This paper offers summaries of a selection of noteworthy Town and Country Planning cases over the last year or so.

The cases we consider, listed by subject areas, are as follows:

(i) Development Plan Challenges:
   1. *Barratt Development Plc v Wakefield MDC & Secretary of State for Communities and Local Government* [2010] EWCA Civ 897
   2. *R(Cala Homes (South) Limited) v Secretary of State for Communities and Local Government & Winchester City Council*

(ii) Enforcement Time Limits:
   5. *Fidler v Secretary of State for Communities and Local Government* [2010] EWHC 143 (Admin)

(iii) EIA and Demolition:
   7. *R (Save Britain’s Heritage) v (1) Secretary of State for Communities and Local Government (2) Lancaster City Council and Mitchells of Lancaster (Brewers) Limited* [2011] EWCA Civ 334

(iv) Conditions Precedent:
   8. *Hart Aggregates*

(v) Due process:
   10. *R(Harris) v Haringey London Borough Council* [2010] EWCA Civ 703

(vi) Material considerations:

(vii) EIA:
   14. *R (Friends of Basildon Golf Course) v Basildon District Council and Basildon Golf Centre* [2010] EWCA Civ 1432
   15. *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157

(viii) Planning conditions:

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1 We gratefully acknowledge the contribution of John Pugh-Smith, Barrister at 39 Essex Street, in the production of this paper.
16. **Avon Estates Limited v Welsh Ministers**
   [2011] EWCA Civ 553

(x) Planning permission: revocation:
18. **Heath & Safety Executive v Wolverhampton City Council & Victoria Hall Limited.** [2010]
   EWCA Civ 892

(x) Enforcement:
20. **Broadland District Council v Trott** [2011] EWCA Civ 301
21. **Davenport v Westminster City Council**
    [2011] EWCA Civ 458
Development Plan Challenges


In *Barratt* an unsuccessful attempt was made to quash Policy CS6 ‘Housing Mix, Affordability and Quality’ of Wakefield’s adopted Core Strategy with Barratt arguing that the 30 per cent district-wide affordable housing requirement imposed an unrealistic target and that it did not pay due regard to PPS3 and PPS12 the Yorkshire and Humberside Plan (the then Regional Strategy to 2026). Whilst expressing some sympathy for the need for developers to have clear policy guidelines, so that they can plan their future development programmes Lord Justice Carnwarth commencing his analysis of the grounds of appeal with the remark: “I say at the outset that I have found the precise legal basis of some of the submissions a little elusive. I have already commented on the limited powers of the court … ” He further reminds that “… ‘soundness’ was a matter to be judged by the inspector and the Council, and raises no issue of law, unless their decision is shown to have been “irrational”, or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law.”. Contrasting the *Barratt* challenge with that by Persimmon in the *Blyth Valley* case, where the LPA had failed entirely to satisfy the requirement of PPS 3 in respect of economic viability assessment, which was held to be a “crucial requirement of the policy” By contrast, in the present case the inspector had plainly had regard to the issue of economic viability, and had taken steps to ensure that she was provided with adequate evidence to make a judgement on it. There was nothing in the judgment of the Court of Appeal in *Blyth Valley* to suggest that it would be illegal or irrational, following such an economic evaluation, to adopt a percentage target at the top of the expected range, subject to negotiation down having regard to the circumstances of individual sites.

2. *Cala Homes*

In the high profile case of *R (Cala Homes (South) Limited) v (1) Secretary of State for Communities and Local Government & (2) Winchester City Council* [4] (“CALA 1”) the primary issue on which Cala succeeded was that the Secretary of State, Eric Pickles MP, had unlawfully, by his announcement on 27th May 2010, exercised the revocation power under section 79(6) of the Local Democracy, Economic Development and Construction Act 2009 for a purpose/objective which was not permitted, the primary objective of the 2009 Act being, in this regard, to produce Regional Strategies. The second, although it was not determinative and did not require comment from Mr Justice Sales, was the judge’s view (obiter) that there had also been a failure to comply with the Environmental Assessment of Plans and Programmes Regulations 2004 and/or the SEA Directive in respect of the Pickles’ announcement.

On the same day as judgment was delivered the Coalition Government’s Chief Planner, Steve Quartermain, sent a letter dated 10th November 2010 to all chief planning officers reminding them of the intention to abolish regional strategies in the forthcoming Localism Bill and that the Secretary of State “expected them to have regard to this as a material consideration in planning decisions”. He

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2 *Blyth Valley Borough Council v Persimmon Homes (North East) Ltd & Ors* [2008] EWCA Civ 861

3 It should also be noted that a s.288 challenge raising economic conditions when setting the proportion of affordable housing also failed in *Robert Hitchins Limited v Secretary of State for Communities and Local Government & Forest of Dean District Council* [2010] EWHC 1157 (Admin)

4 [2010] EWHC 2866 (Admin)
also attached a proposed clause in the Bill to ensure abolition. It simply provided that that Part 5 of
the 2009 Act was to be repealed and regional strategies were to be revoked. On 13th December the
Localism Bill was published with the relevant section included.

Meanwhile, the issue of what “little, if any” weight should be attached to these announcements led
to a return to court by Cala with a second set of judicial review proceedings being issued on 19th
November challenging the Quartermain letter (“CALA 2”). On 26th November Mr Justice Lindblom
delivered an initial judgment imposing a stay on the application of the Letter in a development
control context. On 7th December that stay was lifted at the request of the Secretary of State on
condition that the CALA 2 claim was publicised to LPAs. On 7th February 2011 judgment was handed
down6. Cala then obtained permission to appeal, with the hearing taking place on 5/6th May and
judgment, one year later, being handed down by the Court of Appeal on Friday, 27th May.
Unsurprisingly, perhaps, the Court upheld the judgment of Mr Justice Lindblom that the Secretary of
State’s “guidance” was a material consideration in planning decisions and that Regional Strategies
remained an important factor in plan-making.

3. Save Historic Newmarket Limited v Forest Heath District Council

Failure to comply with the SEA Directive, has led, to the quashing of the Forest Heath Core Strategy.
In Save Historic Newmarket Limited v Forest Heath District Council 6Mr Justice Collins quashed the
Core Strategy, which proposed an urban extension near to the horse racing town of Newmarket, for
inadequate consideration of reasonable alternatives to make the plan environmentally sound. A
current challenge of the Joint Core Strategy for Greater Norwich7 raises a similar point with,
potentially, the same fatal consequences. There are also several challenges pending where LPAs
have adopted lower housing figures than those in the relevant Regional Strategy for their LDD plan-
making.


The issue of timing of a High Court challenge under s.113 of the 2004 Act arose in Barker v
Hambleton District Council, in which an extempore judgment was given on 24th May 2011, the
claimant landowner sought to challenge the allocation of land for housing and employment
development in South West Thirsk and the failure to allocate his land in North East Thirsk in the
Hambleton Allocations Development Plan Document. By section 113 of the Planning and
Compulsory Purchase Act 2004 an application to the High Court had to be made within six weeks of
the adoption of the document. This is a change from section 287 of the Town and Country Planning
Act 1990 which had allowed six weeks from the publication of the first notice of adoption of
development plans. On 21 December 2010 the Council resolved to adopt the DPD. They then
published an adoption statement and a notice of adoption which said that the DPD had been
adopted on 21 December and that proceedings had to be brought within six weeks of 31 December.
Six weeks after that date would expire on 11 February. However, six weeks from 21 December would
expire on 1 February. Realising that the timescale given by the Council might be wrong, the Claimant
sought to make an application to the Court by delivering the claim form and grounds to the

5  R (Cala Homes (South) Limited) v Secretary of State for Communities and Local Government & Winchester City Council [2011] EWHC 97 (Admin).

6  [2011] EWHC 606 (Admin)

7  Heard v Broadland District Council & Ors CO/3983/2011
Administrative Court, Leeds on 1 February. The papers were delivered at 7.46pm after the Court had closed. As the Court building had no letter box, the papers were slipped under the front door and picked up by security staff the following morning. The Council accepted in correspondence that the proceedings had been brought in time. However at the hearing of the substantive application the judge questioned whether the proceedings had been brought within six weeks. He held that putting the papers under the door of the court building was not the making of an application to the High Court! He also held that although the Council’s notice of adoption and adoption statements had been wrong to give a later date for bringing proceedings but that did not alter the time period for bringing the proceedings. Permission to appeal to the Court of Appeal was granted by the High Court.

Enforcement Time Limits
Fiddling the Planning System

Two recent planning cases address the question of time limits under section 171B of the Town and Country Planning Act 1990 (“the Act”) for enforcement in respect of breaches of planning control and the relevance of the intentions of the developer in such cases.

5. Robert Fidler v (1) Secretary of State for Communities and Local Government (2) Reigate & Banstead BC [2010] EWHC 143

The unusual facts of one of these, heard in the Administrative Court in February of last year piqued the interest of a number of national newspapers. The interesting points of principle it has established make it noteworthy also to practitioners of Town and Country Planning Law. The case in question is Robert Fidler v (1) Secretary of State for Communities and Local Government (2) Reigate & Banstead BC [2010] EWHC 143 (Admin) (“Fidler”).

The facts of Fidler, in brief, are as follows:

The appellant, Mr Fidler, appealed against a decision of a planning inspector dismissing his appeal against enforcement notices issued by Reigate and Banstead Borough Council (“R&B”) in relation to the construction of a new dwelling house. Mr Fidler had constructed a house (complete with a tower with turrets and displayed for all to see, together with an interview with Mr Fidler himself, in the pages of the January 09 edition of “25 Beautiful Homes”) without planning permission and had concealed it under straw bales and tarpaulins during its construction. R&B served Mr Fidler with enforcement notices which stated that the building had been completed less than four years previously and that it had to be demolished within a year. Mr Fidler appealed against the enforcement notices on the grounds that the new dwelling house had been substantially completed more than four years before the straw bales and tarpaulins were removed, with the effect that the four-year time limit for taking enforcement action in ss.174(2)(d) and 171B of the Act had expired. The planning inspector had dismissed the appeal on the basis that the building operations had not been substantially completed until the removal of the straw bales so that the enforcement notices had not been served outside the four-year time limit. In the Administrative Court, Mr Fidler argued that the inspector had wrongly decided that the erection and removal of the straw bales formed part of the overall building operations as this fell outside the exhaustive definition of "building operations" in s.55(1A) of the Act, and therefore did not amount to "building operations" in their own right and did not form part of the building operations involved in the construction of a new dwelling.
The intention of Mr Fidler was plainly at the heart of the resulting judgment. In rejecting Mr Fidler’s arguments and dismissing his appeal Sir Thayne Forbes followed the case of Sage v Secretary of State for the Environment, Transport and the Regions [2003] UKHL 22, [2003] 1 W.L.R. 983 and held that there could be a number of ancillary activities on a construction site that, when considered in isolation, would not be a building operation within the meaning of the Act but which could nevertheless form part of the contemplated and intended building operations when considered as a whole. In each case, his judgment provided, it was a matter of fact and degree as to whether such an activity formed part of the overall building operations. Critically, the planning inspector was quite right to consider the evidence and make appropriate findings of fact with regard to the totality of the building operations that Mr Fidler had originally contemplated and intended to carry out. Moreover the Inspector had been entitled to find that Mr Fidler had put the bales in front of his home in order to conceal the dwelling whilst under construction until it was considered that the legal argument on the four-year rule would succeed and that he had always intended to remove the bales once he thought sufficient time had passed for the lawfulness of the construction to be secured. Those findings fully justified his critical conclusion that the erection and removal of straw bales formed part of the totality of the building operations in question. In the words of the judge:

“Mr Fidler made it quite clear that the construction of this house was undertaken in a clandestine fashion, using a shield of straw bales around it and tarpaulins or plastic sheeting over the top in order to hide its presence during construction. He stated that he knew he had to deceive the Council of its existence until a period of 4 years from substantial completion and occupation had occurred as they would not grant planning permission for its construction.”

The Judge concluded that the planning inspector’s findings made it abundantly clear that the erection and removal of the straw bales was an integral, indeed an essential, part of building operations that were intended to deceive the local planning authority and to achieve by deception lawful status for a dwelling built in breach of planning control. Accordingly Mr Fidler’s appeal was dismissed.

No matter Mr Fidler’s intentions regarding his home, he made those regarding this piece of litigation abundantly clear in an interview given shortly before his planning appeal was heard “I’ll take it to the High Court and the Court of Appeal and the House of Lords until I find someone who will see sense”. If so we can expect some interesting case law as to the role of intention, expressed or inferred, in determining immunity against planning enforcement action through lapse of time.

6. Beesley

A few weeks before Sir Thane Forbes’ judgment, the Court of Appeal gave judgment in a case with a number of similarities to Fidler. Welwyn Hatfield Council v (1) Secretary of State for Communities and Local Government (2) Alan Beesley [2010] EWCA Civ 26 (“Beesley”) concerned the unlawful erection of a dwellinghouse and the possibility of enforcement action in relation to it. Like Fidler, it also concerned an attempt to dupe the local planning authority. Unlike Fidler, the attempt was successful.

The facts of Beesley in brief were as follows:

One of the appellants, Mr Beesley, had been granted planning permission by Welwyn Hatfield Council (“WHC”) in December 2001 for the erection of a hay barn and subject to a condition that “the building hereby permitted shall be used only for the storage of hay, straw or other agricultural products and shall not be used for any commercial or non-agricultural purposes”. As Lord Justice Richards notes at the beginning of the Court of Appeal Judgment,
“Mr Beesley…admitted that he deliberately deceived the council when he applied for planning permission, in that he filled in the application on the basis that the building was to be a hay barn but he always intended to build and reside in it as a dwelling.”

The outside appearance of Mr Beesley’s home was that of a barn, whilst internally it was finished in timber and plasterboard plus all mod cons. He argued that since he and his wife had moved into the property at the beginning of August 2002 and, escaping the attention of the local planning authority, had lived there continuously until his application for a certificate of lawfulness, more than four years later, in mid August 2006, he had accrued immunity from enforcement action and was therefore entitled to his certificate under the four year rule in s171B of the Act.

WHC argued that s171B(2) which provided that:

(2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

...was only engaged in relation to a single dwelling house and that Mr Beesley’s was not a dwelling house since it did not appear so externally.

On appeal the planning inspector concluded that since the building was capable of being used as a dwelling house it was therefore to be regarded as such. He therefore allowed the appeal and granted Mr Beesley his certificate.

By the time the matter came before Mr Justice Collins in the Administrative Court, WHC raised the following new argument: there could have been no “change of use” as required by section 171B(2) of the Act since the building had had no use at all prior to its residential occupation. Mr Justice Collins agreed and concluded that as a result a ten-year rule, rather than a four year one applied, so that the authority remained within time to enforce.

Whilst his judgment appeared to be based on a strict construction of 171B of the Act, like Sir Thayne Forbes in Fidler, Mr Justice Collins made his feelings known in his judgment stating (at paragraph 36):

"I am bound to say that seems to me a conclusion which accords with not only the merits of this case but prevents a particular sort of fraud being perpetrated because otherwise Mr Beesley would have got away with a plot to breach the planning laws and to obtain a dwelling house in breach of the Green Belt policies and a development that he would never have been able to achieve if he had gone about things in an honest fashion."

Both Mr Beesley and the Secretary of State appealed the decision of Mr Justice Collins essentially advancing the same two arguments:

1) The building had been built in breach of planning permission since the a hay barn which had been consented and the dwelling which had been built were at odds, so that s171B(1) of the Act and the four-year rule applied;

2) Whether or not there had been a breach of planning permission, there had been a change of use given that a hay barn had been consented but a dwelling had been built, so that s171B(1) of the Act and the four-year rule applied.
Allowing the appeal, the Court of Appeal held that, as the building had the features of a dwelling house when looked at as a whole, what had been built was a dwelling house and not a barn. As it was built in breach of planning control, the construction of the building fell within s171B(1) of the Act and the four-year time limit under that subsection applied. Lord Justice Richards stated (at paragraphs 24 and 25 of the judgment):

"Looked at as a whole, the physical and design features of what was built by Mr Beesley were those of a dwelling house, not a hay barn. Its character and purpose, and its proper classification for planning purposes, were those of a dwelling house. Yet the planning permission was for the erection of a hay barn. If one asks whether the building operation carried out was, both externally and internally, fully in accordance with the planning permission, the answer is clearly "no": What was created internally was not on any sensible view a hay barn. The internal fitting out of the building with the rooms and features of a dwelling house meant that it was built in breach of planning control.

It follows that the construction of the building fell within section 171B(1) and that the four-year time limit under that subsection applied. Since, on the inspector’s findings, the building had been completed more than four years before Mr Beesley applied for a certificate, it was too late for the council to take enforcement action against the operational development constituted by the construction of the building."

Of particular interest in the judgment of the Court of Appeal is its handling of the issue the intention of the developer. It makes clear that the intentions or dishonesty of the person applying for certificate of lawfulness are not relevant. The fact that the breach of planning control had been deliberate and dated back to the planning application could not impact on the purely objective and factual question of whether or not the certificate should be granted. As Richards LJ stated at para 18:

"The court should not be tempted to adopt a strained construction of the section in reaction to the deliberate deceit practised by Mr Beesley or out of concern for the difficulties that such conduct creates for local planning authorities in enforcing planning control. The outcome should be the same as if, for example, there had been a genuine change of mind in the course of construction of a building for which planning permission had been obtained in good faith. The question is whether the situation, viewed objectively, is one for which the statute has provided a four-year time limit or a ten-year time limit. If it is considered that there should be a different outcome in a case of dishonesty or deliberate concealment, it is for Parliament to amend the legislation accordingly."

Both Cases: The Courts’ approach to intention in planning enforcement

Both of these cases concerned construction of s 171B of the Act. But while Beesley concerned change of use in s 171B(2), Fidler came within s 171B(1), i.e. carrying out relevant operations without planning consent.

Where these two cases leave the matter of the relevance of a developer’s intention when establishing immunity from planning enforcement is uncertain and may yet be clarified in the event of an appeal in either case. Whilst Sir Thayne Forbes regarded as significant the intentions of Mr Fidler, the Court of Appeal in slightly different circumstances preferred an objective test in Beesley. If Mr Fidler follows through with his intentions of further appeals it will be interesting to see how the Courts reconcile the different approaches to the question of intention adopted in these cases.
One thing that is common to both cases and relatively clear is that local planning authorities need to take heed of the warning issued by Lord Justice Richards in Beesley that “External appearances can be highly misleading...and authorities need to be alert to the possibility of deception.” As for developers who seek to rely on the four-year rule in circumstances of apparent or real deception, for the time being at least, they do so at their own risk.

EIA and Demolition

7. R (on the application of Save Britain’s Heritage) v (1) Secretary of State for Communities and Local Government (2) Lancaster City Council [2011] EWCA Civ 334

The Court of Appeal recently handed down a judgment which will introduce new controls over the demolition of buildings and other structures. In R (on the application of Save Britain’s Heritage) v (1) Secretary of State for Communities and Local Government (2) Lancaster City Council it held that demolition of buildings is capable of constituting a project for the purposes of article 1.2 of the EIA Directive (85/337) (“the EIA Directive”).

The Claimant campaign group, SAVE Britain’s Heritage (“SAVE”), appealed against the High Court’s dismissal of its claim for declarations that (i) the Town and Country Planning (Demolition – Description of Buildings) Direction 1995 paragraphs 2(1)(a)-(d) (“the Direction”) was unlawful and should not be given effect and that (ii) demolition of buildings was capable of constituting a project under Annex II to the EIA Directive.

The Secretary of State and Lancaster City Council had reached a decision allowing for the demolition of the historic Mitchell’s Brewery building without a screening opinion under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“the EIA Regulations”). SAVE argued that in certain cases the EIA Directive required an Environmental Impact Assessment (“EIA”) to be carried out prior to the demolition of a building and that therefore the Direction was contrary to the Directive. In the High Court Judge Pelling QC dismissed SAVE’s claim for judicial review. SAVE appealed the decision of the High Court on grounds which included reliance on a judgement which was handed down by the ECJ only a week before the appeal was argued. In Commission v Ireland c-50/09 the ECJ ruled that demolition works were capable of constituting a project for the purposes of the Directive. SAVE contended that this ruling was decisive of the issue before the Court of Appeal.

The Court of Appeal agreed. It held that the Directive was to be interpreted purposively and that where works are capable of having significant effects on the environment, the definition of “project” in art 1.2 of the Directive should extend to such works. Accordingly demolition fell within “the execution of other schemes” and was capable of giving rise to the need for an EIA. Finally, it refused the Secretary of State’s application for permission to appeal to the Supreme Court.

This judgment has important implications for local planning authorities, developers and third parties alike. It means that most forms of demolition will now require planning permission, albeit that in many cases this may be granted by means of permitted development rights. This is so even where listed building, scheduled monument or conservation area consents are also required. Where such demolition is likely to have significant effects on the environment then, in addition, an EIA will be required (and permitted development rights do not apply). Schemes which involve large amounts of demolition (such as those carried out under the Pathfinder Programme) are likely to be significantly affected. Those engaged in redevelopment requiring demolition may find that the process now takes longer, costs more and is less certain than was formerly the case.
Conditions Precedent

9. Greyfort Properties Limited v (1) Secretary of State for Communities and Local Government (2) Torbay Council [2011] EWCA Civ 908

In Greyfort the Court of Appeal held that Access works carried out by a company as part of a property development scheme could not constitute a lawful implementation of a planning permission where they had been carried out in breach of a planning condition. They therefore fell squarely within the principle set out in FG Whitley & Sons Co Ltd v Secretary of State for Wales (1992) 64 P & CR 296.

The appellant company (G) appealed against a decision ([2010] EWHC 3455 (Admin), [2011] 16 E.G. 83) that its planning permission had lapsed. G had obtained planning permission in 1974 for the development of 19 flats on a plot of land. The permission included a condition that "before any work is commenced on the site the ground floor levels of the building hereby permitted shall be agreed with the Local Planning Authority in writing". The work had to be commenced within five years. Four years from the date of the permission G carried out some access work, and argued that such work amounted to commencement of the development, so that the planning permission remained in force. However, a planning inspector concluded that the access works had been carried out in breach of the condition, and, applying the principles set out in FG Whitley & Sons Co Ltd v Secretary of State for Wales (1992) 64 P & CR 296 CA (Civ Div), the works could not therefore amount to commencement of the development. He further concluded that the condition went to the heart of the permitted development. The inspector's decision was upheld by the High Court. G submitted that (1) the inspector had erred in his construction of the condition as it was not a condition precedent within the Whitley principle and did not contain a clear and express prohibition on development; (2) the approved plans attached to the planning permission effectively determined the ground floor levels; the purpose of the condition was therefore not to fix the floor levels but to ensure that the works adhered to the details on the plans.

HELD: (1) The prohibition in the condition on the commencement of "any work... on the site" applied to the access works, and was at the very least equivalent to a prohibition on the commencement of "development", Whitley applied. The judge in the instant case had been right to conclude that there was no material difference between a condition which expressly prohibited development before a particular matter was approved, and one which required a particular matter to be approved before development commenced, R (on the application of Hart Aggregates Ltd) v Hartlepool BC (2005) EWHC 840 (Admin). (2005) 2 P & CR 31 applied (see paras 25-27, 30-31 of judgment). (2) The inspector was plainly in a better position than the court to assess the importance of the condition, not only because of his greater expertise in the interpretation and assessment of plans, but also because he had visited the site. The court should therefore be very cautious about concluding that the inspector had fallen into error on the basis of its own examination of the plans. In any event, whilst a lot of relevant information could be gleaned from the plans, they did not define ground floor levels with sufficient certainty to make good G's case. Furthermore, the local planning authority had been in possession of the plans and yet regarded the setting and agreement of ground floor levels as a matter of considerable importance. The very fact that the condition was included at all in a short planning permission indicated the importance attached to it. The surrounding circumstances pointed to the condition as having been included as more than a mere formality or simply as a way of ensuring that the building was built in accordance with the plans already approved. The local authority had chosen wording plainly intended to prohibit the commencement of any work on the site, including access work, before the floor levels were agreed. There was no good reason for declining to respect its judgment on that point (paras 41-44). (3) The access works had therefore been carried out in breach of the planning condition and fell squarely within the Whitley principle,
on the basis of which the works could not constitute a lawful implementation of the planning permission. None of the recognised exceptions to the Whitley principle applied, and there was nothing in the reasoning in Hart to suggest that the principle should not be applied in such circumstances, Whitley and Hart applied (para.45).

**Due process**

**Equality**

*R(Harris) v Haringey London Borough Council* [2010] EWCA Civ 703

10. This decision of the Court of Appeal serves as a reminder of the requirement of LPAs to discharge the duty under section 71 of the Race Relations Act 1971 to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. There, the judicial review concerned the grant of planning permission for the redevelopment of a site of an indoor market comprising a number of business and residential units. Sixty four per cent of traders in the market were Latin American or Spanish speaking and the predominant occupation of homes and business units were by members of the black and ethnic minority communities. Before taking its decision, the LPA had conducted a consultation exercise. The officers' report referred to the representations made. In reaching its decision to grant planning permission, the committee had had regard to the development brief, its UDP policies pertaining to the general impetus for regeneration and the specific aim of promoting the welfare of ethnic minority communities and local planning policies. The Appellant contended that when granting planning permission the LPA had failed to discharge its duties under s.71(1)(b). The LPA argued that because the development would, as required by the UDP policies, assist the area where a large proportion of ethnic minority communities were concentrated, the duty was discharged. The Court of Appeal adopted the approach that there must be a demonstrable application of the s.71 duty to the particular facts. Whilst the UDP policies might have been admirable in terms of proposing assistance for ethnic minority communities they did not address specifically the requirements imposed upon the LPA by s.71(1). Not only was there no reference to s.71 in the report to the committee, or in its deliberations but the required duty in s.71 to have "due regard" for the need to "promote equality of opportunity and good relations between persons of different racial groups" had not been demonstrated in the decision making process. "Due regard" need not require the promotion of equality of opportunity, but on the material available to the LPA, it required an analysis of that material with the specific statutory considerations in mind. The issues that arose on the planning application were such that it was necessary for them to form an integral part of the decision-making process. As they had not the permission would be quashed.

*Broxbourne DC v Robb & Ors*

11. Mr Beary, an Irish traveller, challenged committal proceedings relating to his breach of an injunction prohibiting residential caravans on a plot of land owned by him within a leisure park, partly on the basis that the local authority had failed to satisfy their duties under s.71 Race Relations Act 1976. The park was largely owned by the regional park authority, and caravans were not permissible within the park. However, there were many privately-owned plots which housed residential caravans occupied by gypsies and travellers. In May 2008, the
local authority obtained a without notice injunction prohibiting residential accommodation or structures. For over a year there was no sign of residential use. B bought the plot in October 2009. It was common ground that he did not know about the injunction. By summer 2010, he and his family were living on the plot in a large mobile home and touring caravan. His three children attended the local school. In November 2010, the local authority sent him a copy of the injunction, allowing him 14 days to comply. Throughout December B explained that he had become settled on the plot and had nowhere else to go. In January 2011, the instant committal proceedings were started and B unsuccessfully sought change of use of the leisure plot to residential occupation. He appealed against the refusal and applied within the committal proceedings to vary the injunction so as to extend it until the determination of his appeal. B submitted that (1) the application for committal was unlawful because of the local authority's refusal to consider alternatives after having been made aware of his personal circumstances, and because of its failure to consider the Race Relations Act 1976 s.71; (2) given the clear and urgent need for additional sites for gypsies and travellers, it was proportionate to vary the terms of the injunction to enable him to remain on the site pending the hearing of his appeal. The Court gave Judgment for claimant, on the basis that: (1) The local authority had discharged its duty under s.71 of the Act. Although it had not made any explicit reference to the provision in its papers, it was clear that, in substance, it had had regard to the special position of gypsy and traveller occupants in the park, South Cambridgeshire DC v Gammell [2008] EWCA Civ 1159, [2009] B.L.G.R. 141 and R. (on the application of Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141, [2009] P.T.S.R. 809 applied. It was also clear that the decision to instigate the instant proceedings had been taken in the context of there being no alternative authorised sites available to B. The presence in the park of long-term residents who were not affected by the injunction did not preclude the local authority from taking committal proceedings against people like B who were not long-term residents (see para.32 of judgment). (2) In committal applications and applications to vary injunctions, the overarching consideration was to maintain the authority of court orders, Mid-Bedfordshire DC v Brown [2004] EWCA Civ 1709, [2005] 1 W.L.R. 1460, Wychavon DC v Rafferty [2006] EWCA Civ 628, [2006] 18 E.G. 150 (C.S.) and Gammell applied. B had not applied for the variation "forthwith" as required by Brown and Gammell, but it was appropriate to take account of the principles in South Buckinghamshire DC v Porter (No.1) [2003] UKHL 26, [2003] 2 A.C. 558, since the injunction had been issued before B's occupation of the plot and without consideration of his personal circumstances, Porter applied. It could not be said that B's appeal against change of use had real prospects of success, so that was not a compelling factor in favour of variation. The provision of stability and education for his children was a primary consideration but, in considering proportionality, very great weight had to be given to B's conscious defiance of the law in establishing his home on an environmentally protected site, Chapman v United Kingdom (27238/95) (2001) 33 E.H.R.R. 18 followed. It was a decisive point that the injunction prohibiting residential use was properly in place and to vary the injunction so as to permit the very action that it was designed to prevent would be to ignore the force of the injunction. In the circumstances, neither an adjournment of the committal hearing nor the imposition of a fine was a suitable course of action. The appropriate sentence was committal for 28 days unless B removed his caravans from the plot within four weeks - Guildford BC v Smith [1994] J.P.L. 734 and R. v Newland (Polly) (1987) 54 P. & C.R. 222 considered (paras 33-58).

**Delegated powers**

R (Friends of Hethel Limited) v South Norfolk District Council & Ecotricity (2010) [2010] EWCA Civ 894
12. A decision of the Court of Appeal: a salutary tale on the use of delegated powers. The Council officers had recommended the grant of planning permission for three wind turbines. The relevant area planning committee had voted 5-3 against the application. The minutes of the meeting recorded that the refusal was contrary to the officers’ recommendation, by a vote of less than two thirds of the committee’s membership, so that the application stood referred to the planning committee for determination. At the planning committee’s meeting, the members voted 8-7 for approval of the proposal. FoHL applied for judicial review on the basis that the requirement for a two-thirds majority was contrary to the Local Government Act 1972 Schedule 12 para.39, as applied to local authorities by para. 44(1). On this point, the judge had held that the majority voting requirement was authorised by section 101 of the 1972 Act. Allowing FoHL’s appeal, delegations under section 101 might include conditions or limitations as to the extent of the delegation or the circumstances in which it may be exercised. However, the power to make such arrangements was subject to any express provision contained in the 1972 Act, and Schedule 12 para.44(1) in applying para.39(1) made express provision as to how all questions should be decided by a majority vote. The delegation arrangements could not lawfully override para.39(1) and provide, in effect, that a decision to grant or refuse planning permission should be decided by a two-thirds majority. The arrangements delegating power to determine planning applications to the area committee were lawful in principle. However, the terms of reference were unlawful in respect of the requirement of a two-thirds majority voting requirement. In view of the lapse of time since the area committee’s decision it would have to consider whether there had been any material change of circumstances. Accordingly, the planning permission had to be quashed. It would also have to be quashed on the ground of the Council failure to consult English Heritage under Circular 01/01 in respect of the fact that the proposed development affected the setting of a Grade I or Grade II* listed building; for the decision was finely balanced, as demonstrated by the voting figures. As there would be an effect on the setting of a significant number of listed buildings and, in those circumstances, it was possible that a response from English Heritage might have meant a different decision.

MATERIAL CONSIDERATIONS

R (Copeland) v Tower Hamlets London Borough Council [2010] EWHC 1845 (Admin)

13. The issue of what constitutes a “material consideration” took a new turn when the issue of health policy was so found by Mr Justice Cranston. There, the claimant, Mr Copeland, applied for judicial review of the Council’s decision to grant planning permission for the change of use of premises from a grocery use to a hot food takeaway use. The general vicinity of the premises was residential and in its immediate vicinity was a secondary school. The school had in place a healthy living programme. Mr Copeland, who lived opposite the premises opposed the application on the grounds that it was contrary to the healthy eating programme being promoted at the school. He relied on a planning policy of a different London local authority that restricted the development of takeaways in the vicinity of schools and Government statements on healthy eating. The planning committee granted conditional planning permission for the change of use of the premises. However, the judge found that promoting social objectives could be a material consideration in the context of planning law and planning controls. Further it was clear that the “human factor” could fall to be considered in exceptional cases as part of land use. Here, the planning officer had given a clear direction to the planning committee that points about the proximity of the premises to
the school were not to be taken into account in considering the appropriateness of a grant of planning permission as they were not material considerations. In the circumstances it was apparent that that erroneous advice could have influenced the planning committee in reaching its decision. Accordingly it was appropriate to declare that the Council had acted unlawfully by failing to have regard, as a material consideration, to the proximity of the school to the premises in granting planning permission for a change of use. If the committee had been properly directed they might have reached a different decision. Therefore, the permission would be quashed.

ENVIRONMENTAL IMPACT ASSESSMENT

The last twelve months have produced a number of important cases which highlight the increasingly blurred boundary between planning and environmental law. This is most clearly seen in relation to environmental impact assessment. For a regime that was intended to catch only but a few development projects each year, it has proved to be particularly troublesome. Whilst in the early years it appeared that the domestic courts were inclined to be generous towards local planning authorities in relation to breaches of the relevant regulations, that no longer remains the case. What follows is just a sample of some of the more significant decisions of the last twelve months which serve to illustrate this point. They also illustrate they potency of third parties to derail development projects. It is possible that some of the proposed legislative changes in the Localism Bill such as the statutory duty to consult may provide further fertile grounds for objectors.

Screening opinions

R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157

14. The Court of Appeal was faced with a judicial review of a planning permission for the extension of a grain storage and handling facility in Cambridgeshire following a negative screening opinion. Camgrain is an agricultural co-operative and between 2008 and 2009 it constructed a new storage facility of 12 silos to handle 90,000 tons of grain. It proved to be very successful and by early 2009 Camgrain developed plans to expand the store to handle 300,000 tons of grain. This involved 60 additional silos, 6 additional holding bins and 4 additional bulk bins. They applied to the local planning authority for a screening opinion. On 17 April 2009 the Council’s planning officer provided a screening opinion that EIA was not required. Planning permission was subsequently granted. The Claimants challenged the grant of planning permission. They argued that the screening opinion should be quashed because it was illogical and irrational and did not contain sufficient reasoning to satisfy the requirements of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 and Directive 85/337/EEC. The substance of the argument was that the planning officer had failed to demonstrate that she had considered the likely effect of the development in terms of traffic movements, the landscape and noise, or if she had, to explain why an EIA was not required in this case. Lord Justice Moore-Bick recognised that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment hence the term “screening opinion”. Having said that, however, he then held that it was clear from the Mellor case (R (Mellor) v Secretary of State for Communities and Local Government [2010] Env LR 18) that when adopting a screening opinion the planning authority must provide sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision. Whilst the planning officer’s
decision in this case was carefully and conscientiously considered, and was based on information that was both sufficient and accurate, the reasons given did not make sufficiently clear why the planning officer reached the conclusion that an EIA was not required in this case. Lord Justice Jackson concurred but Lord Justice Mummery dissented. As to the correct relief, the Court of Appeal recognised that the adoption of a screening opinion, if one is required, is part of a process that leads eventually to the grant or refusal of planning permission. If any step in that process is legally flawed, the process as a whole is flawed and the grant of planning permission must be quashed.

Screening opinions and misleading information

*R (Friends of Basildon Golf Course) v Basildon District Council and Basildon Golf Centre* 2010

**15.** The Court of Appeal was faced with the not unusual circumstance of when a planning permission had been granted for development at a golf course which involved the importation of large quantities of waste. The unusual feature here was what waste that was to be imported. This case also highlighted a couple of other interesting points. First, it drew attention to the often blurred boundary between what are “county” matters and what remain within the normal development control authority’s remit. In this instance the planning officer’s decision that it was not a county matter was looked at over a period of time and that his view that it was not “sort of unfolded”. Lord Justice Pill noted this but declined to rule that this was wrong; but he also noted Ministerial concern that some developments similar to this one could circumvent the normal waste regime. Secondly, he expressed doubt as to the correctness of the decision of the then Mr Justice Richards in *R (Fernback) v Harrow LBC* [2002] Env LR 10 (reviewing regn. 7 of the 1999 Regulations. It should also be noted that the Court of appeal (currently unreported) has reversed the decision of HH Judge Alice Robinson in *Mageen v Secretary of State for Communities and Local Government* [2010] EWHC 2652 (Admin), a case not cited in the Basildon judgments. There, the judge confirmed that a negative screening opinion could be referred back to the SSCLG if there was a change in circumstances which “could” rather than “would” lead to a different conclusion on screening. Here, the subsequent designation of a World Heritage Site was such a change in circumstances. This led to the quashing of a permission for a wind turbine in Cornwall although the screening opinion had been given 6 years earlier), that there is no power to adopt a further screening opinion in the absence of a request from the proposed developer, and, that any request must be made within three weeks or an agreed longer period where, as here, the proposal was not being treated as “EIA development”. The main factual point of this case was that the amount of waste to be imported was grossly understated (less than 50,000 tonnes per year as against 156,000 tonnes per year) in the screening 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 excessive bunds was not mentioned or considered in the screening opinion. The planning officer’s consideration of the impact of the development was legally inadequate and the planning permission had to be quashed.

**PLANNING CONDITIONS**

*Avon Estates Limited v Welsh Ministers* [2011] EWCA Civ 553
16. This subject matter is, once again, the subject of further case law, from the Court of Appeal. In the issue was a seasonal use condition that formed part of a planning permission granted for the temporary erection of holiday bungalows. Between 1964 and 1973 planning permissions had been granted for the erection of many holiday bungalows on the appellant’s land. In each case there was a condition that the permission would expire and the site had to be restored to its former use by a specified date, and also conditions that the bungalows would be maintained to the satisfaction of the planning authority until the specified date, and that they would be occupied for only part of each year. In fact they remained in existence long after the specified date and no enforcement action had been taken to secure their removal and the restoration of the site to its former use. By 2009 the bungalows were immune from enforcement action. So Avon sought lawful development certificates of the existing use. As a result of a non-determination appeal, an inspector had found that the seasonal use condition in each permission had not been breached and so it remained extant. Thus, while he allowed the appeal, the LDCs that he granted were subject to the seasonal use condition. The judge had concluded that the seasonal use condition was intended to continue after the expiry of the permission. Allowing Avon’s appeal, the Court of Appeal held that it was very difficult to conceive of a condition on a temporary permission which could sensibly relate to a development once that development had ceased to be authorised by the permission. Such enduring conditions would, to be lawful, still have to relate fairly and reasonably to the permitted development, which was to be seen as a temporary development. Although such enduring conditions might not be impossible, it was very unlikely that the statutory scheme allowed for what could be described as a permanent condition on a temporary permission, other than the time limit condition itself. It was also significant that Parliament had found it necessary to make special express provision for the situation where conditions were often required to apply after the authorisation of the permitted development had expired, such as in the case of mineral extraction.

Hulme v Secretary of State for Communities and Local Government ("Hulme 2") [2011] EWCA Civ 638.

17. This case concerned another challenge to the hard-fought Den Brook Windfarm permission, close to Dartmoor, the recent subject of a BBC2 documentary on Friday nights. It concerned the lawfulness of a scheme of noise conditions imposed to protect the local residents, hopefully, from the adverse effects of the phenomenon of Amplitude Modulation or “blade swish”, were sufficiently precise to be enforceable. Upholding the decision at first instance, the Court of Appeal held that the conditions had to be read in the context of the decision as a whole, that they should be interpreted benevolently and not narrowly or strictly, and, that there is no room for an implied condition. Here, the inspector had regarded conditions to regulate excessive noise as fundamental to the grant of planning permission and clearly envisaged that the conditions would assist the LPA with enforcement should that be necessary. Under the noise conditions, the objective of the scheme was to provide a method of assessment of noise so as to ensure that it was contained within acceptable levels. The conditions imposed could be given a sensible and ascertainable meaning and the obligations were capable of enforcement by the LPA.

Planning permission: revocation

Heath & Safety Executive v Wolverhampton City Council & Victoria Hall Limited [2010] EWCA Civ 892
18. Finally, the issue of revocation of a planning permission under section 97 of the 1990 Act came before the Court of Appeal. The LPA had granted the interested party, VHL, planning permission for the erection of four blocks of student accommodation close to a liquefied petroleum gas facility. The HSE had advised the LPA that permission should not be granted on safety grounds. However, by the time the HSE had learned that permission had been granted, three out of the four blocks were almost complete. The HSE had asked the LPA to issue an order under section 97 to revoke or modify planning permission to develop the land but it had refused. In judicial review proceedings, brought seven months after the grant of the planning permission, the judge had granted the relief sought but had dismissed the challenge in relation to the LPA’s decision not to revoke or modify the permission. The judge gave four reasons for that decision: (i) impossibility, as three of the blocks had already been completed; (ii) inappropriateness, as the planning permission was not being quashed; (iii) that VHL would have probably been put out of business even if compensation was eventually payable; (iv) that the HSE’s failure to take immediate action showed that the safety risk could not be regarded as immediate. The Court held that, with the possible exception of (iv), the reasons given by the judge would have been compelling reasons for the LPA to decide not merely that it should not, but that it could not, lawfully exercise its powers under section 97. However, they did not justify the LPA’s failure to consider the exercise of its section 97 powers so as to prevent the construction of the fourth block, Block D. As the LPA had not considered whether to make an order in respect of Block D alone, accordingly, the judge, because of the LPA’s failings, had rejected the HSE’s challenge on the false premise that revocation had been sought in relation to the entire permission. Furthermore, it was not necessarily inappropriate to modify the permission merely to ensure that the construction of Block D could not lawfully commence. In any event, VHL had made it clear that it had no intention of constructing Block D until market conditions improved and that it would not be put out of business if the permission was revoked in respect of Block D. In addition, the HSE had been entitled to proceed on the basis that the LPA would act with a sense of urgency. For those reasons, the judge had been persuaded to refuse relief on a false premise. Accordingly, his decision was quashed and the LPA was ordered to reconsider whether it should exercise its powers under section 97 in relation to Block D.

The case is also of interest concerning the HSE’s argument that the LPA was not entitled to take into account its liability to pay compensation, following the decision of Mr Justice Richards in the Alnwick case (Alnwick DC v Secretary of State for the Environment, Transport and the Regions (2000) 79 P & CR 130 QBD). However, the majority of the Court (Longmore and Sullivan LJJ) agreed (Pill LJ dissenting) with Mr Justice Ouseley’s conclusion in the recent Usk case (R (on the application of Usk Valley Conservation Group) v Brecon Beacons National Park Authority (2010) EWHC 71 (Admin) that Alnwick was wrongly decided on that issue and should not be followed. Parliament’s intentions in enacting the 1990 Act were to be ascertained by considering the Act as a whole. Decisions under section 97 (and section 102) were not taken in a vacuum; they were taken within a statutory framework which required compensation to be paid if orders were made under those sections. In that statutory context, the obligation to have regard to the development plan and other material planning considerations in section 97(2) (and section102(1)) should not be construed as though it was a prohibition upon having regard to the provisions relating to compensation in sections 107 and 115 of the Act. Lord Justice Pill, on the other hand, took the view that Alnwick was correct in saying that the planning authority was not entitled to take into account the fact that compensation would be payable to the landowner. The material considerations to be taken into account in making a decision under section 97 did not include the effect on the local authority’s finances of a decision to revoke. Planning decisions had to be taken on planning grounds (See also Bond v Dorset County Council [2010] UKUT 364 (LC) where George Bartlett QC reminds that s.107 of the 1990 Act that the loss...
of the prospect of renewal had to be directly attributable to the revocation or modification of
the planning permission).

**Enforcement**

*Gazelle Properties Limited v Bath and North Somerset Council* [2010] EWHC 3127 (Admin)

19. The claimants had applied for judicial review of a the LPA’s decision to issue enforcement
notices against an alleged change of use and certain operational development on that land on
the basis that it was not expedient. The land was in the green belt and close to AONB and used
for a variety of uses including waste recycling within Class B2. The issue arose over the extent of
lawful use with the landowner claiming that it was more extensive than the LPA was prepared to
accept. The LPA then took advice from two experienced counsel who advised respectively that it
would be “wholly inappropriate” and “inexpedient” to take enforcement action. Holding that the
preclusive provisions of the TCPA 1990 did not apply to this type of claim, the Judge, Mr Justice
Lindblom, held that the failure of the Committee members to have any regard to the
negotiations and discussions which had taken place as to the future use of the site and the stage
that those discussions had reached was material to the decision as to whether it was
“expedient” to take enforcement action. The committee’s failure was a basic and fatal error
which attracted relief in a claim for judicial review. Accordingly, the decision was quashed.

**Injunctions**

*Broadland District Council v Trott* [2011] EWCA Civ 301

20. Again before the Court of Appeal, the same Council a few months later fared less well. An
injunction had been granted restraining a developer from preventing certain and on a housing
development being made available for the enjoyment of residents, as required by the planning
permission. The permission, granted at appeal, was subject to a condition, with which Mr Trott
failed to comply, that no development should begin until a landscaping scheme had been
submitted and approved. As part of the landscaping scheme Mr Trott proposed that part of the
development site should be fenced off and planted with trees with a view to it being a secluded
garden for residents of the new flats. The Council then served an enforcement notice alleging
that the land had been enclosed within the boundary of the house, depriving the flats of amenity
land, and required certain alterations to boundary features which, subject a variation of the
wording, had been upheld at appeal. At first instance, the Council had obtained its injunction
upon the basis that Mr Trott's expressed intention had been to make the land available to the
residents, so an injunction would not be an unjustified interference with Mr Trott's rights as
owner. Furthermore, his persistent non-compliance made it just and equitable to grant an
injunction. However, before the Court of Appeal, the nature of the breach of planning control
was more carefully scrutinized. Because the Council had not suggested that there had been a
breach of planning control within s. 171A(1)[a] (i.e. carrying out development requiring
permission) it had had to establish that Mr Trott's failure to make land available for the
enjoyment of the flats' residents had been a failure to comply with a condition subject to which
permission had been granted. However, since the condition did not require that the land be
made available for the enjoyment of the residents of the flats there was no failure to comply
with that condition; and therefore no breach of planning control to be restrained by way of
injunction under section 187B.
21. On the other hand, here the Court of appeal took the view that the grant of a permanent injunction had been right. The LPA sought the continuance on a permanent basis of an interim injunction prohibiting the first defendant, or anyone else, from using certain premises for commercial or non-residential activities. The premises, a large London property with over 110 rooms, were owned by a company but occupied, although not permanently, by Mr Davenport. Planning permission had previously been granted for use of the premises for diplomatic purposes subject to a condition that, upon ceasing such use, they should not be used for any other purpose than residential use or other previously approved purpose. Subsequently, a number of changes of use were identified by the LPA including use of the property as a venue for filming, parties with dinner and music, a nightclub, exhibitions and a fashion show. In June 2006 an enforcement notice had been issued. In January 2010, following complaints from residents that commercial activities were continuing at the property, giving rise to noise and disturbance, the local authority sought and was granted an interim injunction. Mr Davenport had not appealed that injunction but had subsequently sought its discharge. He also submitted that the enforcement notice was a nullity and that no actual or apprehended breach of planning control had been correctly identified or properly assessed by the LPA, arguing that the effect of hiring out of one’s home, or part of it, could be consistent with and ancillary to ordinary residential use, and that the property had always been used as a large grand London town carrying on the tradition of offering entertainment and impressing guests. The LPA contended the various planning assessments or conclusions contained in the enforcement notice were not now capable of challenge. Granting a permanent injunction at first instance, Mr Justice Eady had reminded that the duty of the landowner arising from a planning enforcement notice was perfectly clear: if the notice had not been quashed, he had to obey it. Before the Court of Appeal, the appellant’s contentions that the enforcement notice was a nullity and that reliance on the terms of a condition of a 1960 permission rendered the notice unenforceable failed again. However, the Court went on to point out that the enforcement notice was not a prerequisite of an injunction and the nature of the objections to the notice was such that the granting of an injunction was appropriate even if the notice had been a nullity.