INTRODUCTION

Jonathan Darby

Welcome to the latest edition of our Planning, Environment and Property newsletter. This week we feature contributions from Stephen Tromans QC (on Environmental Assessment); Joe-han Ho, Ruth Keating and Philippe Kuhn (on major reforms to witness statements in the Business and Property Courts, which will be of interest to those with property cases or cases touching on environmental issues in those fora); and Gethin Thomas (on two quashed decisions of nationally significant infrastructure projects, which came along (almost) at once), including the Manston Airport DCO, which was challenged in a claim in which Paul Stinchcombe QC, Richard Wald QC and Gethin acted on behalf of the Claimant).

Our 39 from 39 webinar series continues with Episode 4 coming up on the 15th March. In a follow on from our earlier episode on the 27th January, the speakers will be looking at *'Trade and*

Contents

Cooperation Agreement – Specific Provisions 1'. Keep an eye on our website for further details.

Finally, just a reminder that the Pilot Briefings service is still open for all of our clients to use. To utilise the service, we will require a short email detailing the issues at hand and the questions you would need addressing. On receipt, a 15 minute time slot will be arranged with a member of our established team of silks, senior juniors and juniors, who will be able to discuss the legal query you have. If you would like to book a Pilot Briefing with one of our Planning, Environment and Property experts, then please contact:

Andrew Poyser
Deputy Senior Clerk
andrew.poyser@39essex.com | 020 7832 1190
or

Elliott Hurrell
Practice Manager
elliott.hurrell@39essex.com | 020 7634 9023

ENVIRONMENTAL ASSESSMENT – END PRODUCT EFFECTS AND CUMULATIVE EFFECTS

Stephen Tromans QC

Environmental impact assessment remains a contentious area of environmental law as two recent first instance decisions vividly illustrate.

End product effects

The case of *R (Finch) v Surrey County Council* [2020] EWHC 3566 (Admin), on which judgement was handed down just before Christmas, could scarcely have raised a more important general issue, namely whether an environmental statement describing the likely significant effects of a development, both direct and indirect, requires an assessment of the greenhouse gas emissions resulting from the use of an end product said to have originated from that development. Surrey County Council had granted planning permission for a number of new wells to produce hydrocarbons over a 25-year period. The challenge was that to the non-assessment by the ES of the GHG that would be emitted when the crude oil produced from the site is used by consumers, typically as a fuel for motor vehicles, after having been refined elsewhere. As Holgate J pointed out in the introduction to his judgment, the same principle, if correct could apply in numerous analogous situations, for example the production of raw materials for aircraft or vehicles which when in use would emit GHG.

The core issue was whether the acknowledged effect of greenhouse gases from fuel produced from the extracted hydrocarbons was an "indirect effect" of the project of extraction. The court rejected that proposition:

> **101.** In my judgment, the fact that the environmental effects of consuming an end product will flow "inevitably" from the use of a raw material in making that product does not provide a legal test for deciding whether they can properly be treated as effects "of the development" on the site where the raw material will be produced for the purposes of exercising planning or land use control over that development. The extraction of a mineral from a site may have environmental consequences remote from that development but which are nevertheless inevitable. Instead, the true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought. An inevitable consequence may occur after a raw material extracted on the relevant site has passed through one or more developments elsewhere which are not the subject of the application for planning permission and which do not form part of the same "project".

The court however rejected arguments which turned on whether the oil was refined and mixed with other hydrocarbons, or whether the oil is not extracted would be replaced by other oil – these were regarded as detailed forensic arguments rather than as going to the real issue:

> **102.** The inevitability that the crude oil to be transported off site will eventually lead to additional GHG emissions when the end

> product is consumed is simply a response to the defendant's point that when the oil leaves the site it becomes an indistinguishable part of the international oil market, so that the GHG emissions generated by combustion in vehicles cannot be attributed to any particular oil well or well site. Like the debate between the witness statements as to whether the oil produced on the site would only displace oil production elsewhere or would instead increase overall net consumption, these are forensic arguments about the market consequences of extracting oil at the site which do not address the real legal issues raised by ground 1(a).

The court's conclusions were underpinned by the approach that the planning system and EIA have a specific purpose and that so far as reducing GHG emissions go, there are other ways of skinning a cat:

> **107.** It has to be recognised that development control and the EIA process have a specific and, to some extent, limited ambit, namely to assess and control proposals for new development and in some circumstances, the retention of existing development. But, because the incidence of planning control depends upon whether planning permission is required, or enforcement action is possible, these regimes do not regulate the environmental effects of the general use of all land in the country. So, for example, the use of motor vehicles in connection with, or GHG emissions from, development which has already been permitted is generally not regulated by the development control system. Whatever the outcome of ground 1(a), that would remain the position.

The high point of the claimant's argument in terms of domestic precedent was *R (Squire) v Shropshire Council* [2019] Env. L.R.835 where the issue was assessment of the effects of disposing of waste generated by the development (chicken sheds). The case was however distinguished by the judge as follows:

> The case was concerned with a failure to assess an obvious environmental effect of the proposed development, namely the disposal of the waste it would generate and, moreover, on land in the locality.

The case was also found to be different to those cases concerned with whether a "project" in reality forms part of a larger project. The judge summarised the position as follows:

> **126.** The upshot is that the case law confirms that EIA must address the environmental effects, both direct and indirect, of the development for which planning permission is sought, (and also any larger project of which that development forms a part), but there is no requirement to assess matters which are not environmental effects of the development or project. In my judgment the scope of that obligation does not include the environmental effects of consumers using (in locations which are unknown and unrelated to the development site) an end product which will be made in a separate facility from materials to be supplied from the development being assessed. I therefore conclude that, in the circumstances of this case, the assessment of GHG emissions from the future combustion of refined oil products said to emanate from the development site was, as a matter of law, incapable of falling within the scope of the EIA required by the 2017 Regulations for the planning application.

The decision will obviously be a disappointment to many climate campaigners but given the interlinked and multi-faceted nature of causes of climate change, whereby almost any human activity in modern society will give rise to GHG emissions, it is difficult to see how any other workable conclusion could have been reached. A decision the other way would have firmly set the cat among the pigeons in the planning world, particularly where so many local councils have now declared "Climate Emergencies". Also, it is not easy to see how the contribution of a project to GHG emissions could be accurately measured in many cases, apart perhaps from fuel production or projects like airports, and if

capable of being measured, how that would in any event meaningfully feed into decision making. Steel is manufactured and the GHG emitted by its manufacture is of course material and must be assessed: however, the steel could go into numerous products. Some might be GHG emitting (like cars or lorries); others might be beneficial in terms of reducing GHG emissions (such as wind turbines).

The judgment also contained what is now a somewhat familiar refrain as to the need for restraint and moderation in advancing evidence in judicial review cases:

> **145.** A substantial amount of evidence was produced in this case, particularly in the form of witness statements. Some of this material was, on its face, inadmissible in proceedings for judicial review. The admissibility of certain other passages was either unclear or dubious. This necessitated attempts by parties to clarify the status of the material, which were not wholly successful. Fortunately, I was not asked to make, nor, as it turns out, did I need to make, formal rulings on this subject. The reasoning in this judgment does not depend upon the resolution of any such issue.

Cumulative Effects

Cases where DCOs are quashed remain rare. Cases where the basis of quashing is irrationality are also rare. Therefore, the decision of Holgate J in *Pearce v Secretary of State for Business Energy And Industrial Strategy* [2021] EWHC 326 (Admin) is striking. The Secretary of State had granted a DCO application for an offshore wind farm, Norfolk Vanguard, said to be one of the largest in the world. Vanguard lies adjacent to another huge proposed windfarm, Norfolk Boreas. The issue in the litigation was the failure by the Secretary of State to undertake a cumulative assessment of the grid connection impacts of the two project – which the promoters of Vanguard had acknowledged in their environmental statement as significant. Indeed, the site selection process had been based on the co-location of the two projects.

The approach of the Examining Authority and Secretary of State only became apparent with the publication of the ExA report, the matter not having been the subject of discussion at the examination. The relevant paragraph from the report stated: "Finally, whilst the Norfolk Boreas Offshore wind farm has been included in the Applicant's LVIA cumulative impact assessment, the ExA have not considered it in this part of the assessment due to the limited amount of details available. The ExA considers it would most appropriate for cumulative impacts to be considered in any future examination into Norfolk Boreas." The Secretary of State followed this line in his decision: "The ExA notes that, while the Applicant's Landscape and Visual Impact Assessment cumulative assessment included the proposed Norfolk Boreas offshore wind farm, it was not considered by the ExA because of the limited information available on that project. The ExA concluded, therefore, that this matter should be considered in the future as part of the examination of the development consent application for the Norfolk Boreas offshore wind farm."

The judge found this approach was unlawful:

> "The Defendant unlawfully deferred his evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was "limited". The Defendant did not go so far as to conclude that an evaluation of cumulative impacts could not be made on the information available, or that it was "inadequate" for that purpose. He did not give any properly reasoned conclusion on that aspect. I would add that because he did not address those matters, the Defendant also failed to consider requiring NVL to provide any details he considered to be lacking, or whether NVL could not reasonably be required to provide them under the 2009 Regulations as part of the ES for Vanguard."

Essentially this was not a case which, unlike so many, could be defended on the basis of questions of planning or expert judgement. The judge went on to find that the decision was irrational, in the

sense of being undermined by flawed logic and internal inconsistency.

It was an unfortunate result for the promoter of the scheme, who as the judge had pointed out, had expressly catered for any lack of detailed information on Boreas by proposing a "Rochdale envelope" approach. There was no basis to do anything but quash the decision. The judgment contains an interesting and useful postscript on consequential issues in the redetermination for Vanguard and the determination for Boreas, as well as a warning of the need for compliance even for projects of great national importance:

> Paragraph 11c of [the Interested Party's] submissions relies upon "the importance in the public interest of determining applications for nationally significant infrastructure projects such as this without undue delay" as a factor influencing the timing of the Defendant's decision. That does indeed reflect one of the purposes of the PA 2008 and the procedural timetables it contains … But that consideration does not override the need for compliance with EIA legislation and with principles of public law and procedural fairness.

The Vanguard decision came in a week that was not a great one for DCO projects, as a DCO granting approval for an air freight hub at Manston airport was quashed by consent after the Secretary of State for Transport had acknowledged in December 2020 in the case of *Dawes v Secretary of State for Transport* that the decision letter did not contain enough detail about why approval was given against the advice of the ExA that the application be refused. The Defendant was ordered to pay the Claimant's reasonable costs, limited to £35,000, and the Interested Party to pay the Claimant's additional costs, also limited to £35,000.

MAJOR REFORMS TO WITNESS STATEMENTS IN THE BUSINESS AND PROPERTY COURTS

Joe-han Ho, Ruth Keating and Philippe Kuhn

Overview

Substantial reforms to the preparation and presentation of witness statements are now imminent throughout the Business and Property Courts in England & Wales. That is, the Technology & Construction Court, the Chancery Division and the Commercial Court. These changes will be relevant to users of the Business and Property Courts where cases concerning planning, environment and property are brought there.

The 127th update to the CPR Practice Directions has been published and includes (at Schedule 3) the final version of the new Practice Direction (PD) 57AC and Appendix which will govern preparation of trial witness statements signed on or after on 6 April 2021 (with limited exceptions) in the Business and Property Courts.[1]

Background to the changes

At its meeting on 22 October 2020, the Business & Property Courts Board received the Implementation Report of the Witness Evidence Working Group and endorsed the Working Group's recommendation that its draft for a new CPR Practice Direction 57AC and Appendix (Statement of Best Practice) be put before the Civil Procedure Rules Committee for consideration in December.

1 The Working Group's main report, recommendations can be found here: https://www.judiciary.uk/wp-content/uploads/2019/12/Witness-statement-working-group-Final-Report-1-1.pdf and PD 57AC and the Statement of Best Practice can be found here: https://www.judiciary.uk/wp-content/uploads/2021/02/CPR-PD57AC-with-Appendix.pdf

In summary the concerns of the Working Group were as follows:

- There are real concerns that the current practice in the Business and Property Courts does not always achieve best evidence. The Working Group said this was in part because the process of preparation of witness statements in larger cases, involving the polishing of numerous drafts and iterations, results in the final version being far from the witness's own words even if it started life as such.[2]
- Moreover, developing statements through numerous drafts, getting the witness to retell the story over and over, is a process which may corrupt memory and render the final product less reliable than the first "unvarnished" recollection.[3]
- The vast majority of the current practitioners (solicitors and counsel), and indeed most of the judges, have little or no experience of the previous system which required oral evidence-in-chief at trial.[4]
- Witness statements frequently stray far beyond any evidence the witness would in fact give if asked questions in chief. They often cover matters of marginal relevance and/or stray into comment and 'spin'.[5]
- The time and cost savings of the current practice are often somewhat illusory.[6]

Summary of the Key Changes – Practice Direction 57AC and Statement of Best Practice

In terms of an overview of the relevant changes the following are worth emphasising:

- **Scope:** "Trial" is defined as meaning a final trial hearing, in proceedings (except as provided in paragraph 1.3 of the Practice Direction) in any of the Business and Property Courts under CPR Part 7 or Part 8. The exceptions at paragraph 1.3 are worth checking and include certain Insolvency Act and Companies Act actions (but not e.g. s.994 unfair prejudice petitions), proceedings in the TCC relating to adjudication awards under Section 9 of the TCC Guide and other exceptions including specialist FSMA, IP and probate/wills claims.
- **Certificate of compliance:** Trial witness statement must be endorsed with a certificate of compliance in a prescribed form certifying that the *"relevant legal representative"* (paragraph 4.3 in PD57AC): (i) is satisfied that the purpose and proper content of trial witness statements, and proper practice in relation to their preparation, including the witness confirmation required by paragraph 4.1 of Practice Direction 57AC, have been have discussed with and explained to the witness; and (ii) believes the statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC. A litigant in person does not generally need t o sign a certificate of compliance (paragraph 4.3).
- **Confirmation of compliance:** There is also a new confirmation of compliance from the witness, in addition to existing statement of truth (paragraph 4.1 in PD57AC). This provides for confirmation by the witness that the statement sets out matters of fact of which the witness has personal knowledge and that it is not the function of a witness to argue the case, either generally or on particular points, or to take the court through the documents in the case. This confirmation further provides that the witness understands that on points which

2 Para 13 of the report of the Working Group.
3 Para 14 of the report of the Working Group.
4 Para 16 of the report of the Working Group.
5 Para 17 of the report of the Working Group.
6 Para 18 of the report of the Working Group.

are important in the case, the witness has stated honestly how well they recall matters and whether their memory has had to be refreshed by considering documents.

- **Listing of documents:** PD 57AC makes clear at paragraph 3.2 that a trial witness statement must identify what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement. This requirement to identify documents the witness has referred to or been referred to does not affect any privilege that may exist in relation to any of those documents. This proved controversial amongst the Working Group itself and concerns have been raised as to how judges may draw negative inferences from documents referred to in a list or the difficulties this may cause with privileged documents.
- **Statement of Best Practice:** For the first time in the CPR we see a 'Statement of Best Practice'. In part the Statement of Best Practice stresses existing rules. However, it also adds an important new requirement that for important disputed matters of fact the statement should, if practicable: (i) state in the witness's own words how well they recall the matters addressed; and (ii) state whether (and if so how and when) the witness's recollection in relation to those matters has been refreshed by reference to documents, if so identifying those documents. The Statement of Best Practice also emphasises that the process of drafting the witness statement should involve as few drafts as practicable (paragraph 3.8).
- Importantly for lawyers working on statements is paragraph 3.10 of the Statement of Best Practice that emphasises that wherever practicable: (i) a trial witness statement should be based upon a record or notes made by the relevant party's legal representatives of evidence they obtained from the witness; and (ii) any such record or notes should be made from, and if possible during, an interview or interviews
- As per paragraph 3.11 of the Statement of Best Practice an interview to obtain evidence from a witness should: (i) avoid leading questions where practicable, and should not use leading questions in relation to important contentious matters; (ii) use open questions as much as possible, generally limiting closed questions to requests for clarification of or additional detail about prior answers; and (iii) be recorded as fully and accurately as possible, by contemporaneous note or other durable record, dated and retained by the legal representatives.

Conclusions and takeaways

The reforms are not without controversy and practitioners will have to turn their minds to the issues which might arise in practice for example in respect of the requirement to list documents, the certificate of compliance and implementing best practice, and the additional upfront costs which are to be expected in the majority of cases.

The reforms emphasise the importance of having a sufficiently robust process in place such that the certificate of compliance can be signed with confidence and ensuring that a proper record is kept of interviews with witnesses. Practitioners should turn their minds to these issues now, so that they are ready for the changes coming in April.

MANSTON AIRPORT AND NORTH VANGUARD OFFSHORE WIND FARM DCOS QUASHED: LIKE LONDON BUSES...

Gethin Thomas

Introduction

Since the Planning Act 2008 received Royal Assent in November 2008, no grant of a development consent order ("DCO") had been quashed,[7] until last week when, like the proverbial London buses, two quashed decisions of nationally significant infrastructure projects came along (almost) at once: (i) by a consent order, the decision to grant a DCO approving the re-opening of Manston Airport, on the Isle of Thanet in Kent, and (ii) the DCO granting permission for the North Vanguard Offshore Wind Farm, off the Norfolk coast (pursuant to Holgate J's judgment in *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 326 (Admin)).[8]

Manston Airport

The first grant of a DCO which was quashed approved the re-opening of Manston Airport, as a dedicated freight airport handling at least 10,000 air cargo movements per year, pursuant to a consent order, approved by Holgate J on 16 February. The Secretary of State conceded a judicial review claim brought by Jenny Dawes, a local resident who participated in the examination. Paul Stinchcombe QC, Richard Wald QC and myself, acted on her behalf.

Background to the DCO

The decision of the Secretary of State to grant the DCO was made on 9 July 2020. In approving the re-opening of Manston Airport, the Secretary of State overturned the recommendation of the Examining Authority ("ExA") to refuse the DCO.

The ExA had been composed of four senior Planning Inspectors who made their recommendation to refuse the DCO after one of the most intensely scrutinised examinations ever handled, encompassing a voluminous 682 pages of written questions (13 times the average), 2,052 relevant representations received during the relevant period, and 585 additional submissions.

In recommending the refusal of the DCO, the ExA concluded, inter alia, that: (i) the Applicant had failed to demonstrate sufficient need for the proposed development, additional to (or different from) the need which is met by the provision of existing airports, and (ii) the impacts on climate change of the proposed development weighed moderately against the case for development consent being given.

The Secretary of State disagreed with the ExA, and considered that there was a clear case of need for the development which should be given substantial weight, which outweighed the accepted moderate adverse impact on climate change.

The judicial review challenge

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"), under section 1 of the Climate Change Act 2008.

Lang J granted permission in respect of all grounds on 14 October 2020. The claim had been listed for a 1.5-day hearing on 16 and 17 February 2021.

However, the Secretary of State conceded that the grant of the DCO was unlawful, and must be quashed, on the basis that his decision was inadequately reasoned. The Interested Party, the developer, therefore did not contest the claim.

7 A refusal of a DCO had, however, been quashed previously: *Halite Energy Group Ltd v Secretary of State for Energy and Climate Change* [2014] EWHC 17 (Admin).

8 Both challenges had early support from the Environment Law Foundation.

Unresolved questions: what does the Net Zero duty require?

As such, the other issues with wider implications raised in the claim, in particular, whether the Secretary of State's approach to the Net Zero duty and climate change was unlawful, remain undetermined. Following the detailed and lengthy examination of the developer's application, the ExA concluded that the proposed development would have a material impact on the ability of the Government to meet its carbon reduction targets, including budgets. This conclusion was reached notwithstanding (i) the time available to the Defendant between the development's approval and 2050, and (ii) the potential for hypothetical alternative measures which may be implemented to address emissions in future. The Secretary of State accepted that conclusion.

As such, and unusually in the context of climate change challenges, it had not been in dispute that the development would have a material impact on the ability of the Government to meet its carbon reduction targets. The Secretary of State had maintained, however, that that did not mean it was in breach of its climate change obligations.

Next steps

Following the sealing of the consent order by Holgate J, the DCO decision will now be revisited, with an invitation for further representations to be issued by the Secretary of State in due course.

Manston Airport had also been another first, as it had been the first ever proposed airport development to go through the DCO examination process, and the claim was the first challenge to an airport DCO. Before the Covid-19 pandemic, there had been a queue of airport expansion and related developments lining up to undertake the DCO examination process. Whether the proposed bloom of expansion will now proceed at the pre-Covid rate may now be considered unlikely, given the pandemic's well-publicised impact on the aviation industry.

North Vanguard Offshore Wind Farm

Two days later, on 18 February, the second ever grant of a DCO was quashed by Holgate J, following a claim brought by a local resident, Mr Pearce (*Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 326 (Admin)).

On 1 July 2020, the Secretary of State made the North Vanguard Offshore Wind Farm Order SI 2020 No. 706, which granted development consent for what was said to be one of the largest offshore wind projects in the world. The North Vanguard development was closely related to a second wind farm project Norfolk Boreas, lying immediately to the north-east of the offshore Vanguard array.

The onshore infrastructure for both projects was to be co-located. This involved a cable route carrying high voltage direct current for 60 km from the landfall at Happisburgh to a substation site near the village of Necton. As such, the developer prepared an Environmental Statement which assessed the cumulative impacts arising from both projects, including landscape and visual impacts from the infrastructure proposed at Necton.

However, in their assessment of landscape and visual impacts for the Vanguard application, both the Examining Authority and the Defendant decided that consideration of cumulative impacts from Vanguard and Boreas should be deferred to any subsequent examination of the Boreas proposal.

In short, Holgate J upheld the challenge, and quashed the DCO, on the basis that:

a. First, the Secretary of State had breached the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 by failing to evaluate the information before him on the cumulative impacts of the North Vanguard and North Boreas substation development. The Secretary of State unlawfully deferred his evaluation of those effects because he considered the information on the development for connecting Boreas to the National Grid was "limited". Holgate J observed that the Secretary of State had not gone so far as to conclude that an evaluation of cumulative impacts could not be made on the information available at all, or that

it was otherwise "inadequate" for that purpose. Rather, he did not give any properly reasoned conclusion on that aspect (see para 122).

b. Secondly, and in any event, the Secretary of State's deferral of the evaluation of cumulative effects of both projects was irrational. It had common ground between the parties that the nature and level of information on the two projects for the purposes of assessing landscape and visual impacts of the substation development at Necton was essentially the same. Holgate J observed that the Defendant must have proceeded on the basis that the information on the impacts of the Vanguard project was sufficient for him to be able to evaluate and weigh that matter. The decision was therefore *'flawed by an obvious internal inconsistency.'* (see para 131)

c. Thirdly, the Secretary of State's decision had been inadequately reasoned. Even if it could be assumed that it was legally permissible to defer the evaluation of the cumulative impacts at Necton, the decision had not been adequately reasoned. In particular, there had been no explanation as to why an evaluation could not have been made by the Secretary of State. (see paras 142-145)

On the issue of relief, the Secretary of State and the developer (as the interested party) contended that the Secretary of State would have made the same conclusion, even if he had taken into account the cumulative impacts (relying on section 31(2A) of the Senior Courts Act 1981).

Holgate J rejected the argument, and the key aspect of his analysis warrants setting out in full (at paras 156-158):

> ***156.*** *However, the consequence of the legal errors made by the Defendant is that the court does not have any notion as to what the evaluation of cumulative impacts by the Defendant would have been if he had considered the matter. The court does not even have an idea as to how the Examining Authority evaluated the cumulative impacts, because they too decided not to do so. It would be impermissible for the court to make findings on that issue for itself. To do that would involve entering forbidden territory.*
>
> ***157.*** *So instead, the court is being asked to deduce from the Defendant's conclusions on the solus impacts of the Vanguard development at Necton and the way in which the overall balance was struck that it is highly likely that the outcome would have been the same if the cumulative impacts had been evaluated as well.*
>
> ***158.*** *In my judgment, there is a fundamental flaw in the argument relying upon s.31(2A) which cannot be overcome. It flies in the face of the conclusion which the Defendant actually reached, namely that he would not assess cumulative impacts at Necton because the information on Boreas was "limited". This criticism by the Defendant makes it impossible to deduce what his conclusion would have been if he had evaluated those impacts. But even if that point is put to one side, there are other flaws…*

Holgate J declined the Claimant's invitation to issue particular directions as to how either of the two project's DCOs should be determined when they are (re-)visited, but did observe that (at para 179):

> *…it is very doubtful whether the Defendant could properly proceed to re-determine the Vanguard application, or to determine the Boreas application, without at least giving a reasonable opportunity for representations to be made by interested parties on the implications of this judgment for the procedures now to be followed in each application, considering those representations, and then deciding and explaining what course will be followed.*

Conclusion

The brakes have therefore been placed on these proposed developments, and the DCO decisions will now be revisited. A common thread between the two quashed DCO's was the inadequacy of the Secretary of State's reasons for both decisions. Whatever the outcome of the re-taken decisions, one would therefore expect endeavours to especially be made to explain them.

CONTRIBUTORS

Stephen Tromans QC
stephen.tromans@39essex.com

Stephen is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear powerstations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case. To view full CV click here.

Jonathan Darby
jon.darby@39essex.com

Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way. Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters. To view full CV click here.

Joe-han Ho
joehan.ho@39essex.com

Joe-han practises across the full spectrum of commercial disputes. He has a particular focus on contractual, insolvency, construction, civil fraud, and financial services disputes. He has appeared in the Court of Appeal, the High Court (including as sole counsel against Queen's Counsel in the Commercial Court), and the County Court. He also appears before international arbitral tribunals. Previously, Joe-han practised as a solicitor at Cleary Gottlieb Steen & Hamilton LLP where he focused on international arbitration and commercial litigation. He also held teaching positions at King's College London (trusts & equity) and Durham University (contract law). He is regularly published on a range of commercial law matters. To view full CV click here.

Ruth Keating
ruth.keating@39essex.com

Ruth is developing a broad environmental, public and planning law practice. She has gained experience, during pupillage and thereafter, on a variety of planning and environmental matters including a judicial review challenge to the third runway at Heathrow, protected species, development and land use classes, enforcement notices and environmental offences. Last year Ruth was a Judicial Assistant at the Supreme Court and worked on several environmental, planning and property cases including R (on the application of Lancashire County Council); R (on the application of NHS Property Services Ltd) (UKSC 2018/0094/UKSC 2018/0109), the Manchester Ship Canal Company Ltd (UKSC 2018/0116) and London Borough of Lambeth [2019] UKSC 33. She is an editor of the Sweet & Maxwell Environmental Law Bulletins. To view full CV click here.

CONTRIBUTORS

Gethin Thomas
gethin.thomas@39essex.com

Gethin has a broad planning and environmental law practice. Gethin is ranked as one of the *'Highest Rated Planning Juniors Under 35'* by Planning Magazine (2020). His recent instructions include acting as junior counsel to Richard Wald QC, on behalf of Natural Resources Wales, in a successful 4 week inquiry concerning proposed byelaws to protect salmon and sea trout stocks in Wales. He was also instructed by the Government Legal Department in the judicial review challenge to the Heathrow third runway. He regularly advises on a diverse range of planning and environmental issues. For example, he has advised in relation to the Environmental Information Regulations, on the prospects of appealing a refusal of planning permission to develop a site within the Green Belt, and in relation to issues arising from the removal of permitted development rights by planning conditions. Gethin has been instructed in relation to judicial review claims as sole and junior counsel. Gethin also has experience of enforcement matters. To view full CV click here.

Philippe Kuhn
philippe.kuhn@39essex.com

Philippe has a broad and international practice specialising in commercial, public, mixed civil (including property) and employment disputes. He has a particular interest in commercial matters with an international dimension (including arbitration, civil fraud, energy, construction, banking, insolvency, jurisdiction and choice of law and insurance disputes) and cases at the intersection of private and public law (in particular procurement and Human Rights Act damages claims). This builds on his international background, growing up in Switzerland and Sri Lanka, before reading law at the LSE and Oxford and qualifying as a barrister in England.To view full CV click here.

KEY CONTACTS

Andrew Poyser
Deputy Senior Clerk
andrew.poyser@39essex.com
Call: +44 (0)20 7832 1190
Mobile: +44 (0)7921 880 669

Elliott Hurrell
Practice Manager
elliott.hurrell@39essex.com
Call: +44 (0)20 7634 9023
Mobile: +44 (0)7809 086 843