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Lord Carnwath's contributions to planning and environmental law

Justice Brian Preston

A Climate Change Laws of the World insight

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About the author

Brian Preston (AO FRSN SC) is the Chief Judge of the Land and Environment Court in New South Wales (NSW), Australia. He is a Visiting Professor at Durham University (UK) and an Adjunct Professor at Sydney University, Western Sydney University and Southern Cross University (Australia). He is Vice President (Oceania) of the Global Judicial Institute on the Environment and Chair of the Environmental Law Committee of the Law Association for Asia and the Pacific.

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Introduction

On 27 March 2025, the LSE's Global School of Sustainability, the Grantham Research Institute on Climate Change and the Environment, and the LSE Law School hosted an event to celebrate the 80th birthday and distinguished legal career of Lord Robert Carnwath of Notting Hill, CVO, retired Justice of the UK Supreme Court.

During his tenure at the Supreme Court, Lord Carnwath gave many leading judgments, particularly on issues relating to planning and the environment, property, rating, local government and administrative law. Lord Carnwath has been a Visiting Professor in Practice at the Grantham Research Institute since 2021.

This note contains the response delivered by Justice Brian Preston AO FRSN SC, Chief Judge of the Land and Environment Court of New South Wales, who spoke about Lord Carnwath's contributions to environmental, planning and property law, through both judgments and extra-judicial writings.

This note is accompanied by Lord Carnwath's lecture, 'Law and the Environment: A judge looks back', in which he reflected on the role of the courts, at home and abroad, in the development of environmental and climate change law over the last two decades. Lord Carnwath drew on both his experience as a judge, and as a participant in international judicial exchanges.

Lord Carnwath's contributions to planning and environmental law

1. Introduction

Unlike Marc Antony speaking at Julius Caesar's funeral,[1] tonight I have come to praise Lord Carnwath, not to bury him. The good that Lord Carnwath has done, in his distinguished legal career, will long live after him. That good includes his significant contributions to the development of the law. To understand this contribution, I need to start by saying something about what is law.

The American legal philosopher Lon Fuller described law as acting as a form of social ordering.[2] Law orders the way in which society functions and actors in society interact with each other. Law sets the rules of the interactions between citizens and the state. This is public law, both constitutional law and administrative law. Law sets the rules for the interactions between citizens in society. This is private law. And law sets the rules for the interactions between citizens and the environment. Insofar as the law empowers the state to regulate the interactions of citizens with the environment, such as what can and cannot be done and how it is to be done, this is part of public law, what we label as planning and environmental law. Insofar as the law regulates citizens' interactions with the environment to prevent causing harm to other citizens' interests, this is part of private law, such as the law of torts.

Law also sets the rules for resolving disputes about the applicable rules for the interactions of citizen with the state, citizen with citizen, and citizen with the environment. Adjudication is one form of social ordering for resolving disputes.[3] The law empowering adjudication sets the rules for who adjudicates, what is adjudicated, when it is adjudicated and how it is adjudicated.

One of the main roles of the lawyer, as well as the judge, is to identify the appropriate form of social ordering, and the attendant legal rules, so as to advise or adjudicate, as the case may be, on their application in a particular case. Professor Atiyah, reviewing Fuller's essays on social ordering, explained this process:

> "One of the main tasks of the lawyer is to study the different means of social ordering so that he can advise on the selection of the most appropriate means to achieve a predetermined end. But, if he is to do this task properly he will sometimes have to understand and convince others why the inherent limits on the use of one or other of the principles of sound order may themselves shape the ends to be sought. So the lawyer must understand the principles of social order and the relationship of means and ends; legal education must, therefore, see that lawyers are properly instructed in these matters."[4]

This is a task to which Lord Carnwath has dedicated his legal career for more than half a century, first as a barrister and then as a judge. Through his advocacy and adjudication of planning and environmental disputes, Lord Carnwath has sought to understand and convince others of the applicable "principles of sound order and the relationship of means and ends."

In assaying this task, Lord Carnwath has contributed materially to the development of planning and environmental law. I will address the contributions he has made during his time as a judge. The contributions are in two categories: judicial decision-making and judicial capacity-building. Both categories concern the development of the legal rules that govern and regulate the bodies of substantive and procedural law that constitute planning and environmental law as well as the

[1] William Shakespeare, *Julius Caesar,* Act 3 Scene 2.

[2] See, for example, Kenneth L Winston (ed), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Duke University Press 1981).

[3] Lon L Fuller 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 357.

[4] P.S. Atiyah, 'Book Review: The Principles of Social Order: Selected Essays of Lon L. Fuller, edited with an Introduction by Kenneth L. Winston. Duke University Press, Durham, N.C., 1981.' [1983] Duke Law Journal 669, 671.

adjudication of planning and environmental disputes. In the first category, Lord Carnwath's judicial decisions resolving planning and environmental disputes identify and explicate the legal rules that are applicable in the relevant jurisdiction. In the second category, Lord Carnwath has built judicial capacity through the provision of training materials and instruction on the legal rules that are applicable to resolving planning and environmental disputes throughout the world.

I will focus primarily on Lord Carnwath's contributions in the first category, but I will weave into that discussion a brief summary of his contributions in the second category. I will mainly discuss a selection of Lord Carnwath's judicial decisions, but I will also refer to his speeches and articles which analyse other judicial decisions that have developed planning and environmental law around the world.

To be manageable, my discussion of Lord Carnwath's judicial decisions needs to be set in an analytical framework. Lord Carnwath served as a judge for nearly three decades. He was appointed a judge of the High Court in 1994, the Court of Appeal and the Privy Council in 2002, the Inaugural Senior President of Tribunals in 2007, and the Supreme Court in 2011, serving in the last court until he retired in 2020. In this time, he has made many hundreds of decisions. Of course, as a generalist not specialist judge, only a small proportion of these decisions concern planning or environmental law. Nevertheless, those decisions that do concern planning or environmental law cover the gamut of these fields of law.

The framework I will use to illustrate Lord Carnwath's contribution to the development of planning and environmental law is the taxonomy of legal rules that make up planning and environmental law. At the risk of oversimplification, these rules take two forms: rules of competence and rules of limitation. Rules of competence are rules that enable the exercise of power. Rules of limitation are rules that control the exercise of power.[5] Lord Carnwath has developed jurisprudence on many of the rules of competence and the rules of limitation in planning and environmental law.

My examination of Lord Carnwath's doctrinal development of rules of competence and rules of limitation provides the structure for this paper. In the second part, I deal with rules of competence. I will first summarise the different types of rules of competence. I will then select illustrative cases in which Lord Carnwath has developed rules of competence. These fall into three areas of planning and environmental law: public rights, private rights and institutional powers of the courts. In the third part, I deal with rules of limitation. Again, I will start with an explanation of the different types of rules of limitation before I give examples of Lord Carnwath's development of rules of limitation in his judicial decisions and extra-judicial speeches and writings.

The fourth part concludes my survey of Lord Carnwath's doctrinal development of rules of competence and rules of limitation in planning and environmental law. I observe that Lord Carnwath's adjudication of the disputes at hand has not only served a law-making function through the identification, interpretation and application of the relevant legal rules, but also has provided an explanation of how to adjudicate well. Lord Carnwath's adjudication of the disputes reveals a sound understanding and provides an instructive explanation of the limits and forms of adjudication. This not only improves adjudication as a form of social ordering, but also has a value-adding effect of improving governance of the planning and environmental systems that underlie the disputes being adjudicated.

[5] For a detailed discussion of the these two forms of legal rules, see Douglas Fisher, *Australian Environmental Law: Norms, Principles and Rules* (3rd ed, Thomson Reuters 2014); Douglas Fisher, *Legal Reasoning in Environmental Law: A Study of Structure, Form and Language* (Edward Elgar 2013).

2. Rules of competence

2.1. The types of rules of competence

Rules of competence recognise and enable the exercise of power, both public power and private power. Public power may be recognised by constitutions and statutes, as well as the royal prerogative. Rules of competence expressed in legislation may confer powers to: achieve specific purposes stated in the legislation; manage the environment in various ways stated in the legislation; enforce compliance with the legislation; and ask a court of competent jurisdiction for a remedy for non-compliance with the legislation. Rules of competence may also recognise executive powers based upon the prerogative.[6] Private power may be recognised by legislation or the common law. Rules of competence may recognise individuals' rights, including rights of ownership of property, rights to use land and its resources, and rights to prevent others causing harm to them and their property.[7]

Rules of competence may also confer power on institutions, including the courts. Rules of competence may vest in courts the power to hear and determine disputes arising under public and private laws and to grant remedies for breaches of the laws.[8] Rules of competence may establish and empower specialist courts or tribunals to adjudicate planning and environmental disputes. These are commonly referred to as environmental courts and tribunals.[9]

Lord Carnwath has explored rules of competence in constitutional,[10] administrative[11], planning and environmental cases. The latter cases are the focus of this paper. These cases concern rights, both public rights and private rights, as well as the powers of courts to make orders remedying interference with these rights.

2.2. Public rights

Illustrative of the public right cases decided by Lord Carnwath are two cases dealing with the public's "right" to use public land for recreational purposes, the *Barkas* case[12] and the *Newhaven Port* case.[13] These cases concern a rule of competence: what right does the public have to use public land for recreational purposes and in what circumstances does the right arise? [14]

In the *Barkas* case,[15] a local authority had acquired under the *Housing Act 1936* a large parcel of land (14 hectares) on which it proposed to, and proceeded to, erect houses. Within that larger parcel, initially pursuant to its power under s 80(1) of the *Housing Act 1936* and later its power under s 12(1) of the *Housing Act 1985*, the local authority laid out and maintained a field (of 2 hectares) as a recreation ground for the benefit of the residents of the houses. A local resident applied to register the field as a town or village green under s 15 of the *Commons Act 2006* on the ground that a significant number of the local inhabitants had used it for recreational purposes "as of right", within s 15(2) of the Act, for more than 20 years. The commons registration authority refused the application as the local inhabitants' use of the field had been by "by right" and not "as of right" within s 15(2). The trial judge dismissed the applicant's claim for judicial review of the commons registration authority's decision and the Court of Appeal dismissed her appeal. The Supreme Court also dismissed her appeal.

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[6] *Australian Environmental Law* (n 5) 252; *Legal Reasoning* (n 5) 328.

[7] ibid.

[8] ibid.

[9] United Nations Environment Programme, *Environmental Courts and Tribunals – 2021: A Guide for Policy Makers* (2nd ed, UNEP 2022); Linda Yanti Sulistiawati and Sroyon Mukherjee (eds), *Environmental Courts and Tribunals in Asia-Pacific* (Brill 2024).

[10] An example is Lord Carnwath's dissent in the first *Miller* case: *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61.

[11] An example is Lord Carnwath's decision in the *Privacy International* case: *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; [2020] AC 491.

[12] *Regina (Barkas) v North Yorkshire County Council* [2014] UKSC 31; [2015] AC 195.

[13] *Regina (Newhaven Port and Properties Ltd) v East Sussex Country Council* [2015] UKSC 7; [2015] AC 1547.

[14] For a commentary on those cases, see Charles George, 'Village greens: an ebbing tide?' [2015] Journal of Planning & Environmental Law 883.

[15] *Regina (Barkas) v North Yorkshire County Council* [2014] UKSC 31; [2015] AC 195.

The Supreme Court, for the reasons given by Lord Neuberger, held that where land was held under s 80(1) of the *Housing Act 1936* or s 12(1) of the *Housing Act 1985*, the public had a statutory right to use the land for recreational purposes. When the public so used the land they did so "by right" and not as trespassers, so that no question of user "as of right" within s 15(2) of the *Commons Act 2006* could arise.[16] Hence, the use of the field by the local inhabitants did not satisfy the requirements of s 15(2) to be registered as a town or village green.

Lord Carnwath agreed with Lord Neuberger's reasons that the use of the field by local inhabitants had been "by right" and not "as of right,"[17] but added instructive reasons on the public's right to use land for public recreation. Lord Carnwath noted that:

> "Where land is owned by a public authority with power to dedicate it for public recreation, and is laid out as such, there may be no reason to attribute subsequent public use to the assertion of a distinct village green right."[18]

He continued:

> "Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to 'warn off' the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights."[19]

Within a year, the issue of registration of land as a town or village green under the *Commons Act 2006* arose again in the Supreme Court in the *Newhaven Port* case.[20] The *Newhaven Port* case concerned a proposal by the town council to have a beach, known as West Beach, registered as a town or village green pursuant to s 15 of the *Commons Act 2006*. The beach was an artificial beach that had been created as a consequence of statutory harbour works. The beach was part of the operational land of the harbour, which was owned and operated by the port authority. The council's application for registration as a town or village green was supported by evidence that the beach had been used by a significant number of local inhabitants for bathing and associated recreational activities "as of right" for a period of at least 20 years. The port authority objected to the council's application. The application for registration as a town or village green was accepted. The port operator sought judicial review of that decision. The trial judge allowed the judicial review claim. The Court of Appeal allowed the council's appeal. The Supreme Court allowed the port authority's appeal.

The Supreme Court, for reasons given by Lord Neuberger, held that the public's use of the beach for bathing and associated recreational activities was "by right" and not "as of right" and therefore the beach was incapable of registration under s 15 of the *Commons Act 2006*. At issue, however, was the source of that right of the public. There were five possible sources: the general common law; the byelaws made under statutory authority by the port authority; some form of prescriptive or customary right; implied licence; or trespass tolerated or acquiesced in by the owners.

As to the general common law, earlier decisions, notably *Blundell v Catterall*,[21] were authority to the contrary of the first source. The Supreme Court assumed, without deciding, the correctness of those decisions.[22] Nevertheless, Lord Carnwath, drawing on his deep knowledge and experience as a planning and property lawyer, added a useful survey of the authorities, not only in the UK, but also in New Zealand and particularly the United States.[23] That survey lent support to the public

[16] ibid [21], [23], [49].

[17] ibid [51].

[18] ibid [64].

[19] ibid [65].

[20] *Regina (Newhaven Port and Properties Ltd) v East Sussex Country Council* [2015] UKSC 7; [2015] AC 1547.

[21] (1821) 5 B & Ald 268; 106 ER 1190.

[22] ibid [49]-[51] (Lord Neuberger), [131] (Lord Carnwath).

[23] ibid [106]-[118] on the UK including Scotland, [119]-[130] on New Zealand and the United States.

having a right to use the foreshore for recreational purposes. Nevertheless, in the absence of argument to the contrary, he noted that the Court must proceed on the basis that *Blundell v Catterall* and later cases were rightly decided.[24]

As to the second source, the Supreme Court held that the byelaws made by the port authority under the relevant legislation for the Newhaven Harbour, impliedly permitted members of the public to use the beach for leisure activities.[25]

The next three sources were raised as possibilities by Lord Carnwath. Although some form of prescriptive or customary right might not be appropriate for the relatively recent use of the artificial beach in this case, it might explain long-standing recreational uses of beaches more generally.[26] Lord Carnwath rejected the last possible source – that the public uses beaches for public recreation as trespassers – as defying common sense.[27] Lord Carnwath was, however, attracted to the possibility that there was an implied licence. He stated:

> "Applying that approach to public uses of beaches generally, I see no difficulty in drawing the obvious inference, in the absence of evidence to the contrary, that their use, if not in exercise of a public right, is at least impliedly permitted by the owners, rather than a tolerated trespass."[28]

This provided another reason for holding that the public's use of the beach was "by right."[29]

2.3. Private rights

I turn now to Lord Carnwath's discussion of private rights. In a series of speeches and articles, Lord Carnwath has addressed the increasing role human rights are playing in environmental protection. The laws granting individuals rights in relation to the environment are rules of competence: the right-holders have power to require others, whether government or private actors, to respect, protect and fulfil the right they are granted. One speech, later published in 2019 as "Human Rights and the Environment", is illustrative of Lord Carnwath's explanation of the right to a healthy environment.[30] This explanation drew upon and developed ideas Lord Carnwath had earlier expressed in the 28th Sultan Azlan Shah Lecture he delivered in 2014, which was later published.[31] Lord Carnwath traced the development of this right, starting with earlier decisions of the European Court of Human Rights on the human rights in Articles 2[32] and 8[33] of the European Convention on Human Rights, to decisions of national courts interpreting constitutional guarantees of the right to life as incorporating a right to a quality environment, and then to the Inter-American Court of Human Rights' Advisory Opinion OC-23/17 upholding the right to live in a healthy environment and the correlative state obligation to respect, protect and fulfil that right. The rights concerned in those cases were not articulated expressly as a right to a healthy environment, but rather were general human rights, including the right to life, which the courts construed as including a right to a healthy environment.[34]

One procedural right which Lord Carnwath has addressed in both his judicial decisions and extra-curial speeches is the procedural right to effective access to judicial and administrative proceedings to enforce other procedural and substantive rights. That right is one of the three procedural rights recognised by Principle 10 of the Rio Declaration on the Environment and

[24] ibid [131].

[25] ibid [61], [74] (Lord Neuberger, Lord Carnwath agreeing at [105]).

[26] ibid [132].

[27] ibid [133].

[28] ibid [135].

[29] ibid [136].

[30] Lord Carnwath, 'Human Rights and the Environment' (2019) 24 Judicial Review 32.

[31] Lord Carnwath, 'Environmental Law in a Global Society' [2015] Journal of Planning & Environmental Law 269.

[32] The right to life.

[33] The right to respect for private and family life.

[34] For a recent conspectus of the right to a healthy environment, see Brian J Preston, 'The Nature, Content and Realisation of the Right to a Clean, Healthy and Sustainable Environment' (2024) 36 Journal of Environmental Law 159.

Development[35] and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[36]

An important case in which this procedural right was considered was the *Edwards* case.[37] An issue arose of whether a court decision to order an unsuccessful litigant to pay the costs of litigation challenging an environmental decision interfered with this right to effective access to the courts. The Supreme Court had made an order for costs following a reference to the European Court of Justice regarding the appropriate test to be applied to ensure that review proceedings concerning environmental matters were not prohibitively expensive. Lord Carnwath's discussion of how the court's power to order costs is to be exercised, having regard to the requirement in article 9.4 of the Aarhus Convention that the public would be able to challenge environmental decisions in proceedings which are not prohibitively expensive, is instructive. His reasoning drew on his understanding of and experience in litigation brought in the public interest to enforce compliance with, and ensure accountability in the administration of, planning and environmental laws.

That understanding and experience reflected thoughts Lord Carnwath had expressed extra-judicially. In his lecture in 1998 entitled 'Environmental Litigation: A Way Through the Maze?',[38] Lord Carnwath observed:

> "Litigation through the courts is prohibitively expensive for most people unless they are either poor enough to qualify for legal aid or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds."

Lord Carnwath revisited the problem of costs in environmental litigation in his lecture in 2004 entitled 'Judicial Protection of the Environment: At Home and Abroad?'.[39] He made two suggestions to address the problem.[40] The first is that greater use should be made by courts of the judicial discretion to make no order for costs in cases where the issue is one of general public importance. The second is that courts should make greater use of pre-emptive orders, as public interest litigants need to know in advance what their costs liability is likely to be.[41]

These suggestions reveal a desire to make the planning and environmental systems work as intended. Crucial to the design of modern planning and environment systems is public participation in decision-making and governance. As Principle 10 of the Rio Declaration emphasises, "[e]nvironmental issues are best handled with the participation of all concerned citizens."[42] Effective public participation is facilitated by access to information, the first procedural justice pillar, as well as notification and invitation to participate, the second procedural justice pillar. But there must also be access to the courts to enforce compliance with these procedural rights, as well as with the law regulating decision-making and governance, the third procedural justice pillar. Lord Carnwath's decisions and speeches recognise the importance of upholding all three procedural rights.

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[35] United Nations Conference on Environment and Development: Rio Declaration on Environment and Development 1992, (1992) 31 International Legal Materials 874, principle 10.

[36] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention); See Lord Carnwath, 'Environmental Law in a Global Society' (n 31) 271.

[37] *R (on the application of Edwards) v Environment Agency* [2013] UKSC 78; [2014] 1 WLR 55.

[38] Published as Lord Carnwath, 'Environmental Litigation: A Way Through the Maze?' (1999) 11 Journal of Environmental Law 3, 9.

[39] Published as Robert Carnwath, 'Judicial Protection of the Environment: At Home and Abroad?' (2004) 16 Journal of Environmental Law 315.

[40] ibid 321.

[41] ibid 321.

[42] Rio Declaration (n 35), principle 10.

2.4. Institutional powers of the courts

Another rule of competence Lord Carnwath has developed concerns the institutional powers of courts to make remedial orders. The *ClientEarth* case[43] is illustrative. The case concerned the remedies the Supreme Court has power to order in public law cases. An environmental NGO, ClientEarth, had challenged and sought to remedy the UK Government's failure to secure compliance with nitrogen dioxide levels in certain zones under the Directive 2008/50. The Supreme Court imposed a mandatory order requiring the Secretary of State to prepare new air quality plans by a specified time. Lord Carnwath delivered the lead judgment, discussing the appropriateness of imposing a mandatory order on, rather than accepting a suitable undertaking from, the government. The Supreme Court's mandatory orders were exceptional in the sense that UK courts had rarely made such mandatory orders.

In extra-curial speeches, Lord Carnwath has cited a 19th century instance of a UK court issuing what might be termed in India and elsewhere as a continuing mandamus. This was the *Birmingham Corporation* case.[44] There, the court granted an injunction to stop the corporation pouring untreated effluent from its sewers into the River Tame. The court suspended the injunction to give the polluter, under supervision of the court, the incentive and the time to develop effective technical solutions.[45] Lord Carnwath notes[46] the close parallel between this process in the *Birmingham Corporation* case and the continuing mandamus approach adopted by the Supreme Courts of India[47] and the Philippines.[48]

Lord Carnwath has also considered in his published writings the institutional competence of courts and tribunals to resolve planning and environmental disputes. Lord Carnwath has long been involved in judicial capacity-building internationally and regionally.[49] He was involved in UNEP's Global Judges' programme since attending the UNEP Global Judges' Symposium in Johannesburg in 2002 as part of the World Summit on Sustainable Development (Rio+10). That programme produced a training manual and judges' handbook on environmental law and a collection of international legal materials and case summaries from around the world. Lord Carnwath has been influential in raising judicial awareness of environmental law across the Commonwealth through his involvement with the Commonwealth Magistrates and Judges Association. Lord Carnwath was a co-founder of the European Forum of Judges for the Environment. That association is open to judges from all states within the European Union and the European Free Trade Association.

Apart from improving the capacity of generalist courts, Lord Carnwath has suggested establishing specialist environmental courts and tribunals to adjudicate planning and environmental disputes. He has recommended a tribunal for merits review of decisions on planning consents and environmental licences and a court for judicial review of those decisions.[50] No doubt encouraged by his suggestions, the UK government established a First-Tier Tribunal and Upper Tribunal to review on the merits planning decisions, amongst other administrative decisions,[51] and a Planning Court to review judicially planning decisions.[52] Lord Carnwath acted as the inaugural Senior President of Tribunals for a period of 5 years.[53] In more recent times, Lord

[43] *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28; [2015] 4 All ER 724.

[44] *Attorney General v Birmingham Corporation* (1858) 4 K&J 528; 70 ER 220.

[45] See Lord Carnwath, 'Environmental Law in a Global Society' (n 31) 269-270; Lord Carnwath, 'Judges and the Common Laws of the Environment – At Home and Abroad' (2014) 26 Journal of Environmental Law 177, 177-179.

[46] Lord Carnwath, 'Environmental Law in a Global Society' (n 31) 274-275.

[47] For example, see *M C Mehta v Union of India & Ors,* AIR 1997 SC 734 (1996) (India) (Taj Mahal case); *M C Mehta v Union of India & Ors,* AIR 1998 SC 2963 (1998) (India) (Delhi Pollution case).

[48] *Oposa v Factoran* GR No 101083 (SC 30 July 1993) (Phil); and *Metropolitan Manila Development Authority v Concerned Citizens of Manila Bay* GR 171947-48 (SC 18 Dec 2008) (Phil).

[49] See for his work before 2004, Robert Carnwath, 'Judicial Protection of the Environment: At Home and Abroad?' (n 39), and for an update in 2014, Lord Carnwath, 'Judges and the Common Laws of the Environment – At Home and Abroad' (n 45), 184-186.

[50] Robert Carnwath, 'Judicial Protection of the Environment: At Home and Abroad?' (n 39) 326-327.

[51] See Robert Carnwath, 'Tribunal Justice – a new start' (2009) Public Law 48.

[52] See Lord Carnwath, 'Planning Policy and the Law' (2023) 35 Journal of Environmental Law 133.

[53] Between 2007 and 2012.

Carnwath has praised the model and the work of the world's longest-established, specialist, superior court of record, the Land and Environment Court of New South Wales.[54] In these ways, Lord Carnwath is exploring how courts as adjudicative institutions can better adjudicate planning and environmental disputes.

3. Rules of limitation

3.1. The types of rules of limitation

I turn now to rules of limitation. I will start with an explanation of what they are before giving examples of Lord Carnwath's development of them in his judicial decisions and extra-judicial speeches and writings.

Planning and environmental laws limit proprietary rights to use the environment by specifying what activities are permitted and what activities are prohibited; what procedures need to be followed to obtain approval to carry out permissible activities; what objectives are to be achieved and what methodology must be adopted by the administrative decision-maker in making a decision to approve activities; and what action may be taken to enforce any breach of obligations.[55]

Rules of limitation can be subdivided into regulatory, liability and market rules;[56] methodological rules;[57] normative and strategic rules;[58] and planning rules.[59] I need briefly to explain these subcategories of rules of limitation to lay the foundation for my discussion of Lord Carnwath's development of certain of the rules of limitation in planning and environmental law.

As I have noted, the power to engage in an activity or to regulate an activity is sourced in a rule of competence. The way in which these powers are exercised is controlled by rules of limitation. One way this is done is by regulatory rules imposing duties. Regulatory rules may impose negative or positive duties. Negative duties oblige a person *not* to do something. For example, a person must not damage some aspect of the environment or thing, including land, belonging to another person. Negative duties lie at the core of planning and environmental law. Positive duties oblige a person *to do* something. For example, a person must use their land so as to not unreasonably affect the interests of their neighbour. Positive duties lie at the core of the common law of tort. There are also some, although not many, positive duties in statutory environmental law, such as a duty to eliminate noxious weeds and sometimes to conserve heritage buildings.[60]

While regulatory rules impose duties, liability rules impose liability for non-compliance with duties. There are statutory civil liability and criminal liability rules.[61] There are also rules that deal with the relationship between regulatory rules and liability rules.

Market rules are rules that create and govern the operation of a market for something, such as water, pollution or carbon. The rules of competence create the right to hold an interest in the thing in question and the power to transact or deal with this thing. The rules of limitation regulate how the right or power may be exercised. Examples are systems for tradeable water rights, tradeable rights to pollute, or tradeable rights for carbon emissions or carbon sequestration.[62]

Methodological rules regulate how powers of environmental governance and adjudication are to be exercised. They fall into at least three categories: jurisdictional rules, purposive rules and

[54] See, for example, Lord Carnwath, 'Judges and the Common Laws of the Environment – At Home and Abroad' (n 45), 182 and his foreword to Elizabeth Fisher and Brian Preston (eds), *An Environmental Court in Action: Function, Doctrine and Process* (Hart Publishing 2022).

[55] *Legal Reasoning* (n 5) 328.

[56] *Australian Environmental Law* (n 1) 253-286.

[57] ibid 287-323.

[58] ibid 325-367.

[59] ibid 369-401.

[60] ibid, see examples on 257-262.

[61] ibid 262-268.

[62] ibid 253-286.

deliberative rules. Jurisdictional rules include rules concerning the justiciability of a dispute by the courts; the jurisdiction of a particular court to adjudicate a dispute; the remedies a court may grant to adjudicate a dispute; and the nature and types of jurisdictional error in the exercise of executive or administrative power. Purposive rules concern the purposes or objectives for which statutory powers may be exercised. Deliberative rules regulate the process of deliberation or consideration that an administrative decision-maker must undertake in exercising statutory powers. These include the relevant matters to be considered, the irrelevant matters to be ignored, the proportionality to be achieved, and the degree of unreasonableness in the consideration or outcome that must be avoided.[63]

Normative rules are rules that embody and require adherence to normative values. These include bedrock values of the legal system such as the rule of law, the principle of legality and protection of the individual's fundamental rights; constitutional principles and influences; and values underpinning planning and environmental law such as the principles of ecologically sustainable development and the environmental rule of law.[64]

Strategic rules are the arrangements that state the direction for environmental management in the future or the criteria according to which environmental management in the past is to be judged. Strategic rules comprise statements of outcome or principle.[65] Strategic rules may specify, for example, environmental factors or the principles of ecologically sustainable development as rules of limitation.[66] The precautionary principle and the polluter pays principle may operate in this way as strategic rules of limitation.

Planning rules are the rules established by planning legislation. They include the rules for strategic planning, public resource management and private resource development. Planning rules may require environmental assessment of strategies, policies and plans (strategic environmental assessment) and of proposed projects, both public and private (environmental impact assessment).

3.2. Regulatory rules of nuisance

Lord Carnwath has developed doctrinally rules of limitation in planning and environmental law. These include regulatory, methodological, normative, strategic and planning rules. I will start with regulatory rules in this section before dealing with the other types of rules of limitation in the following sections.

Lord Carnwath has adjudicated on a number of occasions on the positive duty of landowners not to cause a nuisance. This is a regulatory rule of limitation. Two cases are of note: the *Biffa* case,[67] concerning nuisance by smell, and the *Lawrence* case,[68] concerning nuisance by noise.

The *Biffa* case involved a group action by 152 households living in the Vicarage Estate nearby to a waste tip operated by Biffa in Ware, Hertfordshire. The waste tip emitted unpleasant smells, seriously affecting the amenity of the neighbourhood. Biffa did not contest that in emitting the smells it caused a nuisance. But it contended that it was permitted to operate the waste tip by a planning permission granted under the relevant planning legislation and a waste management permit issued under the relevant environmental legislation. Biffa argued that the law of nuisance must be flexible, and be modified, to survive in the complex world of the 21st century. The trial judge agreed with Biffa and dismissed the householders' claims. The Court of Appeal overturned this decision.

Lord Carnwath delivered the lead judgment in the Court of Appeal. Contrary to what the trial judge believed, Lord Carnwath stated that "the applicable law of nuisance is relatively

[63] ibid 293-323.

[64] ibid 327-331.

[65] ibid 331.

[66] ibid 335-364.

[67] *Barr and Ors v Biffa Waste Services Ltd* [2012] EWCA Civ 312; [2013] QB 455.

[68] *Lawrence and Anor v Fen Tigers Ltd and Ors* [2014] UKSC 13; [2014] AC 822.

straightforward, and that the 19th century principles for the most part remain valid."[69] Of importance, Lord Carnwath discussed the relationship between nuisance law and environmental law. Lord Carnwath held that the statutory permits authorising the operation of the waste tip were not a defence to the nuisance, as neither the permits nor the statutes under which they were issued authorised Biffa to use the land in a way which would inevitably involve a nuisance.[70] Although Parliament may enact parallel systems of regulatory control, unless it says otherwise, the common law rights and duties remain unaffected.[71] Lord Carnwath thereby reconciled potentially competing rules of limitation in the statutory and common law.

In the *Lawrence* case,[72] the Supreme Court considered the right of a landowner to commit a nuisance in respect of noise caused by motor sports at a stadium and adjoining land. The defendants had carried out activities at the stadium for over 20 years and the stadium and track had statutory planning permission for use as motor sports.

The Supreme Court considered five issues: (1) Was it possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise? (2) Can a defendant rely on the fact that the claimant "came to the nuisance"? (3) Can a defendant rely on the activities giving rise to a nuisance as constituting part of the character of the locality? (4) Can the grant of planning permission for a particular use affect the question of whether that use is a nuisance? (5) Where an actionable nuisance is established, what approach should the court adopt when deciding whether to grant an injunction restraining the nuisance or to award damages instead? The five judges of the Supreme Court each gave separate judgments, although they agreed with some on some issues and disagreed with others on other issues. As this speech seeks to explore Lord Carnwath's contribution to developing planning and environmental law, I will focus on the fourth issue concerning the interplay between the grant of planning permissions and an actionable nuisance.[73]

Lord Neuberger, with whom Lord Sumption,[74] Lord Mance[75] and Lord Clarke[76] separately agreed, held that the grant of planning permission for a particular development does not mean that that development is lawful for all purposes. All it means is that a bar to use imposed by planning law has been removed.[77] Lord Neuberger stated that "it seems wrong in principle that, through the grant of a planning permission, a planning authority should be able to deprive a property owner of a right to object to what would otherwise be a nuisance, without providing her with compensation, when there is no provision in the planning legislation which suggests such a possibility."[78] Lord Neuberger concluded:

> "Accordingly, I consider that the mere fact that the activity which is said to give rise to the nuisance has the benefit of a planning permission is normally of no assistance to the defendant in a claim brought by a neighbour who contends that the activity cause a nuisance to her land in the form of noise or other loss of amenity."[79]

Lord Carnwath separately elaborated on the issue of the relevance of any planning permission to whether there is an actionable nuisance. He noted at the outset the fundamental difference between planning law and the law of nuisance: "The former exists to protect and promote the

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[69] *Barr and Ors v Biffa Waste Services Ltd* [2012] EWCA Civ 312; [2013] QB 455, [44].

[70] ibid [36](v), [41], [46](ii) and (iii).

[71] ibid [146].

[72] *Lawrence and Anor v Fen Tigers Ltd and Ors* [2014] UKSC 13; [2014] AC 822.

[73] For commentaries on all of the issues in the *Lawrence* case, see Ben Pontin, 'Nuisance Injunctions after *Coventry v Lawrence*: revisiting the question of 'prevention or payment'?' (2013) 25 Environmental Law and Management 209; Maria Lee, 'Private nuisance in the Supreme Court' [2014] Journal of Planning & Environmental Law 705; Paul Singh, 'Rethinking private nuisance in the 21st century: a critical analysis of Coventry v Lawrence' (2016) 32 Construction Law Journal 606.

[74] *Lawrence and Anor v Fen Tigers Ltd and Ors* [2014] UKSC 13; [2014] AC 822, [154], [156].

[75] ibid [162], [165].

[76] ibid [169].

[77] ibid [89].

[78] ibid [90].

[79] ibid [94].

public interest, whereas the latter protects the rights of particular individuals."[80] This may mean that "planning controls and the law of nuisance may pull in opposite directions. A development executed in accordance with planning permission may nevertheless cause a substantial interference with the enjoyment of neighbouring properties."[81] Lord Carnwath asked rhetorically:

> "Should a property owner be able in effect to undermine the planning process by bringing a claim of nuisance against the developer and securing not only damages but also an injunction prohibiting the activity in question, regardless of its public significance?"[82]

I say the question is rhetorical because Lord Carnwath does not expressly answer it. But I discern from reading the rest of the judgment that the answer is "yes, in part." Lord Carnwath referred to his judgment in the *Biffa* case[83] that "the common law of nuisance had co-existed with statutory controls since the 19th century without the latter being treated as a reason for cutting down private law rights."[84] Although Lord Carnwath noted that he was there speaking about environmental regulation (the environmental licence in *Biffa* related to waste disposal) rather than planning control, the point that a statutory permission does not necessarily authorise a nuisance is equally valid. A statutory permission will only authorise a nuisance if the permission authorises a use of the land in a way which would inevitably involve a nuisance. Lord Carnwath noted this would be the situation where a project is authorised by statute, but the defence of statutory authority "applies only where Parliament has 'by express direction or by necessary implication' authorised the activity in question and the alleged nuisance is the inevitable consequence of that activity."[85] Lord Carnwath noted that the Planning Act 2008 adopted the same solution for nationally significant infrastructure projects such as airports and power stations. However, "[t]here is no equivalent statutory protection for other forms of development authorised under ordinary planning procedures, whether by the local planning authority or the Secretary of State following a public inquiry."[86] Lord Carnwath later re-iterated that "there should be a strong presumption against allowing private rights to be overridden by administrative decisions without compensation."[87]

I have suggested Lord Carnwath answered his question "yes, in part". The qualification I discern relates to Lord Carnwath's view that a planning permission can, in limited circumstances, be considered in assessing the character of the neighbourhood. Lord Neuberger had held that "a defendant, faced with a contention that his activities give rise to a nuisance, can rely on those activities as constituting part of the character of the locality, but only to the extent that those activities do not constitute nuisance."[88] Lord Carnwath, however, accepted "that in exceptional cases a planning permission may be the result of a considered policy decision by the competent authority leading to a fundamental change in the pattern of uses, which cannot sensibly be ignored in assessing the character of the area against which the acceptability of the defendant's activity is to be judged."[89]

Lord Carnwath's reasoning, therefore, explained the interrelationship and reconciled the conflict between the regulatory and liability rules of the common law (the law of nuisance) and of statutory law (planning law and planning permissions). This allows for citizens and the state to order their relations and behaviour so as to accord with the rules of limitation and thereby make the planning and environment system as a whole work effectively and efficiently.

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[80] ibid [193].

[81] ibid [194].

[82] ibid [194].

[83] *Barr and Ors v Biffa Waste Services Ltd* [2012] EWCA Civ 312; [2013] QB 455, [46].

[84] *Lawrence and Anor v Fen Tigers Ltd and Ors* [2014] UKSC 13; [2014] AC 822, [197].

[85] ibid [195].

[86] ibid [196]

[87] ibid [222].

[88] ibid [74].

[89] Ibid [223].

3.3. Methodological rules of planning

It is with respect to methodological rules, especially those regulating planning and environmental decision-making, that Lord Carnwath has perhaps made the most significant contribution. Lord Carnwath has long been concerned about the methodological approach that ought to be used in interpreting and applying policies of government, especially planning policies. He practised extensively at the bar in planning law and has an abiding interest in ensuring the planning system works efficiently and effectively. That was an issue he addressed in his lecture in 1990 entitled 'The Planning Lawyer and the Environment'[90] and revisited 30 years later in his commentary in 2023 entitled 'Planning Policy and the Law.'[91] Between these bookends, Lord Carnwath has articulated judicially what he considers to be the proper approach in a series of cases.[92]

In 2017, in *Secretary of State for Communities and Local Government v Hopkins Homes Ltd,*[93] Lord Carnwath gave the lead judgment for the Supreme Court. The case concerned the National Planning Policy Framework (NPPF) made by the Secretary of State. A preliminary question was what is the legal status of the NPPF, as this may affect how it is to be interpreted. Lord Carnwath held that the Secretary of State's powers to formulate planning policy derived from planning legislation, which gave him responsibility for oversight of the planning system, and not from the royal prerogative.[94] That gave the NPPF a foundation in statute law, even though it was not a statutory policy as such.

Lord Carnwath noted that the correct approach to the interpretation of a statutory development plan was discussed by Lord Reed of the Supreme Court in *Tesco Stores Ltd v Dundee City Council*.[95]Lord Carnwath noted that Lord Reed's approach for interpretation of a statutory development plan was applicable to interpretation of the policies in the non-statutory NPPF, paragraphs 14 and 19.[96] However, Lord Carnwath added three qualifications.

The first was that the terms of the policy under consideration are relevant. The policy in *Tesco Stores Ltd v Dundee City Council* was expressed in relatively specific terms, but other policies, including in the NPPF, may be expressed in much broader terms and may not lend themselves to the same level of legal analysis as stated by Lord Reed in *Tesco Stores Ltd v Dundee City Council*.[97] Second, Lord Carnwath observed that, in interpreting policies, "the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly."[98] Third, Lord Carnwath emphasised the need "to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not to elide the two."[99]

In 2018, in *Beau Songe Development Limited v The United Basalt Products Limited,*[100] sitting in the Privy Council on an appeal from the Supreme Court of Mauritius, Lord Carnwath applied the interpretative approach stated by Lord Reed in *Tesco Stores Ltd v Dundee City Council*. The policy to be interpreted had statutory force, being a Development Management Map forming part of an approved Outline Scheme under the Town and Country Planning Act 1954. The map showed a "1 km buffer-zone." At issue was how those words should be interpreted. Lord Carnwath, applying

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[90] Published as Robert Carnwath, 'The Planning Lawyer and the Environment' (1991) 3 Journal of Environmental Law 57, 63-64.

[91] Published in Lord Carnwath, 'Planning Policy and the law' (n 52).

[92] Two of these cases are the subject of case commentaries: Michael Bedford, 'Tesco Stores Ltd v Dundee City Council: a form of non-statutory fiction?' [2017] Journal of Planning & Environmental Law 914; Christopher Young, 'Case law update in a post 'Suffolk' world' [2018] Journal of Planning & Environmental Law 13 (Supp); Craig Whelton, "Interpretation of 'openness'" [2020] 199 Scottish Planning and Environmental Law 57; Samuel Ruiz-Tagle, '*Samuel Smith* and Judicial Review of Policy Interpretation: A Middle Way in the Law and Policy Divide' (2020) 32 Journal of Environmental Law 577 and Alastair Mills, 'The Interpretation of Planning Policy: The Role of the Court' (2022) 34 Journal of Environmental Law 419.

[93] [2017] UKSC 37; [2017] 1 WLR 1865.

[94] ibid [19]-[20].

[95] [2012] UKSC 13; [2012] PTSR 983.

[96] *Suffolk Coastal District Council v Hopkins Homes* [2017] UKSC 37; [2017] 1 WLR 1865, [23].

[97] ibid [24].

[98] ibid [25].

[99] ibid [26].

[100] [2018] UKPC 1.

Lord Reed's approach, held the words "should be interpreted objectively in accordance with the language used, read as always in its proper context."[101]

In 2020, the question of how to interpret the NPPF arose again in *R (Samuel Smith Old Brewery (Tadcaster) and another) v North Yorkshire County Council*.[102] At issue was the interpretation of NPPF, paragraph 90, which indicated that mineral extraction was one of certain forms of development regarded as "not inappropriate" in the Green Belt "provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in the Green Belt." The term "openness" was not defined in the NPPF. An issue in the case was whether the visual quality of the landscape was an essential part of the "openness" of land in the Green Belt. The local planning authority had granted permission in accordance with the recommendation of the planning officer's report. The planning officer, noting that "openness" was not defined, had offered an interpretation of what the word meant in the context of the paragraph, but this did not include the visual quality.

Lord Carnwath, giving the lead judgment of the Supreme Court, held that the local planning authority had correctly understood the meaning of the word "openness" as expressed in the NPPF, paragraph 90, when granting permission for the extension of the quarry in the Green Belt. He found that "[p]aragraph 90 does not expressly refer to visual impact as a necessary part of the analysis, nor in my view is it made so by implication."[103] The issue to be addressed was whether the proposed mineral extraction would preserve the openness of the Green Belt or otherwise conflict with the purposes of including the land within the Green Belt. In addressing that issue, "the matters relevant to openness in any particular case are matters of planning judgment, not law. "[104]

These three decisions concern the interpretation of planning policies, both statutory and non-statutory policies. Lord Carnwath has expounded a similar approach to the interpretation of planning permissions granted under planning legislation. In *Trump International Golf Club Scotland Ltd v Scottish Ministers*,[105] the Supreme Court held that planning permissions and their conditions are not in a special category when it comes to using implication as a technique of interpretation. The appellant had argued that it was not possible by implication to add to a condition of consent for the construction and operation of a wind farm a requirement that the development be completed in accordance with the approved design statement. The Supreme Court rejected that argument. Lord Hodge agreed with Lord Carnwath, although added his own comments that terms can be implied into a condition.[106] Lord Carnwath reviewed the planning cases that the appellant had relied on for a strict interpretation of the condition of consent, but did not regard them as providing support.[107] Lord Carnwath held that "planning permissions are not in a special category" when it comes to using implication as a technique for interpretation.[108] It was not right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents. A planning permission must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved. Planning conditions may also be used to support criminal proceedings. Those are good reasons for a relatively cautious approach, for example in limiting the categories of documents which may be used in interpreting a planning permission. But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation.[109]

[101] ibid [35], [37].

[102] [2020] UKSC 3; [2020] PTSR 221.

[103] ibid [39].

[104] ibid.

[105] [2015] UKSC 74; [2016] 1 WLR 85.

[106] ibid [31]-[36].

[107] ibid [45], [46]-[66].

[108] ibid [60].

[109] ibid [66].

Another methodological rule Lord Carnwath has considered is the duty on local planning authorities to give reasons for their decisions to grant planning permissions and the standard of those reasons. This issue arose in the *CPRE Kent* case.[110] Where a planning authority refuses planning permission for a proposed development there is a statutory duty for the authority to provide the applicant with a decision notice explaining "clearly and precisely their full reasons" for the refusal.[111] Where a planning authority grants planning permission, however, the position is less clear. That lack of clarity gave rise to the challenge in *CPRE Kent*. The local authority had granted planning permission for an extensive residential development, partly within an area of outstanding natural beauty, contrary to the planning officer's recommendation. An objector sought judicial review of the decision to grant planning permission on the principal ground that adequate reasons had not been provided for the decision to grant planning permission. The trial judge dismissed the claim, but the Court of Appeal allowed the claimant's appeal and quashed the planning permission. The Supreme Court dismissed the appeals by the developer and local authority.

Lord Carnwath gave the lead judgment in the Supreme Court. He determined that the local authority had failed to provide adequate reasons for granting planning permission in breach of two duties, one statutory and the other common law. The statutory duty was under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (EIA Regulations), which implemented the Environmental Impact Assessment (EIA) Directive. The EIA Regulations create an obligation to make available for public inspection a statement containing "the main reasons and considerations on which the decision is based"[112] where permission is granted for an "EIA development."[113] It was not in dispute that the council was in breach of the requirement under the EIA Regulations to make available a statement of "the main reasons and considerations" on which its decision was based. The only issue was what remedy ought to be ordered: a quashing order or a declaration.[114] Nevertheless, Lord Carnwath helpfully explained the standard that the statutory duty requires the reasons to meet.[115] That explanation is instructive for decision-makers in providing reasons for their decisions involving EIA development.

But it is Lord Carnwath's discussion of whether there is a common law duty on a planning authority to give reasons for grant of a planning permission that is more interesting. Lord Carnwath accepted at the outset that "[p]ublic authorities are under no general common law duty to give reasons for their decisions."[116] Similarly, in the planning context, a local planning authority generally is under no common law duty to give reasons for the grant of planning permission.[117] But Lord Carnwath then qualified that general proposition so as to require the giving of reasons in two situations.

First, "it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed."[118] Second, the common law principle of openness or transparency may require reasons to be given.[119] Lord Carnwath endorsed[120] the Court of Appeal's approach in this regard in *R (Oakley) v South Cambridgeshire District Council*.[121] There, Elias LJ, who gave the lead judgment, held that in the particular circumstances of that case, "the dictates

[110] *Dover District Council v Campaign to Protect Rural England (Kent)* [2017] UKSC 79; [2018] 1 WLR 108. For a case commentary, see Joanna Bell, 'Reflections on open justice and the status of the general common law duty to give reasons' (2018) 77 Cambridge Law Journal 240; Joanna Bell, 'Dover District Council v CPRE Kent: Legal Complexity and Reason-Giving in Planning Law' (2018) 23 Judicial Review 25.

[111] Town and Country Planning (Development Management Procedure) (England) Order 2015, SI 2015/595, art 35(1)(b).

[112] Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999/293, reg 21.

[113] Defined in ibid reg 2.

[114] *Dover District Council v Campaign to Protect Rural England (Kent)* [2017] UKSC 79; [2018] 1 WLR 108, [64].

[115] ibid [35]-[42].

[116] ibid [51].

[117] ibid [52].

[118] ibid [51] and [54], citing *R v Secretary of State for the Home Department; Ex parte Doody* [1994] UKHL 8; [1994] 1 AC 531.

[119] ibid [55].

[120] ibid [54], [57] and [58].

[121] [2017] EWCA Civ 71; [2017] 1 WLR 3765.

of good administration and the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty."[122]

Lord Carnwath found that the particular circumstances in *Oakley* that demanded reasons be given were also found in the present case. The need for openness and transparency in such cases calls for the provision of reasons. Lord Carnwath considered:

> "...it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically, they will be cases where, as in *Oakley* and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as the 'specific policies' identified in the NPPF – para 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases."[123]

Lord Carnwath's explanation of when planning authorities need to give reasons for their decision to grant planning permission and the standard of the reasons demonstrates his concern to make the planning system work not only efficiently and effectively, but also equitably, so as to achieve fairness for all involved in the planning system. As I have earlier noted, public participation is a critical feature of the planning system, but it depends on the public having access to information on decision-making, including the reasons for decisions. Improving access to and the standard of reasons for decisions enables effective public participation.

3.4. Normative and strategic rules of environmental management

Normative and strategic rules are other rules of limitation. These rules may require administrative decision-makers to consider environmental factors and normative values, such as the principles of ecologically sustainable development, in their environmental decision-making and management. I will refer to two decisions involving normative and strategic rules.

The first is *R (on the application of Mott) v Environment Agency*.[124] The case involved an interplay, and potential conflict, between normative rules – rules of environmental management and rules of protection of an individual's fundamental rights.

Mr Mott was the joint leasehold owner of a right to fish for salmon in the estuary of the River Severn, using a traditional putcher rank of individual conical baskets (putchers) to trap adult fish making their way back from the sea to the river of their birth to spawn. The Environment Agency was concerned at the declining status of salmon stock in rivers in the estuary and sought to impose limits on the annual catch to protect salmon stocks. The Agency imposed an annual catch limit on Mr Mott's licence, which limited his catch by 95%. Mr Mott claimed the catch limit conditions made his putcher rank fishery wholly uneconomic and the lease worthless. He sought judicial review of the Agency's decision to impose the catch limit conditions as irrational and in breach of his right under article 1 of Protocol 1 ($A_1 P_1$) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The trial judge upheld both claims. The Court of Appeal upheld the Agency's appeal on irrationality but dismissed the appeal under $A_1 P_1$. The Supreme Court dismissed the Agency's further appeal.

Lord Carnwath gave the lead judgment for the Supreme Court. Three issues arose in the appeal:

[122] ibid [61].

[123] *Dover District Council v Campaign to Protect Rural England (Kent)* [2017] UKSC 79; [2018] 1 WLR 108, [59].

[124] [2018] UKSC 10; [2018] 1 WLR 1022. For a case commentary, see Douglas SK Maxwell, 'Reeling in classifications of interferences under article 1 of the First Protocol and the fair balance test: R (on the application of Mott) v Environment Agency' [2018] Journal of Planning & Environmental Law 639.

> "(i) whether the conditions imposed by the Agency amounted to control or de facto expropriated under $A_1 P_1$? (ii) if the former, did the 'fair balance' require compensation to be paid? (iii) if the latter, were there any exceptional circumstances justifying absence of compensation?"[125]

In the way the appeal was decided, the first and third issues were not determined. This was because, even if the imposing of the catch limit conditions amounted to control, the Agency had not properly considered whether a fair balance between protecting the public interest in environmental protection and protecting Mr Mott's private fishing rights required that he be paid compensation.[126]

Lord Carnwath cited the Grand Chamber decision in *Hutten-Czapska v Poland*[127] that:

> "Not only must an interference with the right of property pursue, on the facts as well as in principle, a 'legitimate aim' in the 'general interest', but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the state, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.
>
> "The concern to achieve this balance is reflected in the structure of article I of Protocol No I as a whole. In each case involving an alleged violation of that article the court must therefore ascertain whether by reason of the state's interference the person concerned had to bear a disproportionate and excessive burden."

Lord Carnwath held that there was not a "fair balance." The Agency had not considered the impact of the limit on the fisherman's livelihood, even though that was relevant to striking a fair balance. The fisherman had been affected far more than others, whose use of the fishing rights might be solely for leisure purposes.[128]

Lord Carnwath emphasised, however, that this was "an exceptional case on the facts, because of the severity and disproportion (as compared to others) of the impact on Mr Mott." Agencies "have a wide margin of discretion in the imposition of necessary environmental controls, and $A_1 P_1$ gives no general expectation of compensation for adverse effects." Where agencies have given proper consideration to the issues of fair balance, the courts should give weight to their assessment.[129]

The second decision concerned a strategic rule requiring consideration of the polluter pays principle, one of the principles of ecologically sustainable development. In *Fishermen and Friends of the Sea v The Minister for Planning, Housing and the Environment (Trinidad and Tobago)*,[130] Lord Carnwath gave the lead judgment for the Privy Council on an appeal from the Court of Appeal of Trinidad and Tobago. The Minister had made Water Pollution (Fees) Regulations prescribing the various fees payable for applying for and maintaining a water pollution permit. They included a fixed annual permit fee for the term of the permit. The fee did not vary according to the type or amount of the pollution permitted. The regulations were challenged on the ground that the fixed fee permit fee structure was in breach of the polluter pays principle as expressed in paragraph 2.3 of the statutory National Environmental Policy (NEP). That paragraph stated, in part, that:

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[125] ibid [27].

[126] ibid [32]-[36].

[127] (2006) 45 EHRR 4, [167].

[128] *R (on the application of Mott) v Environment Agency* [2018] UKSC 10; [2018] 1 WLR 1022, [36].

[129] ibid [37].

[130] [2017] UKPC 37. For a case commentary, see Chris Hilson, 'The Polluter Pays Principle in the Privy Council: Fisherman and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment (Respondent) (Trinidad and Tobago) [2017] UKPC 37' (2018) 30 Journal of Environmental Law 507.

> "A key principle of pollution control policy is that the cost of preventing pollution or of minimising environmental damage due to pollution will be borne by those responsible for pollution. The principle seeks to accomplish the optimal allocation of limited resources."

The paragraph identified two "important elements of the principle":

> "(a) Charges are levied as an application or processing fee, purchase price of a licence or permit, which entitle the holder to generate specific quantities of pollutants; and
>
> (b) Money collected will be used to correct environmental damage."

The fixed fee permit fee structure did not implement the second element in subparagraph (b). Under that fee structure, the fees were assessed on the basis of full recovery only of the operating costs of the Environmental Management Authority, including the administration of the permit scheme, and did not allow for an additional amount to be used by the Authority itself "to correct environmental damage." Lord Carnwath held that subparagraph (b) of paragraph 2.3 must be given separate effect in accordance with its natural meaning:

> "It is in terms directed, not to the general purpose of the permitting system nor to the implementation of permit conditions, but to the use by the Authority itself of the 'money collected' by way of fees for the correction of environmental damage."[131]

This consideration was left wholly out of account in setting the prescribed fee. It followed that the regulations failed to comply with the NEP.[132]

3.5. Planning rules of environmental assessment

Finally, I turn to planning rules. Lord Carnwath has explicated the planning rules regulating environmental assessment of strategies, policies and plans and of projects. Planning and environmental laws commonly require assessment of the impact of strategies, policies and plans (strategic environmental assessment or SEA) and of proposed projects or activities (environmental impact assessment or EIA). Environmental assessment has been a topic of long-standing interest to Lord Carnwath. He spoke of environmental assessment in his lecture in 1990 on 'The Planning Lawyer and the Environment',[133] his lecture in 2004 on 'Judicial Protection of the Environment: At Home and Abroad'[134] and his lecture in 2014 on 'Environmental Law in a Global Society.'[135]

Lord Carnwath has addressed environmental assessment in at least four cases he has decided, two on SEA and two on EIA. In *Walton v Scottish Ministers*,[136] the Scottish Ministers had approved a proposal for a road on a western peripheral route around Aberdeen. Because of opposition to part of the proposed route, the route was revised to include an extra link of road (the Fastlink). The revised scheme, together with an environmental impact assessment, was published. The Ministers adopted that revised scheme. The appellant alleged that the decision to construct the Fastlink was a modification to a "plan" or "programme" within the meaning of article 2(a) of Directive 2001/42/EC (the SEA Directive), but as there had been no public consultation on the Fastlink, the Ministers had failed to comply with the SEA Directive. The Supreme Court dismissed the applicant's appeal. The Ministers' decision to revise the scheme to include an extra link of road was a modification to a "project" within the scope of the different Directive 85/337, not a

[131] ibid [41].

[132] ibid [43].

[133] Published in Robert Carnwath 'The Planning Lawyer and the Environment' (n 90).

[134] Published in Robert Carnwath, 'Judicial Protection of the Environment: At Home and Abroad?' (n 39).

[135] Published in Lord Carnwath, 'Environmental Law in a Global Society' (n 31).

[136] [2012] UKSC 44; [2013] PTSR 51. For a case commentary, see Katie Hood, 'Access to judicial review and widening the definition of "person aggrieved"' (2014) 16 Environment Law Review 277 and Robert McCracken, 'Standing and discretion in environmental challenge: Walton, a curate's egg' [2014] Journal of Planning & Environment Law 304.

modification to a "plan" or "programme" for the purposes of the SEA Directive.[137] Hence, there had been no failure to undertake further environmental assessment under the SEA Directive. Although Lord Carnwath agreed that the appeal should be dismissed, he added a careful analysis of the rules relating to environmental assessment, derived from the European Directives.[138] The Court's conclusion that there had been no failure to comply with the SEA Directive made determination of the question of remedy unnecessary, although both Lord Reed and Lord Carnwath discussed the judicial discretion to refuse relief.[139]

Regina (Buckinghamshire County Council and Others) v Secretary of State for Transport[140] was another case concerning the need for SEA. The Supreme Court held that a command paper setting out Government proposals for the high-speed rail project HS2, linking London to Manchester and Leeds via Birmingham with northward high-speed connections, was not a "plan or programme" within the SEA Directive such as to require a strategic environmental assessment. Lord Carnwath wrote one of the two lead judgments for the Supreme Court, revisiting the discussion in *Walton v Scottish Ministers* of the evolution and purpose of the relevant European Directives and in particular the SEA Directive.[141]

Lord Carnwath's considered explanation of SEA, in both the *Walton* case and the *HS2* case, have aided understanding of the nature, content and application of SEA.

Turning to environmental impact assessment for projects, in *Jones v Mansfield District Council*,[142] whilst a judge of the Court of Appeal, Lord Carnwath commented on the dangers of the environmental assessment process being an obstacle rather than an aid to informed decision-making. That case concerned a proposed industrial development. The application for planning permission was accompanied by expert reports dealing with landscape and ecological issues, but there had been no formal environmental assessment, including assessing the potential impact on bats and golden plovers. Planning permission was granted. A local resident sought judicial review of the ground that there needed to have been, but there was not, a formal environmental assessment. The Court of Appeal decided that the local authority had been entitled to decide on the evidence that the environmental impact was not sufficiently significant to require a formal assessment. The issue of discretion to grant a remedy did not therefore arise. Nevertheless, Lord Carnwath expressed concern at the delay of five years from the grant of the permit that had resulted from the litigation. He commented that:

> "With hindsight it might have saved time if there had been an EIA from the outset. However, five years on, it is difficult to see what practical benefit, other than that of delaying the development, will result to her or anyone else from putting the application through this further procedural hoop. It needs to be borne in mind that, the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle-race."[143]

The second case on EIA for projects is *Regina (Champion) v North Norfolk District Council*.[144] Lord Carnwath gave the lead judgment in the Supreme Court. The project developers had applied for planning permission to carry out development on a site close to a river which was entitled to protection as a site of special scientific interest and a designated special area of conservation under Directive 97/62 (the Habitats Directive). There were concerns regarding the risk of pollutants entering the river. The EIA screening opinion stated that the development was not likely

[137] ibid [67]-[70] per Lord Reed, Lord Carnwath agreeing at [98], Lord Hope agreeing at [149] and Lord Kerr and Lord Dyson agreeing at [157].

[138] ibid [115]-[140].

[139] Ibid [77]-[181] (Lord Reed), [108]-[114] (Lord Carnwath).

[140] [2014] UKSC 3; [2014] 1 WLR 324.

[141] ibid [34]-[49].

[142] *R. (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408; [2004] Env LR 391.

[143] ibid [57]-[58].

[144] [2015] UKSC 52; [2015] 1 WLR 3710. For a case commentary, see Ned Westaway, 'R (Champion v North Norfolk District Council' (2016) 28 Journal of Environmental Law 523.

to have significant effects on the environment and no EIA was required, subject to appropriate mitigation measures being put into place. The local authority approved the development subject to conditions. The appellant challenged the local authority's decisions that an EIA was not required in relation to the proposed development and to grant planning permission. One of the issues concerned the relevance of mitigation measures in EIA screening. Lord Carnwath found that there was nothing to rule out consideration of mitigation measures at the EIA screening stage. Nevertheless, Directive 2011/92 (the EIA Directive) and the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (UK) expressly envisaged that mitigation measures would, where appropriate, be included in the environmental impact statement. Application of the precautionary principle, which underlay the EIA Directive, implied that cases of material doubt should generally be resolved in favour of undertaking an EIA.[145]

In result, Lord Carnwath held that, although the proposal should have been subject to assessment under the EIA Regulations, that failure did not prevent the fullest possible investigation of the proposal and the involvement of the public. There was no reason to think that a different proposal would have resulted in a different decision.[146]

4. Adjudicating well

This, then, is my survey of Lord Carnwath's valuable and value-adding contributions to the doctrinal development of rules of competence and rules of limitation in planning and environmental law. It reveals a judge concerned not only with 'getting the law right', but with 'adjudicating well'. Getting the law right is, of course, fundamental to the judicial task. The syllogistic process adjudication demands involves, in order to formulate the major premise, identifying and interpreting the relevant law.[147] The judicial decisions and extra-judicial speeches of Lord Carnwath which I have discussed identify and interpret the relevant rules of competence and rules of limitation in planning and environmental law. This involves, mostly, confirmation and consolidation of the existing law. Lord Carnwath's explication of the law of nuisance is an example. Sometimes, however, it involves doctrinal development of the law, incrementally and interstitially though that development may be. This is an example of judicial law-making. The teasing out of the proper approach to interpretation of planning policies is one example; the need for and adequacy of environmental assessment is a second example; and the application of principles of sustainable development, such as the polluter pays principle, is a third example. This doctrinal development not only builds a body of planning and environmental law jurisprudence: it also frames governance of those planning and environmental laws by public decision-makers and private actors.

This brings me to my second point of adjudicating well. Fisher, Scotford and Barritt have advocated the need for courts to resolve disputes, especially climate change cases, 'well'.[148] They observe that "[t]he concept of resolving cases 'well' will ultimately depend on the constitution and traditions of a particular legal culture and legal order, where such orders and cultures are a complex mass of 'essentially contested' concepts, but the overall normative challenges have universal features."[149] They identify two features: one concerning the nature of adjudication and the other concerning the nature of legal reasoning in stabilising legal orders.[150]

As to the first, adjudicating cases 'well' may involve not merely resolving the dispute – this being an essential purpose of adjudication – but also delivering a form of expository justice. Fisher, Scotford and Barritt explain that when adjudication is a form of expository justice, "the role of judges is not simply to resolve disputes; they are also to 'tell us how to conform our behaviour to

[145] ibid [51].

[146] ibid [62].

[147] See Brian J Preston, 'Specialist Environmental Courts: Their Objective, Integrity and Legitimacy' *in Enduring Courts in Changing Times* (Australian Academy of Law, 2024), 338, 360-370.

[148] Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 Modern Law Review 173, 196-200.

[149] ibid 197.

[150] ibid.

our fundamental values'. It is less important that there are specific victims or claimants who require the resolution of a particular dispute, since adjudication is understood to concern norm setting and compliance and with providing judgments or precedents for the community at large."[151]

Many of Lord Carnwath's decisions to which I have referred serve this expository justice function. The decisions on rules of competence regarding the courts' powers to make certain remedial orders are one example. The decisions on many of the rules of limitation, including methodological, normative, strategic and planning rules, are other examples. These decisions not only resolve the dispute at hand. They also concern norm setting and provide precedents that frame and guide good governance by the state and behaviour of the community at large.

As to the second feature, adjudicating 'well' involves maintaining legal stability through the legal reasoning involved in adjudicating the case. Fisher, Scotford and Barritt note that "adjudication and judicial reasoning have a 'homeostatic' quality in which any argument must be integrated into 'the integrity of the legal edifice.'" Deciding planning and environmental cases 'well', therefore, "requires confronting this basic function of adjudication through legal reasoning."[152]

This is a point Lord Carnwath has himself made. In his lecture 'Environmental Law in a Global Society', Lord Carnwath discussed how the courts are not only contributing to the development of environmental laws but also explaining how those laws are to be given practical effect so as to create stable legal systems.

He concluded his lecture saying:

> "I have also tried to show how the courts are making an important and practical contribution to that process. Of course, the courts can do very little on their own. They require committed individuals or organisations or states to bring the cases. They need access to technical expertise to point the way to practical solutions, and they need to engage all parties and agencies, public or private, with the powers and the resources to put those solutions into practice. Given those tools the courts are uniquely placed to create the stable and legally enforceable structures necessary to ensure proper planning, supervision and enforcement. The courts cannot dictate policy. That is for government. But the courts can ensure that the policy is rational and coherent, and consistent with the scientific evidence, and that firm policy commitments are honoured."[153]

Lord Carnwath has, throughout his judicial career, adjudicated well in both these ways. His decisions not only provide a form of expository justice but also, by their reasoning, maintain and enhance the stability of the legal system. Lord Carnwath's decisions have facilitated planning and environmental systems achieving their purposes and functioning effectively, efficiently and equitably. Thus, not only can it be said that Lord Carnwath's life in the law is one well-lived so far, it can also be said that his contributions to the law will be long-lived.

[151] ibid 198.

[152] ibid 199.

[153] Lord Carnwath, 'Environmental Law in a Global Society' (n 31) 278.