



EDITORIAL COMMENT

The Editorial Board

Welcome to this edition of the newsletter, which we hope will provide a little bit of light reading somewhere far from your desk. Variety is very much the flavour. First, regular contributor John Pugh-Smith takes a look at the recent case of *R (Khodari) v Kensington and Chelsea RBC [2017] EWCA Civ 333* and discusses the scope of Section 106s. Second, William Norris QC provides us with his insight into a significant wind energy scheme north of the border. Third, Richard Wald discusses the ins and outs of President Trump's withdrawal of the US from the Paris Agreement. Finally, recorded for posterity, is a short case note on Hopkins Homes.

We hope that you have a great summer.

THE SCOPE OF SECTION 106S: RE-STATING THE OBVIOUS?

John Pugh-Smith

With the desire to achieve truly "sustainable development" as well as reducing unwanted congestion to the roads and controlled parking zones affected Planning Authorities, especially within London, have tried to achieve new "car-free" residential developments. Both through the absence of dedicated parking areas but also, through section 106 obligations, they have sought to prohibit applications for parking permits not just for first occupations but also for subsequent owners and occupiers.

In the recent case of *R (Khodari) v Kensington and*

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Chelsea RBC [2017] EWCA Civ 333, a judicial review claim was brought by a disgruntled lessee of an existing flatted building, who would be dispossessed if the permitted re-development proceeded, over the legality of this prohibition. At first instance the claim succeeded and the related permission was quashed. However, giving judgment on 11th May 2017, the Court of Appeal reversed that decision and, in so doing, has clarified the position. In essence, the Court decided that Section 106 of the Town and Country Planning Act 1990 could not be used to prevent occupants from applying for car-parking permits. However, this restriction was legally enforceable under the ambit of Section 16 of the Greater London Council (General Powers) Act 1974.

Brief facts

The consolidated challenges concerned two consents. The first permission, granted in March 2015, allowed the developer to convert 31 Egerton Gardens, Knightsbridge from five flats to eight through internal works only. Due to parking pressure in the area, RBKC had required the developer, Cedar Park Holdings plc, to enter an obligation that future occupiers of the additional units would not apply for a parking permit and required the developer to pay a one-off monitoring fee designed to enable RBKC to 'police' the obligation. The second, alternative, permission, granted in June 2016, allowed the developer to reconfigure the building from five flats in their existing form to five flats of different sizes. However, since there was no increase in the number of units no obligations about parking were involved. In both instances, Mr and Mrs Khodari would have to vacate their flat under a re-development break clause.

In respect of the parking obligation the references in Section 106 to "the land" had to mean land in which the person making the agreement was interested. "The land" in question could be land other than that covered by the permission, provided that there was a direct relationship between the two; but the person entering into the Section 106 agreement still had to have an interest in that land. In the instant case, the only land identified was the building itself. The use which the local authority sought to prevent was not use of any particular flat in the building, but use of the highway for parking. That was not use of the property. The imposition of a covenant in any lease of a flat took the case no further because the subject-matter of the covenant was not the use of the

flat. Accordingly, the parking obligation was not capable of being a planning obligation under Section 106. In this regard, the Court of Appeal has confirmed the legal position provided by the High Court in *Westminster City Council v SSCLG [2013] EWHC 690 (Admin)*.

However, following its normal practice, RBKC had also included a declaration that the planning agreement was also being made under Section 16 of the Greater London Council (General Powers) Act 1974. Under Section 16 an agreement had to be made "in connection with the land". It was therefore not a requirement that the agreement regulated the use of the land itself. "In connection with" had a wide meaning. Here, there was a "connection" between the use of the three additional units for residential purposes and the potential for the grant of additional parking permits, not least because qualification for a parking permit was residence within the borough. There was therefore a sufficient connection between the requirements imposed by the deed and the proposed development.

Regarding the obligation to pay a monitoring fee, it was a one-off payment to be made on execution of the deed. There was no question of it being enforced against successors in title. In a sense, s.106 was irrelevant. As section 106(1)(d) expressly authorised an obligation requiring a sum to be paid to a local authority, the obligation to pay the monitoring fee fell within the literal scope of the section. That potentially brought into play Regn. 122 of the Community Infrastructure Regulations 2010 which provides that a planning obligation may "only constitute a reason for granting planning permission" if it satisfied certain tests. The first question had to be whether an agreement to pay the monitoring fee was a reason for granting permission. The formal recommendation for permission did not mention the fee, nor was it mentioned in the committee debate adopting the recommendation. The payment was therefore not a reason for granting the permission and Regn. 22 did not present an obstacle to it. That obligation was valid.

Comment

While this judgment brings some clarity to these issues it does so in a rather unsatisfactory way given that obligations made under section 16 of the 1974 Act will avoid the legal test, now enshrined in Regn. 122, namely that obligations must be necessary, fair and reasonable

if they are to constitute a reason for granting planning permission. It also still leaves open the prospect that such obligations are likely to be invalid and unenforceable outside the London Boroughs where the 1974 Act does not apply. In other cases, the validity of the monitoring fee may also require further scrutiny, depending on how that issue is treated in the officer report and committee debate.

The case is yet another reminder that planning officers should not be allowed to use Section 106 agreements as the 'dumping ground' for a variety of policy attractive but potentially unlawful requirements. Equally the developer, desperate for his decision notice, should be slower to sign up to them without taking expert legal advice.

The Other Issue

Before the High Court (Judge Sycamore QC), Mr Khodari's separate challenge that RBKC had failed, on both permissions, to consider that the building was, or should have been identified as, an undesignated heritage asset, and that the development would destroy important interior features. The Court of Appeal upheld that aspect of the judgment, observing that whether an asset satisfied the definition of "heritage asset" was a matter of planning judgment. Here, the heritage significance of the building and the potential loss of internal features had been at the forefront of the planning committee's decisions so the challenge failed on the facts.

However, giving the lead judgment, Lord Justice Lewison tantalisingly remarked (at para. 21):

"I would accept that the loss of internal features is capable of being a material consideration even though those features could be removed without the need for planning permission where that loss is an integral part of development that does not require permission."

Applying that logic it could follow that views of the interior (for example, in twilight without curtains being drawn of internal features like plasterwork, fireplaces, even certain fixed light fittings such as chandeliers) could become relevant, particularly where an unlisted building within a conservation area is being remodelled. At least on the outworking of this aspect of Khodari's unsuccessful challenges we will need to await further clarification, and, perhaps from a differently constituted Court of Appeal?

SOUTH KYLE WIND FARM: SCOTTISH MINISTERS GIVE CONSENT

William Norris QC

On 30th June 2017 the Scottish Ministers notified Vattenfall Wind Power that it had succeeded in its application for consent under s. 36 of the Electricity Act 1986 (and deemed planning permission) in respect of a 50 turbine development (170 MW capacity) in SW Scotland, near Dalmellington and New Cumnock. The proposed development affected two local Planning Authorities, East Ayrshire (which opposed the scheme) and Dumfries and Galloway (which, subject to Conditions, did not).

The PLI took place in December 2015. The proposed development was for an area with an interesting industrial and rural history. It had once been a centre of mining (and still bore the physical scars of that industry) and had enjoyed considerable industrial prosperity but was now seeking to re-establish itself as an area for tourism. As is so often the case, some local people and interests were supportive of the scheme and others were strongly opposed to it. Nevertheless, it was to the credit of all participants (and the Reporters, David Buylia and Robert Seaton) that the debate at the Inquiry, though fierce at times, was constructive and conducted with courtesy and co-operation on all sides.

The issues were typical of such inquiries involving (amongst other things) planning policy, landscape and visual impact, aviation including MOD and Search and Rescue (dealt with by conditions), tourism and so forth. An unusual objection came from the Scottish Dark Sky Observatory (SDSO), sited within the Craiggengillan Estate (also an objector to the scheme), which expressed a concern that the presence of the turbines might discourage visitors and that the lighting associated with construction and any turbine lighting thereafter might reduce the appeal and impede the practical operation of the SDSO.

All adverse effects were held to be too limited to be significant and/or not so serious as to outweigh the benefits of the scheme in terms of sustainable development and renewable energy policy. To that extent, there are few general lessons that can be learnt from the case except that, to succeed in such an application, you need a good project in the right place

and must be scrupulous in consulting thoroughly and in paying proper attention to all opponents whatever you may feel about the merits, substance or manner of their objection. It must always be borne in mind that such projects inevitably provoke strong feelings and those should always be respected.

What may be of wider interest is to see how Scottish Ministers dealt with the Applicant's proposed scheme for community ownership about which some evidence was provided before, during and after the Inquiry.

The Applicant had proposed payment of community benefits of £5,000 per MW to a community partnership and a community shared ownership scheme. That payments into a community fund ('community benefits') do not constitute a material planning consideration was not an issue. The only question of interest is whether a community ownership scheme, in respect of which there is existing guidance from Scottish Ministers, should be treated any differently.

This legal issue has not yet been resolved definitively. The distinction between something which is relevant and important and constitutes a 'material consideration' in law and something equally relevant and important but does not may strike many (particularly non-planners) as somewhat esoteric. Here, however, I shall do little more than record the contrasting approaches of the Reporters and that of the Scottish Ministers, adding the comment that, regardless of whether the question of community benefits/ownership are to be regarded as a material consideration as a matter of law (albeit with arguments as to the weight to be given thereto) they are surely material in practice to local communities, particularly those in relatively deprived areas such as were the focus of this case. Indeed, it is readily understandable that a community might value payments or a source of income which enabled them (say) to keep a village hall open which would otherwise have to close or might fall into disrepair, regarding the temporary (25 years) effect of the scheme on the local landscape as a price worth paying.

The following paragraphs of the Report summarise how the case was put and how the Reporters addressed the issue:

4.77 *Turning finally to the issue of community shared-*

ownership, the applicant's initial proposals were set out in its hearing statement⁶⁸. This committed it to working with the community to implement an offer of shared ownership in the South Kyle project. The applicant suggests that one source of funding for this could be the community development money that it has agreed to pay. The applicant states that the revenue generated by community ownership of part of the development would deliver an on-going revenue stream for the community to spend on local projects for the life of the wind farm and beyond.

4.78 *After the inquiry closed we permitted the applicant to submit further information on how the shared ownership offer could work⁶⁹. This confirmed that the applicant's preferred model for the shared-ownership scheme would be that described in the **Scottish Government Good Practice Principles for Shared Ownership of Onshore Renewable Energy Developments** (the good practice principles) as the "shared revenue model". It regards this as both commercially viable and also likely to maximise the potential for community participation. The applicant considers that it would be appropriate to offer the community the ability to acquire up to 5% of the project. The applicant did stress that if the community preferred a different approach, it would consider that.*

4.79 *In response to these additional thoughts on the matter, the SDSO and Craigengillan Estate responded that there remained no certainty that the applicant's stated commitment to community shared-ownership would actually deliver any significant benefit. Concern was also expressed that the applicant had not consulted widely within the community over its intentions. The council's view is that, as with the proposed community benefit payment, an offer of community ownership should not be treated as a material consideration.*

4.80 *We conclude that, in accordance with section 5 of the good practice principles, the applicant's offer to allow the community to obtain a share of the proposed development is a matter to which we must have regard. A distinction is made in that document between community shared-ownership proposals and offers simply to pay a sum of money to the community. The good practice principles*

document confirms that shared ownership should become the norm in renewable energy projects in the future and NPF3 states that local and community ownership and small-scale generation can have a lasting impact on rural Scotland, building business and community resilience and providing alternative sources of income.

4.81 *We agree that, at this stage there is no certainty that the community shared ownership offer will be delivered and that discussions with potential partners are at an early stage. Therefore, in accordance with the good practice principles, we have given less weight to the applicant's intention to commit to a shared-ownership arrangement than if it had identified a specific partner.*

Scottish Ministers, however, took a different view. Again, I shall simply quote the relevant section of the decision letter.

Scottish Ministers have considered the information provided by the Company regarding their aspirations to provide a community shared ownership offer and find it is not sufficient to determine the net benefit that this might bring to the economic position of the area. Scottish Ministers therefore disagree with the Reporters' view that the Company's offer to allow the community to obtain a share of the development is a matter to which they and Scottish Ministers should have regard. Scottish Ministers do not accept the Reporters' conclusion at paragraph 4.80 and have not taken this into account in their determination of this application.

William Norris QC, instructed by Peter Nesbit and assisted by Kirsty Morris of Eversheds, appeared for the Applicant at the Public Inquiry.

CLIMATE CHANGE: WE'LL ALWAYS HAVE PARIS

Richard Wald

In December 2015 194 countries, including the world's two biggest polluters, China and the US (responsible for 30% and 15% of the world's CO2 emissions respectively), signed the Paris Agreement on Climate Change. The Agreement, which aimed to limit increase in global average temperatures to "well below 2°C above pre-industrial levels" was widely hailed as a landmark international deal capable of reducing the risks and impacts of climate change.

On June 1, US President Donald Trump announced that the US would withdraw from the Paris Agreement.

Article 28.1 of the Paris Agreement

According to Article 28.1 such action is possible both as matter of international and US law. Article 28.1 allows a party to withdraw by giving one year's written notice to the UN Secretary General, commencing three years after the Paris Agreement's entry into force, which was 4 November 2016. The soonest possible US notice of withdrawal under Article 28.1 will therefore be 4 November 2019 which would result in withdrawal a year later on 4 November 2020, which happens to be the day after the next US Presidential election.

Withdrawal from the UNFCCC

If President Trump has any doubts about his ability to win re-election, he may wish to consider swifter methods of withdrawal from the Paris Agreement. One such method would be to withdraw from its parent agreement, the United Nations Framework Convention on Climate Change ("UNFCCC") Article 25.1 of which allows parties to withdraw from the Convention by giving one year's notice. Article 28.3 of the Paris Agreement makes plain that "any party that withdraws from the Convention shall be considered as also having withdrawn from this Agreement." This means that President Trump could withdraw the US from the Paris Agreement in only a year.

One possible complication of this swifter course of action lies in the fact that whilst the Paris Agreement was accepted by President Obama under his executive authority, the UNFCCC was ratified by President George H.W. Bush after receiving the consent of the US Senate

under Article II of the US Constitution. The consequence of this is that there is at least an argument that President Trump would require the consent of the Senate because of the principle in US constitutional law that termination of a law requires action by the same institutional actors that adopted it. In practice, however it is most unlikely that the legality of a decision by the president to withdraw from the UNFCCC could be successfully challenged. The issue arose in the late 1970's when President Carter unilaterally terminated the Sino-American Mutual Defence Treaty with the Republic of China (Taiwan) when he decided to recognise the People's Republic of China. Several Senators challenged President Carter's action on the basis that it required Senate approval but the Supreme Court (in *Goldwater v Carter*, 444 U.S. 996 (1979)) dismissed the complaint.

Effect of US Withdrawal on the Paris Agreement

According to its Article 21.1 entry into force of the Paris Agreement requires acceptance by 55 countries representing 55 percent of total global greenhouse emissions. However, withdrawal of the US from the Agreement would not alter this because as Article 55 of the Vienna Convention on the Law of Treaties states: "a multilateral treaty does not terminate by reason only of the fact that the number of parties falls below the number necessary for entry into force."

Of greater concern are the political and climate change consequences of US withdrawal, and in particular that other governments will follow the US' lead. Early indications, however, suggest that the contrary is the case.

Former President Obama was quick to criticize his successor and at the same time to seek to reassure those concerned by the implications of the announcement on global climate change by expressing confidence that "... our states, cities, and businesses will step up and do even more to lead the way, and help protect for future generations the one planet we've got."

There are reasons to suppose that this optimism was well placed. Numerous US business leaders, city mayors and states have reaffirmed their commitment to levels of emission reductions enshrined in the Paris Agreement raising the possibility that the national effect of withdrawal could be offset but continuing efforts at

combating climate change at corporate, city and state levels. On 7 June Hawaii became the first state to pass a law committing itself to the terms of the Paris Agreement, and on 6 July Governor of California Jerry Brown announced his state's own climate change conference to take place in San Francisco in 2018.

Closer to home, there are similar indications that combating the effects of climate change remains a priority. In Europe via a communiqué on 27 May, the governments of France, the UK, Japan, Italy, Germany and Canada as well as the presidents of the European Council and the European Commission reaffirmed "their strong commitment to swiftly implement the Paris Agreement" with similar commitments made in Hamburg on 8 July by all G20 countries except the US. And a number of recent cases in the UK serve to illustrate how seriously the domestic courts are taking climate change issues such as in relation to air quality (see e.g. *R(ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 and *ClientEarth v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin)).

A report published by the UN Environment Program in May and entitled 'The Status of Climate Change Litigation' suggests that the UK courts are not alone. Examples of climate change litigation used to be few and far between. But as the report describes these have proliferated recently and the US has taken a clear lead with 654 climate change cases filed as of March 2017, ahead of Australia in second position with 80 and then the UK with 49. According to the Renewables 2017 Global Status Report published by the Renewable Energy Policy Network for the 21st Century (REN21) in June, the world is now, for the first time, adding more green energy capacity each year than it adds in new capacity from all fossil fuels combined.

For those concerned about the effects of climate change, President Trump's announcement cannot be seen as good news. But whether viewed from the perspective of governments at the local or national level, the courts and the cases brought to them or the private sector, there seems to be some truth in the UN's observation that the "renewables train has already left the station" and therefore that the Paris Agreement will survive the departure of the US.

CASE NOTE: HOPKINS, RICHBOROUGH AND HOUSING SUPPLY

Jonathan Darby

On 10 May 2017, the Supreme Court gave its long awaited judgment in *Suffolk Coastal DC v Hopkins Homes & SSCLG and Richborough Estates v Cheshire East BC & SSCLG* [2017] UKSC 37 on the meaning of the phrase “relevant policies for the supply of housing” in NPPF, para 49.

It will be recalled that NPPF, para 49 is in the following terms:

“Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.”

The issue before the Supreme Court was whether NPPF, para 49 should have a narrow construction, e.g. only covering policies that are specifically concerned with the supply of housing. Or, should NPPF, para 49 have a wide construction, e.g. any policy that has an effect on the supply of housing.

The Supreme Court held in favour of the narrow construction.

However, the Court also went further and Lord Carnworth stated as follows, at para 59:

“This may be regarded as adopting the ‘narrow’ meaning, contrary to the conclusion of the Court of Appeal. However, this should not be seen as leading, as the lower courts seem to have thought, to the need for a legalistic exercise to decide whether individual policies do or do not come within the expression. The important question is not how to define individual policies, but whether the result is a five-year supply in accordance with the objectives set by paragraph 47. If there is a failure in that respect, it matters not whether the failure is because of the inadequacies of the policies specifically concerned with housing provision, or because of the over-restrictive nature of other non-housing policies. The shortfall is enough to trigger the operation of the second part of paragraph 14. As the Court of Appeal recognised, it is that paragraph, not paragraph 49,

which provides the substantive advice by reference to which the development plan policies and other material considerations relevant to the application are expected to be assessed.”

The practical effect is that a Council's housing supply remains front and centre, but in the absence of a five year supply it will only be policies for the supply of housing (narrowly interpreted) that will be considered to be ‘out of date’. Other policies that restrict the supply of housing will not be ‘out of date’ but the weight to be given to them will need to be balanced against the need to boost the supply of housing (NPPF, para 47) and the presumption in favour of sustainable development (NPPF, para 14).

At paragraph 86 of the judgment, Lord Gill notes as follows:

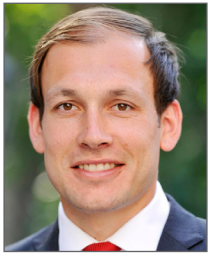
“Paragraph 49 merely prescribes how the relevant policies for the supply of housing are to be treated where the planning authority has failed to deliver the supply. The decision-maker must next turn to the general provisions in the second branch of paragraph 14. That takes as the starting point the presumption in favour of sustainable development, that being the “golden thread” that runs through the Framework in respect of both the drafting of plans and the making of decisions on individual applications. The decision-maker should therefore be disposed to grant the application unless the presumption can be displaced. It can be displaced on only two grounds both of which involve a planning judgment that is critically dependent on the facts. The first is that the adverse impacts of a grant of permission, such as encroachment on the greenbelt, will “significantly and demonstrably” outweigh the benefits of the proposal. Whether the adverse impacts of a grant of permission will have that effect is a matter to be “assessed against the policies in the Framework, taken as a whole”. That clearly implies that the assessment is not confined to environmental or amenity considerations. The second ground is that specific policies in the Framework, such as those described in footnote 9 to the paragraph, indicate that development should be restricted. From the terms of footnote 9 it is reasonably clear that the reference to “specific policies in the Framework” cannot mean only policies originating in the Framework itself. It must also mean the development plan policies to

which the Framework refers. Green belt policies are an obvious example."

The Supreme Court judgment also cautions against the "over-legalisation of the planning process" following the Supreme Court's earlier judgment in *Tesco Stores v Dundee City Council*. In this regard, the Lord Carnworth stated as follows, at paras 25 and 26:

*"25. It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light. Even where there are disputes over interpretation, they may well not be determinative of the outcome. (As will appear, the present can be seen as such a case.) Furthermore, the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly. With the support and guidance of the Planning Inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local. As I observed in the Court of Appeal (*Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692; [2009] PTSR 19, para 43) their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence (see *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49; [2008] 1 AC 678, para 30 per Lady Hale.)*

26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the Tesco case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgement in the application of that policy; and not to elide the two."

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Jonathan's broad practice encompasses all aspects of public and administrative law. His planning, environmental and property practice encompasses inquiries, statutory appeals, judicial review, enforcement proceedings and advisory work. Jonathan is instructed by a wide variety of domestic and international clients, including developers, consultants, local authorities and the Treasury Solicitor. He is listed as one of the top junior planning barristers under 35 in the Planning Magazine Guide to Planning Lawyers. Before coming to the Bar, Jonathan taught at Cambridge University whilst completing a PhD at Queens' College. To view full CV [click here](#).

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Daniel specialises in planning and environmental law and regularly acts in public inquiry, High Court and Court of Appeal proceedings. He is the co-editor of Sweet & Maxwell's Planning Law: Practice and Precedents and a contributory editor of The Environmental Law Encyclopedia. He is also a contributor to Shackleton on the Law of Meetings. Daniel also practices in public, regulatory and competition law, with a particular emphasis on the energy sector. Daniel is a member of the Attorney General's 'C Panel' of Counsel. Before coming to the bar, Daniel completed a PhD at the University of Pennsylvania including an Urban Studies Certificate. To view full CV [click here](#).

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Richard Wald was called to the bar in 1997. He specializes, and is ranked by the main directories, in the following areas of law: Planning, Environmental, Energy, Administrative and Public Law (including Local Government). He edits Thompson's Bulletin of Environmental Law, contributes to Tromans on EIA Law and Practice and Tromans on Nuclear Law and is co-author of Butterworth's Highways Law and Practice. He was appointed to the AG's B-Panel of Junior Counsel to the Crown in 2009 and an Assistant Boundary Commissioner in 2016. Recent and current significant cases include acting for the claimants in the challenge to the 3rd runway at Heathrow, for Natural Resources Wales in its objection to a £1.1 bn extension to the M4 motorway around Newport and for the government in HS2. In May of this year he appeared before the Supreme Court for the appellant in *R(Bancourt) v Secretary of State for Foreign and Commonwealth Office*. To view full CV click [here](#).

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