Care has to be taken when examining pieces of evidence such as advocates understandably draw to the attention of the court. That evidence has to be seen in the context of other evidence, and it may well have taken colour and qualification from cross-examination. It is an overall view of the evidence which is required in a careful decision letter, which fairly and accurately summarises the evidence, as this decision letter has done. There is little, if anything, to be gained by consideration of odd pieces of evidence or extracts from statements. It is necessary to read the decision letter as a whole, so that a passage which may offer some hope to one party, when qualified by other parts that may offer hope to the other, is read and adjudged as part of a whole."

Uncontentious and objectively verifiable errors of fact do occur from time to time, and can form the basis of successful challenges (see e.g. *Ensign Group Ltd. v. First Secretary of State* [2007] JPL 141). If the error itself is likely to be undisputed once it has been pointed out, the point may be a good one. If not, then in practice the requirements of the *E* case are unlikely to be satisfied.

e. A good point can normally be explained very simply and shortly. As Albert Einstein said, "If you can't explain it simply, you don't understand it well enough".

**<u>Defending decisions and the role of the second defendant</u>**

**The role of the first defendant**

82. The main burden of defending appeal decisions falls upon the Treasury Solicitor, which has a team of lawyers who specialise in planning cases in the Administrative Court. They provide advice to the Planning Inspectorate in relation to individual challenges, and instruct counsel from the Attorney General's panel to represent the Government when the matter comes to court.

83. A large number of challenges are being dealt with by the Treasury Solicitor at any one time, and the planning team therefore has a great deal of experience and expertise in defending them. It is also able to call on the services of some very able counsel to appear on its behalf, most of whom can also claim to have accumulated considerable relevant experience and expertise.

84. In appropriate cases the Inspector may submit a witness statement to deal with the way a particular point was or was not put to him in the inquiry, and/or to exhibit additional

documentation from the appeal which was not included in the Claimant's bundle. In practice that will often only happen at a fairly late stage, and although the Treasury Solicitor is generally successful in adducing such evidence outside the prescribed time limits for the service of evidence that is not always the case. A good example of this, and a helpful authority for claimants seeking to resist the late production of evidence on behalf of the first defendant, is *Surrey Heath Borough Council v. Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 58 (Admin). Maurice Kay J rejected the explanation for the very late production of the witness statement of the witness statement in that case, which seems to have been no more than that the Inspector and others involved were busy people, as "pathetic" (paragraph 20).

**The role of the second defendant**

85. Against that background, it is easy to see why many second defendants (normally the successful party in the relevant appeal) simply leave the task of defending the decision to the Treasury Solicitor and play no part. That can often be a sensible decision; why bother spending more money on the case when someone else is going to be doing the same job? An additional factor that quite properly weighs on the minds of second defendants is the general reluctance of the court to award a second set of costs in favour of the second defendant if they do attend.

86. Second defendants can, however, play an important part in defeating statutory challenges, and where the decision to participate is properly based on the second defendant's ability to add something important to the proceedings that can be reflected in costs. A useful summary of the position was provided by Ouseley J in *Beach v. Secretary of State for the Environment Transport and the Regions and Runneymede BC* [2001] EWHC Admin 381:

> "The appropriate approach to the order for a second set of costs where it is sought is set out in *Bolton Metropolitan District Council v Secretary of State for the Environment* [1995] 1 WLR 1176 from letters G to A on the subsequent page. The particular passage that is relevant here is at H: the developer will not normally be entitled to his costs unless he can show that there is likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State, or unless he has an interest which requires separate representation. The House of Lords also noted that the second set was more likely to be awarded at first instance.
> Mr Jones referred to the decision of the Court of Appeal in *Berkeley v Secretary of State for the Environment* 12th February 1998 and drew attention to the fact that the Court of Appeal, though exercising the first instance discretion afresh, declined to make an order for costs in favour of the successful developer. Part of the basis upon which the successful developer had sought costs was that the developer had been present at the inquiry throughout and was uniquely able to assist the judge as to the information available at the inquiry in order to help the judge decide whether, in the absence of the environmental statement, there had been sufficient information available to take its place. The Court found that in fact there had been. The Court of Appeal concluded, exercising its discretion in that case,

that that did not constitute the demonstration of a separate issue not covered by the Secretary of State.

In this case I do not make the order on the basis that there was a separate issue not covered by the Secretary of State, but that this is a case where, as the House of Lord recognises, exceptionally a decision awarding a second set of costs can be made. I do not regard the decision of the Court of Appeal in *Berkeley* as laying down for all time and in all circumstances, that the fact that the Court has derived considerable assistance from the presence of the Second Respondent precludes an order for costs in favour of the Second Respondent unless it relates to a separate issue.

In my judgment there are two particular reasons why the attendance of the Second Respondent was necessary, valuable and should receive a partial award of costs. At first instance, in a case of this sort, where the Claimant is represented by counsel who was at the inquiry and where it is necessary to put in context what happened at the inquiry, and the way in which the argument there developed it is important for the person best placed to put the opposing side to be represented so that the opposing argument can be expressed. That is something which the Second Respondent here was well placed to do.

Secondly, it is not something that the Secretary of State was in a position to do, except if he had known all that was going to happen at this appeal beforehand and had dealt with it by the preparation of evidence. There are obvious advantages in having present counsel who, from their own knowledge, and from the instructions of those behind them, can deal with what happened at an appeal. The Inspector, who decides the case, is not normally present in Court and able to offer assistance to Treasury Counsel explaining the background.

Where the judge has been significantly influenced and assisted by the arguments of somebody who is entitled to be represented and be heard, the exercise of his discretion is not confined to simply identifying whether there was a separate issue but can exceptionally go beyond that. It is very close here, however, to the identification of a separate issue because in relation to the technical point the arguments put forward by the Secretary of State were very much more a reflection of those which were advanced by the Second Defendant than the other way around. Accordingly I exercise my discretion to make an award of costs in favour of the Second Defendant" (emphasis added).

87. In the *Beach* case Ouseley J therefore identified two circumstances where the second defendant is justified in participating in the challenge, which in that case led to the award of a second set of costs.

88. The first related to the second defendant's knowledge of what took place at the inquiry, which can be crucial in some cases and is at least helpful in many more. Counsel representing the Secretary of State will not have that advantage, and neither will those instructing him. In some cases being the sole source of information for the court as to what took place at the inquiry can be a major advantage to the claimant, and I have experience of cases where (in my view) the absence of any representation

on behalf of the second defendant has allowed a challenge to succeed which would otherwise almost certainly have failed.

89. The second was that in the case before him the second defendant's counsel seems to have led the way in advancing the winning arguments. It is unusual for that to be the case at the hearing itself, but it is not uncommon for counsel for the second defendant to produce his draft skeleton argument early so as to encourage/inform and/or make life easier for counsel for the first defendant. In some cases that can be a very useful exercise, particularly in identifying points that may be obvious to those who participated at the inquiry but are less obvious on the papers.

90. There are a range of other situations where the second defendant could be justified in choosing to be represented. At the simplest level, the implications of the case may be sufficiently important that it is worth leaving no stone unturned in seeking to uphold the decision obtained on appeal. That will most obviously be the case for a developer with a valuable planning permission, but for many local authorities important issues of principle can arise, such as the interpretation of a particular development plan policy, which make it vital that the second defendant's views are put before the court.

91. On occasion the Treasury Solicitor may be willing to submit to judgment in the face of a challenge which you consider to be defensible. In those circumstances it is open to second defendants to elect to defend the decision alone. A number do, sometimes successfully. A good example of that is the recent decision of the Court of Appeal in *Wychavon District Council v. Secretary of State for Communities and Local Government* [2008] EWCA Civ 692. The local planning authority challenged an Inspector's decision to grant planning permission for a development in the Green Belt, and the Secretary of State agreed to consent to judgment. The second defendants, the recipients of the planning permission, took a different view, and sought to defend the decision. In the High Court Mitting J found in favour of the local planning authority [2007] EWHC 3209 (Admin), but the second defendants were not deterred, and Mitting J's decision was subsequently overturned in the Court of Appeal, establishing a new understanding of the approach to the exceptional circumstances test in Green Belt cases.

92. In addition to providing any missing materials or information from the original appeal (an important task in itself), and submitting a detailed skeleton argument in draft to Treasury counsel well in advance, there is at least one other practical step that a second defendant take in appropriate section 288 challenges. As I have discussed, an increasing number of second defendants are using the strike out mechanism as a means of knocking out unmeritorious section 288 challenges at an early stage. As far as I am aware the Treasury Solicitor itself has not so far adopted this tactic, and may be reluctant to do so on anything like a regular basis because of the additional public expenditure involved. Unless and until a permission stage is introduced, this is a measure likely to be employed largely if not exclusively by second defendants.

93. Many second defendants will be content to leave their fate in the hands of the Government, but, for the reasons I have set out, any decision not to participate should only be taken after careful consideration.

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