A recent judgement by Justice Dove in the case of Daniel Gerber (Claimant) vs Wiltshire Council (Defendant) raises a number of points of law that will need to be considered by EIA practitioners in the future. The full court ruling can be found at www.no5.com/cms/.../JWI%20Gerber%20Final%20Judgment.pdf. This article summarises the more pertinent issues and discussion points resulting from this case.

Background
The owner of a solar farm in Wiltshire may be forced to demolish their development after the owner of a nearby Grade II* listed hall won a ruling that the planning permission granted was unlawful.

What did Wiltshire Council do Wrong?
The ruling confirmed that Wiltshire Council’s permission failed on the following grounds:

1. Wiltshire Council (WC) had failed to consult with English Heritage as required by regulation 5A of the Planning (Listed Buildings and Conservation Areas) Regulations 1990. The Council had undertaken an assessment of the impact upon the setting of the listed building which established that there would be an impact on Mr Gerber’s property but not the significance of that impact. Having established there was an effect, it was WC’s duty to consult with English Heritage;

2. WC did not have special regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses, which is required within s66 of the Planning (Listed Buildings and Conservation Areas) Act 1990;

3. WC failed to notify the claimant, despite not being a notifiable neighbour as defined within the General Development Procedure Order. The Statement of Community Involvement created a legitimate expectation that the claimant would be consulted by the Council about the application.

4. WC’s EIA screening opinion did not confirm whether or not the development would be likely to have significant environmental effects. The judgement reinforced the position that a screening opinion cannot rely upon the finding of further assessments.

How does this Impact Future EIA Practice?

1. & 2. The first two grounds for refusal refer generally to the need to consult with the appropriate regulatory body. In the role of EIA coordinator there can be an overreliance on others to ensure that the appropriate bodies have been consulted. In many cases the lack of a response is considered to be indifference by that body rather than a lack of effort by the applicant’s team or Planning Authority to engage with the body.

Lesson Learned: the EIA coordinator must ensure that all consultations required are undertaken and appropriately recorded.

3. The judgement on the third ground for refusal is slightly more difficult to address. Justice Dove states that:

"In undertaking neighbour notification in this case the council did not limit themselves to only those who were adjoining but also consulted those who were affected. For these reasons I am satisfied that the failure to consult in accordance with the promise made in the Statement of Community Involvement in this case was a breach of the claimant’s legitimate expectation that he would be notified"
Justice Dove goes on to state:

“In so far as reliance might be placed on the question of whether or not the council may have felt that the claimant’s property was affected in my view it would not have been open to the defendant to submit that they could properly or rationally have concluded in the circumstances that the claimant’s property was not potentially affected. The reasons for that are already set out in relation to Ground 1. In addition to those matters, as is pointed out in the documentation, there were in the material accompanying the planning application numerous references to Gifford Hall all of which should have alerted the defendants, acting reasonably, to the fact that it was necessary to consult the occupier of that property.”

The number of ‘affected properties’ that would need to be consulted, to comply with this ruling, as part of the Statement of Community Involvement becomes increasingly onerous. For example, when assessing the potential effects of noise and air quality on residential properties resulting from changes in traffic flows, the assessment area extends many miles from the site and can include the assessment of many hundreds of properties.

In addition, Justice Dove; whilst recognising what was done, in terms of publicising the application, does not indicate what would have been appropriate in respect to the claimant. A guide to this would have been helpful, as clearly press adverts and site notices are no longer considered to be adequate.

Lesson Learned: What is a desirable and practicable level of effort to engage with “potentially affected properties” clearly needs to be carefully considered during the consultation period. Contacting, by leafleting, recorded letter or personal visit, every receptor assessed during the EIA process would be an onerous and costly process.

However, the judgement suggests that EIA practitioners certainly need to consider taking a wider approach to consultation.

4. The final reason for refusal, which is of most relevance to the EIA professional, is summarised by the following extract from the ruling.

“I am unprepared to accept in the absence of any supporting evidence within the contemporaneous documentation that the author of the document must have had the relevant test in mind when he undertook the exercise of screening the development. In my view, similar to the concerns expressed by the court of appeal in Bateman, the screening opinion is flawed both as to its substance and its reasoning. In substance dependence on the provision of further report is not a substitute for the application of the correct test. In terms of the reasoning the screening opinion simply does not explain why the development does not pass the test. In those circumstances there has been an error of law.”

Lesson Learned: EIA practitioners need to ensure that they provide the planning authority with sufficient information on the proposed development and any potential environmental effects, to allow the planning authority to apply the correct screening test. If a negative screening opinion is received from the planning authority, which does not adequately explain why the development does not require EIA, this should be queried with the planning authority, with a view to a revised and correctly worded screening opinion being issued.

Adrian Rous, Associate Director WYG, April 2015.