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ENVIRONMENTAL AND PLANNING LAW – UNEASY BEDFELLOWS?

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Summary

This paper sets out to provide an inevitably selective overview of the environmental law and policy developments in recent years and how, if at all, the planning system can contribute to meeting those objectives, or (if bad decisions are taken) detracting from them. This will involve two main strands of discussion, based on the commonly quoted idea that environmental law and policy range from very large matters ("the stratosphere") to very local concerns ("the street corner").

First, I will consider how the planning system can contribute to modern environmental policy objectives and legal obligations, and how well or badly the NPPF addresses these issues. Sustainable development is not a new concept – Mrs Thatcher was advocating it in the late 1980s and much of the planning guidance cancelled by the NPPF was originally introduced to try and embed sustainable development in the planning system. Planning has a role, either by promoting development which will help to deliver the relevant objectives, or in preventing development which would be the wrong decision. However, the limitations of its role must be realised.

The "golden thread" or touchstone of sustainable development used in the NPPF is not a sensible test for the planning system in itself. Leaving aside extreme instances, it is generally impossible to say with intellectual honesty whether a specific development is "sustainable" or not. Is the adjective "sustainable" used simply to provide environmental respectability for a presumption in favour of development, such as we remember from Circular 22/80? In fact if sustainability were to be applied rigorously as a test then there would be the real prospect of development finding it hits the buffers of environmental limits in matters such as clean air and sustainable water resources.

Secondly, at "street corner" level, I will consider the issue which has been raised in recent cases such as Coventry v. Lawrence and Barr v. Biffa as to whether decisions made under the planning system, or other permitting regimes, should have any effect on restricting the private law rights of those affected by nuisance from those projects. If so, what are the possible implications for the planning system? The issue is likely to become ever more controversial as environmental and sustainability imperatives

dictate the provision of waste, energy and other infrastructure. The planning system is however not geared to resolving the type of dispute which the law of nuisance is there to address.

Introduction

1. Some 20 years ago I presented a paper to this conference on the emerging and exciting subject of environmental law, and its implications for planning lawyers. They were heady days when Mrs Thatcher had seemingly discovered the environment[1] and the Government had just brought out the first ever White Paper devoted to the topic,[2] setting out a comprehensive programme for environmental policy and drawing heavily on the concepts of sustainable development in the Brundtland Report.[3] Furthermore, it was not just policy – the Environmental

[1] In her speech on 27 September 1988 to the Royal Society, Mrs Thatcher raised the three atmospheric pollution issues of the day of greenhouse gases, the discovery of the hole in the ozone layer by the British Antarctic Survey and acid deposition, and said:

"*For generations, we have assumed that the efforts of mankind would leave the fundamental equilibrium of the world's systems and atmosphere stable. But it is possible that with all these enormous changes (population, agricultural, use of fossil fuels) concentrated into such a short period of time, we have unwittingly begun a massive experiment with the system of this planet itself.*" (see http://www.margaretthatcher.org/document/107346).

In her speech to the 1988 Brighton Conservative Party conference, she famously included in the section "Protecting Our World" (between The Economy and Law and Order) the words:

"No generation has a freehold on this earth. All we have is a life tenancy—with a full repairing lease. This Government intends to meet the terms of that lease in full." (see http://www.margaretthatcher.org/document/107352)

She returned even more forcefully to the theme in her speech on 8 November 1989 to the UN General Assembly, inspired it is said by the Ambassador to the UN Sir Crispin Tickell, urging the development of framework conventions on climate change and biodiversity, she concluded poetically with an extract from *Paradise Lost* and the thought that:

"We are not the lords, we are the Lord's creatures, the trustees of this planet, charged today with preserving life itself—preserving life with all its mystery and all its wonder." (see http://www.margaretthatcher.org/document/107817).

See also Iain Murray, *Margaret Thatcher: A Free Market Environmentalist* (PERC Reports, Vol 22 No. 4, Winter 2004) giving a broader and more nuanced perspective: http://www.perc.org/articles/article506.php.

[2] "*This Common Inheritance: Britain's Environmental Strategy"* (Cm 1200, September 1990).

[3] Produced by the World Commission on Environment and Development under Gro Harlem Brundtland, then Prime Minister of Norway, at the invitation of the Secretary General of the UN, and often known by its title, "*Our Common Future*", with its famous definition:

Protection Act 1990 had provided the UK with what appeared to be modern environmental legislation, to replace the Victoriana which had previously largely constituted our "pollution control" laws.

2. In fact Mrs Thatcher, speaking to the UN General Assembly in 1989, as well as announcing the investment in the science of predicting climate change which would lead to the UK becoming a world leader in that field, encapsulated the principles of sustainable development in a way remarkably similar to, yet more engagingly and clearly worded, than the drafts-persons of the National Planning Policy Framework would achieve 22 years later:[4]

> "Britain has some of the leading experts in this field and I am pleased to be able to tell you that the United Kingdom will be establishing a new centre for the prediction of climate change, which will lead the effort to improve our prophetic capacity.
>
> "It will also provide the advanced computing facilities that scientists need. And it will be open to experts from all over the world, especially from the developing countries, who can come to the United Kingdom and contribute to this vital work.
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> "But as well as the science, we need to get the economics right. That means first we must have continued economic growth in order to generate the wealth required to pay for the protection of the environment. But it must be growth which does not plunder the planet today and leave our children to deal with the consequences tomorrow.
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> "And second, we must resist the simplistic tendency to blame modern multinational industry for the damage which is being done to the environment. Far from being the villains, it is on them that we rely to do the research and find the solutions."

3. The conundrum identified by Mrs Thatcher still lies at the heart of the debate over sustainable development re-ignited by the draft NPPF. It is therefore an opportune time to revisit how environmental law and policy have developed since 1990 and whether matters have become any clearer in terms of the tensions which I discussed at that time.

4. In considering the topic the focus is often from a planning lawyer's point of view on how the growth of environmental law and its various regulatory manifestations impact on planning. To what extent should the planning decision makers leave environmental regulation to the environmental regulators, and what role remains for planning? These are important questions which are discussed by Greg Jones QC in his paper at this Conference. My focus is a somewhat broader one – what impact do planning decisions have on environmental law and on environmental policy objectives, given that the planning system is essentially concerned with the development and use of land?

"*Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs".*
The full Report is at http://www.un-documents.net/wced-ocf.htm.

[4] http://www.margaretthatcher.org/document/107817.

5. This can be considered at two levels, both of which are important, and in a sense encapsulate the catch phrase used in the 1990 White paper to capture the breadth of environmental issues: "from the stratosphere to the street corner".[5] The two are actually linked in an interesting way. The considerations of "stratosphere" lead to the need for the provision of new and low-carbon infrastructure, such as wind turbines, energy from waste and biogas facilities, nuclear power stations, etc. These infrastructure projects will have often unwanted effects at the "street corner" or field margin level for local councils and local residents. How do the planning decisions made to provide these projects affect the balance of the law on local amenity and the standards of comfort and enjoyment of land which local residents may reasonably expect?

Environmental Law and Policy in 2012

6. Before setting off for the stratosphere, it will be helpful to remind ourselves of how environmental law and policy have moved on since the1990 White Paper, and what are now in 2012 the key issues. The White Paper quoted John Stuart Mill's *Principles of Political Economy* that "*the Earth itself, its forests and waters, above and below the surface*" are the inheritance of the human race, and that "*No function of government is less optional than the regulation of these things, or more completely involved in the idea of a civilised society.*" The White Paper set out a wide ranging agenda for change both at EU and domestic level, foreshadowing many initiatives which have indeed been translated into law and policy in areas such as energy efficiency, renewable, air quality and critical loads, water, waste and recycling. To that extent it is important not to lose sight of how far matters have come since 1990. It is salutary to bear in mind that in 1990, amongst other things, we were still burning huge quantities of high-sulphur domestic coal in our power stations, using PCBs in industrial equipment, dumping industrial wastes, sewage sludge and mining wastes at sea, and disposing of hazardous waste in unlined "dilute and disperse" landfills. Agriculture was largely uncontrolled in terms of its effects on landscape, wildlife and water resources.

7. Some of the problems identified in the White Paper have largely been resolved or are a long way to being resolved. The big and intractable issues of climate change, energy, water resources, waste management, and the marine environment have of course not. What follows is my own no doubt partial and subjective overview of the most important aspects, and those which have the most important implications for the planning regime. There are numerous other initiatives which, whilst undoubtedly making a substantial contribution to sustainability objectives, do not have such direct implications for land-use and physical infrastructure provision – for example requirements as to energy

[5] The Environmental Protection Act 1990 itself demonstrated that catholicity, with provisions ranging from controlling major industrial emitters with potentially global effects, to the nuisances of dog-fouling and litter. David Cameron, when Leader of he Opposition, used (unknowingly?) the same phrase in the 2008 local election campaign when urging that green issues were "not just about the stratosphere, it's about the street corner" with an emphasis on graffiti, fly-tipping and fly-posting (perhaps he felt dog-fouling was now under control). See http://news.bbc.co.uk/1/hi/uk_politics/7351813.stm.

efficiency under the Carbon Reduction Commitment Energy Efficiency Scheme, which came into force in 2010.[6] Nor am I seeking to deal with measures which are essentially concerned simply with pollution control, or the restriction on use of hazardous substances.

Greenhouse gases and other emissions to air

8. At EU level a scheme has been introduced for the trading of allowances for greenhouse gas emissions, the third trading period for which starts in 2013.[7] This cap and trade approach has not been without its difficulties, but represents an extremely important and significant step forward and has since been extended to emissions from aviation.[8] The main difficulty has been the collapse of the price of allowances as the result of historic over-allocation, increased energy efficiency and economic recession. This has created a huge windfall (estimated at some €1.8 billion) for the small number of steel and cement companies which have surplus allowances.[9] Energy companies such as Shell and E.on have called on the Commission to withdraw at least 1.4 billion allowances. This problem will need to be addressed by some means before the start of the third trading phase in 2013-2020.[10] Another key issue is that of "carbon leakage" – the increase in emissions outside the EU which is the result of constraining emissions within the EU – which itself presents very difficult regulatory problems.[11]

9. The prospect of emerging technology for the capture and storage of carbon dioxide has led to another area of EU regulation[12] and will no doubt in due course present its own land use planning and permitting challenges. As with so much else in this area, its progress is dependent on the economics being conducive to

[6] The latest being the recently confirmed announcement that from April 2012 all 1,200 companies listed on the London Stock Exchange will be required to include data on their greenhouse gas emissions in their annual reports, with the obligation likely to be extended to some 24,000 large UK businesses from 2016: see *The Environmentalist*, July 2012, p. 5.

[7] Directive 2003/87/EC on the emissions trading scheme for greenhouse gas emissions within the EU. See also the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (SI 2005 No. 925). The Courts have started to grapple with the curious juridical nature of allowances: see e.g. *Ineous Manufacturing Scotland Limited v. Grangemouth CHP Ltd* [2011] EWHC 163 (Comm); *Armstrong DLW GmbH v. Winnington Networks Limited* [2012] EWHC 10 (Ch); *Deutsche Bank AG v. Total Global Steel Ltd* [2012] EWHC 1201 (Comm).

[8] See Directive 2008/101/EC and the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009 and 2010.

[9] See *The Environmentalist*, July 2012, p. 5.

[10] Ultimately, wider systems of carbon tax may be required, as the EU ETS covers only some 40% of emissions: see David A Weisbach, *Carbon Taxation in the EU: Expanding the EU Carbon Price* [2012] JEL 24:2, 183.

[11] See for a recent discussion, Yassen Spassov, *EU ETS: Upholding the Carbon Price Without Incidence of Carbon Leakage* [2012] JEL 24:2, 311.

[12] Directive 2009/31/EC on the geological storage of carbon dioxide and the Storage of Carbon Dioxide (Licensing, etc) Regulations 2010 (SI 2010/2221).

funding – it has been estimated that a carbon price of about €30/tonne is necessary to attract the investment needed, whereas the price in April 2012 was at an all time low of just over €6/tonne.

10. The role of local authorities in delivering climate change targets, both through the services they deliver and their regulatory role was highlighted in the Climate Change Committee's May 2012 report, *How Local Authorities Can Reduce Emissions and Manage Climate Risk*.[13] The role is significant in terms of energy efficiency, buildings, transport and waste, and through planning permissions for renewable projects. The Committee recommended that local authorities should draw up low-carbon plans which include a high level ambition for emissions reduction (e.g. 20% reduction across buildings, surface transport and waste by 2020 relative to 2010 levels) but focus on drivers of emissions over which they have influence (e.g. number of homes insulated, car miles travelled). The TCPA has provided helpful and detailed guidance and model policies in this area.[14]

11. The advent of targets for reduction of greenhouse gas emissions under the Climate Change Act 2008 has been the basis of some challenges to decisions on infrastructure such as airports, though with mixed success. In *R (Hillingdon London Borough Council) v. Secretary of State for Transport*,[15] Carnwath LJ (as he then was) sitting in the Administrative Court, referred to evidence of "a powerful demonstration of the potential significance of developments in climate change policy since the 2003 White Paper [on air transport]". Support for a third runway at Heathrow, pending production of the national policy statement, could not be regarded as immutable and was subject to review in the light of developments such as the national commitments imposed under the Climate Change Act 2008. On the other hand a challenge on similar grounds to the expansion of aircraft numbers at London City Airport failed in *R (Griffin) v. Newham London Borough Council*.[16]

12. There has been much discussion on setting a carbon floor price to encourage investment in low carbon electricity generation, the price rising over time. Supplies of fossil fuels used for electricity generation will be subject to carbon price support rates after 1 April 2013 and will result in electricity prices rising until around 2030 as more low-carbon capacity comes on stream.[17] These signals will

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[13] http://hmccc.s3.amazonaws.com/Local%20Authorites/1584_CCC_LA%20Report_bookmarked_1b.pdf .

[14] *Planning for Climate Change – Guidance and Model Policies for Local Authorities* (Planning and Climate Change Coalition, November 2010). http://www.tcpa.org.uk/data/files/pccc_guidance_web.pdf.

[15] [2010] EWHC 626 (Admin).

[16] [2011] EWHC 53 (Admin).

[17] See http://www.hmrc.gov.uk/budget2011/tiin6111.pdf.

again, over time, have their effect on the balance of electricity generation and on the infrastructure required to produce and distribute it.

13. Whilst progress on greenhouse gas controls is being made at UK and EU level, and is beginning elsewhere, such as Australia and California, there has so far been a failure to achieve meaningful progress at the international level and after the Durban climate change conference in December 2011 and the follow up at Rio+20 in June 2012,[18] it has to be admitted that two decades of international effort based on the Kyoto Protocol have resulted in no commitment to take steps to mitigate climate change. Essentially, there is now a "two speed carbon world", some countries with differing carbon prices, but most without, giving rise to trade distortions by effectively subsidising industries which are not internalising the global costs of the carbon emissions they produce.[19] The recent report of the House of Commons Energy and Climate Change Committee puts it as follows:[20]

> "There is a clear divergence between the UK's territorial emissions and its consumption-based emissions. The UK's territorial emissions have been going down, while the UK's consumption-based emissions, overall, have been going up. The rate at which the UK's consumption-based emissions have increased have far offset any emissions savings from the decrease in territorial emissions. This means that the UK is contributing to a net increase in global emissions.
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> We conclude that there are two main reasons for the fall in the UK's territorial emissions, neither of which were a result of the Government's climate policy: the switch from coal to gas-fired electricity generation in the 1990s, which was driven by privatisation of the electricity sector; and the shift in manufacturing industries away from the UK in response to the pressures of globalised markets. The latter led to an increase in consumption-emissions as the UK imported goods it previously manufactured domestically. However, the rate at which the UK's consumption-based emissions are increasing is also indicative of increasing levels of consumption."

14. Given the dominance of foreign imported goods to the UK economy,[21] embedded carbon is an important issue,[22] which may perhaps only be addressed by what

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[18] See the depressingly vacuous "renewed commitment", The Future We Want, which emerged from Rio: http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf.

[19] See *Trade, Climate Change and the Political Game Theory of Border Carbon Adjustments* (Helm, Hepburn and Ruta, May 2012: Centre for Climate Change Economics and Policy Working Paper No. 92; Grantham Research Institute on Climate Change and the Environment Working Paper No. 80).

[20] Energy and Climate Change 12th Special Report – Consumption-Based Emissions Reporting (HC 1858, 18 April 2012). http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenergy/1646/164602.htm.

[21] For an engrossing account of the developments in containerisation, the associated vessels and port infrastructure which form the background to this phenomenon, see *Marc Levinson, The Box – How the Shipping Container made the World Smaller and the World Economy Bigger* (2006, Princeton University Press, Oxford).

are called border carbon adjustments, a term which generically covers mechanisms such as tariffs, requirements for importers to purchase emissions allowances, and embedded carbon product standards. The long-term consequences for industries which depend on that import and export trade, ports in particular, should be obvious.

15. The reduction of carbon dioxide emissions from road vehicles remains a difficult issue. The European Commission acknowledges that its goal of reducing emissions from new cars to 120g/km by 2012 will not be achieved and is looking at new longer term targets. Plainly a technological breakthrough in vehicle technology, if and when it occurs, would have major implications for future policy.

16. Considering air quality more generally, it seems clear that EU air quality legislation, in particular Directive 2008/50/EC on ambient air quality, is not fully successful in delivering the desired results especially in relation to limit and target values for particulates, nitrogen dioxide and ground-level ozone in urban areas.[23] A major public consultation exercise was launched in 2011 and a new clean air strategy package is intended to be adopted in 2013. In the meantime urban air quality remains a serious health issue in many parts of Europe,[24] including at times the UK.[25] In 2011 the European Commission demanded a plan from the UK government to avoid any further breach of PM_{10} limits, on the basis of which the Commission agreed not to pursue legal action for historic breaches going back to 2005. This at present involves measures such as transport dust suppressants, steps at industrial and construction sites with levels of coarse

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[22] See Andrew Simms writing in the *The Guardian*: "If I want to own and enjoy a cheap, garage-sized TV, all the fossil fuel emissions that result from making it don't get added to my home account, but to the country of manufacture, most probably China. As a result, the origins of demand and the place of consumption become insulated from environmental consequences. Worse still, as the latest, most comprehensive set of figures on the hidden trade in "embodied carbon" reveal, it allows countries such as the UK and the US to delude themselves, by suggesting that the real problems in tackling climate change lay elsewhere, and to dangerously misunderstand the scale of domestic challenges." See http://www.guardian.co.uk/commentisfree/2011/may/01/carbon-accounting-emissions-imported-goods. Such carbon flows are massive and are growing in commodities such as clothing, steel, automotive products, and the like: see the detailed analysis at http://www.carbontrust.com/our-clients/i/international-carbon-flows.

[23] In *R (Clientearth) v. Secretary of State for the Environment Food and Rural Affairs* [2011] EWHC 2623 (Admin) and [2012] EWCA Civ 897 the Secretary of State candidly conceded that the UK was in breach of the Directive's target for nitrogen dioxide in various urban agglomerations within the UK, though the Court concluded that in those circumstances there was no obligation to apply for a postponement of the deadline under Art. 22 of the Directive, and it was for the Commission and the European Court to decide what consequences would follow from the breach.

[24] France has been taken to the European Court for failure to meet limit values for PM10 in some 16 air quality zones across France: see IP/11/596, 19 May 2011: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/596&format=HTML&aged=0&language=EN&guiLanguage=en.

[25] See http://www.clientearth.org/health-environment/clean-air/clientearth-and-air-pollution-what-we-do-1431.

particulate, and the planting of vegetation and "green walls" to trap particulates,[26] rather than more substantial preventive measures. The Commission is however clearly not satisfied with progress and has recently refused to allow the UK to defer meeting its obligations except for 12 zones where it could be demonstrated that nitrogen dioxide limits could be met by 2015.[27] The UK's application for extension admitted that targets would not be met until at least 2020 in some 16 areas, and not until 2025 in London.

Energy

17. Energy is an intractable area. At EU level the Commission adopted its Communication Energy Roadmap 2050,[28] which explores the challenges presented by its long-term goal of reducing greenhouse gas emissions to between 80-95% below 1990 levels by 2050, while ensuring security of supply. This will involve a step up from the already ambitious Energy 2020 goals.[29] It makes the critical point that "*Uncertainty is a major barrier to investment*" which could be adopted as the leitmotif of energy law and policy. Electricity will play a greater role and there will be a transition to an energy system based on higher capital expenditure, with major investment needed in generation and transmission systems, energy efficiency and insulation, smart meters, low carbon vehicles, local renewable energy equipment, etc. In all scenarios, the contribution of renewables will have to rise considerably, to about 55% of gross final energy consumption by 2050, compared with about 10% today. Carbon capture and storage will also have to play a pivotal role.

18. Directive 2009/28/EC on the promotion of energy from renewable sources,[30] requires Member States to ensure that the share of energy from renewable sources, in gross final consumption of energy in 2020 is at least its national overall target under the Directive, the UK target being 15%. The 2009 UK National Renewables Action Plan,[31] required under Article 4 of the Directive, is

[26] See ENDS Report 23 August 2011, *London moves to improve air quality*; 18 July 2013, *Green walls could dramatically reduce air pollution*.

[27] Commission Decision C(2012) 4155 final, 25 June 2012, giving the list of zones in default. http://ec.europa.eu/environment/air/quality/legislation/pdf/uk2_no2_en.pdf.

[28] COM/2011/0885final. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011PC0885:EN:NOT.

[29] The 2020 goals, adopted by the European Council in 2007 and 2009, are: by 2020, at least 20 % reduction in greenhouse gas emissions compared to 1990 (30% if international conditions are right); saving of 20 % of EU energy consumption compared to projections for 2020; 20 % share of renewable energies in EU energy consumption, 10% share in transport.

[30] Defined as energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases.

[31] http://www.decc.gov.uk/assets/decc/what%20we%20do/uk%20energy%20supply/energy%20mix/renewable%20energy/ored/25-nat-ren-energy-action-plan.pdf.

intended to set out the proposed trajectory and measures for meeting the UK target, but is a highly technical document, intended for European Commission consumption, from which few clear answers emerge.

19. In the UK 2011 saw the approval of the six energy national policy statements covering general policy (EN-1), fossil fuels (EN-2), renewable energy infrastructure (EN-3), Gas supply and gas and oil pipelines (EN-4), electricity networks infrastructure (EN-5) and nuclear power generation (EN-6). Of these only nuclear is location-specific.

20. At the same time the Government is currently embarked on a major programme of energy market reform, following the energy White Paper, *Planning Our Electric Future*,[32] published in July 2011 and seeking to face the formidable multiple challenges of security of supply as existing generating plants close, the need to decarbonise generation, and the likely trends to 2050 of rising electricity demand and rising electricity prices.

21. The levels of subsidy available for renewable energy schemes are critical to levels of investment and hence the number of projects coming forward. The award of renewable obligations certificates (ROCs) which can be sold to electricity supply companies has been the main driver in the expansion of onshore wind schemes and other projects such as landfill gas. Investment decisions are made on the rate of ROCs issued per MW/hr generated and uncertainty over future levels of support undoubtedly has a chilling effect, hence the concern of the onshore wind industry to the perceived wish of the Treasury to reduce further the level of support for onshore wind below the reduced 0.9 per MW/hr proposed by DECC for the period 2013-2017 (intended to reflect cost improvements and deter schemes in areas of low wind resource).[33]

22. The Energy Bill, published in draft on May 22, 2012,[34] has already aroused substantial controversy in many areas.[35] It will from 2017 replace the renewables obligation, which has been since 2002 the main means of incentivising investment in large-scale renewable, nuclear and carbon capture projects with a Contracts-for-Differences system to provide long-term revenue certainty for investors, as would the earlier, bespoke, "investment instruments" which the Government may offer to individual investors. These market signals can be expected to have significant effects on how, when and where the massive development in energy infrastructure which is contemplated will come forward.

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[32] CM 8099. http://www.decc.gov.uk/assets/decc/11/policy-legislation/EMR/2176-emr-white-paper.pdf.

[33] ENDS Report 18 July 2012: "Renewable energy subsidy decisions delayed."

[34] See http://www.decc.gov.uk/en/content/cms/legislation/energybill2012/energybill2012.aspx.

[35] Being described for example as "misleading, manipulative and destructive" by George Monbiot in The Guardian – see http://www.guardian.co.uk/environment/georgemonbiot/2012/may/31/energy-bill-destructive-daveys-claims. See also ENDS Report No. 449. June 2012, p. 13.

23. However, the problem of energy security, to be achieved in the short term, and the long term goal of energy decarbonisation, seem unlikely to be entirely compatible when push comes to shove. The current costs speak for themselves. As of June 2012, offshore wind energy costs about £140 per MW/hr to produce, onshore wind about £80, and gas £40-70. The signals are certainly there in comments made in the 2012 Budget by George Osborne that "Gas is cheap, has much less carbon than coal and will be the largest single source of our electricity in the coming years", coupled with the announcement that gas fired power stations will not have to meet CO_2 emission performance standards requiring carbon capture until 2045.[36] It may be, as in the US, that the governing factor will be the ability to tap domestic resources of the "unconventional hydrocarbons", such as shale gas[37] or the less controversial coal bed methane.

Waste

24. In the area of waste, technical standards have been raised by the requirements of the Landfill Directive, and waste has had to be diverted away from landfill to the various forms of re-use, recycling or recovery, a process assisted by economic instruments in terms of the Landfill Tax and local authority tradable allowances (LATS) for biodegradable municipal waste.[38] The need to pre-treat waste has had, as we shall see, consequences in terms of the odorous nature of the waste and its impact on residents living around landfill sites.

25. Domestic waste policies have in fact been relatively successful. Over 40% of household waste is now recycled, compared with 11% in 2000/2001.[39] Initiatives to increase the capacity for cost-effective waste re-use, recovery and recycling mean that the costs of such options now compare very favourably with the cost of landfill, though there remain some regional disparities.[40] The review of waste policies by DEFRA in 2011 suggested that it is on course to meet the EU landfill diversion target to reduce by 2013 the proportion of biodegradable waste sent to landfill by 50% of 1995 levels, proposed abolishing the LATS scheme as no longer needed, and proposed consulting on increased recycling targets for plastic, steel, aluminium and glass.[41] Landfill bans for wood and other possible

[36] See ENDS Report 446, March 2012, p. 36.

[37] See the June 2012 report commissioned by the Royal Society and Royal Academy of Engineering appraising the environmental risks of that technology: Shale Gas Extraction in the UK – A review of hydraulic fracturing. http://royalsociety.org/uploadedFiles/Royal_Society_Content/policy/projects/shale-gas/2012-06-28-Shale-gas.pdf.

[38] See the Waste and Emissions Trading Act 2003 and the Landfill Allowances and Trading Scheme (England) Regulations 2004 (SI 2004/3212).

[39] http://www.defra.gov.uk/environment/waste/.

[40] ENDS Report 16 July 2012: "Gate fees for recycling continue to fall."

[41] *Government Review of Waste Policy in England.* http://www.defra.gov.uk/publications/files/pb13540-waste-policy-review110614.pdf.

materials such as textiles and metals are also in contemplation. The increase of waste recovery from material such as food waste, sewage sludge and agricultural manures and slurries through anaerobic digestion is also a priority, with publication in 2011 of the *Anaerobic Digestion Strategy and Action Plan*.[42] These policies will see the need for schemes for more waste treatment facilities at local level, and an important issue is the need to educate local planning authorities and the public in the issues and benefits of such schemes.

26. Sectoral schemes have been developed and incorporated into EU law to deal with particular waste streams such as packaging waste,[43] waste electrical and electronic equipment, and end of life vehicles,[44] all based on the concept of producer responsibility. These set increasingly stringent targets for material-specific recycling, though in many cases the actual recycling takes place in locations such as China rather than the UK.[45]

27. Having agonised for some years over the delivery of waste infrastructure for energy from waste, pre-treatment, gasification, biomass, etc, it now appears on the latest figures that by 2015 the UK as a whole (like Germany) may have an oversupply of such facilities.[46] There will however be regional shortfalls in capacity. The disposal of hazardous waste streams (such as waste electrical equipment, oil for regeneration, air pollution control residues, contaminated soil for bioremediation, ships for recycling and hazardous waste landfill – the last resort) is likely to involve a limited number of major facilities according to the draft National Policy Statement on *Hazardous Waste*.[47] Such facilities seem unlikely to receive the warmest of welcomes by the local authorities or communities where they are proposed. The draft caused a frisson of concern among the waste industry with its proposed requirement for the promoters of such schemes to carry out a "community stress and anxiety assessment" and it is worth setting out the paragraphs from the House of Commons Select Committee report on this point:[48]

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[42] *Anaerobic Digestion Strategy and Action Plan*, July 2011.
http://www.defra.gov.uk/publications/files/anaerobic-digestion-strat-action-plan.pdf.

[43] Directive 94/62/EC.

[44] Directive 2000/53/EC.

[45] In respect of which the resulting export trade has given rise to its own controversies under Community law – see e.g. Case C-405/10 *Özlem Garenfeld*, a case concerning export of spent catalytic converters from Germany via The Netherlands to Lebanon.

[46] See ENDS Report No. 449, June 2012, p. 18.

[47] Issued for consultation in 2011 and then the subject of a Select Committee enquiry which reported in December 2011: see http://www.defra.gov.uk/consult/2011/07/14/hazardous-waste/ and http://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/inquiries/parliament-2010/hazardous-waste-nps/.

[48] http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenvfru/1465/146504.htm#a14.

> 53. Industry representatives expressed concern about the requirements which the NPS placed on them to carry out a "community stress and anxiety assessment". CIWM drew attention to the "paucity of guidance" about how such assessments should be conducted which was likely to lead to "significant dispute" about both the assessment process and the analysis of results. The ESA agreed, telling us that they felt that this part of the NPS was "almost a throwaway section" and that it was "very unclear exactly what the company is expected to do-what sort of assessment, what sort of ways it could seek to allay anxiety and stress that was seen to be there".
>
> 55. We recognise that it may be desirable for there to be a degree of flexibility about how stress and anxiety assessments are conducted, depending on the circumstances of the application. This does not obviate the need for clarity about the purpose and expected outcome of such an assessment. Despite DEFRA's assurances, it is clear that developers face an unacceptable degree of uncertainty in interpreting how stress and anxiety assessments should be undertaken. **We recommend that the draft NPS be amended to include guidance on how community stress and anxiety assessments should be carried out.**

28. Perhaps not surprisingly, in its response to the Select Committee, the Government indicated that "having given the matter further thought", it had decided to drop the requirement for this assessment, on the basis that the NPS would require the decision-maker to take account of health concerns when setting conditions, and that consultees would be able to express their anxieties during the pre-application consultation and determination stages.[49]

Water

29. The last paper which I gave at this Conference, in 2001, was entitled "*Too Much or Too Little – Water Management and the Land Use Planning System*" and dealt with the issues of water resources and flooding.[50] A decade later, 2012 has so far been a year including both widespread drought conditions, and also the wettest late spring/early summer on record for almost a century, with widespread local flooding.

30. Sir Michael Pitt's review of the summer 2007 floods[51] urged comprehensive legislation. This has not come about, though the Flood and Water Management Act 2010 has implemented a number of the Review's recommendations and clarifies the statutory responsibilities for managing flood risk.[52] The Act (section

[49] HC 540, Government's Interim Response (17 July 2012) para. 12

[50] JPL Occasional Paper, *Planning Law: The Cappuccino Years* (2001), p. 64.

[51] *Learning Lessons from the 2007 Floods*. http://webarchive.nationalarchives.gov.uk/20100807034701/http:/archive.cabinetoffice.gov.uk/pittreview/thepittreview/final_report.html.

[52] For a progress report on implementation of the 2010 Act, see http://www.defra.gov.uk/publications/2012/03/27/pb13732fwm-progress-report/.

27) requires flood and coastal erosion risk management authorities to aim to contribute towards the achievement of sustainable development when exercising their flood and coastal erosion risk management functions. Statutory guidance on that duty has been issued by DEFRA.[53] Interestingly, that guidance resists the temptation to try and provide a precise interpretation of sustainable development: "... sustainable development is an evolving concept that seeks to respond to these concerns in the way we manage our society, economy and environment. We cannot, and should not, try to pin it down too narrowly" (para. 2.5). Rather, at para. 3.1, it lists a number of matters which sustainable development in this context will include: taking account of the safety and wellbeing of people and the ecosystems upon which they depend; using finite resources efficiently and minimising waste; taking action to avoid exposing current and future generations to increasing risk; and improving the resilience of communities, the economy and the natural, historic, built and social environment to current and future risks.

31. The Flood and Water Management Act will work in tandem with the Flood Risk Regulations 2009,[54] which transpose the EU Floods Directive 2007/60/EC and require the formal assessment of areas at serious risk of flooding, the preparation of flood risk maps[55] and flood risk management plans, as well as placing the Environment Agency and relevant local authorities under a duty of co-operation. Given that over 5 million people in England and Wales live or work in properties (one in seven) at risk of flooding,[56] this can be genuinely said to be an issue of national importance. The House of Commons Environment Committee has twice reiterated its deep concern as to the expiry in 2013 of the interim "Statement of Principles" agreed between the Government and the Association of British Insurers in 2008, under which insurance is provided to properties in areas of flood risk. Withdrawal of that cover would lead to a serious danger of blight, with significant impacts on the housing market and on social cohesion.[57]

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[53] *Guidance for risk management authorities on sustainable development in relation to their flood and coastal erosion risk management functions* (October 2011). http://www.defra.gov.uk/publications/files/pb13640-sdg-guidance.pdf.

[54] SI 2009 No. 3042.

[55] For a recent case on the approach to mapping areas at risk and the assumptions to be made regarding failure of defences in that exercise, see *R (Manchester Ship Canal Co and Peel Holdings Ltd) v. Environment Agency* [2012] EWHC 1643 (Admin).

[56] http://www.environment-agency.gov.uk/homeandleisure/floods/default.aspx.

[57] *Future Flood and Water Management Legislation* (HC 522, First report of Session 2010-2012) paras. 40-41; *The Water White Paper* (HC 374, Second Report of Session 2010-2012) para.31. The Joseph Rowntree Trust has also highlighted the fact that climate change adaptation policies should have not only a spatial dimension but also should incorporate social justice by identifying and responding to groups which are most vulnerable in terms of the economic and social ability to adapt to and recover from climate change related events: see Jean Welstead et al, *Socially Just Adaptation to Climate Change* (13 July 2012). http://www.jrf.org.uk/publications/socially-just-adaptation-climate-change.

32. Unfortunately, lessons are clearly not being learned. The Adaptation Sub-Committee of the Committee on Climate Change in its July 2012 progress report presented the following sobering message on new development at risk of flooding:[58]

> "Indicators show that development in the floodplain in England increased by 12% over the past ten years compared with a 7% increase outside the floodplain. Around 21,000 homes and business premises (13% of all new development) have been built in the floodplain every year over this time period.
> Planning policy ensures that this development is generally well protected from flooding. The majority of floodplain development proceeded in line with Environment Agency advice, because the developer incorporated adaptation features, such as raised ground and floor levels or safe evacuation routes.
> However, our analysis raises some questions about implementation of the policy. While over 80% of floodplain development took place in locations well protected from flooding with community defences, one in five properties built in the floodplain were in areas of significant flood risk under today's climate.
> In addition, the approval process is not sufficiently transparent or accountable. The Environment Agency only knew whether or not their advice had been followed in 65% of planning applications where they had objected.
> Development in the floodplain may be a rational decision in cases where the wider social and economic benefits outweigh the flood risk, even when accounting for climate change. However, from a review of 42 of the most up to date local development plans we found mixed evidence on whether or not local authorities were transparently: assessing the potential for accommodating growth elsewhere before deciding to allocate land for development in the floodplain; or accounting for the long-term costs of flooding with climate change, both in terms of the increasing costs of flood damage and any additional costs of flood protection."

33. The shortage of water resources in some parts of the country is, equally, no laughing matter. Despite this summer's heavy rain, groundwater resources have yet to recover from the effects of a series of exceptionally dry winters and many aquifers remain at levels equivalent to those of the 1976 drought.[59] Careful management of water resources will therefore continue to be a significant issue, which the both the land use planning system and water resource management planning will have to face.[60] The White Paper, *Water for Life*,[61] published in December 2011, makes the case for legislative action to avoid the security of water supplies being compromised. As well as the need for secure and affordable water supplies for its population, the UK will need to make very

[58] Climate Change – is the UK preparing for flooding and water scarcity? http://hmccc.s3.amazonaws.com/ASC/2012%20report/CCC_ASC_2012_Spreads.pdf. See also the Impact Assessment on the NPPF (DCLG, July 2012) pointing out (p. 26) that 9% of new dwellings were built in areas of high flood risk in 2010.

[59] http://publications.environment-agency.gov.uk/PDF/GEHO0612BWNM-E-E.pdf.

[60] For a thorough review of the issue of water resources management planning under the Water Act 2003, including the public inquiries held into the South East Water and Thames Water plans, see William Howarth, *Planning For Water Security* [2012] JPL 357.

[61] CM 8230. http://publications.environment-agency.gov.uk/PDF/GEHO0612BWNM-E-E.pdf.

substantial advances in the proportion of water bodies which have properly functioning ecosystems if it is to comply with its obligations under the EU Water Framework Directive 2000/60/EC.[62] There is a major problem looming here. Household water usage has increased dramatically since the 1950s and demographic change will only increase the pressure as development is concentrated in areas which are already stressed in terms of water resources. Some scenarios suggest a growth of as much as 35% in demand by 2050. There will be a need for investment in water infrastructure, both in major and smaller projects, and in the means of moving water around in bulk to meet demand, with interconnection and bulk water trading.[63] The current legal regime on abstraction, dating from the 1960s, is in need of reform. The White Paper also makes clear that a new mindset will be necessary under the planning system:

> "4.16 More houses and commercial properties are needed to meet the needs of a growing population, changing lifestyles, and to enable economic growth. However, houses and offices should not be built until the water and sewerage infrastructure serving the development is sufficient to ensure the environment is not placed at risk. This requires close dialogue and collaboration between local authorities, the Environment Agency, developers and water companies, so that the parties can balance the needs of the economy and society for new development, the environment, and the bills to customers."

34. This very clear statement of Government policy is however not reflected in the NPPF save in very general and anodyne form at paras 156 and 162, which suggest the need to assess assess the quality and capacity of infrastructure for transport, water supply, wastewater, energy, and other forms of physical and social infrastructure, and its ability to meet forecast demands. This work will however require, as the White Paper acknowledges, constructive engagement between local authorities and the relevant bodies as local plans are prepared, effective input by the water companies into that process, and robust data on which the water companies can base their own water resource management plans and price review business plans for submission to Ofwat. As identified by the House of Commons Environment Select Committee in its June 2012 report on the Water White Paper,[64] it will also need a more joined-up approach to the opportunities to provide long distance interconnection which may be presented by other major infrastructure projects – as with United Utilities' "putting ideas into the pot" suggestion of a water pipeline running alongside the High Speed 2 railway line.[65]

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[62] According to para. 12 of the White Paper, only 27% of England's rivers and lakes are fully functioning ecosystems. The WFD sets the general objective of achieving "good" ecological status for all surface waters by 2015.

[63] We are starting to see this, with the proposal for Severn Trent Water to supply bulk water to Anglian Water via the Rivers Tame and Trent: ENDS Report No. 447, April 2012, p. 23. See also the discussion of the possibility of water exports from Scotland in Hendry, *Scotland the Hydro Nation* [2012] Water Law, Vol 22, Issue 1, p. 24.

[64] HC 374, Second Report of Session 2010-2012.

[65] Para. 22.

Food security[66]

35. Do environmental lawyers regard food and food security as an aspect of environmental law or planners regard it as an aspect of planning law or policy? The answer is probably not ... yet. Food production and distribution are not topics to be found in environmental texts, journals, seminars or courses. The interest is probably peripheral, related to matters such as GMOs, pesticides and water use. Yet food security and the environmental impacts of feeding the UK are probably among the most important issues which will face government over the next few decades. Many warning signs are already there. The system is hopelessly unsustainable and looks increasingly precarious. It has been estimated by the UK Government that by 2030 the world will require 50% more food than is currently produced, as compared with 45% more energy and 30% more water.[67] The UK will not be immune to these pressures.

36. When I learnt and taught law at Cambridge in the 1970s and 80s, UK food production was still an important issue in legal terms. Memories of the U-boat blockade meant that legislation and policies were in place to encourage domestic food production and to safeguard prime agricultural land as a natural asset. The government policy is now largely laissez-faire. The RTPI has correctly pointed out that preserving green belt land means that agricultural land located there will be close to major markets, with low food miles and potentially greater sustainability advantages.[68]

37. In 2008 the Cabinet Office published what was probably the first comprehensive review of the food security and related environmental issues facing the UK.[69] Matters have not improved since then – the problems are manifold and include: nitrogen pollution from fertilisers, now regarded by the EU as one of its major environmental problems; the huge carbon and water footprint of producing and transporting the contents of the average family's shopping basket; the abhorrent animal welfare practices involved in industrialised agriculture as illustrated by recent proposals for "super-dairies" and the increasing numbers of dairy cows kept permanently indoors in large herds on a "zero-grazing" system; the catastrophic loss of biodiversity in the UK countryside from monoculture; the massive and rising costs of waste food disposal, falling on local councils, as a result of the cynical over-promotion of perishable food by supermarket retailers;

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[66] This section draws on a paper I gave in the first series of Castle Debates, organised by the Law Society in 2011. See http://services.lawsociety.org.uk/events/sites/default/files/Castle%20Debate%20report%20-%20Sustainable%20Farming%20and%20Food%20Security%2021%20June%202011_2.pdf.

[67] Caroline Spelman, Secretary of State for Environment, Food and Rural Affairs (Green Futures, June 2012).

[68] RTPI, *Planning for Food* (August 2010).

[69] *Food Matters: Towards a Strategy for the 21st Century* (Strategy Unit, July 2008). http://webarchive.nationalarchives.gov.uk/+/http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/food/food_matters1.pdf.

and the unhealthy diet of a large proportion of the UK's population, leading to disease, obesity and waste of NHS resources.

38. In a 2008 discussion paper,[70] Defra defined food security as: "*consumers having access at all times to sufficient, safe and nutritious food that meets all their dietary needs and food preferences for an active and healthy life*". That is an inadequate approach. It pays no heed to the environmental consequences and to the inherent sustainability. If by "food preferences" it means that those who wish to eat strawberries in January should have access to them at all times, then I respectfully disagree. It is a much more serious issue.

39. The Government is only just beginning to grapple with these issues through initiatives such as the Green Food Project, the first report of which was published in July 2012, looking at ways of seeking to reconcile more efficient food production with environmental objectives.[71] Time is not on Britain's side. It currently imports over 40% of food consumed, and that proportion is rising.[72] Early 2008 saw a huge spike in food price rises on global markets, bringing to an end a period of decline in the relative price of food in the UK. There is significant vulnerability to the effects of emerging diseases such as the bluetongue virus, transmitted by midges which have migrated north as a result of climate change, and the Ug99 strain of "wheat rust" fungus, which since 1999 has spread steadily from Uganda. Types of crop diseases in the UK will change with warmer and wetter winters, and the marked decline in insect pollinators is a further serious cause for concern.

40. Taking these matters into account, it is unfortunate that the NPPF policy protecting the country's best and most versatile agricultural land is so weak:

> 112. Local planning authorities should take into account the economic and other benefits of the best and most versatile agricultural land. Where significant development of agricultural land is demonstrated to be necessary, local planning authorities should seek to use areas of poorer quality land in preference to that of a higher quality.

It perhaps not surprising, though regrettable, that this is the case, since the equivalent policies in PPS 7, though fuller, were also weak.[73] Preserving the country's future ability to feed itself is about as fundamental an aspect of sustainability as one could find, along with preserving clean water and healthy

[70] Ensuring the UK's food security in a changing world (July 2008)

[71] See http://www.defra.gov.uk/publications/files/pb13794-greenfoodproject-report.pdf.

[72] See http://www.foodsecurity.ac.uk/issue/uk.html.

[73] PPS 7: Sustainable Development in Rural Areas (2004) paras. 28, 29. See http://www.communities.gov.uk/documents/planningandbuilding/pdf/147402.pdf. For a recent case in which the Secretary of State was held to have misconstrued the PPS 7 policy as involving the need to avoid loss of BMV agricultural land "unless absolutely unavoidable", see *Fox Strategic Land and Property Ltd. v. Secretary of State for Communities and Local Government* [2012] EWHC 444 (Admin) at paras. 62-63 per HHJ Gilbart QC sitting as a Deputy High Court judge

ecological systems. Successive governments have taken their eye off this particular ball, and need to get it back on again.

41. There are however potential resonances with the Government's localism agenda which may be exploited. Initiatives in the 2011 White Paper, *The Natural Choice – Securing the value of nature*[74] included helping local authorities use their new duties and powers on public health, creating a "Local Green Areas" designation to allow local protection of green space, establishment of a Green Infrastructure Partnership to support development of green infrastructure, including allotments, and launching a new phase of volunteering opportunities – for example community food-growing projects. Unlike so many aspects of the planning system, this is an area where communities, without major infrastructure investment, can be the key. The planning system, especially at the new local level, has potentially a huge role to play here. A network of community allotments and schemes for sharing gardens should be instituted and encouraged. The Localism Act's provisions and the community right to bid to buy community assets[75] could be extremely important here. Yet the section in the NPPF on "Promoting Healthy Communities" contains not a single reference to food.

The marine environment

42. Protection of the marine environment in terms of law and policy, though sadly not in terms of the actuality,[76] has improved massively since 1990. At EU level the Marine Strategy Framework Directive 2008/56/EC is an important first step.[77] The Marine and Coastal Access Act 2009, set out a planning and control process. The UK Marine Policy Statement, made pursuant to the MSFA Directive[78] was jointly published by the administrations in March 2011 and provides the overall policy framework for the development of sub-national marine plans and for making authorisation and enforcement decisions.[79] It sets out the high level principles for "achieving a sustainable marine environment" as well as policy objectives for key marine activities such as offshore energy infrastructure,

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[74] CM 2082.

[75] Localism Act 2011, Part 5, Chapter 3, Assets of Community Value. See http://www.communities.gov.uk/communities/communityrights/righttobid/.

[76] The authoritative assessment of the state of the UK marine environment, *Charting Progress 2*, published in 2010, refers to continued decline of populations of seabirds and seals, the continued unsustainable exploitation of fish stocks, and the problem of plastic litter and damage to the seabed and its species from fishing and physical structures. On the other hand, estuaries are now much cleaner and heavy metal and other toxic pollution is greatly reduced. See http://chartingprogress.defra.gov.uk/.

[77] http://ec.europa.eu/environment/marine/index_en.htm.

[78] See the Marine Strategy Regulations 2010 (SI 2010 No. 1627) imposing a duty to develop a marine strategy.

[79] http://archive.defra.gov.uk/environment/marine/documents/interim2/marine-policy-statement.pdf.

shipping, tourism and telecommunications. As the UK Marine Policy Statement makes clear, the system has much in common with town and country planning, being a plan led system which should rest on a sound evidence base:

> "1.1.1 The MPS and Marine Plans form a new plan-led system for marine activities. They will provide for greater coherence in policy and a forward-looking, proactive and spatial planning approach to the management of the marine area, its resources, and the activities and interactions that take place within it."

43. Marine and terrestrial planning cannot exist in hermetically sealed isolation and as the Policy Statement make clear will require careful steps to ensure effective integration:

> "1.3.4 Integration of marine and terrestrial planning will be achieved through:
>
> • Consistency between marine and terrestrial policy documents and guidance. Terrestrial planning policy and development plan documents already include policies addressing coastal and estuarine planning. Marine policy guidance and plans will seek to complement rather than replace these, recognising that both systems may adapt and evolve over time;
>
> • Liaison between respective responsible authorities for terrestrial and marine planning, including in plan development, implementation and review stages. This will help ensure, for example, that developments in the marine environment are supported by the appropriate infrastructure on land and reflected in terrestrial development plans, and vice versa; and
>
> • Sharing the evidence base and data where relevant and appropriate so as to achieve consistency in the data used in plan making and decisions."

The Stratosphere

44. The terms stratosphere and strategy have a common root: the Greek stratos or Latin stratus, meaning that which is spread out. The areas of environmental policy described above have extensive implications going far beyond the land use planning system, or decisions or plans made by local planning authorities. How then can the planning system, and its underlying policies, as now set forth in the NPPF, contribute to these strategic, and in some cases stratospheric?

45. The NPPF seeks to do no more than set out the Government's planning policies for England.[80] It does not contain specific policies for nationally significant infrastructure projects falling within the decision-making process of the Planning Act 2008 (which are provided by the national policy statements made under that

[80] Para. 1.

legislation)[81] nor specific policies on waste (which are part of the National Waste Management Plan).[82]

46. As is well known, the NPPF describes the presumption in favour of sustainable development as being "*a golden thread running through both plan making and policy making*" (para. 14). Policies in local plans are to based upon and reflect that presumption, with clear policies guiding how the presumption should be applied locally and making it clear that development which is "sustainable" can be approved without delay (para. 15). It will also, according to the NPPF, have implications for how communities engage in neighbourhood planning (para. 16) and as a "core principle" planning should "*proactively drive and support sustainable development*" (para. 17, third bullet point). Planning should "*encourage and not act as an impediment to sustainable growth*" (para. 19) and policies should positively and proactively encourage "*sustainable economic growth*" (para. 21, first bullet point). The "*sustainable growth and expansion*" of all types of business and enterprise in rural areas is to be encouraged and "*sustainable rural tourism and leisure developments*" (para. 28, first and third bullet point).

47. The NPPF contains many traditional planning policies on matters such as building a strong economy, ensuring the vitality of town centres, supporting a prosperous rural economy, delivering a wide choice of high quality housing, requiring good design, creating healthy and inclusive communities, ensuring a sufficient choice of school places, access to open space and recreational opportunities, protecting green belt land, seeking to mitigate and adapt to climate change and associated flood risk, supporting a move to a low-carbon future, conserving the natural environment and biodiversity, ensuring adequate supplies of minerals and aggregates, etc. All of these policies are perfectly intelligible without using the words "sustainable" or "sustainable development" at all. Indeed the NPPF states that these policies and the others at paras. 18-219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system (para. 6).

48. The elephant in the corner is what is meant by "sustainable" in all the contexts mentioned in the NPPF and whether in fact it is a quite meaningless touchstone. For some matters, such as transport, it may be reasonably clear that some forms are more sustainable than others, if sustainability is simply treated as a surrogate for relative greenhouse gas emissions. But plainly even there it is relatively meaningless in most contexts, since what might be thought by many to be "unsustainable" modes have no negative presumption, but rather simply there is a requirement to explore and maximise sustainable solutions.[83]

[81] Para. 3.

[82] Para. 5.

[83] Paras. 29-41.

49. In its section on "Achieving Sustainable Development", the NPPF refers to the UN General Assembly Resolution 42/187 which defined sustainable development as "*meeting the needs of the present without compromising the ability of future generations to meet their own needs*". It also cites the five "guiding principles" of the UK Sustainable Development Strategy *Securing the Future*: living within the planet's environmental limits; ensuring a strong, healthy and just society, achieving a sustainable economy, promoting good governance, and using sound science responsibly.

50. UN Resolution 42/187 was the one which received and endorsed the Brundtland Report and needs to be read in its proper context of a very broad policy statement set as a guiding principle for the future development of international law. It concurred with the Commission that a number of very broad objectives followed from the need for sustainable development:[84]

> "... preserving peace, reviving growth and changing its quality, remedying the problems of poverty and satisfying human needs, addressing the problems of population growth and of conserving and enhancing the resource base, reorienting technology and managing risk, and merging environment and economics in decision-making"

51. It is a classic example of "soft law" in the international environmental context, which may be highly influential but lacks any legal force and is essentially of an aspirational nature. As defined in one work, it is:[85]

> "A term used to refer to non-binding instruments or documents which have the appearance of law....While not legally binding, soft law can be politically influential in setting down objectives and aspirations."

52. Equally the passage referred to in the 2005 UK *Sustainable Development Strategy,*[86] with its five guiding principles, applies the broadest of broad brushes. Sustainable development was seen as the cure to all the world's ills, as exemplified by the speech by Tony Blair to the World Summit on Sustainable Development, quoted at p. 12:

> "We know the problems. A child in Africa dies every three seconds from famine, disease or conflict. We know that if climate change is not stopped, all parts of the world will suffer. Some will even be destroyed, and we know the solution – sustainable development."

53. It was replete with similar clichés, such as "*Living on the earth's income rather than eroding its capital*", "*living within environmental limits*", "*fair principles for the sound management of the planet*", "*a comprehensive set of wellbeing indicators*",

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[84] Para. 5. http://www.un.org/documents/ga/res/42/ares42-187.htm/.

[85] Parry & Grant *Encyclopaedic Dictionary of International Law*, cited at http://www.ll.georgetown.edu/guides/internationalenvironmentallaw.cfm.

[86] Cm. 6467, March 2005. http://www.defra.gov.uk/publications/files/pb10589-securing-the-future-050307.pdf.

etc. The "guiding principles" set out at p. 16 of the Strategy are not in fact a definition of sustainable development, but "the set of shared UK principles used to achieve our sustainable development purpose". As was made clear in the much more substantive 1995 UK Sustainable Development Strategy,[87] produced by John Major's government, "*sustainable development is, inevitably, a long-term process*."

54. Part of the Labour Government's legacy was the creation of the Sustainable Development Commission, disbanded on 31 March 2011 after its funding was withdrawn. In its last report, *Governing for the Future – The Opportunities for Mainstreaming Sustainable Development*,[88] the Commission provided a very clear overview of how sustainable development should work, its holistic nature and its architecture. It is "*not a singular, prescribed outcome*" but a continuous process, a "*systems-based approach for achieving positive, enduring change*". It requires holistic thinking for the long term: "development" implies progress and improvement, while "sustainable" suggests resilience, long-termism and future-proofing. "*Short-term thinking is the biggest risk to sustainable development*." It involves the mechanisms of performance management frameworks, delivery plans and tools, monitoring and reporting.

55. Nowhere does the Sustainable Development Commission suggest that it is, or should be, a test for distinguishing between good and bad, or acceptable and unacceptable, "development" in the narrow town and country planning sense. The closest one gets is the Sustainable Development Commission's 2008 report on *Local Decision Making and Sustainable Development*,[89] where it is said at Annex A:

> "Delivering sustainable development should involve planning for the long-term, fully integrating economic, social and environmental factors into decision making and considering impacts beyond the local area."

56. The fallacy inherent in the NPPF is that it is possible to judge in any meaningful, reliable or indeed transparent and fair way, whether a particular form of development, growth or expansion is "sustainable" or not. The matter was expressed with great clarity by former Parliamentary draftsman and inveterate writer of letters to *The Times*, Francis Bennion:[90]

> "With wide experience as a parliamentary draftsman accustomed to framing statutory definitions, I am astonished that heavy weight should be placed on such an inadequate term. It will cause prolonged argument at almost every future planning hearing.

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[87] Cm 2426, January 1994, para. 1.6.

[88] http://www.sd-commission.org.uk/publications.php?id=1191.

[89] http://www.sd-commission.org.uk/data/files/publications/SDC_Localgov_SD_report.pdf.

[90] 9 April 2012. http://www.francisbennion.com/pdfs/fb/2012/2012-008-times-sustainable-development.pdf. The text is reproduced here with kind permission of Mr Bennion.

"The document contains no proper definition of the term 'sustainable development'. It says 'Sustainable means ensuring that better lives for ourselves don't mean worse lives for future generations'. What sort of definition is that?
"The document also says 'Resolution 42/187 of the United Nations General Assembly defined sustainable development as meeting the needs of the present without compromising the ability of future generations to meet their own needs.' That is no better as a definition.
"The document adds: 'The policies in paragraphs 18 to 219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system.' Are planning hearings really going to have to plough through over two hundred paragraphs of this document every time there is argument about whether a proposed development is 'sustainable'?[91] The government should think again."

57. It is perhaps ironic that such an imprecise concept should have been made the "golden thread" of planning policy at the same time that the Supreme Court has provided a salutary reminder that the meaning of planning policies, as distinct from their application to a given set of facts, is an objective question of construction, not one for a "Humpty-Dumpty" of giving the words the meaning the reader would like them to have.[92] To sustain is a verb, derived from the Latin sustinere, meaning to uphold, to bear up, or to support. As an adjective applied to development it has no clear meaning. As a term of art, even one of its main proponents, Sir Crispin Tickell, has said that it is: "... *an elusive and elastic concept and for most people it still lacks a coherent definition*".[93]

58. It is interesting to remind ourselves that back in 1990, a focus of the environment White Paper, in the whole part devoted to land use, was a systematic review, updating, extension and revision of existing planning guidance. This involved expanding and strengthening, significantly, the suite of PPGs, with new guidance on archaeology, heritage, wildlife and planning, and on planning, pollution control and waste management, to give a few examples. Much of the detail of that work has now been lost.

59. Sustainable development only gains real meaning when translated into clear objectives. If clear national or local policies can help to deliver those objectives, all well and good. But I would query whether the focus is sufficiently clear. It is plainly not sustainable to continue building homes in areas which at risk of repeated flooding, yet this practice seems to continue. To encourage as many people as possible to cycle, either as a means of transport or for pleasure, is

[91] Much the same point was made in evidence to the House of Commons Communities and Local Government Committee in its enquiry into the draft NPPF by the Planning Officers' Society: "What that is saying is that you have a definition that runs to 52 pages whose conclusions will inevitably point in all sorts of different directions" (Eighth Report of Session 2010-2012, HC 1526 para. 51), http://www.publications.parliament.uk/pa/cm201012/cmselect/cmcomloc/1526/152602.htm.
[92] See *Tesco Stores Limited v. Dundee City Council* [2012] PTSR 983, [2012] UKSC 13, paras. 18-20 per Lord Reed.

[93] *Sustainability: From the natural to the human world*, Lecture in the Global Environmental Change Lecture Series. University of East Anglia. 22 February 2005. http://www.crispintickell.com/page90.html.

plainly an extremely sustainable objective, and one to which the localism approach might be thought well suited. Yet even on basic matters such as ensuring safe facilities for those who would like to cycle, performance of many local authorities is poor.[94]

60. The shallowness of the sustainable development concept in the NPPF was exposed mercilessly in entertaining written evidence from Professor David Fisk, previously Chief Scientist and policy director at the Department of Environment, and one of the most respected environmental civil servants of his day. Professor Fisk's evidence on what he called "a Frankenstein fusion of conflicting ideas" includes the following:[95]

> "The draft NPPF quotes the Brundtland definition of sustainable development ... In the 1980s "sustainable" (as in "sustainable fisheries", "sustainable forestry") just meant what it said on the tin. Subsequent interminable redefinitions seem largely to curtail or redirect its meaning rather than add light. The Brundtland Report itself was a 300 page review of major global policy areas. The scope is breath taking. It not only included issues like biodiversity but issues long since shunted elsewhere like arms proliferation, over population, and sprawling megacities ... The Brundtland definition then only sets the Commission's idea of scale – big issues over large timescales. That it might be applied to a proposal for a lap dancing club in Broadway High Street might have struck the Commission as perplexing."
>
> "It is hard for an external reader not to guess that this section has been shoe-horned in from Departments that neither understand the background to the Brundtland Commission, how planning actually works and what currently motivates applications in England. The first difficulty is that "development" in planning has a different gloss from "development" in the rarefied text of Brundtland ... The hypothetical lap dancing club would be a sustainable development if it paid its bills. The collateral damage of that success would not, as the text is written, seem to be a material issue.
>
> "Perhaps the real difficulty is that the English have forgotten what the Planning system was for. If people work just to pay taxes so as to fund large public sector vanity projects, then maybe tax revenue generating lap dancing clubs and hypermarkets plonked anywhere are fine. But suppose people work principally so they can enjoy their home, live in communities of people they like and bring up their families in localities spared cycles of degeneration and fitful regeneration. In a nation that, especially in the South East, is beginning to look conspicuously overdeveloped, overpopulated and over tarmac-ed compared with competing centres in Mainland Europe, the draft NPPF may indeed be following the Brundtland prescription: a quick fix to a current problem that passes on an unmanageable future liability for the real heart of what drives the English economy, its people."

61. The planning system cannot hope in itself to deliver the nirvana of sustainable development, though bad planning decisions can of course negate that goal.

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[94] House of Commons Transport Select Committee 2nd Report, Session 2010 -2012, *Road Safety* (HC 506, 18 July 2012).
http://www.publications.parliament.uk/pa/cm201213/cmselect/cmtran/506/506.pdf.

[95] Eighth Report of Session 2010-2012, Vol. II.
http://www.publications.parliament.uk/pa/cm201012/cmselect/cmcomloc/1526/1526vw10.htm.

Delivery will involve a whole raft of policy areas outside the planning system. However it can provide a policy framework which will hopefully discourage or prevent development which runs counter to the principles underlying sustainability, and can encourage or facilitate development which will provide more sustainable ways of producing energy, food, housing, employment, etc. Planning policies can provide the stability necessary to take the long-term view and to resist the temptation of short-term decisions which lead to outcomes that are not in the interests of sustainability.

62. As already discussed, some aspects of sustainability require a strategic approach. Quite plainly, air and water do not recognise local administrative boundaries, nor is it safe or realistic to assume that each local authority can plan in a self contained way for its necessary energy and waste infrastructure (for example). So for example in respect of renewable energy, prior to the Localism Act 2011, it was clear that the regional level was seen as the most appropriate for making decisions on key renewable targets and broad areas.[96] Equally the provision of strategic waste facilities was a matter apt for regional resource estimates, targets and criteria-based policies.

63. Regional planning forms no part of the localism agenda. The provision for abolition of regional strategies in the Localism Act, s. 109, is accompanied by the new duty in s. 33A of the Planning and Compulsory Purchase Act 2004 on local planning authorities and other prescribed bodies to co-operate in relation to "strategic matters", defined by s. 33A(4) to include "sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas." It is plain already that this will have major legal implications, and will be an immediate point of scrutiny for PINS, as in the case of objections raised at the hearing in June 2012 of the North London Waste Plan as to lack of consultation with regional waste bodies outside London.[97] It is not something that will lend itself for formulaic or "tick-box" approaches and will involves some difficult discussion on which there may be deep disagreement as to which is the right solution in terms of sustainability.[98]

64. One interesting feature of the NPPF is the emphasis in local plan making on meeting objectively assessed needs, "*unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole*." Much speculation has arisen over what these words will mean in practice. Presumably both the adverse impacts and the benefits of the proposal need to be assessed in the light of the policies in the NPPF. Some impacts (most notably a significant effect on a protected European habitat) will be trump cards in this regard. But for others this

[96] See Companion Guide to PPS 22: *Planning for Renewable Energy* (2004), para. 3.7.

[97] Planning, 13 June 2012: "Waste plan hearing halted by duty to cooperate objections."

[98] See the Planning Advisory Service Simple Guide to Strategic Planning and the Duty to Co-operate (June 2012). http://www.pas.gov.uk/pas/core/page.do?pageId=2133454.

will not be a straightforward weighing exercise, made more complex perhaps by the words "significantly and demonstrably".

65. The 2011 White Paper, *The Natural Choice: Securing the Value of Nature*,[99] proceeds on the premise that the benefits of the natural environment are not properly valued and pledges to put natural capital at the centre of economic thinking. The concepts of ecosystem services and natural capital[100] currently play little by way of a prominent role in the planning system, but this seems likely to change as the White Paper's policies and initiatives feed through.[101] The House of Commons Environment, Food and Rural Affairs Committee in its July 2012 report on the Natural Environment White Paper was heavily critical of the Government for failing to integrate its approaches into planning and transport policy:[102]

> 84. It is disappointing that the opportunity was not taken to integrate the principles and policies in the Natural Environment White Paper within the National Planning Policy Framework. We recommend that the Department for Communities and Local Government publish guidance as to how planning bodies should take into account the benefits of the natural environment when determining planning applications. In particular this guidance should set out how planners and developers can protect the environment in areas designated as Nature Improvement Areas.
>
> 85. The Government must ensure that local planning bodies finalise their local plans which should demonstrate a link between the principle of protecting and enhancing nature and planning decisions.

66. The concepts enshrined in the White Paper will presumably, if the work being undertaken is to mean anything, have the capability to demonstrate the weight and significance of adverse impacts on components of natural capital and to counteract the benefits of meeting the "objectively assessed needs".

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[99] CM 8082, June 2011. http://www.official-documents.gov.uk/document/cm80/8082/8082.pdf.

[100] DEFRA defines natural capital as follows: *"Natural capital can be defined as the stock of our physical natural assets (such as soil, forests, water and biodiversity) which provide flows of services that benefit people (such as pollinating crops, natural hazard protection, climate regulation or the mental health benefits of a walk in the park). Natural capital is valuable to our economy. Some marketable products such as timber have a financial value that has been known for centuries. In other cases (eg the role of bees in pollinating crops), we are only just beginning to understand their financial value."* See http://www.defra.gov.uk/naturalcapitalcommittee/natural-capital/.

[101] The Government has now created the Natural Capital Committee, chaired by Oxford economist Dieter Helm, to provide advice on where natural assets are being used unsustainably and on how Government should prioritise future action. See http://www.defra.gov.uk/naturalcapitalcommittee/.

[102] Fourth Report of Session 2012-2013, HC 492. http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvfru/492/49208.htm.

67. As the ground-breaking work on the *UK National Ecosystem Assessment* (UKNEA) published in June 2011 makes clear in its findings, there are broad ranging implications for how planning decisions will be made in future:[103]

> "Of the range of services delivered in the UK by eight broad aquatic and terrestrial habitat types and their constituent biodiversity, about 30% have been assessed as currently declining. Many others are in a reduced or degraded state, including marine fisheries, wild species diversity and some of the services provided by soils. Reductions in ecosystem services are associated with declines in habitat extent or condition and changes in biodiversity, although the exact relationship between biodiversity and the ecosystem services it underpins is still incompletely understood.
>
> "Contemporary economic and participatory techniques allow us to estimate values for a wide range of ecosystem services. Applying these to scenarios of plausible futures shows that allowing decisions to be guided by market prices alone forgoes opportunities for major enhancements in ecosystem services, with negative consequences for social well-being. Recognising the value of ecosystem services more fully would allow the UK to move towards a more sustainable future, in which the benefits of ecosystem services are better realised and more equitably distributed.
>
> "This will need the involvement of a range of different actors – government, the private sector, voluntary organisations and civil society at large – in processes that are open and transparent enough to facilitate dialogue and collaboration and allow necessary trade-offs to be understood and agreed on when making decisions."

68. It is important to appreciate that this exercise is not one of seeking to reduce every asset or attribute to a monetary value. That is an approach which has been tried and discredited.[104] Rather, the UKNEA recognises that some considerations relating to the natural environment are not based on utility and are essentially non-monetary, for example ethical, spiritual, cultural and aesthetic considerations which translate into health values (both mental and physical) and shared social values.[105] The challenge lies in how those considerations are to be balanced. Diminution of natural capital therefore may affect not only the health and well-being of the current population, but also that of future generations which inherit a diminished or damaged asset.

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[103] http://uknea.unep-wcmc.org/Resources/tabid/82/Default.aspx. This is an independent, peer-reviewed study involving over 500 natural scientists, economists, and social scientists.

[104] See e.g the 1994 paper by John Adams, The Role of Cost-Benefit Analysis in Environmental Debates, discussing the 1971 Roskill Commission into the third London Airport: "*Cost-benefit analysis fails an elementary political test. It does not convince. It is proffered by economists to politicians and government officials as a method for making decisions about controversial issues. But, far from resolving controversy, CBA has itself become a focus of conflict. "Horse and rabbit stew", "nonsense on stilts", "insidious poison in the body politik", "Vogon economics", and "the economics of genocide" are but a few of the more colourful epithets that have been directed at CBA over the last three decades*." http://john-adams.co.uk/wp-content/uploads/2006/The%20role%20of%20cost-benefit%20analysis%20in%20environmental%20debates.pdf.

[105] See the discussion at pp. 32 ff of the UKNEA.

69. Sir Gus O'Donnell has famously in recent months listed planning reform as one of the three main policy failures in his civil service career. His words are relevant here:[106]

> "For my third failure I will use a microeconomic example; namely, the failure to agree on a planning system that achieves our desired goals. Every time there is a recession, or even of a reduction in growth below trend, there is a call for more 'structural reforms'. Top of the list is always the planning system. It is blamed for holding back growth and development.
> "The problem is, in fact, a classic example of not being clear about the outcome that is desired**.** If it is to boost GDP, then the answer is simple: concrete over the South East. But of course that's not what we want and that's because you would have to be an idiot to want to maximise GDP. It's a highly flawed measure and I am pleased that we are at last starting to think more broadly about how as a society we measure success. …The good news is that we are starting to apply the best economics to these issues. I am hopeful that the recent advances in methods of valuing environmental goods and bads will help decision makers make better choices *once they are clear about what they want to achieve*.**"**

70. Another component of sustainable development is recognising and living within environmental limits. One can pay lip service to this or one can apply it seriously. If the latter, then the implications for the localism agenda are significant. Before its abolition, the Sustainable Development Commission produced a report, *Know Your Environmental Limits – a Local Leaders' Guide*,[107] which was intended to redress the general ignorance of the concept. It said this on the question of what local governance bodies can do:

- **set ambitious local environmental limits** which will enable current and future generations within the local area to live healthily and equitably. The limits should be set in discussion with, and with support from, local people and community groups. Central government should also be called upon in order to utilise the latest monitoring data available and to ensure a consistent, nationwide spatial approach

- develop, in partnership with the local community, a **long-term vision** for protecting and enhancing the natural environment that recognises the value the environment provides in supporting all public services. This vision should be based on the environmental limits set for the local area, as above. It should then be incorporated into all other plans and strategies, for example for economic regeneration, housing, transport, and spatial planning

- **take stock and monitor** the status of local environmental assets and progress towards the long-term vision. For example, maintain up-to-date records on BAPs, green space availability and quality, air quality levels and cultural assets, and compare to the local environmental limits – this may include existing target levels and proxy limits. **Report and communicate** details and progress against the limits to communities for transparency and dialogue, and to central government as mediator

[106] *Ten Commandments of Good Policy Making – A Retrospective.* http://blogs.lse.ac.uk/politicsandpolicy/2012/05/01/retrospective-sir-gus-odonnell/.
[107] http://www.sd-commission.org.uk/data/files/publications/know_your_env_limits1.pdf.

- **raise awareness** of environmental limits and **provide advice** to the wider community on how to reduce pressure on the environment

71. There have been some many urban civilizations before our own which proved not to be sustainable in the sense that they crashed, sometimes dramatically, for reasons ranging from damage to the environmental base on which they rested to the mounting costs in human, economic and organizational terms of maintaining them.[108] Some of the past reasons, such as overpopulation, water resources and the like apply equally today, but we have added the further possible causes of energy shortage, climate change, the build-up of toxic materials in the environment, and so on.[109]

72. So to summarise, how does the planning system, taken as a whole and now including marine planning, fit with the ideal of sustainable development? The key point is perhaps that "development", i.e. physical built development and its location, is not the same concept as "development" when coupled with "sustainable" in the Brundtland sense. "Sustainable development" seeks to describe a form of progress which holds economic, social (in the broadest, inter-generational sense) and environmental factors in balance, or creative tension, and seeks outcomes which provide gains in all three terms. Decisions made by the planning system are a very minor component of this. Much more important, arguably, are decisions made as to the manner in which businesses operate, the goods and services they produce, and how they are consumed. Techniques such as life-cycle assessment, providing tools to allow companies to measure and reduce the environmental impacts of their products across their whole lives, have now passed from their period of infancy into mainstream use, backed up by objective standards such as ISO 14040 and ISO 14044.[110] What will be central in this respect is how multinational companies respond to the sustainability issue, as for example General Electric with its "Ecomagination" strategy launched in 2005, and described by the Washington Post as "... *the most dramatic example yet of a green revolution that is quietly transforming global business*."[111] Land-use planners fool themselves if they imagine that anything they can do will have anything like the impact of such developments.

73. Yet planning can of course play its part in preventing built development which will make it harder to achieve these ends, and in facilitating development which will promote them. A proposed project could at one level be highly "sustainable" in contributing to resource efficiency, clean energy, etc, but be in a bad location in land use terms. The role of the planning system is to balance these factors. Terming the development "unsustainable" because it is in a bad location adds

[108] *Sustainability: From the natural to the human world*, Lecture in the Global Environmental Change Lecture Series. University of East Anglia. 22 February 2005. http://www.crispintickell.com/page90.html.

[109] See the prize-winning book, *Collapse – How Societies Choose to Fail or Succeed*, by Jared Diamond, Professor of Geography at the University of California: Viking Press, 2005.

[110] See the useful summary in *The Environmentalist*, July 2012, pp. 16-20.

[111] *The Environmentalist*, July 2012, pp. 22-25.

nothing to that process. The converse approach is to ask what weight should be given to certain types of project (onshore wind being a key example, but there are many others) which may justify some degree of harm in land use location terms. That question leads us straight in to the next part of this paper.

The Street Corner

74. The Directives, legislation and policies discussed above on matters such as waste recycling and renewable energy will inevitably feed through (indeed are already doing so) into decisions on land use, since the necessary facilities must be located somewhere. Tension between these imperatives and environmental protection is not confined to the UK. For example, in Case C-2/10 *Azienda Agro-Zootecnica Franchini Sarl v. Regione Puglia* the first Chamber of the European Court of Justice had to consider a ban by the Regional Authority on commercial windfarms within the Alta Murgia national park on the basis that such projects were "totally inappropriate" in areas designated as of importance under the Birds and Habitats Directives. This was said to be contrary to provisions of Directive 2001/77/EC on the promotion of energy from renewable resources, recital 2 of which provides that "*The promotion of electricity produced from renewable energy sources is a high [European Union] priority … for reasons of security and diversification of energy supply, of environmental protection and of social and economic cohesion. …*"

75. The Court found that it was permissible for a member state to set more stringent controls on such development than were provided for by the Birds and Habitats Directives and that there was no principle that the emphasis on development of new renewable energy capacity should take precedence over the environmental objectives of those Directives, subject to the measure not being either discriminatory or disproportionate.[112] Somewhat similarly, a dispute arose in Case C-120/10 *European Air Transport SA v. Collège d'environnement de la Région de Bruxelles-Capitale* as to the compatibility of a national system of penalties for aircraft breaching ground limits on noise with Directive 2002/30/EC on the introduction of noise related operating restrictions at Community airports and the Chicago Convention on Civil Aviation. The Court held that the national legislation was not an "operating restriction" which was contrary to the Directive.[113]

76. To take the NPPF as being as good a starting point as any, para. 120 of the Framework reads:

> "To prevent unacceptable risks from pollution and land instability, planning policies and decisions should ensure that new development is appropriate for its location. The effects (including cumulative effects) of pollution on health, the natural environment or general amenity, and the potential sensitivity of the area or proposed development to adverse effects from pollution, should be taken into account ..."

[112] 21 July 2011, nyr.

[113] 8 September 2011, nyr.

77. Then para. 122 goes on:

> "In doing so, local planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities."

78. And according to para. 123:

> "Planning policies and decisions should aim to:
> - avoid noise from giving rise to significant adverse impacts on health and quality of life as a result of new development;
> - mitigate and reduce to a minimum other adverse impacts on health and quality of life arising from noise from new development, including through the use of conditions;
> - recognise that development will often create some noise and existing businesses wanting to develop in continuance of their business should not have unreasonable restrictions put on them because of changes in nearby land uses since they were established; and
> - identify and protect areas of tranquillity which have remained relatively undisturbed by noise and are prized for their recreational and amenity value for this reason.

79. A key benefit of the planning system should be to increase certainty that land use conflicts will not arise. As termed by the 2010 Penfold Review of Non-Planning Consents,[114] and endorsed by the Commons Communities and Local Government Committee in its report on the NPPF, this is the "abattoir effect":[115]

> "... the certainty the planning system gives to developers that, having made an investment, they will not see it devalued by, for example, planning permission being granted for an abattoir next to their residential or office development."

80. It could also be argued that the reverse should be true and that operators of abattoirs (for example) should have some certainty that housing development will not be permitted on their doorstep. That however is not always the case. Planning permission may be, and not infrequently is, granted for housing development which may potentially be affected by odour or noise from existing industrial operations. A recent example is the grant of planning permission on appeal for over 100 homes, 78 of which would be within 250m of an Anglian

[114] Final Report, July 2010. http://www.bis.gov.uk/assets/biscore/better-regulation/docs/p/10-1027-penfold-review-final-report.pdf.

[115] Eighth Report of Session 2010-2012, HC 1526, 21 December 2011, para. 11. http://www.publications.parliament.uk/pa/cm201012/cmselect/cmcomloc/1526/152602.htm.

Water sewage treatment works in rural Suffolk.[116] The inspector found no clear guidance on what constitutes an unambiguous threshold for development around a rural sewage works, but reasoned that a significant loss of amenity could occur at levels that would not be defined as a statutory nuisance. He rejected the proposed 300-400m "cordon sanitaire" proposed by Anglian Water as not based on any policy. Anglian Water had in fact not objected to allocation of the site for housing in the adopted local plan in 2006, nor in the adopted core strategy in 2010.

81. Centuries before planning law was enacted,[117] such protection as existed against adverse impacts on health or quality of life (using the language of the NPPF, para 123) was mainly derived from the common law,[118] in particular private nuisance and public nuisance. To these two forms of nuisance the Victorian public health legislators added statutory nuisance.

82. A private nuisance is an unreasonable level of interference with the reasonable comfort and enjoyment by an individual of land in which they have some proprietary interest, or which affects that land itself. It is not concerned with fault:[119]

> "At common law, if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it."

83. A public nuisance may, as was said in one case, be "made up of a collection of private nuisances occurring more or less simultaneously",[120] but it could also be an act or state of affairs which affects the community in general, whether or not those affected would have the right to sue for private nuisance.[121] Public nuisance is concerned with the infringement of public rights, not private rights.[122]

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[116] *Planning* magazine, "In Focus", 13 July 2012, p. 25.

[117] Whilst the historical origins of private nuisance remain elusive in terms of a date, the assize of nuisance is thought to have emerged as a tort around the middle of the 12th century.

[118] Mainly, but not exclusively, as there were some statutes made with the objective of protecting the environment and public health. In 1306, Edward I ordered that the burning of sea coal in craftsmen's furnaces be prohibited because of the foul-smelling fumes produced. Elizabeth I banned, for similar reasons, the burning of coal in London while Parliament was in session.

[119] *Rapier v. London Street Tramways Company*[1893] ChD 588 at 599-600 per Lindley LJ.

[120] *R v. Rimmington* [2006] 1 AC 459 at [47] per Lord Rodger of Earlsferry.

[121] As put by Lord Denning in one case, it "covers a multitude of sins, great and small" (*Southport Corporation v. Esso Petroleum Co Ltd* [1954] 2 QB 182, 196) and remains available to cover all sorts of unpredictable behaviour, such as swimming into the path of the Oxford and Cambridge Boat Race.

[122] John Murphy, *The Law of Nuisance* (Oxford, 2010, p. 4). See further, JR Spencer, *Public Nuisance – A Critical Examination* [1989] CLJ 55.

84. Statutory nuisance is based on a situation[123] where there is either prejudice to health or a nuisance, and for this purpose the nuisance must be either a public or a private nuisance.[124] The common factor is that the law seeks to control land use in either the public or private interest by way of injunction to restrain uses which give rise to an actionable nuisance, or alternatively seek to compensate in damages the individual or individuals affected.

85. Private nuisance of necessity involves striking a balance between the competing rights of the parties before it: the claimant's right to enjoyment of their land free from disturbance and inconvenience; the defendant's right to use their land for lawful purposes. The time-honoured formulation of the test is that stated by Knight Bruce VC in 1851 in *Walter v. Selfe*:[125]

> "... an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and simple notions among the English people".

86. One problem which defendants in nuisance actions undoubtedly face is that the plain and simple notions of English people have become less forgiving since 1851. Cities are no longer subjected to the noise, smoke[126] and smells which communities would have taken in their stride, or at least phlegmatically,[127] at the time of Dickens. Industry has largely moved out of city centres and few of the old "offensive trades" now remain. Those living in rural locations tend to value quiet environmental conditions highly, and will see the introduction of "industrial activity", whether wind farms or intensive livestock units, as alien and unwelcome Accordingly, where there are activities which generate significant noise or odours, whether in urban or rural environments, trouble probably lies ahead.

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[123] The list of such nuisances being set out in s. 79(1) of the Environmental Protection Act 1990 and including matters such as smoke, fumes, gases, dust, smell, noise, insects and (now) artificial light.

[124] *National Coal Board v. Thorne* [1976] 1 WLR 543 at 548, per Watkins J (Kilner Brown J and Lord Widgery CJ concurring).

[125] (1851) 4 De G & Sm 315, at 322.

[126] The best known nuisance being probably the "fuliginous and filthy vapour" from the burning of soft, high sulphur "sea-coal" as immortalised by John Evelyn in his *Fumifugium: or the Aer and Smoak of London Dissipated* (1661). Interestingly the problem has been linked to an energy crisis resulting from population increase and the clearance of the woodlands which would have been the alternative source of fuel: see William H. Te Brake, *Air Pollution and Fuel Crises in Preindustrial London 1250-1650*, Technology and Culture, Vol. 16, No. 3 (July 1975) pp. 337-359.

[127] Though not invariably. In his book *A History of London* (Macmillan, 1998) Stephen Inwood instances the successful suit in the assize of nuisance in 1378 by a Thomas Yonge against armour makers who had built a forge i the close of their tenement. The court rejected their plea that "good and honest men of any craft ... are at liberty to carry on their trade anywhere in the City, adapting their premises as is most convenient for their work."

87. The problem will often be operations which result in sporadic interference over a protracted period. The developer or operator would ideally like the certainty of clear thresholds in terms of intensity, frequency or duration, within which the facility can operate with legal impunity. The courts have declined to incorporate such an approach into the common law of nuisance. This can be seen from the decision in *Barr v. Biffa Waste Services*,[128] discussed below, and more recently in *Pusey v. Somerset County Council*,[129] in which Patten LJ said:

> 26. A threshold is a useful tool for the purpose of regulating a potentially intrusive activity which should be allowed to continue in the future but subject to restrictions on its frequency and duration. In this way its impact on the claimants can be limited and local residents who are most directly affected by an intermittent but noisy activity such as power-boat or motor racing can regulate their lives accordingly...
>
> 27. But, as Carnwath LJ emphasised in *Barr v Biffa* (supra), these were all cases in which the setting of maximum noise levels and a limited number of race days could make life tolerable for the claimants. Thresholds are not a legitimate means of establishing whether the degree of interference which the claimant has experienced amounts to an actionable nuisance. This is a matter of evaluating the effect of the particular incidents complained of. There is no suggestion in this case that the use of the lay-by could be regulated in this way.

88. Moreover, one needs to look at the cumulative effect of the defendant's activity, as again Patten LJ made clear (para 31):

> "... As the decision in *Barr v Biffa* illustrates, one can have a situation where the source of the alleged nuisance is an operation which continues over a prolonged period during which some level of interference will be experienced. The claimants in *Barr v Biffa* rarely, if ever, were free of all odorous emissions. But they were only entitled to recover damages for the occasions or periods when the odour levels from the waste tip became unreasonable in the sense that it was unreasonable for the claimants to be expected to tolerate them. In all such cases there is the potential for overlap between the effect of the worst periods of interference and the cumulative effect of lesser incidents. But the court has to approach its task in an objective manner and decide whether there have been occasions when the average resident in the place of the claimants would have been adversely and unreasonably affected by what was happening on his neighbour's land. For this purpose, everything has to be taken into account but any particular sensitivities of the actual claimants are excluded."

89. Writing in 1989, Conor Gearty described a High Court private nuisance action (as opposed to the numerous complaints of statutory nuisance dealt with every week by environmental health departments) as "a source of surprise and nostalgia".[130] That is no longer the case – as will be seen from the decisions discussed here, private nuisance has enjoyed a startling renaissance in the past decade or so.

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[128] [2012] EWCA Civ 312.

[129] [2012] EWCA Civ 988, paras 26-27..

[130] *The Place of Private Nuisance in a Modern Law of Torts* [1989] CLJ 214, p. 217.

Nationally significant infrastructure projects

90. Nationally significant infrastructure projects authorised under the Planning Act 2008 may benefit from certain immunities in respect of private and statutory nuisance. This follows from section 158 which provides:

> **Nuisance: statutory authority**
>
> (1)This subsection confers statutory authority for—
>
> (a)carrying out development for which consent is granted by an order granting development consent;
>
> (b)doing anything else authorised by an order granting development consent.
>
> (2)Statutory authority under subsection (1) is conferred only for the purpose of providing a defence in civil or criminal proceedings for nuisance.
>
> (3)Subsections (1) and (2) are subject to any contrary provision made in any particular case by an order granting development consent.

In addition, Schedule 5, Part 1, dealing with ancillary matters in development consent orders provides for the imposition or exclusion of obligations or liability in respect of acts or omissions. These provisions are supplemented by section 152, which provides for statutory compensation to be paid to any person whose land is injuriously affected by the carrying out of the authorised works.[131]

91. This means that the issues of such possible nuisance will need to be explored at the consenting stage as, for example, paras 4.14.1 – 4.14.3 of the NPS on Ports makes clear:

> 4.14.1 Section 158 of the Planning Act 2008 confers statutory authority for carrying out development consented to by, or doing anything else authorised by, a development consent order. Such authority is conferred only for the purpose of providing a defence in any civil or criminal proceedings for nuisance. This would include a defence for proceedings for nuisance under Part III of the Environmental Protection Act (EPA) 1990 (statutory nuisance), but only to the extent that the nuisance is the inevitable consequence of what has been authorised. The defence does not extinguish the local authority's duties under Part III of the EPA 1990 to inspect its area and take reasonable steps to investigate complaints of statutory nuisance and to serve an abatement notice where satisfied of its existence, likely occurrence or recurrence. The defence is not intended to extend to proceedings where the matter is 'prejudicial to health' and not a nuisance.

[131] Meaning the development for which consent is granted and anything else authorised by an order granting development consent (s. 152(3)).

> 4.14.2 It is very important that, at the application stage of an NSIP, possible sources of nuisance under section 79(1) of the 1990 Act and how they may be mitigated or limited are considered by the decision-maker so that appropriate requirements can be included in any subsequent order granting development consent.
>
> 4.14.3 The decision-maker should note that the defence of statutory authority is subject to any contrary provision made by the decision-maker in any particular case in a development consent order (section 158(3)). Therefore, subject to paragraph 4.14.1, the decision-maker can disapply the defence of statutory authority in whole or in part, in any particular case, but in doing so should have regard to whether any particular nuisance is an inevitable consequence of the development.

Character of the locality

92. The character of the locality in which the alleged nuisance occurs has long been part of the law of nuisance when assessing the reasonable standard of comfort which the claimant should expect. It is interesting to put this in historical context in that at the time the modern law was being established during the Industrial Revolution, the character of certain areas was changing markedly with the establishment of concentrated industries, such as the alkali works of St Helens in Lancashire and the forges and foundries of Wolverhampton. The eastern part of London had since the 16th century been seen as "base" and "filthy", the "Easterly Pyle" where the "stink industries" such as dye making, chemical manufacture, manure, lamp black, glue and paraffin congregated, a position consolidated with the springing up of the new industrial districts of Canning Town, Silvertown and Beckton.[132]

93. Against that background, the comments of Cozens-Hardy LJ in *Rushmer v. Polsue & Alfieri Limited* in 1905, whilst politically incorrect by today's standards, make sense:[133]

> "A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it. This idea is expressed by Thesiger L.J. in *Sturges v. Bridgman*, when he said that what might be a nuisance in Belgrave Square would not be a nuisance in Bermondsey. But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to create a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the

[132] See Peter Ackroyd, *London: the Biography* (Vintage, 2001), pp. 676-677.

[133] [1906] 1 Ch 234 at 250-251. Approved by the House of Lords at [1907] AC 121 at 123.

> steam-hammer is of the most modern approved pattern and is reasonably worked. In short, if a substantial addition is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy, and that the defendant's machinery is of first-class character.
> ... The lower standard of comfort existing, say, in Whitechapel would equally exist in one of the numerous districts which have sprung up in late years on the outskirts of the City, and which are occupied by persons of the same class as those who occupy the older houses in Whitechapel."

94. The character of the locality was in issue in the case of *Dennis v. Ministry of Defence*,[134] the case involving noise from Harrier jump-jets at RAF Wittering. The airfield had been in use for military purposes since 1916. The introduction of Harriers in 1969 resulted in much higher levels of noise. Buckley J in considering the nature of the locality commented as follows:

> 34. I regard such activities which generate extreme noise or other pollution as extraordinary uses of land, even in this day and age. They may well be justified by other considerations but not, in my view, as ordinary use. Nor do I think that a consideration of the character of the neighbourhood tips the balance against finding the Harriers a nuisance. The area remains essentially rural, with villages and individual residences. As Mr Wood submitted it would be odd if a potential tortfeasor could itself so alter the character of the neighbourhood over the years as to create a nuisance with impunity.
>
> 35. As to the common law's approach to industrial development and the evolution of society generally, and at the risk of over simplification, the following observations may be relevant. The development of railways, canals, roads, large factories or plants and airports has largely proceeded pursuant to statutory authority or control. Planning controls were introduced in the 1940's and public enquiries also became fashionable. Clearly such major developments in any society will interfere with the private enjoyment of nearby land. The private interests so affected have been dealt with in various ways, including: compulsory purchase, grant schemes and compensation. Statute can, of course, deal expressly with the right to bring actions, either preserving or prohibiting them. The common law has contributed by restricting the alleged tortfeasor to disturbances that are reasonably necessary in carrying out the undertaking that has been authorised. However, there is no statute in question here and the MOD is not subject to planning controls. The land was purchased originally in the usual way, so far as I am aware. All that has happened is that with the development of the jet engine and the vertical takeoff capability of, for example, the Harrier, the noise made by military aircraft has escalated. It is not surprising that no proceedings or, so far as I know complaints, arose in the early years since the aircraft then were not so noisy and the country was twice at war. However, with the introduction of the V-bombers and more particularly the Harriers, matters changed dramatically. I have already outlined the history of complaints that followed. To an extent a court can only take a neighbourhood as it finds it, but that cannot permit an undertaking in an area such as the one in question here to generate an ever increasing level of noise.

[134] [2003] EWHC 793 (QB); [2003] Env LR 34.

"Normal" planning permissions

95. In the 2012 Court of Appeal decision in *Coventry (t/a RDC Promotions) v. Lawrence*,[135] Jackson LJ summarised the law on the relationship between planning permission and nuisance in four propositions (para 65):

1. A planning authority by the grant of planning permission cannot authorise the commission of a nuisance.

2. Nevertheless the grant of planning permission followed by the implementation of such permission may change the character of a locality.

3. It is a question of fact in every case whether the grant of planning permission followed by steps to implement such permission do have the effect of changing the character of the locality.

4. If the character of a locality is changed as a consequence of planning permission having been granted and implemented, then:

   a) the question whether particular activities in that locality constitute a nuisance must be decided against the background of its changed character;

   b) one consequence may be that otherwise offensive activities in that locality cease to constitute a nuisance.

96. In arriving at these propositions, Jackson LJ observed at para. 53:

> "The first point to note is that the planning system exists to protect the public interest, not to protect private interests: see *PPG1: General Policy and Principles*, paragraph 17 (first version, 1988), and *The Planning System: General Principles*, published by the Office of the Deputy Prime Minister in 2005, paragraph 29 (and still current). Nevertheless both grants and refusals of planning permission impact upon private interests, sometimes to a substantial extent. Grants of planning permission may result in the character of an area being changed, with consequential effects upon private rights."

97. This passage highlights immediately something of a conundrum. It is clear both from policy and from case law that purely private interests are not what the planning system is about. In the EIA context, for example, the fact that a proposed house extension may affect the environmental amenity of a neighbour, even decisively, does not equate to a significant effect on the environment, requiring assessment.[136] That is of course not to say that the planning system is deaf to such effects, or that they are incapable of being material considerations.

[135] [2012] EWCA Civ 26. Permission has been granted by the Supreme Court to appeal against this decision.

[136] See *R (Loader) v. Secretary of State for Communities and Local Government* [2012] EWCA Civ 868, per Pill LJ at para, 46. See also *R (Malster) v. Ipswich Town Football Club* [2001] EWHC 711 (Admin) at para 73 per Sullivan J (as he then was).

The impact of noise, odour or dust from a proposed development on one or more local residents will of course be relevant in deciding whether the proposed development is acceptable, or what conditions should be imposed to mitigate such effects.

98. The point is simply that the planning system, unlike the law of nuisance, is not there to adjudicate between the competing interests of neighbours. This is equally the case where a planning authority proposes to allow new residential development in an area of existing noisy or odorous industry, in the hope that the industry may relocate: according to the decision of Simon Brown J (as he then was) in *R v. Exeter City Council, ex p JL Thomas & Co Ltd*,[137] where he said:

> "Thomas and the other industrial users have no legitimate expectation that other conflicting uses will never be introduced into the vicinity; the planning permissions which they obtained and enjoy confer upon them no right to commit nuisances against their neighbours either now or in the future.
> "... It is in my judgment perfectly proper for a planning authority to wish to encourage residential development in a particular area even if it contains existing industrial users. It is legitimate also for the planning authority to recognise and accept that planning permission for residential development in such an area is likely to give rise to conflicts with those existing users. It is also perfectly proper for the authority to harbour the wider aspiration that the existing users will relocate, whether influenced by carrot or stick. The one thing that would flaw the authority's decision is if they were concerned to promote rather than minimise the conflict, which I am satisfied is not this case."

99. In *Coventry*, there had been a long-running history of the stadium owned by the defendant and used for various motorsports. There had been a certificate of lawful use and a series of temporary planning permissions subject to conditions governing time of use and noise levels and culminating in a permanent planning permission in 2002. The claimants bought their house, some 500 metres from the Stadium, in 2006. Jackson LJ commented that over the years,

> "... careful consideration was given to the differing interests of those who lived in the locality. On the one hand there was a need to protect residents close to the Track from undue disturbance. On the other hand there was a recognition that the facility for motocross racing performed a valuable social function ... It can be seen that in the planning permission finally granted the council struck a balance between the conflicting interests which were in play."

100. In these circumstances the Court of Appeal rejected the conclusion of the first instance judge that noise from the Stadium amounted to a nuisance. Jackson LJ put it thus:

> 69. In January 2006, when the claimants purchased Fenland, the position was this. For the last thirteen years various forms of motor sports had been taking place at the

[137] [1991] 1 QB 471.

> Stadium and the Track on numerous occasions throughout the year. These noisy activities, regarded by some as recreation and by others as an unwelcome disturbance, were an established feature, indeed a dominant feature, of the locality.
>
> 74. The noise of motor sports emanating from the Track and the Stadium are an established part of the character of the locality. They cannot be left out of account when considering whether the matters of which the claimants complain constitute a nuisance.
>
> 75. I quite accept that if the second and third defendants had ignored the breach of condition notices and had conducted their business at noise levels above those permitted by the planning permissions, the claimants might have been able to make out a case in nuisance. It appears, however, that this was not the case. Abatement works were carried out in 2008 to the satisfaction of Forest Heath District Council. No breach of condition notices have been served since then, apart from one which did not relate to noise level.

101. The cases on which Jackson LJ based his four propositions are something of a mixed bag. In the first, *Gillingham Borough Council v Medway (Chatham) Dock Co. Ltd* [138] the dock company obtained planning permission to develop a commercial port on part of the site of the former Chatham Dockyard. The council, having granted planning permission for that development, then contended that heavy goods vehicles travelling to or from the port at night constituted a public nuisance. Buckley J noted that planning permission differed from statutory authority, and analysed the interplay between planning permission and the law of nuisance as follows:[139]

> "Parliament has set up a statutory framework and delegated the task of balancing the interests of the community against those of individuals and of holding the scales between individuals, to the local planning authority. There is the right to object to any proposed grant, provision for appeals and inquiries, and ultimately the minister decides. There is the added safeguard of judicial review. If a planning authority grants permission for a particular construction or use in its area it is almost certain that some local inhabitants will be prejudiced in the quiet enjoyment of their properties. Can they defeat the scheme simply by bringing an action in nuisance? If not, why not? It has been said, no doubt correctly, that planning permission is not a licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood. That may have the effect of rendering innocent activities which prior to the change would have been an actionable nuisance."

102. Buckley J held that he grant of planning permission and the construction of the port had changed the character of the neighbourhood and that it would be unrealistic to operate the port without causing the disturbances of which the local residents complained. In *Coventry*, Jackson LJ agreed:

[138] [1993] QB 343.

[139] Page 359F-H.

> "Harsh though that outcome may seem, I respectfully agree both with the decision and with the reasoning on which it is based. The planning authority had made a decision in the public interest and the consequences had to be accepted."

103. In the next case, *Wheeler v JJ Saunders Ltd*,[140] smells from the defendant's pig farm were held to constitute a private nuisance. One of the issues concerned the effect of planning permissions which the defendants had obtained for this development. The Court of Appeal held that this did not constitute a defence to the plaintiffs' claim in nuisance. The court distinguished *Gillingham* on the basis that the grant of planning permission for "a change of use of a very small piece of land" had not changed the character of the neighbourhood. Jackson LJ saw this analysis as "readily comprehensible" and as giving rise to no inconsistency with the decision in *Gillingham.* It is a curious case, where planning permissions for buildings housing some 400 pigs were granted, the pig houses being only 11 metres away from the nearest part of the claimant's residential property, as compared with the recommended separation distances in the UK and elsewhere of between 100 – 700 metres.[141]

104. Third, there was the House of Lords' decision in *Hunter v Canary Wharf Ltd,*[142] in which residents in the London Docklands area complained that the large building constructed by the defendants interfered with the reception of television broadcasts. The House of Lords held that the plaintiffs could not maintain a claim in nuisance. The defendants had constructed their building in accordance with the planning permission which had been granted. The defendants could not be held liable in private nuisance for the simple consequences of their building being present. Lord Hoffmann noted that since 1947 planning legislation has drastically curtailed the freedom of an owner to build as he chooses on his land and then added:[143]

> "In a case such as this, where the development is likely to have an impact upon many people over a large area, the planning system is, I think, a far more appropriate form of control, from the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law. It enables the issues to be debated before an expert forum at a planning inquiry and gives the developer the advantage of certainty as to what he is entitled to build."

105. Lord Hoffmann also added the important qualification that the grant of planning permission does not constitute a defence to anything that is a nuisance

[140] [1996] Ch 19.

[141] See the expert evidence summarised by Staughton LJ at p. 27C-F.

[142] [1997] AC 655.

[143] At 710A-C.

under the existing law.[144] Lord Cooke of Thorndon, who dissented in the result, observed that planning measures denoted "*a standard of what is acceptable in the community*" with the consequence that failure to comply with restrictions imposed by the planning system would mean that the defendant's user of their land was unreasonable.[145] He accepted that compliance with planning controls was not in itself a defence to a nuisance action, as illustrated by the decision in *Wheeler*. He added that *Wheeler* was:[146] "... *an instance of an injudicious grant of planning consent, procured apparently by the supply of inaccurate and incomplete information*". On the other hand, he regarded it as of "major importance" that Canary Wharf had been built in an enterprise zone under special legislation designed to encourage regeneration.[147]

106. *Hunter v. Canary Wharf* and *Wheeler v. Saunders* are of course extremely different cases on their facts and context. The Canary Wharf development was undertaken pursuant to the statutory scheme in ss. 134-136 of the Local Government Planning and Land Act 1980, the London Docklands Development Corporation Orders and the Isle of Dogs Enterprise Zone Order, and to enterprise zone consents issued by the LDDC. Even so, the powers under which the development was authorised did not in themselves provide immunity from nuisance. The case turned on the question of whether the common law should restrict the individual's right to build on their land, even if the presence of the building had effects on others such as interference with TV reception (absent any easement) – to which the majority answer was that it should not interfere.[148] The issue of character of the neighbourhood did not arise for decision, since the case was decided on a number of preliminary issues.[149] As Lord Hoffmann made clear, this was major development to meet a key policy objective of regeneration in the national interest, and was not subject to the normal requirements of a public inquiry.[150] The fact that the normal planning law safeguards for affected local residents had been curtailed did not in Lord Hoffmann's view justify changing the basic principles of the law of nuisance, under which the local residents had no remedy.

[144] At 710D.

[145] At 721D-E.

[146] At 722A.

[147] At p. 722A-B.

[148] Lord Cooke of Thorndon dissenting.

[149] See per Pill LJ at 669H, commenting however that the evidence did not suggest that the neighbourhood would continue to have anything other than a substantial TV-watching residential component. Lord Cooke did however regard the development as having changed the character of the neighbourhood by which the standard of reasonable user fell to be judged (p. 722G).

[150] Page 701A-C and 710F.

107. A fourth case, *Watson v. Croft Promo-Sport Ltd*,[151] is also relevant. It was dealt with briefly by Jackson LJ in Coventry as simply an example of the application of established principles to particular facts, but in fact the judgment of the Court of Appeal contains some further helpful discussion. Planning permission had been granted in 1963 for use of a WWII aerodrome for motor sport events. In 1998, in the context of a further planning inquiry into deemed refusal for variation of conditions, the owner had entered into a section 106 undertaking agreeing to ensure that no vehicle using the circuit should exceed certain maximum noise levels and that the use of the circuit for motor and motor cycle events should be limited by reference to noise levels measured at a defined point on the circuit. The inspector had allowed the appeal and granted permission for continued use free of the relevant 1963 conditions but subject to those in the s. 106 undertaking. This was on the basis that the site enjoyed almost unrestricted rights to use the circuit for motor racing with unsilenced vehicles every day of the year, and that the section 106 restrictions represented a reasonable compromise.

108. On appeal against an award of damages to the claimants for private nuisance it was argued by the defendant that in the case of those planning decisions which may properly be regarded as "*strategic planning decisions affected by considerations of public interest*", the grant of planning permission of itself affects the private rights of the citizen to complain of a common law nuisance. The Court of Appeal rejected that submission. There is no category of "strategic" planning permission which can, simply by virtue of being granted, affect common law rights, but that even if there were such a category, the permissions in this case would not fall within it as put by Sir Andrew Morritt, Chancellor:

> 33. In the light of these two well established principles I find it hard to understand how there can be some middle category of planning permission which, without implementation, is capable of affecting private rights unless such effect is specifically authorised by Parliament. It has not been suggested to us that there is any section in the statutory code governing the application for and grant of planning permission which could have that result. For that reason alone I would reject the second ground of appeal put forward by the defendants.
>
> 34. In any event, even if there be some middle category such as that for which the defendants contend neither of the grants of planning permission on which the defendants rely can be properly described as 'strategic'. The 1963 grant was specific to the part of the airfield to which it applied. It dealt with the issue of noise, but in a more confined context than what might reasonably be described as 'strategic'. In the case of the 1998 grant it is plain from the passages in the inspector's report to which I have drawn attention that the purpose and effect of that grant was to introduce some restriction and control over the otherwise unrestricted activities authorised by the 1963 grant. In effect it dealt with the unimplemented parts of the 1963 grant. It follows that, on the facts of this case, neither grant of permission can come within any such third category.

[151] [2009] EWCA Civ 15, [2009] 3 All ER 249.

109. That being the case, there was no basis to interfere with the conclusion of the first instance judge, Simon J, that implementation of the 1963 and 1998 permissions had brought about a change in the nature and character of the essentially rural area. The judge's conclusions on this point are worth setting out:[152]

> 54. I accept that the 1998 decision was robust in the sense that it was based on a full and thorough Inquiry; and the Defendant may be right to say that there could not have been a better forum for a consideration as to what the nature and character of the area should be. However, I do not accept that there was a decision as to the nature and character of the area, which defeats the present claim. It is clear that the Inspector regarded the 1963 planning permission as providing the developer with a very wide consent; and the s.106 Agreement as a protection against what he otherwise described ... as 'the almost unrestricted rights which the operators now enjoy to operate the circuit'. The decision cannot properly be regarded as a strategic decision affected by considerations of public interest. The Inspector considered that some controls were better than none; and it was only to that extent that a public interest arose.
>
> 55. The Defendant is correct in saying that the noise from racing has occurred for forty years; but I do not accept that the character of the neighbourhood has been changed. From 1949 to 1994 the character and nature of the locality was essentially rural, but with the use of the former airfield for a limited number (no more than 20) of races each year. It is clear that the circuit could be, and was, run in a way that was consistent with its essentially rural nature. That essential character did not change, despite the gradual development of the Circuit with an intensification of the level of noise.
>
> 56. It is clear from the planning process leading up to the 1998 decision that it was the Defendant which was dictating what would and would not take place (including the noise levels) at the Circuit. It seems to me that in such circumstances it is difficult to treat the 1998 decision as 'a far more appropriate form of control, from the point of view of both the developer and the public', to use the phrase of Lord Hoffman.
>
> 57. I do not accept the Defendant's contention that it is 'wrong and contrary to public policy for a common law Court to travel over the same ground and to come up with an inconsistent conclusion.' It seems to me that this submission comes close to a contention that the planning permission is determinative of the issue of private nuisance in a case such as this. There may be sound arguments in favour of such a contention; but it does not represent the present state of the law. What is essentially an administrative decision does not extinguish private rights without compensation.

110. It is difficult not to conclude that there is an element of confusion running through the cases as to the effect of planning permission. It may be that this will be resolved by the Supreme Court, which has given permission to appeal against the Court of Appeal judgment in *Coventry v. Lawrence*. It seems clear that, as

[152] [2008] Env LR 43, [2008] 3 All ER 1171, [2008] EWHC 759 (QB).

the law stands, the grant of planning permission does not in itself provide a defence to an action in nuisance.[153] In other words, the fact that a local planning authority has decided to permit a landfill site to be located within smelling distance of housing does not avail the landfill operator if the smells emitted are unreasonable in terms of their effects.

111. However, implementation of a planning permission may lead to a change in the character of the locality, which may in turn affect the standard of comfort which a resident can reasonably expect. One would not normally expect a single development to have that effect except in the most extreme cases. The introduction of a new source of noise or odour should not itself change the character of the locality, as otherwise the perpetrator of the nuisance would be legitimising their own unlawful conduct. But if numerous sources of noise and odour are introduced then there must come a point at which the character of the locality has changed. It should logically make no difference whether or not these have been subject to planning permission – what matters is the factual question of the change which has come about.

112. If the grant and subsequent implementation of a single planning permission could in general bring about a change in the character of the locality, and hence affect private rights, then it could be said with force that local planning authorities would have to take that into account as a material consideration, leading them into territory which previously they have in general avoided. Plainly one would not expect a local planning authority, acting reasonably, to grant planning permission for a development (a composting facility for example) where it is clear that nuisance to existing neighbours will inevitably be the result. The LPA's view may well be that, the plant being properly operated and well-regulated, there should not be a nuisance. However, that assumption may turn out to have been mistaken once operation begins. In that case the law of nuisance provides important safeguards for local residents, and it should not follow that the residents will simply have to put up with whatever smells or noise emanate from the plant.

113. Equally of course planning permission may be granted for residential development in an established industrial area. In the same way, it should not be the case that the mere grant of permission would entitle the incoming resident to expect higher standards of comfort than would be the case in a basically industrial area. It is trite law that "coming to the nuisance is no defence":[154] it makes no difference "whether the man went to the nuisance or the nuisance to the man."[155] It is a sound rule, in that it should not be for one landowner, simply because he is first in the field, to determine unilaterally the character of the

[153] Indeed, were that the case, the law of nuisance would be left with an extremely limited role: see J Steele and T Jewell, *Nuisance and Planning* (1993) 56 MLR 568.
[154] See e.g. *Bliss v. Hall* (1838) 4 Bing NC 183; *Miller v. Jackson* [1977] QB 966.

[155] *Fleming v. Hislop* (1866) 11 App Cas 686 at 697 per Lord Halsbury.

neighbourhood and the viability of using nearby land;[156] however it may have harsh consequences in individual cases. The locality principle is a key way in which the potentially harsh consequences of that rule are mitigated in practice.[157]

114. A somewhat different question arises where the planning permission purports to lay down standards for noise and other environmental effects. Does keeping within the terms of these restrictions provide a defence to nuisance? In other words is it presumptively the case that the standards set by the planning authority represent the level of comfort which a residential occupier can reasonably expect? Do these standards have a potential role in setting any threshold for what amounts to a nuisance, whether in terms of intensity (decibel levels), frequency (the number of "events" allowed per year) or duration (operating hours)?

115. Breach of a planning requirement of this sort will not of course of itself mean that there is a claim in nuisance, unless there is actual interference at an unreasonable level with the claimant's enjoyment of their land. This will involve looking at all the relevant factors, of which the planning requirements will be one. There is certainly some suggestion in the judicial pronouncements of Jackson LJ in *Coventry* (see above) and Carnwath LJ in *Barr v. Biffa* (see below) that exceeding limits set in a planning permission might make the interference unreasonable.[158] Equally, Jackson LJ in *Coventry* appeared to find it relevant that the defendant had conducted itself in accordance with the permissions and that there had been no abatement or enforcement action by the local authority.

116. It is suggested that this is an area which does not lend itself to clear cut, black and white rules. The parameters set by a local planning authority or inspector on appeal may or may not be a suitable yardstick for the court in seeking to find the reasonable level of enjoyment protected in any given case by the tort of nuisance. Such parameters can never, it is suggested, be fully decisive, in that the court cannot yield its own exercise of judgment in an individual case to a planning authority which has made a decision in the wider public interest. The planning parameters should not at the same time be entirely irrelevant. It will be for the court to decide what weight to give them. This will involve a degree of interrogation of the decision-making process which led to the parameters to ascertain their strength in the context of the question which the court has to answer. In a recent article in the Modern Law Review, Maria Lee visits the same question when considering the relationship between the standard of care applied in personal injury cases and regulatory standards.[159] The abstract to her article

[156] See RA Buckley, *The Law of Negligence and Nuisance* (5th edn., Lexis Nexis, London, 2011) para. 23.26.

[157] See John Murphy, *The Law of Nuisance* (Oxford, 2010) para. 5.16.

[158] See para. 75 in both judgments.

[159] *Safety, Regulation and Tort: Fault in Context* [2011] MLR 555.

puts it as follows from which the possible parallels with the nuisance/planning situation can be seen:[160]

> "The relationship between tort and regulation is dense and complicated. This paper examines diverse approaches to one small element of this relationship: the relationship between regulatory norms and the standard of care in personal injury cases. The lack of clear rules governing that interaction is not surprising: we would never expect the courts to give up the authority (or abdicate the responsibility) to generate private law norms; on the other hand, nor would we expect them to ignore the potential authority and legitimacy of external norms. The strength of external standards is best identified by close scrutiny of the regulation itself. The varying authority of external norms in a private law forum requires engagement with the process by which the external norms were reached. Who and what determined the 'ought' of regulation will provide greater insight into the ways in which it should inform the 'ought' of tort."

117. In applying this possibly very helpful approach to nuisance some caution is of course needed.[161] Regulatory norms set in the context of avoiding the risk of injury to employees (for example) may be a very different animal to conditions set as part of the process of consenting a project. Care is needed to see what scenarios were examined and what representations were made and how they were addressed. Simply to argue that the conditions represent a balance of public and private interests and that such a balance should apply in all future circumstances may be far too simplistic. Indeed, social utility or public interest are not recognised defences in private nuisance. The courts are in general not inclined to engage in "utilitarian balancing of general good against individual risk."[162]

118. To conclude it may be helpful to consider two particular case studies which are highly topical in illustrating the relationship between the planning system and the private law of nuisance. These concern wind farm noise and landfill odours.

Case study: wind farm noise

119. There are certain areas which seem to present particular problems. One is wind farm noise. This led DEFRA to commission a research project which

[160] https://iris.ucl.ac.uk/research/browse/show-publication?pub_id=332691&source_id=3.

[161] One example of where it has been applied is in respect of the defence of prescription, where it has been said that the prescriptive right will only extend to carrying on the business in the best practicable way, according to standards applying at the time the nuisance was alleged to have been created: see *Shoreham-By-Sea UDC v. Dolphin Canadian Proteins Ltd* (1972) LGR 261 at 267 per Donaldson J.
[162] See *Transco Plc v. Stockport Metropolitan Borough Council* [2004] UKHL 61; [2004] 2 AC 1, at para. 105, per Lord Walker of Gestingthorpe.

considered the use of statutory nuisance abatement powers to deal with noise nuisances from wind farms.[163] It concluded that planning and statutory nuisance regimes work separately and are not a substitute for each other; further that while compliance with planning conditions may prevent statutory nuisance occurring, it does not provide an automatic defence against the normal test for a statutory nuisance. Planning conditions dealing with noise and amplitude modulation from wind farms have themselves proved difficult to interpret and apply, as in *Hulme v. Secretary of State for Communities and Local Government*, where the Court of Appeal was willing to imply words into what would otherwise have been a defective condition in order to make it workable.[164]

120. The UK's first commercial wind farm was built in Delabole in North Cornwall. Its ten 400kw turbines became operational in 1991. Planning permission was granted without appeal. A great deal has changed since 1991. The first change is the scale of the industry, encouraged as part of the Government's policy on renewable, discussed above. What this means in practice is that schemes are no longer mainly located in relatively remote mountains and moors, but often exist in close proximity to housing.

121. The second change is the scale of the technology. Early wind farms used turbines with an installed capacity of 250-400kW, and an overall height of around 55m. Today, applications commonly specify 3MW machines and the typical turbine has grown to more than 150m. Although the size and capacity has increased, the rotational speed of the turbine blades has declined. The blades of a 250kW machine may rotate at up to 30rpm; those of a 3MW turbine do not rotate at more than 18-20rpm. The combination of greater turbine height and flatter topography as locations have moved from the hillier areas of Wales and the South West into the flatter terrain of Eastern England has implications for the type of noise which may be generated, in particular aerodynamic modulation.

122. The third change is the scale of the opposition. There are more than 200 anti-wind farm groups in the UK; opposition is dedicated, organised, and has been shown to inhibit the likelihood and speed with which planning permission is obtained. The list of objections can be long. It will depend, of course, on the circumstances of each site. The visual impact of the turbines on the surrounding landscape is a perennial ground of challenge.[165] Now almost as commonplace, and more controversial, are objections on the basis of noise.

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[163] *Wind Farm Noise Statutory Nuisance Complaint Methodology*, April 2011: see http://www.defra.gov.uk/publications/files/pb-13584-windfarm-noise-statutory-nuisance.pdf.

[164] [2011] EWCA Civ 638 (though the case can also be seen as a matter of construction based on the language of the conditions rather than implication (as as such not on all fours with the traditional approach in *Trustees of Walton on Thames Charities v. Walton and Weighbridge District Council* [1970] 21 PMCR 411). For a further recent planning decision on the issue of wind farm noise see *R (Lee) v. Secretary of State for Communities and Local Government* [2011] EWHC 807 (Admin).

[165] See House of Commons Library Standard Note SN/Sc/4370, *Consents for Wind Farms – Onshore* (5 July 2012) for a useful up-to-date summary. http://www.parliament.uk/briefing-papers/SN04370.

123. The guidance in PPS 22 stated that ETSU-R-97 *The Assessment & Rating of Noise from Wind Farms*, a 1996 paper of the Noise Working Group of the Energy Technology Support Unit for the DTI, is the way in which wind farm noise should be assessed and rated. This recommends the taking of baseline noise measurements under a variety of wind conditions to derive the "prevailing background noise level" from which noise limits are calculated, allowing for example night-time noise limits of 43 dB L_{A90}, or 5 dB above the prevailing background level, whichever is higher. ETSU has a variety of critics.[166] It has been said that it bears no resemblance to standards for other industrial noise sources and can allow very significant noise impacts at certain properties particularly where background noise levels are low. This perhaps is not surprising given that ETSU seeks to strike a balance between noise impacts and the need for renewable energy. As Elias LJ commented in one case:[167]

> "The ETSU standard, as with most guidelines, recognises that a balance has to be struck between the public interest in the development and the interference with private rights. It assists an inspector in determining how that balance should be struck so far as noise is concerned. It does not, of course, mean that individuals will not be adversely prejudiced even by noise levels which fall below the maximum indicated in the ETSU guidelines, but they will generally have to put up with that noise in the wider public interest."

124. It has been said that the guidance has not kept pace with the technology, and that ETSU should be reformed or replaced to take account of modern machines and different kinds of noise. At the very least, ETSU is not always an easy document to understand and to implement. As evidenced by the cases, this difficulty often forms the basis of challenges in planning appeals, and in the higher courts.[168] On July 27, 2010, the Secretary of State for Energy and Climate Change was asked in Parliament whether ETSU would be reviewed. The answer was negative:

> "Noise is a key issue to be taken into account in considering proposals for wind farm development. There is no reason to believe that the protection from noise provided for by the ETSU-R-97 guidance does not remain acceptable, and we have no plans to change this. However, I have commissioned an analysis of how noise impacts are considered in the determination of wind farm planning applications in England. The project will seek to establish best practice in assessing and rating wind turbine noise

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[166] See for example, Dick Bowdler, *ETSU-R-97 Why it is Wrong* (July 2005). http://www.dickbowdler.co.uk/wp-content/uploads/2010/03/ETSU-R-97-Why-it-is-Wrong-v2.1.pdf.

[167] *Tegni Cymru Cyf v. Welsh Ministers* [2010] EWCA Civ 1635, [2011] JPL 1342 at para 34..

[168] See e.g. the decision of the Court of Appeal in *Tegni Cymru Cyf v. Welsh Ministers* [2010] EWCA Civ 1635, [2011] JPL 1342 on the status of ETSU-R-97 under TAN8 as good practice which the inspector could differ from as a matter of planning judgment. At para. 24, Pitchford LJ said: *"I detect no irreconcilable inconsistency in the Inspector's findings. He acknowledged that the cumulative noise effect of the proposed development would not fall outside the ETSU indicative levels, but having experienced the existing noise for himself, he was satisfied that the proposed development would result in a level of harm which would conflict with MEW 10(iv) [the UDP policy]. What he was deciding was that ETSU indicative levels in relation to the proposal which he was considering were not the last word on "acceptable" noise levels."*

by investigating previous decisions. Our aim is to ensure that ETSU-R-97 is applied in a consistent and effective manner and that it is implemented in a way that provides the intended level of protection."

125. The report reviewing how ETSU-R-97 is applied was published in April 2011.[169] It considered and reviewed some 46 noise assessments undertaken for wind farms. It identified a number of issues and inconsistencies in approach, perhaps the most important of which were the approach to cumulative assessment, the lack of any agreed methodology for noise prediction and modelling,[170] assumptions and corrections as to wind shear effects, the possible inconsistency of the night-time limits with the most recent WHO positions on noise at night, and potential for modulation of aerodynamic noise (blade swish) – the latter being the subject of further assessment work commissioned by Renewable UK. Despite this, the Report found that the ETSU-R-97 methodology had been universally employed.

126. However, noise will undoubtedly continue to be a concern for proposals of this sort, in rural communities which may have benefited traditionally from low levels of background noise. As Sedley LJ put it in his judgment in the decision in *R (Enstone) Uplands and District Conservation Trust*:[171]

> "Noise is a plague which can wreck communities and ruin lives, and planning authorities are not only entitled but bound to take very seriously any land use or proposed land use which is going to add to the burden of noise to which communities, and none more than rural communities, are subjected."

127. With that in mind, it is unfortunate that there is so much in the relevant law and practice which remains unclear. As Deputy High Court Judge George Bartlett QC put it in the *Barnes* case, at para. 44:

> "I would only add that it seems to me most unfortunate that after many years of wind farm developments there are no generic noise conditions, contained in national planning guidance, for local planning authorities and inspectors to impose. The result is that resources have to be spent by developers, local planning authorities and objectors in agreeing, or disputing, what the noise conditions should contain; and, on appeal, inspectors have to devote time at the inquiry and afterwards in resolving the matter. And then there can be challenges to the conditions that are imposed, as has happened here. Unsurprisingly appeal decisions come up with different answers, as I

[169] Hayes McKenzie Partnership Limited, *Analysis of How Noise Impacts are Considered in the Determination of Wind Farm Planning Applications* (HM:2293/R1). http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/wind/2033-how-noise-impacts-are-considered.pdf.

[170] Though some assistance with agreed practice comes from the article published in the Institute of Acoustics Bulletin Vol. 34, No. 2, 2009, *Prediction and Assessment of Wind Turbine Noise*, mentioned in the Report.

[171] [2009] EWCA Civ 1555, para. 44.

was shown, and the scope that there is for inconsistency in this respect is obviously undesirable."

128. The first civil noise nuisance claim against a wind farm developer was heard in 2011.[172] The case was *Davis v. Tinsley, Watts, Fenland Windfarms Ltd, EDF & Fenland Green Power Co-op Ltd*. Jane Davis – a veteran wind-farm objector – lived about 1,000 metres from an 8 turbine wind farm in Deeping St. Nicholas, Lincolnshire. The Particulars of Claim described "swishing, ripping/flashing, low frequency humming, mechanical turning, background roar, 'helicopter noise' (aerodynamic modulation) and enhanced 'helicopter noise' (amplitude modulation of aerodynamic modulation)". However, it was agreed that the turbines were ETSU-compliant. Nonetheless, their operation was said in the particulars of claim to give rise to an inconvenience materially interfering with the ordinary comfort and enjoyment by the claimants of their home and garden. The claimants had complained that there was a statutory nuisance, but in the opinion of the local environmental health officers this was not the case. Part of the defendants' case was that the wind farm's compliance with PPS22, PPG24 and ETSU-R-97 is evidence that it does not constitute a nuisance, and further that the support for wind farms in UK energy policy is relevant in determining "reasonableness" for the purposes of a nuisance action. The case settled on confidential terms and has been the subject of markedly differing commentary by leading counsel for the defendant[173] and solicitors for the claimant.[174]

129. Some areas of the country, for example Lincolnshire, are disproportionately affected by very large numbers of wind farm applications. Inevitably, this provokes a reaction. The Wind Turbines (Minimum Distances from Residential Premises) Bill,[175] introduced by Lord Reay, received its first reading in the Lords in May 2012.[176] It seeks to preclude any relevant authority granting planning permission or development consent for a wind turbine unless it meets the required minimum separation distances from residential premises, including farmhouses. For the smallest turbines the distance would be 1000m, rising to 3000m for wind turbines greater than 150m in height. A similar bill ran out of time in the last Parliamentary Session, following a second reading debate on 10 June 2011 in which it attracted considerable support.[177] Centrally imposed prescriptive

[172] A statutory nuisance case on wind farm noise had failed in *Nichols v. Powergen Renewables* (the Askam Windfarm case) in 2004 – see S Tromans [2004] JPL 1023 for a note on the decision.

[173] W Norris, *Wind Farm Noise and Private Nuisance* [2012] JPL 230.

[174] S Ring and B Webb, *Wind Farm Noise and Private Nuisance: A Return to Common Sense* [2012] JPL 892.

[175] HL Bill 11.

[176] See the helpful Information Note produced by the House of Commons Library, dealing with two other ten-Minute Rule Bills on the matter and the policy background: Standard Note SN/SC/5221, Wind Farms – Distance from Housing (5 July 2012). http://www.parliament.uk/briefing-papers/SN05221.

[177] Hansard HL, col. 488ff.

distances would however be counter to the Government's localism and decentralisation agenda, as pointed out by Baroness Hanham for the Government.[178] There is however some central guidance. The Companion Guide to PPS 22 suggests a practical separation distance of 350m based on noise impacts, Scottish guidance suggests distances of up to 2 km between areas of search and the edge of settlements to reduce visual impact,[179] and in Wales 500m is considered a typical separation distance to avoid unacceptable noise impacts.[180]

130. At the more local level, Lincolnshire County Council has announced its intention to apply minimum separation distances of 2km unless it can be demonstrated that noise levels would be acceptable.[181] The County Council is of course not the planning authority and it is difficult to see what weight this statement could properly carry. Meanwhile, the separation distances introduced by Milton Keynes Council look to be subject to possible legal challenge as contrary to national policy by RWE npower.[182]

131. It has been noted that in Denmark, Germany and Spain, large increases in numbers of wind farms have proved to be relatively uncontroversial, possibly because programmes of community benefits are built into the fabric of the process, taking the form of local tax payments, jobs and economic benefits and opportunities for community ownership.[183] How far such an approach would be acceptable in the UK legal and social context is debatable.[184]

Case study – landfill odours

132. One side effect of the requirement to pre-treat domestic waste before it goes to landfill is that landfills have potentially become smellier. Waste remains for longer in the materials recycling facility while the recyclable fractions are removed

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[178] Col. 513.

[179] Scottish Planning Policy 2010, para. 190.

[180] Welsh Assembly, Answers issued to Members on 21 January 2008, WAQ50841, citing TAN8.

[181] Press Release: *Council says "Enough is enough" on Wind Farms*, 6 June 2012. http://www.bheag.co.uk/http://www.bheag.co.uk/wp-content/uploads/LCC-Wind-Farm-Position-Statement-June-2012.pdf .

[182] See House of Commons Library Standard Note SN/SC/5221, Wind Farms – Distance from Housing (5 July 2012) p. 13. http://www.parliament.uk/briefing-papers/SN05221.

[183] See Centre for Sustainable Energy, *Community Benefits from Wind Power* (2005). http://www.cse.org.uk/pdf/pub1049.pdf.

[184] See Caryl Walter, *Incentives-based Planning Policy: A Clash of Rationalities* [2012] JPL 647.

and sorted, and the proportion of bio-active material is higher. This can present unwelcome effects for communities living close to landfill sites. Such was the case for residents living near the Westmill 2 site operated by Biffa Waste Services near Ware, Hertfordshire. Residents complained of offensive odours which prevented enjoyment of their gardens, caused them to keep windows closed and prevented them drying washing outdoors. They brought a group action in private nuisance in the case of *Barr v. Biffa Waste Services Limited*.[185]

133. At first instance, following a long trial in the Technology and Construction Court, Coulson J held that the private law and environmental law should march in step, in that if EU law demanded pre-treatment facilities, which are subject to detailed control under the environmental permitting regime, then there should be no right to claim in nuisance unless there was some negligence or default in complying with its permit by the operator.[186] This would have been a major development in the law of nuisance, but the Court of Appeal disagreed. The Supreme Court on 26 July 2012 refused permission to appeal against the Court of Appeal's decision on the basis that the application did not raise a arguable point of law.

134. In the Court of Appeal, Carnwath LJ (as he then was) put the matter pithily:

> 45. The following are the main building blocks of the judge's reasoning :
>
> i) The "controlling principle" of the modern law of nuisance is that of "reasonable user". If the user is reasonable, then absent proof of negligence, the claim must fail.
>
> ii) In the context of the modern system of regulatory controls under EU and domestic environmental legislation, and the specific waste permit granted in 2003, the common law must be adapted to "march in step with" the legislation. Biffa's user must be deemed to be have been reasonable, if it complied with the terms of the permit (para 350).
>
> iii) Furthermore, the permit was relevant in two other ways:
>
> a) The grant of a permit for what was the first site for tipping of pre-treated waste was "strategic" in nature, and therefore altered the character of the neighbourhood in which reasonableness was to be judged.
>
> b) The permit (in particular condition 2.6.12) by implication gave statutory licence for "inevitable teething troubles"; and for escape of "a certain amount of odour emission", which was "inevitable", and "inherent" in the granting of the permit and the underlying statutory scheme.

[185] [2012] EWCA 312.

[186] [2011] EWHC 1003 (TCC).

iv) It followed that in the absence of any specific allegation of negligence or breach of the permit, Biffa's user must be deemed reasonable, and the claims must fail.

v) In any event, in the light of recent authorities, and since some level of odour was inherent in the permitted activity and accepted by residents, it was necessary to set a precise "threshold", to distinguish between the acceptable and the unacceptable.

vi) In the absence of any alternative suggestion by the claimants, the judge set the threshold at "one odour complaint day each week (i.e. 52 each year) regardless of intensity, duration, and locality". Judged by that test all but two of the claims would have failed.

46. In my view there are short answers to all these points:

i) "Reasonable user" is at most a different way of describing old principles, not an excuse for reinventing them.

ii) The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should "march with" a statutory scheme covering similar subject-matter. Short of express or implied statutory authority to commit a nuisance (rule (v) above), there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights.

iii) Further:

a) The 2003 permit was not "strategic" in nature, nor did it change the essential "character" of the neighbourhood, which had long included tipping. The only change was the introduction of a more offensive form of waste, producing a new type of smell emission.

b) The permit did not, and did not purport to, authorise the emission of such smells. Far from being anticipated and impliedly authorised, the problem was not covered by the original Waste Management Plan, and the effects of the change seem to have come as a surprise to both Biffa and the Environment Agency. Nor can they be dismissed as mere "teething troubles", since they continued intermittently without a permanent solution for five years.

iv) There was no requirement for the claimants to allege or prove negligence or breach of condition. Even if compliance with a statutory permit is capable of being a relevant factor, it would be for the defendant to prove compliance, not the other way round.

v) There is no general rule requiring or justifying the setting of a threshold in nuisance cases. The two cases mentioned do not support such a general rule, and in any event concerned noisy activities which could readily be limited to specific days (unlike smelly tipping at Westmill).

vi) By adopting such a threshold, the judge deprived at least some of the claimants of their right to have their individual cases assessed on their merits.

135. At para. 75 and following, Carnwath LJ discussed the question of the relevance of planning permission. The judge had concluded that the fact that the site had planning permission did not help Biffa, but the fact that it had a an environmental permit for landfill did, and that the grant of the permit was "clearly strategic". Carnwath LJ disagreed:

> "I am unable to agree with this interpretation, either in principle or on the facts of this case. This does not mean that the terms of any permission or permit are irrelevant. An activity which is conducted in contravention of planning or environmental controls is unlikely to be reasonable. But the converse does not follow. Sticking to the rules is an aspect of good neighbourliness, but it is far from the whole story - in law as in life.

136. Carnwath LJ also referred to the 2009 Court of Appeal decision in *Watson v Croft Promo-Sport* (mentioned above) and the Chancellor's summary in that case of the effect of earlier authorities:[187]

> "First, it is well established that the grant of planning permission as such does not affect the private law rights of third parties… Second, the implementation of that planning permission may so alter the nature and character of the locality as to shift the standard of reasonable user which governs the question of nuisance or not…

137. In the light of these well established principles Carnwath LJ found it hard to understand how there can be some middle category of planning permission which, without implementation, is capable of affecting private rights unless such effect is specifically authorised by Parliament. Carnwath LJ also referred to the word "strategic" as used in some of the case, noting that it came from an *obiter dictum* of Staughton LJ in *Wheeler v Saunders* where he said:[188]

> "It is not a *strategic planning decision affected by considerations of public interest*. Unless one is prepared to accept that any planning decision authorises any nuisance which must inevitably come from it, the argument that the nuisance was authorised by planning permission in this case must fail. I am not prepared to accept that premise. It may be -- I express no concluded opinion -- that some planning decisions will authorise some nuisances. But that is as far as I am prepared to go…"

138. Carnwath LJ noted that although the other members of the Court of Appeal in *Wheeler* agreed in general, they did not in terms adopt that formulation. Peter Gibson LJ, commenting on the *Gillingham* case, said:[189]

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[187] [2009] EWCA Civ 15.

[188] Page 30, emphasis added by Carnwath LJ.

[189] Page 35E-G, emphasis again added by Carnwath LJ.

> "Prior to the *Gillingham* case the general assumption appears to have been that private rights to claim in nuisance were unaffected by the permissive grant of planning permission, the developer going ahead with the development at his own risk if his activities were to cause a nuisance. The *Gillingham* case, if rightly decided, calls that assumption into question, at any rate in cases, like *Gillingham* itself, of *a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted*. I can well see that in such a case the public interest must be allowed to prevail and that it would be inappropriate to grant an injunction (though whether that should preclude any award of damages in lieu is a question which may need further consideration). But I am not prepared to accept that the principle applied in the *Gillingham* case must be taken to apply to every planning decision. The Court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge."

139. In any event, Carnwath LJ could not see how this line of authority assisted Biffa. He noted that the scope of the "*Gillingham Docks* exception" remains unsettled and is a matter of continuing debate among environmental lawyers.[190] But whatever its true scope, it had no relevance in this case:

> "Contrary to the suggestion in the passage of the judgment ... there was no evidence of a pre-determined "strategy" of the Environment Agency, let alone the planning authority, to transform this area into one for the tipping of pre-treated waste. Had any such strategy been proposed, and had the possible consequences been explained, one would have expected there to have been consultation followed by strong objections. In any event, there is no authority for extending such principles to a waste permit: granted by the Environment Agency, not the planning authority; and for purposes concerned, not with the balance of uses in the neighbourhood (which remained unchanged), but with the regulation of one particular activity within it."

140. Carnwath LJ likewise regarded the decision of the court of Appeal in *Coventry* as of little assistance in this case:

> "Although we invited the parties' comments on this judgment, they do not affect my view of the issues in the present case. The judgment of Jackson LJ adds additional authority to the *Gillingham Docks* approach. It is also of interest that he appears to have seen the question of "change of character" as raising a simple question of fact, rather than one limited by epithets such as "strategic". However, I agree with Mr Tromans' submission that there is no parallel between the permissions in that case, granted some years before, and the waste permit in this case. The more direct analogy here would be with the various permissions, granted over a long period for quarrying and tipping as well as housing, the implementation of which has created the character of the neighbourhood as it now is. As Mr Tromans points out, there was no detailed consultation on the likely adverse implications of the permit in terms of odour, nor any balancing of the conflicting interests of the residents and the public

[190] See, for example, Maria Lee *Tort Law and Regulation: Planning and Nuisance* [2011] JPL 986; William Norris QC *Wind Farm Noise and Private Nuisance Issues* [2012] JPL 230.

interest in landfilling. In my view, the case gives no support to the proposition that a relevant change in character was effected by the grant of the 2003 waste permit.

141. Arguments in nuisance cases tend to follow a well-trodden path: there are arguments that the claimant is exaggerating, or is unduly sensitive, or that their credibility is undermined by the failure to keep written records of incidents of the nuisance, or to make contemporaneous complaints. The judgment of Veale J in the 1960s case of *Halsey v. Esso Petroleum Co Ltd* presents a refreshingly down-to-earth approach to these matters – for example he commented that

> "... neither the plaintiff nor his wife before the action had made a specific complaint of smell; but they had in my judgment many matters of which they were entitled to complain."[191]

142. *Barr v. Biffa* at one level can be seen as a return to the basic values of nuisance law; a reaction against sophisticated arguments which seek to reach some accommodation between modern forms of regulation and the traditional "reasonableness" based approach of nuisance. Keeping within the regulatory rules may be a prerequisite of good neighbourliness, but as Carnwath LJ stressed, it does not provide any guarantee of immunity if the effect of keeping within those rules is unreasonable interference with one's neighbours.

Overall conclusions

143. If planning decisions are to have the effect of restricting or curtailing rights which people would otherwise have at common law, then that raises squarely a number of issues. The first is what procedures exist to ensure that those affected are made aware of and can effectively participate in the decision making process. There are plainly serious problems here.

Procedural issues

144. First, as has been recently pointed out in an article in the Journal of Planning Law, the procedures and practices under the Development Management Procedure Order 2010 Article 13 for notifying local residents of projects (in that case a 112 foot turbine which would be seen from 5 miles in all directions and where only 14 local residents were notified) are unsatisfactory and unpredictable.[192] The courts have not in general shown willing to find general

[191] [1961] 1 WLR 683 at 696.
[192] See Naeem Siraj, *Planning Law and the Turbine: Part I – the Publicity Requirements* [2012] JPL 666.

duties exist to notify neighbours of proposed development, as a matter of procedural fairness.[193]

145. Secondly, as anyone who has practised in planning law for any length of time knows, the planning system is currently at a low ebb in facilitating effective public participation, the reasons for this being forcefully articulated by Dr Wendy Le-Las and Emily Shirley in another recent JPL article.[194]

146. Thirdly, procedures adopted with the laudable aim of speeding up decision-making on appeals may result in unfairness to a third party who wishes to oppose development on the grounds of impact on their amenity. The recent decision of the Court of Appeal in *Ashley v. Secretary of State for Communities and Local Government* provides a clear example.[195] Local residents opposed a housing development of 43 units on the ground of noise disturbance that would be caused by use of the proposed parking area. The local planning authority refused permission on that ground and a written representations appeal followed. The local residents were notified of the date by which their final representations were to be received; on that date, without notice being given to the residents, the developer submitted a detailed acoustic technical report. It took a trip to the Court of Appeal to quash the decision resulting from this patently unfair process. The Court was less than impressed with the PINS guidance[196] on written representations appeal procedures from the point of view of fairness:[197]

> "In my view, the Guidance deals less than adequately with the legitimate interests of interested persons in the position of the Association, the appellant and Mr and Mrs Bovey, in circumstances such as the present."

The test to be applied

147. Another problem with a planning system which affects private rights through its decisions is what test is applied in the decision making. The question of noise and ETSU-R-97 has been considered above. There is also in the wind farm context the so-called "Lavender Test", named after the Inspector in the Hempnall wind farm appeal.[198] Here the Inspector said this at para. 41 when considering visual amenity:

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[193] *R v. Secretary of State for the Environment, ex parte Kent* [1988] JPL 706; [1988] 3 PLR 17 (upheld in the Court of Appeal at [1990] JPL 124).

[194] *Does the Planning System Need a "Tea Party"?* [2012] JPL 239.

[195] [2012] EWCA Civ 559.

[196] *Planning appeals and called-in planning applications* (PINS 01/2009).

[197] Per Pill LJ at para. 28.

[198] APP/L2630/A/08/2084443, 8 December 2008. Available at http://www.showt.org.uk/Decision.pdf.

> "The planning system exists to regulate the use and development of land in the public interest. While there is a public interest in avoiding the effects of climate change, for the most part the outlook from private property is a private interest, not a public one. There is, however, a public as well as a private interest in protecting the visual amenity of individual homes where, especially in combination with other impacts such as noise and shadow flicker the presence of wind turbines might be widely regarded as making the property concerned an unattractive (but not necessarily uninhabitable) place in which to live. It is in those terms that I have assessed the effects on visual amenity from neighbouring houses."

148. Where a planning authority gets it wrong and finds that permitted development is causing unacceptable effects, one possible remedy is of course a revocation or modification order under s. 97 TCPA 1990. However, following the Supreme Court decision in *HSE v. Wolverhampton City Council*,[199] in considering the expediency of exercising these powers, the local planning authority is not precluded from taking into account the financial considerations which would follows from having to pay compensation under s. 107. Absent rationality challenges for example where serious issues of public safety are at stake,[200] it seems unlikely that s. 97 will provide a reliable means of putting right such problems as may stem from planning decisions. The lack of any likely cause of action in tort against the local authority by landowners affected adversely by the grant of planning permission[201] makes it all the more unlikely that the authority will contemplate such costly solutions as revocation.

149. There are also important issues of social justice which arise and which are only just beginning to be grappled with. For example in its excellent report, *Wind Energy and Justice for Disadvantaged Communities*,[202] the Joseph Rowntree Foundation reviews the growing literature on this topic, and points out that provision of benefits to communities affected by development should be a matter of justice, not simply a means of cultivating acceptance and expediting planning permission.[203] It comments that the current long-standing industry benchmark for community benefits of £1000 per MW per annum of installed capacity seems very low. With increasing scale of development and related financial flows may come the opportunity to use benefits over a long period to improve local "resilience", so as to leave the local community with a more sustainable, locally-embedded energy system, with elements of community ownership, which would retain local

[199] [2012] UKSC 34.

[200] *Ibid*, para 53 per Lord Carnwath.

[201] See *Strable v. Dartford Borough Council* [1984] JPL 329; *Ryeford Homes Ltd v. Sevenoaks District Council* [1990] JPL; *Lam v. Brennan* [1997] 3 PLR 22.

[202] Cowell, Bristow and Munday (May 2012). See http://www.jrf.org.uk/sites/files/jrf/wind-farms-communities-summary.pdf.

[203] Research shows that – at a broad brush level – disadvantaged communities are less likely to oppose wind development than relatively more advantaged communities, and that many of the areas most affected by such development are characterised by ageing populations, higher than average levels of deprivation, youth outmigration, and reliance on seasonal low-paid employment.

employment and generate ongoing funds for community purposes, as opposed the current position where few jobs are created of which few will accrue to local residents.

150. At the end of the day, whilst some dicta in cases loosely talk about nuisance in terms of balancing rights as between the parties, its purpose (unlike the planning system) is not to balance interests in terms of their social, economic or environmental value; it is to protect the reasonable expectations of owners and occupiers of land as to how they should be able to enjoy their land, in their locality.[204] Ultimately, the answer may lie not in denial of a remedy, but in tailoring remedies with a more overt level of discretion based on the public interest, so that socially necessary activities are not prevented altogether but are allowed subject to constraints, or to the payment of compensation. This has been advocated by some academic commentators, including this author,[205] for some years, and appears to be gaining a degree of judicial recognition.[206]

151. Logically, the fact that even Parliament considers the construction and operation of a project to be in the public interest, whilst it may be a good reason why the courts should not injunct that operation, does not (or should not) affect the principle that costs should be internalised.[207] It is often said that what developers and investors want is certainty that they will be able to operate their facility without facing the threat of an injunction. That is an understandable wish. It should not however be translated into carte blanche to avoid the payment of proper compensation where that operation causes unreasonable interference with the amenity of local residents, current or future.

[204] See the discussion in JE Penner, *Nuisance and the Character of the Neighbourhood* [1993] JEL 1, pp. 21-22.

[205] See S Tromans, *Nuisance – Prevention or Payment* [1982] CLJ 87; P Bishop and V Jenkins, *Planning and Nuisance: Revisiting the Balance of Public and Private Interests in Land-Use Development* (2011) JEL 23:2, 285; M Lee, *Tort Law and Regulation* [2011] JPL 986.

[206] *Dennis v. Ministry of Defence* [2003] EWHC 793 (QB) at paras 46-48; [2003] Env LR 34; *Barr v. Biffa Waste Services Limited* [2012] EWCA Civ 312 at para 124.

[207] See *Transco Plc v. Stockport Metropolitan Borough Council* [2004] UKHL 61; [2004] 2 AC 1, at para. 30 per Lord Hoffmann.