”Trust me, I’m the expert”: the weight to be given to statutory consultees’ witness evidence at inquiry

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R. (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin); [2010] Env. L.R. 33; [2010] 2 WLUK 460 (QBD (Admin))
Shadwell Estates Ltd v Breckland DC [2013] EWHC 12 (Admin); [2013] Env. L.R. D2; [2013] 1 WLUK 87 (QBD (Admin))
R. (on the application of Prideaux) v Buckinghamshire CC [2013] EWHC 1054 (Admin); [2013] Env. L.R. 32; [2013] 4 WLUK 680 (QBD (Admin))
R. (on the application of Morge) v Hampshire CC [2011] UKSC 2; [2011] 1 W.L.R. 268; [2011] 1 WLUK 241 (SC)

J.P.L. 1494 Introduction

Here is what we have found to be an increasingly common situation faced by applicants/appellants and local planning authorities minded to grant planning permission:

- A statutory consultee objects to the planning application, and then persuades the Secretary of State to call it in on the basis of that objection.[1]
- The statutory consultee then appears at the subsequent inquiry as a Rule 6 party, and calls expert witnesses on the issue of concern to it. Those witnesses might be employees of the statutory consultee; they might be external consultants.
- Relying on the line of authority that begins with *R. (on the application of Hart DC) Secretary of State for Communities and Local Government*,[2] the statutory consultee then asserts that:
    - because it is a statutory consultee, the evidence of its expert witnesses supporting its objection must be given “great weight” (and perhaps implicitly more weight than the applicant/appellant’s expert witnesses); and

- the views of its expert witnesses can only be departed from for "cogent reasons".

But is the statutory consultee correct in making such assertions, as a matter of law? We say the answer is no.

In this brief article, we address some common misconceptions about the scope of the *Hart* line of authority. We trace its humble beginnings and show that, although it has clearly expanded beyond its original confines, the principle has not yet evolved to a level where it can upset the delicate balancing act that is the exercise of planning judgment in a planning inquiry. In our view, the assessment of the merits of a statutory consultee's expert witness evidence—as with any other witness evidence before an inquiry—involves the unfettered exercise of the Inspector's judgment, having regard to the oral and written evidence in its totality: as it properly should. ***J.P.L. 1495***

The *Hart* case is, as far as we can determine, the origin of the principle that a planning decision-maker is *entitled* to give great weight to the views of a statutory consultee and must give cogent reasons from departing from those views.

In *Hart*, in which one of the authors of this article appeared for the Secretary of State, applications for planning permission were made for the erection of 170 dwellings and the change of use of a field from agricultural to Suitable Alternative Natural Green Space (SANGS) to serve the residential development at Dilly Lane, Hartley Wintney. The main appeal site lay 1.5km from the Thames Basin Heaths Special Protection Area (SPA). The council considered it had insufficient information to allow it to make the requisite appropriate assessment under the Habitats Regulations [3] and was not satisfied that the proposed development on its own or in combination with other projects would not have an adverse impact on the integrity of the SPA.

On 20 October 2006, Natural England wrote to the council indicating that the further mitigation information provided, including the proposal for a suite of SANGS, enabled the council to conclude, without requiring an appropriate assessment, that adverse effects upon the SPA arising from the development would be avoided.[4] After the public inquiry into the appeals in December 2006, the council and Natural England withdrew their objections on this ground, and the Secretary of State allowed the appeal, despite the Inspector's contrary recommendation. In so doing, the Secretary of State said in a minded to decision letter:[5]

> 14. "The Secretary of State has therefore taken account of the possible impact that allowing these proposals may have on the features of the Special Protection Area that are of conservation interest, namely nightjar, woodlark and Dartford Warbler. In considering this matter she has taken into account the fact that Natural England has withdrawn its objections to the proposed development and has confirmed (IR8.5) it is satisfied that the package of measures offered by the appellant is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be significant effect on the SPA, and that no appropriate assessment under the Habitats Regulations is necessary. These measures will provide 'suitable alternative natural green space' (SANGS) to serve the residential development and for use by the local community (IR4.8). The Secretary of State gives great weight to Natural England's views as the appropriate nature conservation body in relation to the application of the Conservation (Natural Habitats &c) Regulations 1994. She is therefore satisfied she can proceed to grant planning permission without having to undertake an Appropriate Assessment. Accordingly, the Secretary of State has concluded that there is no need to consider further the Inspector's deliberations in IR12.5-IR12.15 on the effect of the current proposals on the integrity of the habitat …"

In the subsequent decision letter the Secretary of State said:[6]

> 11. "The Secretary of State continues to give great weight to the views of Natural England as the appropriate nature conservation body in relation to the application of the Conservation (Natural Habitats &c) Regulations 1994. That body has withdrawn its objections to the proposed development and has confirmed (IR8.5) it is satisfied that the package of measures offered by the appellant is sufficient in scale and detail to allow a competent authority to ***J.P.L. 1496*** conclude that there is not likely to be a significant effect on the SPA, and that no appropriate assessment under the Habitats Regulations is necessary. The Secretary of State therefore retains the position set out in her 'minded' letter."

In upholding the Secretary of State's decision Sullivan J said:

> 49. "… Mr Hockman [for the claimant council] rightly accepted that the weight to be given to the views of NE was a matter of planning judgment for the first defendant. Since NE is the 'appropriate nature conservation body', as defined by reg.4 of the Regulations, the first defendant was entitled to give 'great weight' to its views if she chose to do so. Indeed it would have required some cogent explanation in the decision letter if the first defendant had chosen not to give considerable weight to the views of NE."

There are several things to note about the *Hart* case:

- the case involved a challenge under the Town and Country Planning Act 1990 (the TCPA 1990) s.288 to a decision of the Secretary of State on a s.78 appeal following the holding of an inquiry. As we discuss below, most of the subsequent cases applying the principle have instead involved local authority decisions to grant planning permission;
- Natural England did not appear at the inquiry and did not thus call any expert witnesses; its role was confined to setting out its views in writing;
- the only expert evidence on ecology came from the appellants; the council, despite opposing the scheme, did not call any expert ecologist;
- in terms of the principle itself there are two key aspects:
  - the weight to be given to Natural England's views was, in the ordinary way, a matter of planning judgment for the decision maker. However, given Natural England's statutory status under the Habitats Regulations, the decision maker was entitled to give its views great weight;
  - the decision maker is not prohibited from disagreeing with the views of Natural England on these matters, but if it does so must give reasons for so doing.

Later applications of the *Hart* principle to Natural England

The principle we are concerned with is sometimes called the *Hart* principle, and sometimes the *Prideaux* or *Shadwell* principle, after later cases that we will now turn to that further encapsulated it. The principle has, in fact, been applied in many subsequent cases in relation to Natural England's views on ecological issues, especially in relation to the Habitats Regulations. Before considering the *Prideaux* or *Shadwell* cases it is necessary to consider one other decision.

The Akester case

In *R. (on the application of Akester) v Department for the Environment, Food and Rural Affairs*,[7] there was a legal challenge to a decision of a private company and the owner of, and statutory harbour authority for, the ferry terminal at Lymington Pier on the River Lymington. The company wished to introduce a new, larger class of ferries on an already established ferry route, part of which was along the Lymington River between the mainland and the Isle of Wight. Concerns were raised on the impact on the area of the route which included salt marshes and mud flats which were designated amongst other things as part of a Special Area of Conservation (SAC). The judicial review, which succeeded, alleged that the company ***J.P.L. 1497** should have undertaken an appropriate assessment before introducing the new ferries. The advice of Natural England was that an appropriate assessment might be required. Owen J said:

> 112. "It is submitted on behalf of the claimants that Wightlink could not reasonably have concluded that no doubt remained as to adverse effects given the formal advice given by Natural England. The fact that Natural England had given contrary advice does not of itself render the decision Wednesbury unreasonable. In making its appropriate assessment Wightlink was not obliged to follow the advice given by Natural England; its duty was to have regard to it. But given Natural England's role as the appropriate national conservation body, Wightlink was in my judgement bound to accord considerable weight to its advice, and there had to be cogent and compelling reasons for departing from it. Unless Wightlink was to come to the conclusion that the conclusion at which Natural England had arrived was simply wrong, it is difficult to see how it could come to the conclusion that no doubt remained as to whether there would be significant adverse effects on the protected sites."

It should be noted that in *Akester*, the judge changed the formulation of the principle in one key way. He said that "cogent *and compelling* reasons for departing" (emphasis added) from Natural England's views. That was not the formulation of Sullivan J in *Hart*: see above. He referred only to the need for cogent reasons. The *Akester* formulation was then referred to in *R. (on the application of Long) v Monmouthshire CC*.[8] This was another case in which one of the authors of this article appeared.

The Shadwell case

In *Shadwell Estates Ltd v Breckland DC*,[9] in which one of the authors of this article appeared, there was a legal challenge to the adoption by the local planning authority of the Thetford Area Action Plan on the basis that it was legally defective on in that it failed to assess the potential impact of the development the subject of the Action Plan on a nearby SPA, and on a protected species, namely stone curlews. In rejecting the challenge, Beatson J said:

> 72 "… a decision-maker should give the views of statutory consultees, in this context the 'appropriate nature conservation bodies', 'great' or 'considerable' weight. A departure from those views requires 'cogent and compelling reasons': see *R. (on the application of Hart DC) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin)* at [49] per Sullivan J, and *R. (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin)* at [112] per Owen J. See also *R. (on the application of Jones) v Mansfield DC [2003] EWCA Civ 1408* per Dyson LJ at [54]." [10]

In that case, Natural England had been consulted and were satisfied with the ecological assessments. The Action Plan has been the subject of an examination by an Inspector. It does not seem that Natural England appeared at the examination or sought to rely on any expert witnesses. It will be noted that the formulation for departure was the same as the *Akester* one "clear and compelling". ***J.P.L. 1498*** [11]

The Prideaux case

R. (on the application of Prideaux) v Buckinghamshire CC,[12] in which again one of the authors of this article appeared, was a challenge to a local authority grant of permission to an "energy from waste" plant. Natural England had withdrawn its original objection on nature conservation grounds: the local planning authority relied on Natural England's conclusions to find that the applicant's environmental statement was sufficient. Lindblom J (as he then was) said this:

> 116. "As the committee was well aware, by the time [the developer]'s proposals came before it for a decision, the effects of the development on ecological interests, including European Protected Species, had been discussed over a long period, both with the County Council's officers and with Natural England. It is clear that the committee gave considerable weight to the conclusions reached by Natural England. This is hardly surprising. It is exactly what one would expect. Natural England is the 'appropriate nature conservation body' under the regulations. Its views on issues relating to nature conservation deserve great weight. An authority may sensibly rely on those views. It is not bound to agree with them, but it would need cogent reasons for departing from them (see, for example, the judgment of Sullivan J, as he then was, In *R. (on the application of Hart DC) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin); (2008) 2 P. & C.R. 16* at [49]), and the judgment of Owen J in *R. (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] Env. L.R. 33* at [112])."

The principle further "codified" in *Prideaux* is thus straightforward, and widely known:

- Natural England is "the expert" on nature conservation, and so its views on nature conservation deserve great weight (Note though that Sullivan J in *Hart* had not said that their views *deserve* great weight, but that a planning decision maker was *entitled* to give them great weight).
- A planning authority can depart from those views: but it needs cogent reasons for doing do. Note in this case Lindblom J used the *Hart* departure formulation—cogent reasons—not the *Shadwell /Akester* one of "cogent and compelling".

Other cases involving Natural England

There are many more cases where the *Hart* principle has been applied to cases concerning the views of Natural England (or in one instance, discussed below, Natural Resources Wales) on ecological matters relating to a planning proposal. The most important of these are as follows.

First, there is the decision of the Supreme Court in *R. (on the application of Morge) v Hampshire CC*.[13] This was a judicial review of a local planning authority's decision to grant planning permission. The development was one that would have also required in due course a licence under the Habitats Directive art.12.[14] Natural England initially objected to the planning application on the grounds, among other things, of the impact of the proposed development on bats. The planning authority then commissioned an updated bat survey, and, because of the findings of the survey, Natural England withdrew its objections to the planning application. Thereafter the planning committee, having also considered the reports of the planning officers, granted planning permission for the development. Lady Hale said: ***J.P.L. 1499***

> 45 "… The United Kingdom has chosen to implement article 12 of the Directive by creating criminal offences. It is not the function of a planning authority to police those offences. Matters would, as Lord Brown JSC points out, have been different if the grant of planning permission were an automatic defence. But it is so no longer. And it is the function of Natural England to enforce the Directive by prosecuting for these criminal offences (or granting licences to derogate from the requirements of the Directive). The planning authority were entitled to draw the conclusion that, having been initially concerned but having withdrawn their objection, Natural England were content that the requirements of the Regulations, and thus the Directive, were being complied with. Indeed, it seems to me that, if any complaint were to be made on this score, it should have been addressed to Natural England rather than to the planning authority. They were the people with the expertise to assess the meaning of the updated bat survey and whether it did indeed meet the requirements of the Directive. The planning authority could perhaps have reached a different conclusion from Natural England but they were not required to make their own independent assessment."

Secondly, the *Hart* principle has also been applied in the context of a DCO examination: see *R. (on the application of Mynnyd y Gwynt Ltd) v Secretary of State for Business Energy and Industrial Strategy*.[15] In this case, what was in issue were written objections by Natural Resources Wales to a nationally significant infrastructure project under the Planning Act 2008 which were outstanding at the end of the process, and which in a critical regard the applicant failed through its experts to respond to.

However, more recently, in the Sizewell C nuclear power station decision, The *Hart* line of authority was not mentioned in the Examining Authority's Report or the Secretary of State's decision. The Examining Authority rejected most of Natural England's arguments against the project, noting at 5.15.243 that:

"We have considered this matter carefully and we give due weight to NE's expertise and role. We agree with NE's position on [two out of 22 issues]. However, on the other disagreements we do not consider that NE has made out its case and we give very little weight to their disagreement with the Applicant."

So, unlike in the *Mynnyd y Gwynt Ltd* case, the applicant advanced expert evidence that dealt with Natural England's objections and the Examining Authority accepted that case in preference to the outstanding objections and without any explicit reference to the *Hart* principle.

Thirdly, *Hart* was also recently cited by the Court of Appeal in *R. (on the application of Wyatt) v Fareham BC*,[16] noting that there must be a "good reason" not to follow Natural England's general nutrient neutrality advice, applying *Hart*.[17] In that case, the Court of Appeal held that a good reason not to follow Natural England's general advice in the context of a specific planning application is if Natural England offered no specific objection to the proposal. That case involved a challenge to a local authority decision to grant permission. ***J.P.L. 1500***

Hart

There have been several High Court cases applying the principle to other statutory consultees, such as the local highway authority and English Heritage.[18] We do not propose to cover all of the subsequent examples but discuss the most pertinent ones below.

The *Hart* principle was applied to the views of a statutory highway authority in a planning appeal in *Visao v Secretary of State for Housing, Communities and Local Government*.[19] This case concerned an appeal to an Inspector in a written representations case. There was no inquiry, and so no calling of experts nor cross-examination.

In Northern Ireland, the principle was applied to traffic advice provided by the Department for Infrastructure in respect of a large development scheme, in *Re Mooreland and Owenvarragh Resident's Association's Application for Judicial Review*.[20] It is notable that the judge interpreted the principle in these terms: "The decision maker was *entitled* to give considerable weight to the views of the statutory consultee" (emphasis added) ([96]).[21]

In *Steer v Secretary of State for Communities and Local Government*,[22] the *Hart* principle was applied to the views of Historic England in the context of a planning appeal that was determined following an inquiry.[23] In that case, Historic England had raised written objections but did not appear at the inquiry or call any witnesses: again, this fact is significant as we shall explore below.

In *R. (on the application of East Meon Forge and Cricket Ground Protection Assoc) v East Hampshire*, the principle was applied to the written representations of Sport England to a local planning authority (at [108]–[109]).[24]

Interestingly, the principle has not always won the day for the statutory consultee, even outside the inquiry context to which we will turn shortly. In *R. (on the application of Hawkhurst) v Tunbridge Wells*,[25] a challenge to a grant of permission by a local planning authority, James Strachan QC (sitting as a Deputy Judge of the High Court) said (emphases added):

> 122. "In the case of impacts on the highway network, the local highway authority is a consultee. But it is also particularly well placed to assist a local planning authority in making the sort of judgment required under paragraph 109 of the NPPF. As Mr Mills correctly points out, ***J.P.L. 1501*** the judgment still remains that of the local planning authority, rather than the local highway authority as a consultee. A local planning authority can *ultimately disagree with a consultee (subject to the normal principles of administrative law to which I have already referred). It may then have to defend that disagreement at appeal. But equally, it is entitled to agree with a consultee of this kind. It is axiomatic the weight it chooses to attach to such views is a matter for its own judgment.*
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> 123. Ms Thomas and Mr Cannock rely on cases which address the potential requirement of a local planning authority to attach considerable, or great, weight to the views of Natural England, when it acts as the "appropriate nature conservation body" statutory consultee in respect of certain ecological matters: see *Prideaux v Buckinghamshire CC [2013] EWHC 1054 (Admin)* at 116; *R. (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] Env. L.R. 33* at [112], *R. (on the application of Morge) v Hampshire CC [2011] UKSC 2* at [45].
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> 124. I do not consider it necessary for me to decide how far that principle can be extended beyond that particular situation so as to require considerable weight to be attached to the views of a local highway authority in relation to highway impacts. *It is sufficient in the context of this challenge to apply conventional principles, namely that the Defendant is entitled (if not obliged) to take into account the views of KCC on such impacts as material to its decision, but thereafter it is a matter for the Defendant's judgment as to what weight it applies to those views as material considerations*."

The *Hart* principle was also recently cited with approval by Lang J in *Swainsthorpe Parish Council v Norfolk CC*,[26] a consultation challenge that (once again) did not involve live witness evidence at an inquiry. That case involved a judicial review of the consultation response of a highway authority, and which went beyond highway matters. Lang J said:

> 70 "… statutory consultees play an important part in ensuring that planning decision-making is informed, fair and effective. The importance of the role of a statutory consultee is demonstrated by the fact that a decision-maker is required to give the views of statutory consultees great or considerable weight. In *Shadwell Estates v Breckland DC [2013] EWHC 12 (Admin)*, Beatson J stated, at [72] that: 'a decision-maker should give the views of statutory consultees, in this context the "appropriate nature conservation bodies", "great" or "considerable" weight. A departure from those views requires "cogent and compelling reasons"': see *R. (on the application of Hart DC) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin)* at [49] per Sullivan J, and *R. (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin)* at [112] per Owen J."

There is, accordingly, a wealth of case law on the *Hart* principle that reaffirms its basic tenants: so it is perhaps unsurprising that it is now being invoked in planning inquiries where statutory consultees appear and call expert witness evidence and where there is competing expect evidence called by the appellant/applicant. But that is the point at which, we say, the principle hits the buffers. ***J.P.L. 1502***

The *Hart* principle at inquiry

The authorities

The *Hart* principle has fared less well during planning inquiries, where there is competing expert oral evidence. Where, at an inquiry expert, witnesses are called by a statutory consultee and there is competing expert evidence from other parties then this evidence must—like any other evidence—be properly tested via cross-examination.

The cases above do not deal with this situation. Most concern local authority grants of permission or other procedures (e.g. examinations or written representations) where there is not the calling of competing expert witnesses and cross-examination of those witnesses. In most of these decisions, there was not any competing expert evidence at all on the issue with which the statutory consultee was concerned. So, for example, while *Hart* itself was a case concerned with a s.78 appeal, as we noted above, there was no competing expert evidence called to contradict Natural England's views (indeed the only expert called was by the appellant and this supported those views) and, moreover, Natural England did not actually appear at the inquiry and so its case was not tested by cross-examination.

Gallagher Properties Ltd v Secretary of State for Communities and Local Government [27] was a s.288 challenge to an Inspector's decision following an inquiry. The Inspector relied on the views of a local councillor on wildlife impacts. This approach was challenged under s.288 on the basis of the *Hart* principle. The judge (Collins J) rejected this argument (emphases added):

> 41. "Ground 3 relates to concerns which were raised by a local councillor, Mr Harwood, who gave evidence about the risk of an adverse impact on the River Len and its wildlife, and on the local wildlife reserve managed by the Kent Wildlife Trust. There were no material objections raised by the Wildlife Trust or by the Environment Agency,[28] and indeed in the environmental statement it was clearly stated that the view taken was that there was no risk of any adverse effect. Mr Harwood was a local wildlife enthusiast who said that in his experience, in particular his having dealt with the silting of the river resulting from the construction of the M20, it was in his view inevitable that some adverse effect would be likely to result.
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> 42. He had, it was submitted, no expertise, and the inspector therefore acted irrationally in accepting his evidence against that of the experts, including in particular what was set out in the environment statement and bearing in mind the lack of any objection by, perhaps in particular, the Kent Wildlife Trust, who could be expected to have real concerns were there any chance of any adverse effect, it is said, and a judgment of Beatson J is relied on for this proposition in *Shadwell Estates v Breckland DC [2013] EWHC 12 (Admin)*, *that there was a need for cogent and compelling reasons to depart from the views of a statutory consultee.*
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> 43. That *depended of course upon the facts of that particular case*, and it certainly is not the case that the evidence given by an expert can only be properly contradicted by evidence given by an expert. Mr Harwood stated that he had considerable experience in dealing with the River Len and the wildlife around it, and that despite indications that there would not be any damage from the M20, there was. It seems to me that *the inspector was, in the circumstances, having regard to the evidence given by Mr Harwood, entitled to give it some weight, as I say, bearing in mind his experience and his local knowledge of the relevant conditions*. It is quite unnecessary that there be an expert. ***J.P.L. 1503*** "

Section 77 decisions and s.78 appeal decisions

There are, as we have touched on already, also various appeal decisions that apply the *Hart* principle following an inquiry. But in many if not all of these, the situation is a written response from the statutory consultee—often a non-objection to the scheme—on which one or other party (the applicant/appellant or local planning authority) were seeking to rely, and with no

contradictory expert evidence having been called by any opposing party. In other words, these are not cases where there is *competing expert evidence*.

We say the situation is very different where the statutory consultee's evidence is subject to direct challenge by competing expert evidence. In a called-in decision *Land at Citroen Site, Capital Interchange Way, Brentford, TW8 0EX*,[29] Historic England opposed the scheme at inquiry and called an expert witness. The appellant (and other parties: the council and another rule 6 party) also called expert witnesses on heritage. In its closing submissions, Historic England referred to its role as the Government's principal advisor on the historic environment, and submitted that "[a]s a statutory consultee and with its specialist role its views should be given considerable weight and only departed from for good reason". [30] The Inspector and Secretary of State, in rejecting Historic England's view and granting planning permission, did not appear to accord any added weight to the views of Historic England and its expert witness, just because it was Historic England. Instead, the expert evidence on those issues from all the parties was assessed and judged on its merits.

The argument received the same treatment in a recent called-in decision *Land at Silverthorne Lane, Bristol, BS2 0QD*, in which both authors acted for the successful applicant. The application concerned a large mixed-use regeneration scheme in central Bristol, supported by the local planning authority and (unusually for a large scheme) the local media and many local residents. However, the Environment Agency opposed the scheme on flood risk grounds (notwithstanding the satisfaction of the Lead Local Flood Authority) and persuaded the Secretary of State to call in the decision. At the subsequent inquiry, the Agency argued its witnesses' views should be given great weight and could only be departed from with cogent and compelling reasons.[31]

This inquiry brought into sharp relief some of the contradictions of trying to apply the *Hart* principle to evidence given at a planning inquiry.

First, if a witness performs badly under cross-examination, should that witnesses' arguments be given "extra credit" simply because they are the statutory consultee's witness, in circumstances where the arguments would otherwise be defeated by those of the applicant/appellant's expert? That would appear to be a somewhat bizarre proposition.

Secondly, the question arose in *Silverthorne Lane* as to whose evidence, exactly, was to be given great weight on flooding. If the Environment Agency's evidence, then why not also the evidence of the Lead Local Flood Authority (who were entirely satisfied with the flood risk and associated mitigation measures)? Where there are competing and overlapping areas of responsibility, particularly as between a statutory consultee and a local planning authority, the application of the *Hart* principle to both experts would cancel out the added benefit on both sides and would thus have no impact overall.

Thirdly, the bar for providing a "cogent reason" for departing from the views of a statutory consultee must, in the planning inquiry context and where there is competing expert evidence, be a low one (as they were indeed departed from in this case). If an Inspector explicitly departs from the views of *any* expert witness who has given evidence at an inquiry on a key matter of dispute, but is unable to point to a "cogent" reason for doing so, then surely such a decision will be subject to legal challenge on ordinary public law principles; whether the witness was the statutory consultee's or not: see *Georgiou v Secretary of State for* ****J.P.L. 1504*** *Communities and Local Government* ****J.P.L. 1504*** ,[32] in which the Court of Appeal held that a planning inspector had unlawfully failed to give reasons for rejecting an environmental noise expert's report when refusing to remove a noise condition. It is not clear what an incantation of the *Hart* principle helpfully adds to the exercise of choosing between two competing expert views on a key issue: in order to choose one view over the other, the Inspector will necessarily have to be able to demonstrate a cogent reason for doing do. We consider below the alternative departure formulation from *Shadwell* /*Akester* that is to say "cogent and compelling".

In the end, although the Inspector in *Silverthorne Lane* acknowledged the Agency's arguments on the *Hart* principle in her report,[33] she recommended the grant of permission (which the Secretary of State granted) without appearing to attach any additional weight to the evidence of the Agency's witnesses.

The same argument was being made by Natural England in respect of issues related to the impact on the scenic beauty of AONBs (i.e. not nature conservation issues) in the call-in inquiry Land adjacent to *Turnden, Hartley Road*.[34] A decision on this case is awaited at the time of writing.

The limits of the *Hart* principle

In light of the above, the following is clear.

All of the cases cited above articulate the principle that: (i) great or considerable weight can or should be given to the views of statutory consultees; and (ii) that cogent, and in many of the later cases "cogent and compelling" reasons are needed for departing from those views.

Most of the cases involved challenges by way of judicial review to decisions by local planning authorities to grant permission or other procedures not involving an inquiry, and not s.288 challenges to decisions made on appeals under the TCPA 1990 s.78, or other decisions following an inquiry (e.g. a call-in under the TCPA 1990 s.77).

There are various s.77 and s.78 decisions that apply the *Hart* principle following an inquiry, but in many of these, the situation is a written response from the statutory consultee—often a non-objection—which one or other party (appellant or local planning authority) is seeking to rely on and with no contradictory expert evidence having been called, rather than a case where there is competing expert evidence including from the statutory consultee.

We were not able to find an authority involving live competing expert witness evidence where the application of the *Hart* principle was in any way held to be decisive to the Inspector's assessment.

This is unsurprising. A planning inquiry is like a laboratory: arguments must be placed under the microscope and tested, sometimes to breaking point. A statutory consultee puts forward its experts: an applicant/appellant puts forward theirs. In that kind of environment, it is hard to see how the *Hart* principle can meaningfully be said to apply. The evidence put forward by a statutory consultee must surely attract such weight as it deserves, depending on how its witnesses perform in oral evidence as against the applicant/appellant's witnesses. It is a matter of judgment for the Inspector. The question of which expert evidence to prefer where there is a contested technical issue cannot properly or sensibly be influenced by attaching more weight from the outset to the witnesses appearing for one party over another.

Alternatively, even if it were accepted that a statutory consultee's views do carry added weight to start with, it must be recognised that an Inspector is perfectly entitled to reject the view of such a consultee where there is evidence to the contrary. The *Gallagher* case (see above) can be seen perhaps as supporting that view. There, the written views of a statutory consultee were overridden by the Inspector relying on the non-expert evidence provided by a local objector on ecology matters. The judge so concluded despite applying the departure test from *Shadwell*, that is to say "cogent and compelling". ***J.P.L. 1505***

This may show that the bar for "compelling" or "cogent" reasons for departing is not that high. This is even more so where there is expert evidence that contradicts the views of the statutory consultee. So, where a statutory consultee objects in writing but does not appear at the inquiry, and the applicant/appellant calls expert evidence to expressly contradict the views of the statutory consultee, that evidence would very readily provide a basis for departing from the views of the statutory consultee. Where instead the statutory consultee appears at the inquiry and calls a witness, and so does the applicant/appellant, the Inspector must in the ordinary way weigh up all that evidence and reach a view on it. If the Inspector concludes the expert evidence of the applicant/appellant is to be preferred, then that clearly provides provide a ready basis for departing from the views of the statutory consultee. In those circumstances, saying the view of the statutory consultee carries "great weight" to start with and that cogent and compelling reasons are needed to depart from that view adds very little.

This analysis is supported by the general principles that where a court is faced with competing expert evidence it must properly weight that evidence and give sufficient reasons for why the evidence of one expert is preferred over that of another: see *Flannery v Halifax Estate Agencies [2000] 1 W.L.R. 377*.[35] The expert evidence of one party could not be preferred over another merely because, for example, one of the witnesses was called by a statutory consultee and the other was not.

However, it might be said that there is a distinction between the reasons being simply "cogent" (i.e. logical and clearly stated) and the reasons being "cogent *and compelling*" (as a number of the post-*Hart* cases say they must be). If one accepts the principle that "great" (or similar) weight must be attached to the views of a statutory consultee, especially those which are expert national agencies (such as Natural England or Historic England) then the reasons may need to be sufficient to show that such weight has indeed been applied.[36] If the reasons were merely "cogent" but not "compelling" (or perhaps alternatively "good" reasons as in *Wyatt* and *Smyth*; see below) then that *might* be argued to give rise a substantial doubt as to

whether a relevant matter (i.e. the need to give "great weight" to the views of the expert national agency) had indeed been taken into account. If that is right, then the principles being discussed here might be said to go a little further than obliging a decision maker to do no more than clearly explain why they have preferred one case over another in the normal way. It could be said that this means that the reasons must be something more, for example: identifying a factual error or a policy misunderstanding in the advice, or evidence not before the expert national agency that the inquiry has seen, or (as in *Wyatt*) a subsequent consultation response raising no concerns.

We are somewhat doubtful though as to whether there is really a need for reasons that are compelling as well as cogent to depart from the views of a statutory consultee. We think the suggestion that there be good reasons (and which has Court of Appeal support, see above) may be preferable and perhaps not as stringent as "compelling". In our view, if the Inspector, at an inquiry, having heard the oral evidence finds that the evidence given by an expert called by a party other than the statutory consultee is to be preferred then they must be able depart. And they need not do more than give clear reasons for why they have taken that view. The standard of reasons imposed should not be too great in this situation.

Conclusion

It is sometimes said that all professions are conspiracies against the laity.[37] We would not go that far (perhaps for obvious reasons), but clearly, the mere fact of one's professional expertise should not provide ***J.P.L. 1506*** insulation from a legitimate challenge. In the context of a planning inquiry, the evidence of a statutory consultee on subjects within their expertise should be open to challenge and properly tested, in the same way that any other inquiry evidence is.

Thankfully, that appears to be exactly the approach that has been taken by planning decision-makers so far. We hope that it will continue.

James Maurici KC

Landmark Chambers

Alex Shattock

Landmark Chambers

Footnotes

1 We have been involved in cases where both the Environment Agency and Natural England have done this and then made the same argument.

2 *R. (on the application of Hart DC) Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin); [2008] 2 P. & C.R. 16*.

3 Conservation of Habitats and Species Regulations 2017 (SI 2017/1012).

4 On this point, *R. (on the application of Hart DC) Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin); [2008] 2 P. & C.R. 16* must now be considered wrongly decided in the light of *People Over Wind v Coillte Teoranta (C-323/17) EU:C:2018:244; [2018] P.T.S.R. 1668*. The CJEU opting to interpret the Habitats Directive in a way that Sullivan J regarded (with justification) as lacking common sense.

5 Quoted in *R. (on the application of Hart DC) Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin); [2008] 2 P. & C.R. 16* at [27].

6 Quoted in *R. (on the application of Hart DC) Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin); [2008] 2 P. & C.R. 16* at [47].

7 *R. (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin); [2010] Env. L.R. 33*.

8 *R. (on the application of Long) v Monmouthshire CC [2012] EWHC 3130 (Admin)* at [75].

9 *Shadwell Estates Ltd v Breckland DC [2013] EWHC 12 (Admin); [2013] Env. L.R. D2*.

10 This case pre-dated *R. (on the application of Hart DC) Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin); [2008] 2 P. & C.R. 16*. However, it does not quite articulate the *Hart* principle as we now know it. In that case, Dyson LJ said at [54]: "The judge was also right to say that the comments by English Nature (referred to at [6] of the Appendix to this judgment) were important. The Officer was right to say, as he did in the first report, that these comments enabled him to advise the committee that the development would not have a significant environmental impact on the golden plover habitat. As the judge pointed out, English Nature did not suggest, still less request, that further investigations be carried out which might reveal the likelihood of a significant impact."

11 As it was in the Scottish case of *Sustainable Shetland v Scottish Ministers [2013] CSOH 158 at [143]; 2013 S.L.T. 1173* decided not long after *Shadwell Estates Ltd v Breckland DC [2013] EWHC 12 (Admin)*. See also other examples of this formulation in *No Adastral New Town Ltd v Suffolk Coastal DC [2014] EWHC 223 (Admin); [2015] Env. L.R. 3* at [138] and *R. (on the application of Zins) v East Suffolk Council [2020] EWHC 2850 (Admin)* at [94].

12 *R. (on the application of Prideaux) v Buckinghamshire CC [2013] EWHC 1054 (Admin); [2013] Env. L.R. 32*.

13 *R. (on the application of Morge) v Hampshire CC [2011] UKSC 2; [2011] 1 W.L.R. 268*.

14 Directive 92/43 on the conservation of natural habitats and of wild flora and fauna [1992] OJ L206/7.

15 *R. (on the application of Mynnyd y Gwynt Ltd) v Secretary of State for Business Energy and Industrial Strategy [2018] EWCA Civ 231; [2018] P.T.S.R. 1274* at [8(8)].

16 *R. (on the application of Wyatt) v Fareham BC [2022] EWCA Civ 983* at [139].

17 The court cited with approval the judgment of Sales LJ in *Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174; [2015] P.T.S.R. 1417*:

> 85. "Moreover, the authorities confirm that in a context such as this a relevant competent authority is entitled to place considerable weight on the opinion of Natural England, as the expert national agency with responsibility for oversight of nature conservation, and ought to do so (absent good reason why not): Hart supra at [49]; *R. (on the application of Akester) v DEFRA [2010] Env L.R. 33* at [112]; *R. (on the application of Morge) v Hampshire CC [2011] UKSC 2; [2011] 1 W.L.R. 268* at [45] (Baroness Hale); *R. (on the application of Prideaux) v Buckinghamshire CC [2013] EWHC 1054 (Admin); [2013] Env L.R. 32* at [116]. The judge could not be faulted in giving weight to this consideration in the present case, at [165] of her judgment."

Interestingly, the formulation for departure here is not cogent or compelling, but just that there are good reasons for departing.

18 See, e.g. *R. (on the application of Loader) v Rother DC [2016] EWCA Civ 795 at [40]; [2017] J.P.L. 25*, in overturning the judge's exercise of discretion below Lindblom LJ said "I think the approach she took to the exercise of her discretion was incomplete—in two respects. The first is that she did not, it seems, allow for the significance of English Heritage's role as a statutory consultee on proposed developments likely to affect heritage assets; I agree with Ms Wigley that she ought to have done so (see the judgment of Beatson J, as he

then was, in *Shadwell Estates Ltd v Breckland DC [2013] EWHC 12 (Admin)* at [72]). As English Heritage say in their charter (”A Charter for Historic England Advisory Services”), they are “the government’s expert advisor on England’s heritage and … have a statutory role in the planning system”, and “[central] to [their] role is the advice [they] give to local planning authorities, government departments, developers and owners on development Judgment Approved by the court for handing down proposals affecting the historic environment”.

19 *Visao v Secretary of State for Housing, Communities and Local Government [2019] EWHC 276 (Admin)* at [65]–[68]. The departure formulation was from *R. (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin)* and the “clear and compelling” reasons.

20 *Re Mooreland and Owenvarragh Resident’s Association’s Application for Judicial Review [2022] NIQB 40*. Although called in, the decision did not involve an inquiry.

21 See also in Northern Ireland: *Newry Chamber of Commerce and Trade’s Application for Judicial Review, Re [2015] NIQB 65* at [64], *Donnelly’s Application for Judicial Review, Re [2017] NIQB 84* and *McGurk’s Application for Judicial Review, Re [2017] NIQB 108* all citing *Shadwell Estates Ltd v Breckland DC [2013] EWHC 12 (Admin)*.

22 *Steer v Secretary of State for Communities and Local Government [2017] EWHC 1456 (Admin); [2017] J.P.L. 1281*. Note that the decision in the *Steer* case was reversed in the Court of Appeal ([2018] EWCA Civ 1697), albeit not on any point related to the principle in *R. (on the application of Hart DC) Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin)*. On Historic England, see also *R. (on the application of Hayes) v York CC [2017] EWHC 1374 (Admin); [2017] P.T.S.R. 1587* at [92]: “Historic England, the Government’s statutory adviser on heritage assets, supported the proposal; and the city council would be bound to attach “considerable weight” to its view and would need “cogent and compelling reasons” for departing from it: *Shadwell Estates Ltd v Breckland DC [2013] EWHC 12 (Admin); [2013] Env L.R. D2* at [72] per Beatson J.”

23 *Steer v Secretary of State for Communities and Local Government [2017] EWHC 1456 (Admin)* at [52].

24 *R. (on the application of East Meon Forge and Cricket Ground Protection Assoc) v East Hampshire DC [2014] EWHC 3543 (Admin); [2015] A.C.D. 45*. The judge quoted from *Shadwell Estates Ltd v Breckland DC [2013] EWHC 12 (Admin)* referring to the *Akester* departure formulation of “cogent and compelling” (*R. (on the application of Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin)*).

25 *R. (on the application of Hawkhurst) v Tunbridge Wells [2020] EWHC 3019 (Admin)*.

26 *R. (on the application of Swainsthorpe Parish Council) v Norfolk CC [2021] EWHC 1014 (Admin)* at [70].

27 *Gallagher Properties Ltd v Secretary of State for Communities and Local Government [2016] EWHC 674 (Admin)*.

28 This is an error; the judge meant to refer to Natural England.

29 *Land at Citroen Site, Capital Interchange Way, Brentford, TW8 0EX (APP/G6100/V19/3226914)*. One of the authors acted for a rule 6 party.

30 See the Inspector’s Report *Land at Citroen Site, Capital Interchange Way, Brentford, TW8 0EX* at para.9.185.

31 See the Inspectors Report *Land at Silverthorne Lane, Bristol, BS2 0QD* at paras 167–183 and 421–424.

32 *Georgiou v Secretary of State for Communities and Local Government [2011] EWCA Civ 775; [2011] L.L.R. 506*.

33 e.g. at IR 421.

34 *Land adjacent to Turnden, Hartley Road (ref:20/00815/FULL)*.

35 *Flannery v Halifax Estate Agencies [2000] 1 W.L.R. 377; [2000] 1 All E.R. 373*. And the notes in the White Book (London: Sweet and Maxwell), para.35.0.3. See in particular *Temple v South Manchester HA [2002] EWCA Civ 1406* (a judge is entitled to prefer the evidence of one expert to that of another, but reasons should be given for the preference) and *Smith v Southampton University Hospital NHS Trust [2007] EWCA Civ 387; (2007) 96 B.M.L.R. 79* (it was not sufficient for a judge to merely say that the preferred expert was highly reputable and representative of a responsible body of medical opinion).

36 See *South Buckinghamshire DC v Porter [2004] UKHL 33; [2004] 1 W.L.R. 1953* at [36].

37 *George Bernard Shaw, The Doctor’s Dilemma (1906)*.

