Planning, Environment and Property 20th Anniversary Special Edition Newsletter

Introduction

Peter Village QC &
Thomas Hill QC

As Joint Heads of the Planning, Environmental & Property Group at 39 Essex Chambers, we are delighted to introduce this Special Anniversary Edition of our Newsletter, marking 20 years since the formation of this Practice Group, which counts a substantial proportion of our 152 strong team of barristers amongst its membership.

This Edition looks back over the past two decades through the eyes of some of those who have been at the helm during that time, including our outstanding Group Head Clerk Andrew Poyser, who has been clerking the PEP practitioners throughout this period. We have also taken the opportunity to cast our collective minds back and recall (with appropriately strict word limits) some particularly memorable cases in which we have been engaged over this time. We hope you will enjoy these vignettes. Indeed, many of you will have been fellow combatants. We now look forward to the next decade.

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20 Years of Planning and Environment – Foreword

Stephen Tromans QC and John Pugh-Smith

20 years ago, in April 2002, a group of five of us moved to 39 Essex Street from the Chambers of Lionel Read QC to set up a specific Planning and Environment Group. This was a new venture for 39 Essex, and our specialist group was, then, a very small fish in the pool of established planning sets. However, we did have a few things going for us: we had an edge in environmental law; we were in a very modern and well-resourced set with excellent clerking; we had a pool of very keen newly called barristers who were very committed to growing a practice in these areas, and some senior members willing to embrace and support the group with their complementary specialisms and related practices.

It has been quite a journey as the Group has grown, as well as a lot of hard work in raising and maintaining the profile with seminars, writing, etc. We were pleased to welcome Matthew Horton QC and Richard Wald (now a QC) from another planning set, and then a larger group including our now joint group heads, Peter Village QC and Tom Hill QC. There have been other excellent individuals who have joined us from leading planning sets. So our strength at all levels of seniority has grown and we are now firmly established as among the leading planning sets, and probably the pre-eminent set for environmental work. We were also delighted to have Justine Thornton QC as a member, now Mrs Justice Thornton DBE, and in our early years we were helped greatly by Alison Foster QC, now Mrs Justice Foster DBE.

If we are asked what marks 39 Essex out in terms of its planning and environmental work, there are probably two main things, apart from the excellence of the barristers though, of course, excellent barristers can be found in other chambers as well as at 39 Essex. One distinguishing factor is the quality of clerking, in terms of efficiency, friendliness and client service, a fact often remarked upon by clients. The other is the breadth of expertise within 39 Essex in other areas of law, creating huge opportunities for synergies with our planning and environmental work, in areas such as alternative dispute resolution, commercial and construction, energy law, insurance, property law and public law.

Planning law

During the past twenty years planning law, and, its related practice and procedures have become that much more complex, and, in turn require a far wider range of knowledge, skill and expertise. Members of 39 Essex have been actively and increasingly involved by making law through new cases, promoting and resisting specific schemes, and, in seeking to shape future direction, for example, through participation arising from committee memberships of the Bar Council, the Compulsory Purchase Association and the Planning and Environment Bar Association. As the planning system and its outworkings have increasingly become a political (and media) "football" so has the need to become involved at an earlier stage in the formulation of local planning policy (including at "neighbourhood" level) and their progression and scrutiny as well as of projects and their related applications and decisions in which the acronyms increasingly abound (AA, CIL, DAS, EIA, GDPO, GPDO, NHB, NPA, NPPF, PPG, etc) as well as the periodic changes of name of the principal Government department (DoE, DETR, DCLG, MHCLG, DLUHC).

Some work areas have come and gone – the lengthy Local Plan inquiry replaced by the focused examination hearing – while others, like planning judicial review, have increased, and, become even more time critical and document sensitive. Attempts to speed up the determination of planning appeals (as with housing proposals) have sought to embrace greater consensus (through the use of Statements of Common Ground and roundtable sessions). Different advocacy styles

and skills have had to be developed dealing with appeal hearings in preference to inquiries, as well as different procedures such as sessions being held "on-line". Development Consent Order examinations are a new kid on the block. Indeed, Chambers members have been actively involved in the growing number of nationally strategic infrastructure projects (including Hinkley, Sizewell, Stonehenge and Thames Tideway Tunnel). They also acted for the promoter and several objectors to the HS2 Bill. On the other hand, some issues remain perennial such as Green Belt development, housing land supply and availability, development viability, and, determination timelines both for Local Authorities and the Planning Inspectorate.

Environmental law

The past twenty years have of course seen huge growth in the practice of environmental law. Members of 39 Essex have been at the forefront of many of these developments, both in terms of making law through new cases and in seeking to shape the direction of environmental law through participation in groups such as the UK Environmental Law Association. Of course, some areas have come and gone – the great boom in litigation on EIA and SEA in the early days of these regimes has markedly calmed down, though they can still throw up issues. The demand for advice on coal fired power stations has faded as these have closed, but other forms of energy have taken their place and advice on wind, solar and biomass has increased. The fortunes of nuclear energy have waxed and waned, and currently seem on the up, an important area for Chambers in the future.

On the other hand, some issues seem doomed to be perennial. It is still possible to argue about the definition of waste and when waste becomes a product or by-product. Twenty years ago members of chambers were representing water companies at inquiries on combined sewer overflows, still an intractable problem which periodically hit the news. The rules on habitats still continue, for good or ill and notwithstanding Brexit, to stymie major development proposals.

Energy is, of course, an absolutely vital issue for the security and prosperity of the UK and for the challenge of achieving net zero. As we mention above, the multi-faceted nature of our chambers means we have a very diverse Energy Group, able to grasp these complex issues.

As we go forward, the Group is in very good heart and in a very good place to be at the centre of the development of planning and environmental law for the next 20 years.

20 Years from a clerk's perspective

Andy Poyser

It is an honour to have been asked to write this short piece in recognition of the 20 wonderful years I have spent in Chambers as well as my 25 years as a clerk.

In 1993 I started my career as a junior clerk at 13 Old Square (now Serle Court) with the late Charles Sparrow QC as Head of Chambers. I still recall my first day really well being placed in a team of four clerks with a huge paper diary in the middle of the desk. I became a master of coffee making and distributing the faxes that the machine was constantly churning out. With my trusty two wheeled trolley, I also quickly became a master of getting 15 stow away boxes up and down various flights of stairs and in to court on time. After a number of years, I quickly rose through the ranks seeing a merger with another set; and then being promoted to the clerking desk, agreeing fees and booking in cases. I knew I had the clerking bug and the rest, as they say, is history.

In 2002 I joined 39 Essex Street, as it was then, and was asked to jointly clerk the newly formed planning and environmental team with my great friend and colleague Ben Sundborg. Planning and Environmental law, was new to me but my keenness to learn and the opportunity I was given was too good to turn down, and I never looked back. Initially, with five core members of the group we worked very hard to establish ourselves; and

it paid off; and quickly we became a "go to" set for Planning and Environment law. This core had moved to take advantage of both the marketing opportunities that the modern Bar allowed and 39 Essex Street provided. It certainly turned the heads of the planning and environmental sector, and in particular the traditional Planning and Environmental Bar. There were extensive business development trips up and down the country, early mornings and late nights and the group continued to grow. After our initial successes, ten years later a number of barristers from 4-5 Gray's Inn Square joined, which built on our strengths and cemented our position as one of the leading sets at the Planning and Environmental Bar.

Over the last two decades in chambers the PEP Group have won numerous awards and commendations from the legal directories, collectively and individually, and it has been brilliant to be a part of these successes and to help drive forward chambers to the modern set that we are today. I have made some great friends along the way, both clients and members and I just can't believe how twenty years have gone so quickly.

As some of who you know me will know, I don't like being in the limelight but I could not be more proud of the some of the personal and team testimonials I have seen such as *"Deputy senior clerk Andrew Poyser is described as "hands down the best planning clerk in the country", "Andy is my go-to man, even when I don't quite know what it is that I'm asking" and "The clerking service is consistent and responsive. You can be confident with what you're going to get."*. These testimonials make me very proud to be a clerk and I think the important thing they show is that I am very much committed to my role, with client service being at the forefront of my mind.

It has been an absolute pleasure to have had the opportunity to work with, help develop and clerk some of the most distinguished members of the Bar throughout my career, as well as attending and being part of numerous QC's "swearing in ceremonies" and being a part of the successes of 39 Essex Chambers. It has been simply amazing. This could not however have happened without the support of former colleagues, Michael Kaplan, other clerks and mentors from my previous set, Steve Whittaker, Terry Buck and from 39 Essex Chambers – Lindsay Scott, our CEO, our wonderful Senior Clerk, Alastair Davidson and Sheraton Doyle (Senior Practice Manager). My thanks must also extend to my current amazing clerking team in Chambers, Elliott Hurrell, Oliver York and Charlie Quant who have supported and continue to support me.

I can't of course write this without passing on my sincere thanks to my wife and children, as they too have supported me through my wonderful time in Chambers, and have heard so many excuses as to why I am late or just having to nip here and there often at the last minute to see a client. I am not sure why but they seem to suggest that I am always at a wine bar…

I thought that I might add in a few unknown facts about me. From the age of five I used to regularly waterski, and in my teens I played tennis for Essex, now I have settled for being a keen golfer and in my time out of chambers I can often be found in the 19th at the local golf club wondering why my ball always goes right.

39 Essex Chambers, friends, clients and colleagues – thank you, here is to the next twenty years!

A look back on some of our favorite cases.

In the following section we have asked some of the members of our group to provide a short piece on a case they have acted in over the past 20 years and which has been particularly memorable for them.

Hornsea 2 Windfarm Consent

Rose Grogan

In the very early days of pupillage, Stephen Tromans QC set me a research task involving the Habitats Directive and the Harbour Porpoise. It was, as they say, lemon difficult, and was one of those moments of pupillage that haunt you forever. Years later, the porpoises returned. Stephen and I were instructed by the Wildlife Trusts to look at issues arising from the Hornsea 2 wind farm and its effect on the harbour porpoise. Following our advice, the Trusts successfully secured a condition in the Hornsea 2 planning consent which named them as a consultee for the package of mitigation measures relating to the porpoises.

It has been one of the highlights of my career because it was one of the first cases I worked on where I felt I might have helped benefit the environment in some small way. It was also the start of a mini-specialism in marine habitats work and an interesting example of a non-statutory consultee being able to exercise some influence post-consent. It sticks in my memory for non-legal reasons as well: a few months later I was sailing in the firth of clyde and a school of porpoises popped by to say hello (and maybe thank you).

'Store Wars – Revenge of the Indefatigable' – *R (Milton (Peterborough) Estates Company (t/a Fitzwilliam (Malton) Estate) v Ryedale District Council & Anor* [2015] EWHC 1948 (Admin)

James Strachan QC

Some cases have multiple episodes and the twist and turns of a blockbuster. This was one. It was a retailing battle about the historic town of Malton in North Yorkshire. Our client (the Claimant in the High Court proceedings) sought planning permission to build a supermarket in the town centre on the site of the former livestock market. The Council had other plans. It refused planning permission and in turn promoted an edge-of-centre location on the site of car-park in its ownership and resolved to grant consent for that much larger proposal with a petrol filling station. I acted as junior counsel to Peter Village QC at the subsequent section 78 appeal inquiry instructed by Matthew Baker of Pinsent Masons with Chris Goddard of DP9 as our planning consultant. It was a potent lesson in what can be achieved in cross-examination, as the Council's case crumbled and the Council's witness admitted to Peter that it had misapplied national policy on town centres in resolving to grant planning permission for its own proposal. Our client's appeal was allowed and costs awarded against the Council. But despite this seeming victory, the Council redetermined its own planning application and decided once again to grant planning permission for its proposal despite evidence showing retail capacity for just one supermarket. Undeterred by this setback our indomitable client and instructing solicitor instructed us to commence judicial review proceedings of this decision. They were good enough to keep me involved as a second silk. Judicial review claims of grants of planning permission are always difficult, but it is fair to say that we were a little taken aback to be refused permission on the papers to proceed with what we thought was a powerful challenge to the lawfulness of the Council's decision on various

grounds, including its approach to planning policy and the application of the EIA Regulations. Yet none of us ever believed the claim could be marked "totally without merit" as it was, so preventing an oral renewal hearing in the High Court, leaving only resort to the Court of Appeal. This made it all the more satisfying when the Court of Appeal not only overturned the High Court's refusal of permission, but made some trenchant observations about the arguability of our case. The High Court subsequently allowed our claim on all grounds, so illustrating how perseverance in the face of seeming adversity can win the day.

Poundland Ltd v various freeholders (2020-2021)

David Sawtell

The Covid-19 pandemic created considerable uncertainty for commercial lease renewals under Part II of the Landlord and Tenant Act 1954. There were two crunch points. Firstly, many tenants sought to incorporate 'Covid clauses' to reduce rent and other obligations in the event of another lockdown or social distancing measures. Secondly, the effect of the pandemic on rent reviews was unclear, not least because of its uncertain duration. I acted for a number of freeholders of large out of town retail shopping centres against a major UK retailer, Poundland Limited, in 2020 and 2021. On each occasion, the parties settled at the door of court. On one occasion, I successfully obtained an order for specific disclosure of Poundland's other commercial lease renewals following its assertion that it was their 'standard position' to obtain such clauses.

The cases turned on section 35 of the 1954 Act, and the direction to the court to have regard to the terms of the current tenancy: as set out in the Court of Appeal and House of Lords judgments in the leading case of *O'May v City of London Real Property Co Ltd,* the courts would be slow to change the allocation of risk envisaged in the commercial balance of the lease. To what extent, then, did Covid-19 mean that the courts would place the risk of occupation and the viability of the tenant's business on the freeholder?

I co-authored 'A Practical Guide to the Landlord and Tenant Act 1954', now in its second edition, and research and write about risk allocation and leases. The cases were a highlight as they represented the coming together of litigation strategy, doctrinal analysis into the policy of the 1954 Act, and the commercial issues created by the pandemic.

St Albans City and District Council v (1) Hunston Properties Limited and (2) Secretary of State for Communities and Local Government [2013] EWCA Civ 1610

Paul Stinchcombe QC

I led Ned Helme when winning the seminal case which established a new planning industry (not to mention the ultimate adoption of the 'standard methodology') regarding the objective assessment of housing needs when a Council had an out-of-date Local Plan.

The question was whether, on a section 78 appeal, an Inspector was entitled to adopt a constrained housing requirement in the absence of an up-to-date Local Plan.

The definitive answer was 'no': the Inspector had to assess the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure:

> *"… I accept Mr Stinchcombe QC's submissions for Hunston that it is not for an inspector on a Section 78 appeal to seek to carry out some sort of local plan process as part of determining the appeal, so as to arrive at a constrained housing requirement figure. An inspector in that situation is not in a position to carry out such an exercise in a proper fashion, since it is impossible for any rounded assessment similar to the local plan process to be done. That process is an elaborate one involving many parties who are not present at or involved in the section 78 appeal".*

Stubbs v Lake District National Park Authority

Katherine Barnes

This claim for judicial review was a challenge to the refusal of the Park Authority to impose a Traffic Regulation Order ("TRO") in respect of two green lanes in the Lake District National Park which would prohibit use of the lanes by motor vehicles. The claim was brought by a community environmental group concerned that usage of the lanes by four-wheel drives was damaging the character of the National Park and the experience of those using the lanes for peaceful rest and recreation.

The principal argument concerned the correct interpretation of section 11A of the National Parks and Access to the Countryside Act 1949. Members were informed by officers that the need to prioritise the statutory purpose of "conserving and enhancing the natural beauty, wildlife and cultural heritage" over that of "promoting opportunities for the understanding and enjoyment" would only arise where there was an "irreconcilable conflict" between the two. The Claimant argued that was a misstatement of the test in section 11A (intended to enshrine in law the "Sandford principle") which refers only to "conflict" (and not "irreconcilable" conflict).

The court (Dove J) ultimately rejected this argument, finding that the conflict between conservation and promotion of public enjoyment must be of a certain degree for section11A to be triggered. Whether the relevant threshold had been reached was a matter of discretion for the decision-maker. As such, it found that whether the conflict was described as "acute, or unresolvable, or irreconcilable is a matter of semantics".

The case was a highlight given the previous absence of authority on section11A and therefore the clarification provided by the case on this issue of public importance, as reflected in the significant press interest in the case (for example, coverage in the Guardian: https://www.theguardian.com/uk-news/2020/aug/24/campaigners-lose-legal-challenge-over-lake-district-4x4-vehicles).

R (Burridge) v Breckland District Council [2013] J.P.L. 1308

Ned Helme

I have chosen *R (Burridge) v Breckland District Council* [2013] J.P.L. 1308 partly because of its significance in the development of the law on EIA and partly because, in this celebration of PEP at 39, it seemed appropriate to choose the first case I did on joining 39 in 2013.

The challenge concerned a biomass renewable energy plant and combined heat and power ("CHP") plant. Originally, they had been applied for together on a single site and the Council had adopted a negative screening opinion under the EIA Regulations then in force. However, the original application had then been amended to remove the CHP plant, and a second application submitted to locate it over a kilometre away, linked to the energy plant by a pipeline. No further screening opinions had been adopted before permission was granted on both applications.

Ms Burridge brought a challenge and John Hobson QC and I represented the Council. The Court of Appeal's decision remains one of the leading cases on "project-splitting". Disagreeing with the black letter approach that had been adopted in the High Court ([2012] Env. L.R. 36), it found that the Regulations required such functionally interdependent applications to be assessed as a single project, with a screening opinion on both. The need to construe the Regulations so as to prevent the protections of EIA being avoided (whether intentionally or not) by splitting a project into multiple applications is the central message of the decision, but the case is also of continuing interest in showing that judicial distaste for after the event evidence is not absolute: the majority (Pill LJ dissenting) accepted witness evidence from the Officer that he had considered screening for the overall project, and found that his failure to produce a screening opinion on both applications did not invalidate the permissions.

R (Environment Agency) v OSS Group Limited [2007] EWCA Civ 611

Stephen Tromans QC

Some cases are memorable to the advocate because of the interesting legal issues, others for the human interest. For me, this case combined both. My client, OSS Group, collected waste lubricating oils which it refined and treated to produce a fuel which could be used instead of normal "virgin" fuels in heavy industrial equipment. OSS felt they had produced a legitimate product which was no longer a waste requiring a waste management licence for its use.

Naturally its customers would not countenance having to obtain such a licence just to use fuel, and hence the issue was absolutely fundamental to OSS' survival as a business. The Environment Agency, not for the first or last time, took a purist view. Refine and treat as much as OSS wished, if it was to be burnt, waste it must be. Relations between the Agency and OSS had become vitriolic, and the Agency had gone so far as to publish warnings of possible enforcement to anyone using OSS' product.

Round 1 went to OSS. We succeeded in obtaining from Harrison J an interim order restraining enforcement until the substantive issue was decided. OSS were jubilant and the Agency incandescent. They went to the Court of Appeal and the order was overturned in no uncertain terms, but by then the substantive hearing was near and OSS had survived.

Round 2 went to the Agency. Burton J was pretty well bamboozled by the baffling case law of the Court of Justice into agreeing with the Agency that burning the fuel was waste recovery and not use of a product.

However, Round 3 in the Court of Appeal saw common sense prevail in the form of Carnwath LJ, later of course Lord Carnwath, and the then most knowledgeable judge on environmental law. Despite his eminence in that area, he was equally puzzled by the European cases, which focused on what was meant by "discarding" something. However, he cut through it all to produce what became known as, and still is, "the OSS Test" for when waste ceases to be waste and becomes a product. Budding young environmental lawyers generally have it tattooed on some part of their anatomy.

It was immensely satisfying to have a part in developing a paradigm issue of environmental law, and to secure the survival and future of a business whose existence was threatened by a Calvinistic approach to what should have been a practical problem. The glass of champagne in my instructing solicitor's office after victory in Round 1 stays in my mind.

R (on the application of Millgate Developments Ltd) v Wokingham Borough Council [2011] EWCA Civ 1062

John Pugh-Smith

This was the seminal case which upheld the "stand alone" nature of section 106 obligations, and, of the "hard edged" judicial response to subsequent shouts of unfairness. Millgate had been initially refused planning permission by Wokingham. However, it suggested that the reasons for refusal could in part be overcome by the giving of an acceptable unilateral undertaking. Millgate then entered into the Undertaking but had also appealed the initial refusal. That appeal was allowed and consent granted, with the planning inspector also stating in his decision that Wokingham had failed to show that the contributions contained in the Undertaking were necessary. Millgate sought to have the Undertaking discharged. The Council refused which led to the judicial review challenge. It also sought to enforce the Undertaking albeit in a lesser sum and for other planning purposes.

Nonetheless, the Court of Appeal held that the Undertaking was still enforceable as it had been

entered into without any condition that it was enforceable only if the inspector agreed that it was necessary. While he had been prepared to grant the planning permission without giving weight to the Undertaking it did not follow that the Undertaking did not have, or did not continue to have, a legitimate planning purpose. Accordingly, its enforcement was not Wednesbury unreasonable. Furthermore, following the Tesco (Witney) case, that enforceability did not depend upon degree of nexus to the development but rather to the Undertaking's provisions. The reduction in Wokingham's claim had not involved a finding that the remaining sum was other than for appropriate planning purposes.

The case remains a stark reminder of making the enforceability of obligations conditional upon a specific necessity finding and/or the implementation of a preferred permission. Developers should also avoid rushing to give unilateral undertakings, without thought for their future, simply to gain a consent.

Jockey Club Racecourses Ltd v Persons Unknown [2018] EWHC 3234 (Ch), [2019] EWHC 1026 (Ch)

John Steel QC

When you are called upon to describe your practice at the Bar, the answer very much depends upon who is asking the question. I have found that saying one is a planning barrister provokes a glazed expression with embarrassed suppression of yawning, alternatively, rather like the confession by someone that they are a doctor, it gives an opportunity for plentiful free advice on all manner of ills. So what have I done over the last 20 years?

The case that comes immediately to mind concerns racehorses, namely *Jockey Club Racecourses Ltd v Persons Unknown* [2018] EWHC 3234 (Ch), [2019] EWHC 1026 (Ch). Victoria Hutton and I represented the Jockey Club in seeking injunctions restraining touts from operating during race meetings, selling fraudulent tickets and causing antisocial behaviour.

Until being involved in this case, I used to have the somewhat naïve view held by many that touts were shady characters of overall public benefit operating a secondary ticket market. I have since discovered this is far from the truth. Many operate in gangs, touting being part of sophisticated organised crime with a Mr Big based in a city many miles away from the sporting venues in question.

We obtained our injunction, it was ground-breaking and a first based on the law of trespass, with the judge being as interested in the facts of the case as the law, I suspect. The number of touts was as a result reduced from approximately 200 to literally 6 at the Cheltenham Festival in 2020. It hit the headlines at the time, especially in the sporting press but also more generally. The development and betterment of Cheltenham Racecourse and other sporting venues continues, spurred on by the need to satisfy a growing leisure market as well as increasing investment in sports development.

Manston Airport Development Consent Order

Richard Wald QC and Gethin Thomas

The re-opening of Manston Airport, on the Isle of Thanet in Kent, as a dedicated freight airport was the first ever proposed airport development to go through the DCO examination process. Following an intensively scrutinised examination, the Examining Authority recommended that the DCO be refused on 18 October 2019. However, on 9 July 2020, the Secretary of State granted approval of the re-opening of the airport.

Jenny Dawes, a local resident who participated in the examination, brought a judicial review challenging the decision to grant the DCO. The claim contended that: (i) the Secretary of

State's analysis of the need for the development was flawed, (ii) the decision was inadequately reasoned, (iii) the Secretary of State breached procedural safeguards prescribed in the Infrastructure Planning (Examination Procedure) Rules, and (iv) that the Secretary of State failed to discharge his duty to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline ("Net Zero").

Lang J granted permission in respect of all grounds on 14 October 2020. However, shortly afterwards, the Secretary of State conceded that the grant of the DCO was unlawful on the basis that his decision was inadequately reasoned. The Interested Party, the developer, therefore did not contest the claim. The DCO was quashed pursuant to a consent order, approved by Holgate J in February 2021.

The claim was the first challenge to an airport DCO. It is understood that the DCO is the first grant of consent for a Nationally Significant Infrastructure Project to be quashed since the introduction of the Planning Act 2008.

Notably, the Examining Authority had concluded that consenting to the DCO would materially prejudice the UKs ability to meet its NetZero commitments, which in light of the Supreme Court's judgment in *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52, could be considered to be one of the high water marks in the ill-fated history of Net Zero litigation, hitherto.

A decision on Manston Airport's future is yet to be re-taken.

We acted on behalf of Ms Dawes along with Paul Stinchcombe QC. Gethin had also previously acted on behalf of local resident objectors pro bono through the Environmental Law Foundation. James Strachan QC and Celina Colquhoun acted for the landowners during the DCO examination process.

All Wales Salmon and Sea Trout Byelaws

Richard Wald QC and Gethin Thomas

In August 2018, the Welsh Minister for Environment, Energy and Rural Affairs referred Natural Resources Wales' ("NRW") proposed Wales Rod and Line (Salmon and Sea Trout) Byelaws 2017 and the Wales Net Fishing (Salmon and Sea Trout) Byelaws 2017 ("the Byelaws"), to the Planning Inspectorate Wales to conduct a Local Inquiry.

The Byelaws proposed stricter regulation of fisheries and in particular a ban on catch and kill fishing for salmon and sea trout for a period of 10 years, in order to address the severe decline in stocks of these species in Welsh rivers.

Although it was common ground between NRW and the objectors to the Byelaws that salmon and sea trout stocks had been generally suffering an ongoing decline, there was significant resistance amongst members of the angling community against the imposition of the mandatory measures contained in the Byelaws. The Byelaws were comprehensively tested during the four week inquiry, which was conducted in mid-Wales.

On 16 July 2019, the Welsh Government announced, following the Inspector's recommendations, that it would confirm the Byelaws. The Inspector concluded that the Byelaws were necessary, proportionate and reasonable in view of the decline of salmon and sea trout stocks throughout Wales.

The sharp decline of salmon and sea trout stocks is both a national and international problem. Similar measures were taken by the Environment Agency, pursuant to Byelaws implemented in January 2019. However, the Inquiry was a unique occasion in which the nature and depth of the problem was robustly scrutinised.

We represented NRW.

Waste exports

Juan Lopez

During 2021 I represented a UK based waste facility, asserted by the Environment Agency to be the statutory person responsible to compulsorily take-back transboundary shipments of (claimed) unconsented 'waste' from the economic free zone of a (non-OECD) Southeast Asian state, nearing 300 shipping containers of non-hazardous assorted material (including polyurethane and textiles), so marking one of the largest UK Government-mandated international 'waste' repatriations.

The UK repatriation of unconsented waste exports undeniably attracts the highest environmental merit. Facilitating repatriation is now indelibly on the UK Government's enviro-enforcement agenda.

That the appropriately deemed 'notifier' for the purposes of the Transfrontier Shipment of Waste Regulations 2007 – transposing the Waste Shipments Regulation (EC) No. 1013/2006 (including Articles 2, 24 and 25) and viewed in the light of Basel Convention transboundary waste controls (including Article 9) – is liable to take back 'waste' upon an exporting notification or consent failures, was, unremarkably, settled principle in the immediate case. The governing statutory framework, principally, the 2007 Regulations, has however not always proved an enabling partner to take-back repatriations, properly established or not.

Owing to layered evidential complexities of identifying the responsible actor(s) for waste exportation in (the not uncommon) circumstances of a confused chain of claimed nationwide 'producers', 'collectors', 'processors', 'brokers', 'loaders', and eventually, the 'shipper', the identification of the appropriate deemed 'notifier' – for the purposes of the 2007 Regulations – unsurprisingly excited litigation. Delaying, if unavoidable, negotiations between a series of extra-territorial regulator and enforcement bodies (unhelpfully having excluded the EA and the waste facility), together with the fact of abandoned 'waste' containers, and of the physical integrity of other containers having been compromised (to the extent of partly 'mixing' with other 'wastes') long before repatriation had been initially flagged by the EA (exacerbated somewhat by a restraint order seizing 'waste' containers within the jurisdiction of the competent authority of despatch), served to further complicate what some waste sector actors wrongly suppose is a straightforward exercise of liability apportionment under the 2007 Regulations, as regards the deemed 'notified' and geographical starting points of loading and exportation (e.g. *R v KV* [2011] EWCA Crim 2342).

In the result, argument over identifying any appropriately deemed 'notifier' was subsequently overtaken by events, and a without prejudice agreement governing partial, phased 'waste' take-back, as well as disposal optioneering, so circumventing further litigation.
Ongoing Parliamentary debate over perceived unconsented waste (and other) enforcement limitations of the EA aside, it remains that domestic legislation governing waste exports (and imports) is fast being outpaced by international treaty and other obligations seemingly driving UK Government repatriations.

Waterbeach, Cambridgeshire energy-from-waste called-in planning inquiry (decision 2020)

James Burton

This was an inquiry into a large energy from waste (EfW) proposal at an existing waste/recycling site, near to the remarkable Denny Abbey heritage complex, in the flat fen-edge landscape.

The process spoke to me on various levels (including the slightly Fawlty-Towers-esque hotel I stayed at for three weeks of the inquiry). But I am listing it here because of the reassuring sense it

gave of the planning system working as it should.

The site was allocated for uses that included EfW. Cambridgeshire County Council had refused permission. Key issues were: heritage; landscape/ visual impact; and claimed climate change benefits.

The appellant was represented by a heavyweight silk, leading a junior. I represented the County Council.

The Inspector/Secretary of State rightly refused to take the allocation as carte blanche for EfW of any size/form and the appellant's claims were subjected to proper scrutiny, not just through the County Council' s expert evidence but also third party contributions.

As to heritage, the appellant argued that improvements to the visitor experience at Denny Abbey would actively reduce the harm to significance caused by the proposal (a flawed assertion, but interesting nonetheless).

The claimed climate change benefits were particularly fascinating, as well as topical: planned/hoped for future shifts in the content of waste feedstock, with transfer of biogenic waste from landfill to e.g. dedicated food waste streams, would completely negate the proposal's greenhouse gas benefits relative to landfill.

The local community's concerns regarding pollution were also treated with sensitivity and respect, the appellant's expert engineering witness deserving particular commendation in that regard, and the wider public as a whole were fully and appropriately engaged over the inquiry's three weeks.

The County Council's reasons for refusal for were upheld and the appeal was dismissed.

Stonehenge New Road DCO and Judicial Review

Victoria Hutton

A few years ago I was asked whether I would be interested in helping a group of archeologists present their case at the hearings for the Stonehenge New Road DCO. I didn't hesitate in saying yes. Peter Village QC and I headed off to Amesbury to meet a number of Professors and to be taken on a tour of a Mesolithic site (Blick Mead).

I ended up supporting the Consortium of Archeologists throughout the DCO hearings. I soon worked out that the less the Examining Authority ('ExA') heard from me and the more from my expert clients, the better. This included Professor Parker-Pearson (of TV documentary fame) treating those assembled to a slide show explaining the importance and volume of artefacts which would be lost. Professor Jaques and Paul Garwood also took on starring roles. Overall, the Consortium's evidence played a significant part in convincing the ExA that the proposal to dig a dual carriageway (only part of which would be in tunnel) through the World Heritage Site could not be supported in its current form and the ExA duly issued a strong recommendation for refusal. However, the Secretary of State did not agree.

At the DCO hearings I met Kate Fielden of the Stonehenge Alliance ('SA') who were also opposing the project. The SA instructed me as junior counsel to David Wolfe QC in the High Court challenge. We came up against 3 silks and two juniors (most of whom are brilliant colleagues at 39). Long story short, the challenge was successful and the decision was quashed. One of the grounds on which the decision was quashed was that there were exceptional circumstances (including the world heritage status of the site and the level of permanent and irreversible harm found by the Secretary of State) which meant that alternatives had to be considered as a material consideration as part of the decision. The level of harm which my archeologist clients had impressed upon the

ExA and the Secretary of State thus provided an important part of the foundations for the successful High Court challenge.

Dill v Secretary of State for Communities and Local Government [2020] UKSC 20

Richard Harwood OBE QC

Two large lead urns (or 'vases' as Lord Carnwath JSC subsequently called them) and their stone plinths had followed the Dill family around the Midlands for several generations. In 2009 Mr Marcus Dill sold them at auction, wholly unaware that they had been put on the list of listed buildings. As is common, the purchaser's name was not disclosed and they were taken out of the country. Six years' later, the local council found out they had gone and demanded that Mr Dill bring them back.

I was brought in by Mr Dill's auctioneer. It seemed to me that the essential question was whether these freestanding objects were each 'a building' on the list. Whilst the council engaged, to a limited degree, with that question, on appeal the Inspector took a point of his own and said the list was determinative. That view prevailed until the Supreme Court where, with Catherine Dobson as junior, our appeal was allowed. The Court reaffirmed the right of individuals to defend themselves by challenging public law decisions which are being used against them. It also resolved the meaning of building in planning and heritage legislation and the different approach to objects 'fixed' to buildings. Unresolved was whether the urns and plinths were buildings. Having been given a very firm steer to drop enforcement action, the council did so.

Dill is an illustration of the need to stick with a case which is right. Having been rejected in three appeals, Mr Dill's case finally succeeded in the Supreme Court.

The CALA Litigation

Peter Village QC

This twentieth anniversary of the formation of the 39 Essex PEP Group is of particular resonance for me as it was precisely 20 years ago that I was appointed to silk by the then Lord Chancellor, Derry Irvine. It seems like only yesterday.

It is an invidious task to identify the most important or memorable single case undertaken during that time. It seems trite but every case a barrister undertakes is important, sometimes profoundly so, for the client. In my case I think of the *Guinness v Railtrack* (now Network Rail) compensation case relating to the value of air rights over the railway lines into Park Royal, involving an eye-wateringly large monetary claim which was subsequently ordered at a very much more modest sum. Guinness was Good For Me in that case.

And I think of the CPO I promoted for University College Hospital involving a site inspection lasting several days, but led to the concentration of several of the hospital sites, including the Middlesex Hospital, into one new state of the art hospital at the top of Gower Street. I beam with pride every time I pass it.

But inevitably I have to pick the CALA litigation as my stand out case. This was the successful challenge to the foundation stone of the Conservative Government's Localism Initiative, which formed the basis of the Conservative Manifesto at the 2010 General Election. The *casus belli* was the decision to abolish Regional Strategies ("RS's"), at the stroke of the then Secretary of State's pen, the very larger than life Eric Pickles.

I was asked by a number of national housebuilders to advise on the lawfulness of the abolition. To me, and my then junior James Strachan (now pre-eminent QC) the decision was obviously unlawful. The power purportedly exercised by Pickles was

exercised for an ulterior purpose. This was a clear error of law.

But the housebuilders were warned off from rocking this boat, with some allegedly being threatened with "difficulties" in the event that they did mount a challenge.

For one house builder, however, the abolition of RS's proved an existential threat. CALA Homes had bought outright a large site outside Winchester on the basis that the Site was expressly identified in the RS. And suddenly, through Pickles's decision, it was no longer identified in a development plan document.

My abiding memory after receiving the judgment was taking my superb solicitors (Ian Ginbey) and other members of the team to a liquid lunch at Scotts in Mayfair. And who was sitting at the very next table? None other than Eric himself.

The consequence of the judgment was profound, not just to CALA, who eventually succeeded in their planning appeal with the Secretary of State himself giving full weight to the RS allocation (but only after another humiliating legal challenge); but also for LPA's up and down the country, many of which had gleefully thrown their development plan into the dustbin upon the abolition of RS's. The planning system was then thrown into chaos and confusion for two years whilst the Government put in place the statutory framework to abolish a perfectly sensible system of deciding where large scale residential development should be directed.

I predict the return of RS's – or something very similar – in the not too distant future.

***Stansted Airport Limited v Uttlesford DC*: Raising the passenger cap at Stansted by 8mppa**

Thomas Hill QC

Many different factors contribute to making cases memorable: sheer length; complexity; particularly agreeable (and occasionally disagreeable) colleagues and opponents; delightful (and difficult) tribunals; magnificent (and miserable) hotels; marathon rail journeys or flights to the furthest extremities of the jurisdiction...All these factors (and many more) play their part in how a case lodges in one's memory.

The Covid pandemic introduced some novel features. In 2021 I had the pleasure of acting for old clients Manchester Airport Group (MAG) at a lengthy public inquiry during the third lockdown. The inquiry concerned the refusal by Uttlesford District Council of planning permission for MAG to raise its passenger cap at Stansted Airport by 8 million passengers per annum, whilst maintaining its pre-existing cap on air transport movements. I had invaluable assistance from Philippa Jackson as my Junior, whilst three silks were ranged against us.

The appeal was heard virtually by a panel of three Inspectors. The case covered many bases, with notable emphasis on national aviation policy and the net zero carbon agenda. What was unusual was that the clients were keen that we should convene as a team, stay at a deserted hotel at the eerily quiet airport and participate in the virtual inquiry from a dedicated communications suite. We created a "bubble", with regular team Covid testing by specialist nurses. Boxed food of palate-numbing monotony was delivered to our hotel bedrooms at pre-ordained times, as all restaurants were closed. However, with something akin to a wartime spirit, everyone rose to the challenge. We explored, inter alia, the legal, policy and actual carbon implications of the proposed development in great detail and wrapped up the case in 8 weeks. Our reward was that the appeal was allowed in record time and a full award of costs made in favour of MAG. Although plainly a recent case, the memory of our lockdown inquiry at Stansted will, I have no doubt, linger for many years.