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| Our Ref | Your Ref | Date |
|---|---|---|
| BG/10276966 | TR030007 | 22 January 2024 |

Dear Ms Robbins

**Immingham Eastern Ro-Ro Terminal - Applicant's Closing Statement**

We have noted that some of the Interested Parties, notably CLdN and DFDS, have taken the opportunity at Deadline 9 to submit Closing Submissions to the Examination; and indeed DFDS have made a further submission at Deadline 10. As the ExA is aware from our discussion and correspondence on this matter, it has always been the Applicant's wish and intention to submit a Closing Statement which, as well as summarising the Applicants' position, would also assist the ExA by drawing a number of disparate themes into one place.

We had intended to submit our Closing Statement with our Deadline 10 responses last Thursday, 18th January. In the light, however, of the volume of documentation, information and new material - including the closing statements – that was submitted at Deadline 9, it has unfortunately simply not been possible to review and absorb all of that information, respond to the ExA's Rule 17 Request for Further Information and also finalise our Closing Statement by Deadline 10 - effectively in three days.

I am aware that there are no further deadlines scheduled before the close of the Examination and I would as a consequence therefore, be very grateful if you could please pass the attached Closing Statement, submitted on behalf of the Applicant, to the ExA for its acceptance for the purposes of the Examination.

Yours sincerely

[redacted]

Brian Greenwood
Clyde & Co LLP

Enc.

**PLANNING ACT 2008**

**INFRASTRUCTURE PLANNING**

**IMMINGHAM EASTERN RORO TERMINAL DCO APPLICATION**

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# CLOSING SUBMISSIONS FOR THE APPLICANT

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**CONTENTS**



## 1. Introduction

1.1. This document sets out the Closing Submissions by the Applicant, Associated British Ports ("**ABP**") in respect of the Examination of its application for a development consent order ("**DCO**") for the Immingham Eastern RoRo Terminal ("**IERRT**" or the "**Proposed Development"**).

1.2. These Closing Submissions are only intended to provide a summary of the Applicant's position at the close of the Examination. The case for the Proposed Development has already been set out in detail in the application documents, the evidence given at Issue Specific Hearings ("**ISHs**") and evidence and representations submitted during the course of the Examination. These submissions are intended to assist by providing a summary on certain points, but are not intended to be exhaustive or a substitute for that material and evidence.

## 2. The Compelling Case for the Proposed Development

2.1. The overall compelling case for the Proposed Development has been set out in a number of the Applicant's documents, including: (a) the Applicant's Planning Statement [**APP-019**]; and, for example, specifically in terms of the need for it [**APP-040** and **APP-062**] (need and alternatives chapter of the Environmental Statement and Addendum); (b) the Applicant's further detailed representations during the course of the Examination: [**REP1-008**] (summary of ISH1 Reps); [**REP1-013**] (Response to

written reps.); [**REP3-007**] (Response to CLDN's Written Representation with Appendix); [**REP4-009**] Written Summary of the Applicant's Oral Submissions at ISH3 with Appendices; [**REP4-013**] Applicant's Response to CLdN's Written Representation at Deadline 3; [**REP5-032**] Applicant's Response to CLdN's Deadline 4 Submissions; [**REP6-027**] Applicant's Response to CLdN's Deadline 5 Submissions; [**REP7-023**] Applicant's Response to CLdN's Deadline 6 Submissions with Appendices; [**REP8-021**] Applicant's Response to CLdN's Deadline 7 Submissions; [**REP8-028**] Humber Shortsea Market Study Update 2024; [**REP9-010**] Applicant's Response to CLdN's Deadline 8 Submissions; and [**REP10-017**] Response to Interested Parties' Deadline 9 Submissions[1].

2.2. The Applicant has no hesitation in commending the DCO to the Examining Authority and the Secretary of State for Transport ("**the Secretary of State**"). This is an urgently needed new RoRo facility at the Port of Immingham. As well as meeting an established policy need, it will also meet a specific need assessed by ABP for a leading operator, Stena Line ("**Stena**"). It is strongly supported by the National Policy Statement for Ports ("**NPSfP**"). That national policy document sets out a clear presumption in favour of granting development. The NPSfP also prescribes the substantial weight to be attached to the economic benefits it would deliver. It is also clearly supported by local policy and the local authority, North East Lincolnshire Council ("**NELC**"). It is vital development which will deliver jobs and a significant boost to the economy in this area, consistent with the Government's Levelling-Up agenda which specifically targets North East Lincolnshire.

2.3. In determining this DCO application, section 104(2) of the Planning Act 2008 ("**the 2008 Act**") requires the Secretary of State to have regard to any relevant national policy statement, any appropriate marine policy document, any local impact report, any prescribed matters and any other matters which the Secretary of State thinks are both important and relevant to the decision.

2.4. Section 104(3) of the 2008 Act requires the Secretary of State to decide the application in accordance with any relevant national policy statement, in this case the NPSfP, except to the extent that one or more of subsections (4) to (8) applies.

2.5. As summarised further below, the NPSfP requires the Secretary of State to accept the need for this form of development (para. 3.5.1). The NPSfP identifies the need as compelling (para 3.4.16) and urgent (para 3.5.2). In light of that established compelling and urgent need, the NPSfP creates a clear presumption in favour of granting consent for this Proposed Development (para 3.5.2). The nature of the need is explained in detail in section 3 of the NPSfP. It includes not only being able to provide further capacity to ensure the UK can address growth in this essential type of RoRo trade, but also to provide competition and resilience.

2.6. As discussed below, the Applicant has (in any event) provided clear evidence of its own assessment of a specific need for this development in this location to meet the needs of Stena. Stena has also confirmed this need. The NPSfP specifically identifies that it is for ABP and Stena as part of the port industry/port developer to be able to

[1] Identification of other representations relating to other topics such as transport or navigation is provided later.

make such assessments (rather than this being a matter for the decision maker) in order to be able to operate within a free market environment (para 3.3.1).

2.7. No one has suggested that sections 104(4)-(6) or (8) of the 2008 Act are engaged by what is proposed. They are not. Section 104(7) of the 2008 Act only applies if the Secretary of State is satisfied that the adverse impact of the Proposed Development would outweigh its benefits. The Applicant has presented conclusive evidence as to the significant benefits of the Proposed Development. They include contributing to the compelling and urgent need identified in the NPSfP. They also include meeting the specific need assessed by ABP and Stena and delivery of important economic benefits not just to the UK, but this specific part of North East Lincolnshire.

2.8. The Applicant has similarly provided comprehensive evidence that there would be no material adverse impacts from what is proposed with its mitigation. There is no dispute about this on the vast majority of the relevant topic areas for assessment identified in section 5 of the NPSfP: e.g. biodiversity and geological conservation (para 5.1); flood risk (para 5.2); coastal change (para 5.3); waste management (para 5.4); water quality and resources (para 5.6); air quality and emissions (para 5.7); dust, odour, artificial light, smoke, steam and insect infestation (para 5.8); biomass/waste impacts (para 5.9); noise and vibration (para 5.10); landscape and visual impacts (para 5.11); historic environment (para 5.12); and land use (para 5.13). The position on any residual issues are addressed below. The extent of accepted compliance with all of these topics is further strong evidence of the Proposed Development's inherent locational merits to meet the identified need in the NPSfP.

2.9. Notwithstanding this, even if any adverse impacts were to arise, they would be incapable of outweighing the significant benefits the Applicant has identified, particularly where the NPSfP requires substantial weight to be attached to the positive impacts associated with the Proposed Development (NPSfP para. 4.3.5).

2.10. The Applicant has presented a detailed analysis of how the Proposed Development accords with the requirements of the NPSfP, as was initially summarised in sections 4 and 8 and Appendix 1 of its Planning Statement. That is further considered in the Applicant's various representations to the Examination – see **[APP-019], [REP1-001]**, **[REP3-007], [REP4-009]**, **[REP5-032]** and **[REP7-013]**.

2.11. The Government has performed its own needs assessment in the NPSfP and established *"a compelling need for substantial additional port capacity over the next 20-30 years"*; the Proposed Development will serve that need in providing a further RoRo facility in this strategic location (para 3.4.16 of the NPSfP). Government policy in the NPSfP is not open to question in this process, in light of sections 5, 11, 12, 104(3) and 106(2) of the 2008 Act.

2.12. Excluding the possibility of providing additional capacity for the movement of goods and commodities through new port development would be to accept limits on economic growth and on the price, choice and availability of goods imported into the UK and available to consumers, whilst also limiting local and regional and economic benefits that new development might bring (NPSfP para 3.4.16). The new proposed RoRo facility will fundamentally contribute both to that national need, with the corresponding national economic benefits identified, as well the local and regional

economic benefits for this area of the Humber that are so important. As the NPSfP specifically identifies, failing to provide additional capacity for such movement of goods and commodities with the benefits it will bring would be "*strongly against the public interest*" (para 3.4.16).

2.13. The consequence of the need assessment for this type of development in the NPSfP is that in determining this application, para 3.5.1 of the NPSfP identifies that the Secretary of State should accept the need for future capacity to (amongst other things): (a) cater for the long-term forecast growth indicated by the Government's MDST forecasting; (b) offer a sufficiently wide range of facilities at a variety of locations to match existing and expect trade, ship call and inland distribution patterns and to facilitate and encourage coastal shipping; (c) ensure effective competition among ports and provide resilience in national infrastructure; and (d) take full account of both the potential contribution port developments might make to regional and local economies.

2.14. Given the level and urgency of the compelling need identified by the Government in the NPSfP, the Secretary of State should start with a presumption in favour of granting consent for the Proposed Development unless any more specific and relevant policies in the National Policy Statement clearly indicate that consent should be refused and subject to the provisions of the 2008 Act (NPSfP para 3.5.2). The relationship between sections 104(3) and (7) of the 2008 Act is now well-established. The latter provision cannot be used to circumvent the application of ss87(3), 104(3) and 106(2) of the 2008 Act and, in particular, the established need and the presumption in favour of development that it creates: see *R (Clientearth*) in the High Court at paras. 176-7 [2020] EWHC 1303 (Admin) (at Appendix 6 to [**REP1-009**]) and see Accompanying Note with submissions on the judgment in addition to ISH1 [**REP2-010**] and [**REP4-009**] and Appendix 1 to [**REP5-032**] with legal submissions incorporated but not repeated again here).

2.15. As to the UK Marine Policy Statement and East Inshore and East Offshore Marine Plans, the Applicant has fully addressed the Applicant's compliance with these: see eg Section 8 and Appendix 2 of the Planning Statement [**APP-019**] and all the further representations dealing with all relevant issues.

2.16. As to Local Impact Reports ("**LIRs**"), it is not only the Applicant that has identified the Proposed Development's compliance with local policy, but also NELC as the relevant local authority that agrees. NELC specifically recognises the economic benefits the Proposed Development would bring and identifies that this is "*well aligned with the core aims of the NELLP economic strategy*" [**REP1-023**]. NELC has expressly agreed with ABP's local plan compliance assessment set out in Appendix 3 to the Applicant's Planning Statement: see section 3 of the SOCG between ABP and NELC [**REP 10-014**]. Indeed, there is no objection from any local authority in relation to any issue.

2.17. There is an important consistency in the granting of development consent with both national and local policy aspiration. The Government's own levelling-up agenda for the UK specifically identifies the importance of levelling up that is necessary in the location of North East Lincolnshire, where the Port of Immingham is located. This is an area which is crying out for further investment. Securing the economic future of the area and region with economic growth of the ports in exactly the way ABP is striving

to achieve is an essential step of securing the objective of 'levelling up'. This principle is reflected in the local policy framework as well. Both the national interest and the local interest, with the need for this type of economic investment and growth, are in perfect harmony in supporting the Proposed Development. It would be a huge retrograde step for that policy objective (now and in the future) if the jobs and opportunities this Proposed Development provides were to be prevented. That is particularly when securing economic growth, the health of the trade sector in ports such as this, is so vital to the UK and local economy.

2.18. Section 5 of the Planning Statement [**APP-019**] and the many further representations from the Applicant, as well as those from Stena, identify the IERRT is desirable in the interests of securing the improvement of the Port of Immingham Statutory Harbour in an efficient and economical manner and facilitating the efficient and economic transport of goods and passengers by sea. The Proposed Development is specifically designed to achieve those objectives.

2.19. The Applicant has identified the significant positive impacts of the Proposed Development in its documentation, including the unchallenged economic benefits which are to be given "substantial weight" under the NPSfP (para 4.3.5). The Applicant has also fully assessed all other impacts. There is a notable absence of any material adverse impacts, let alone ones which would be capable of outweighing the positive benefits, including the economic benefits to which substantial weight is given by the NPSfP.

2.20. There is no requirement to consider alternatives in this case under the NPSfP or the law for the reasons the Applicant has identified (see e.g. [**REP4-009**] oral submissions on Agenda Item 2 and [**REP5-032**] Section 3 and Appendix 1 Legal Submissions, incorporated but not repeated again here).

2.21. Notwithstanding this, the Applicant has analysed whether there are any potential alternative solutions capable of meeting the facets of need that have been identified [**APP-019**, paras 4.28-32 of the Planning Statement and [**APP-040**] Chapter 4 of the ES and **APP-062**]. It has done so both in terms of broad options, and more specifically within the Humber Estuary. For the reasons identified in that analysis, there are no such alternative options. That analysis has been reiterated for the purposes of the Without Prejudice Derogation Report that has been provided during the course of the Examination [**REP8-033**]. That has been provided without prejudice to the Applicant's position that the grant of the development consent order will not require any derogation from the principles in the applicable Habitats Regulations (as summarised below).

2.22. As part of the design and evolution of the Project, the Applicant undertook extensive engagement with statutory bodies and key stakeholders and the local communities. That, of course, included the engagement that took place in the production of the Navigational Risk Assessment ("**NRA**") in which the objectors participated (see ES Ch.10 Vol 1 [**APP-066**] and NRA [**APP-089**], as now updated [**REP7-011**]). That process of engagement generally has continued throughout the Examination process and has led to the modest changes to the Proposed Development that the Examining Authority has accepted during the course of the Examination, as well as continuing assessment of matters like navigational risk (see e.g. [**REP7-011**]) – a process which is not static but will, as the Applicant and relevant harbour authorities have explained

– continue throughout the construction and subsequent operation of the Proposed Development itself.

2.23. Any examination of the documentary records will demonstrate how singularly inappropriate it is for the three remaining objectors identified below to put forward incorrect claims about a lack of engagement by the Applicant. The history of the application itself, the extensive efforts the Applicant has made to engage with each of them throughout this application and the Examination (including, for example, the early request for comments from CLdN to which CLdN did not respond, the involvement of DFDS and the IOT Operators in the NRA formulation and, most recently, the without prejudice efforts the Applicant has made to address any remaining concerns by the IOT Operators) demonstrates there is no substance to these complaints. As is all too often the case, proper disagreement with what is being asserted, or claimed as being required by objectors is mischaracterised as lack of engagement.

2.24. In addition to the contribution the Proposed Development will make to the urgent compelling need for such facilities as identified in the NPSfP, as well as the specific need ABP and Stena have identified for the Humber Estuary, and for Stena to operate, the Proposed Development will also deliver a number of other substantial benefits including:

2.24.1. employment benefits during construction and operation;
2.24.2. the wider economic benefits with a significant contribution to the economy during both construction and operation;
2.24.3. the strengthening of the 'Ports and Logistics' sector (identified as a key sector within the North East Lincolnshire Local Plan); and
2.24.4. environmental enhancements to terrestrial and intertidal habitats.

2.25. During the construction period, employment opportunities will be created as a result of the works, representing a significant beneficial economic impact for the local area. Jobs will be created. The estimated GVA growth will contribute approximately £41.2 million per annum to the national economy, of which £30.9 million would be generated within the Grimsby Travel to Work Areas (TTWA), a priority area for the Government's Levelling-Up agenda: see Chapter 16 of the ES Vols 1 and 2 [**APP-052** and **APP-072**].

2.26. The direct expenditure involved in the construction phase will lead to increased output generated in the TTWA economy. In addition, ABP is committed to providing skills and training initiatives in communities near to developments. The "Supporting Our Communities" statement identifies initiatives such as working with local schools to educate pupils about engineering activities and careers: see Ch. 16 of the ES Vols 1 and 2 [**APP-052** and **APP-072**].

2.27. During its operation, the IERRT project will generate long-term employment opportunities representing a significant beneficial economic impact for the same TTWA. GVA is expected to increase and it is estimated that operational jobs required for the project will contribute approximately £2.9 million every year to the national economy, of which £2.7million every year would be generated within the TTWA: see Ch 16 of the ES Vols 1 and 2 [**APP-052** and **APP-072**].

2.28. It is, therefore, difficult to overstate the importance of the project in terms of the delivery of jobs and direct benefit to the local economy and the region. It is (rightly) an area that the Government has identified as one that needs to be addressed under the Levelling-Up agenda.

2.29. The Applicant has provided a detailed assessment of all relevant environmental effects of the Proposed Development in its Environmental Statement ("**ES"**), updated and supplemented with additional information through this examination process. Those assessments have been undertaken by highly experienced, specialist and competent professional experts in each of the relevant areas as certified in the ES itself. The ES results in the conclusion that the Proposed Development will not result in any significant adverse environmental effects.

2.30. That conclusion includes the absence of any adverse effects on the integrity ("**AEOI**") of relevant European sites as confirmed by the shadow HRA and its updated Assessment [**REP8-012**]. That remains the conclusion of the Applicant's professional experts at the end of the examination. The Marine Management Organisation ("MMO") agree – see SOCG between ABP and the MMO [**REP 10-011**].

2.31. That is also the position for Natural England, save only in respect of two residual points of disagreement which are very limited, as set out in [**REP 10-018**]. The two residual points relate to (1) the wording of one condition in the Draft Marine Licence ("**DML**") in the DCO in terms of whether a construction distance should be 300m rather than 200m; and (2) whether there would be any potential in-combination effect with the Immingham Green Energy Terminal ("**IGET**") project that has been submitted for examination – but in circumstances where Natural England agree that the Proposed Development itself would not have such an effect. The Applicant disagrees that there is any such in-combination effect (as summarised below) and consider Natural England appears to have misunderstood the nature of the intertidal habitat in issue for these purposes; and, in any event, Natural England has not identified any credible evidence to explain its position. It should be noted, however, that the Applicant has already agreed in principle with the IGET project (which post-dates the IERRT Proposed Development but which is also being promoted by ABP) that even if there were to be any in-combination effects, the IGET project would address those. So neither point of disagreement involves any in principle or sustainable objection to the Proposed Development in any event.

2.32. As requested by the Examining Authority, a without prejudice Derogation Report has been provided to the Secretary of State [**REP8-033**] to deal with the situation even if a contrary conclusion were reached on AEOI. This proves the absence of alternatives and demonstrates imperative reasons of overriding public interest for allowing the Scheme (not least as a nationally significant infrastructure project), but also the compensation measures which can be provided which Natural England agree would be acceptable if any derogation were required.

2.33. In summary:

2.33.1. The Proposed Development is clearly an appropriate use of land within ABP's statutory port estate and water within the Port of Immingham's Statutory Harbour Authority (SHA) area as well as the River Humber SHA area.

2.33.2. Its provision will meet a very clear and compelling need already established in the NPSfP which that policy states should be accepted, and the meeting of which is strongly in the public interest.

2.33.3. The proposal will deliver both significant national economic benefits in providing for further RoRo trade facilities for the UK, but also significant local economic benefits giving effect to the Government's levelling-up agenda for this specific area of North East Lincolnshire. These are very important jobs because of where they will be created.

2.33.4. Its provision will also meet an urgent and compelling need for this facility in this location to serve the needs of a specific operator, Stena, where there is no available facility available to them on any acceptable commercial terms.

2.33.5. Although unnecessary to demonstrate, there is no alternative to meet the need that has been identified.

2.33.6. There is clear presumption in favour of approving the proposal under the NPSfP.

2.33.7. The proposed development will deliver a range of significant benefits including economic benefits which, under the NPSfP must be given substantial weight.

2.33.8. Its environmental effects have been fully assessed and addressed in its design and mitigation. These include assessments of navigation and navigational safety of what is proposed in principle. That is in circumstances where navigational safety is already regulated and will continue to be regulated separately by the relevant statutory harbour authorities including: the Humber Harbour Master; the Port of Immingham Dock Master and ABP in its capacity as SHAs and duty holder for the purposes of the Port Marine Safety Code. Such regulation will necessarily, as it has done to date, operate to impose all necessary controls to ensure its safe construction and operation, including specifically in relation to the existing IOT facility, along with all facilities and operations that exist at the Port of Immingham. There are no significant adverse effects, let alone significant adverse effects which weigh against, let alone outweigh the benefits of what is proposed.

2.34. The Applicant has therefore no hesitation in identifying that there is a compelling case for the grant of this development consent under the PA 2008.

## 3. Overview of remaining objections

3.1. Set against that policy context, the presumption in favour of this development and the substantial weight to be given to the benefits it would deliver, it is conspicuous: (a) how few objections were actually made at submission – and how few still exist to the Application; (b) the support it enjoys from the local authority, given the national policy position support for such infrastructure and the local policy framework that is engaged; and (c) the absence of any objection from any relevant statutory consultees or regulators to the principle of the Proposed Development

3.2. The Applicant predicted (and it has proved to be the case), that proposing such positive and urgently needed new infrastructure of this kind (specifically intended to enhance competition where it is needed as the NPSfP seeks) would inevitably stimulate opposition from commercial rivals. They currently benefit from the existing constraints to competition that prevent or inhibit a rival operator, like Stena, from competing on a level playing field in this region.

3.3. It was no surprise to find both CLdN Ports Killingholme ("**CLdN**") and DFDS Seaways plc ("**DFDS**") objecting to the Proposed Development. The IERRT presents exactly the sort of competition that the NPSfP seeks to encourage, but which an existing commercial operator would oppose. It is, therefore, predictable that they: (a) have sought through this process to put as many obstacles in its way to prevent it being realised because of the competitive effect it will have; and (b) have remained as objectors throughout the examination.

3.4. Such vigorous opposition is itself symptomatic of the existing constraints on Ro-Ro operations in this location, and the restricted competition that is available from which such existing operators benefit. From a commercial perspective it is inevitable they are seeking to protect it. Both operators have an obvious strong commercial interest in preventing such competition on the Humber. Opposition of this kind is therefore predictable, but it is also inimical to the NPSfP and the public interest. The NPSfP is seeking to ensure the delivery of additional RoRo capacity for the benefit of the UK national economy and this essential type of trade. It is seeking to stimulate such competition and resilience. As the NPSfP identifies, excluding the provision of such additional capacity and the constraints on economic growth, competition and consequential price, choice and availability of goods is strongly against the public interest. Both DFDS and CLdN therefore have a demonstrable policy conflict of interest in objecting to this scheme.

3.5. By contrast, ABP as a port owner is seeking to deliver exactly the type of additional capacity required by the NPSfP. In so doing, the Proposed Development is subject to the benefit of the presumption in its favour set out in the NPSfP. Although objection from DFDS and CLdN is consequently predictable, it is harmful to the public interest.

3.6. The Applicant has gone to extraordinary lengths to address each of the claimed points of concern from them. It has done so comprehensively. But that does not make such objections inherently well-founded and the analysis has demonstrated that they are not.

3.7. ABP has faced a slightly different, but similarly unjustified commercially interested objection from the IOT Operators, the operators of the IOT facility.

3.8. Their fuel operations do not involve direct competition with Ro-Ro trade. Indeed, ABP itself is directly interested in, and has comprehensively ensured, the ability for the IOT Operators to continue all of their operations at the IOT facility with the Proposed Development in place. ABP has and could have no interest in inhibiting the IOT operations which form an important part of ABP's port itself. ABP has from inception ensured that would not be the case.

3.9. It has not just engaged professional experts in navigation to assess the position, but it also has ensured that the Humber Harbour Master and the Port of Immingham Dock Master have been able to examine and consider in detail the ability to construct and operate IERRT safely alongside the IOT facility. None of that is surprising given that the IOT facility is, itself, part of ABP's own infrastructure and investment. The safe and continued operations of that facility are a necessary part of ABP's operation of its Port. ABP adopted a highly precautionary approach in such assessments. It has also now gone above and beyond those assessments by offering the Enhanced Operational

Controls over the IERRT facility. These enhanced controls are not ones its own NRA, its professional experts or the navigational authorities require[2].

3.10. Unfortunately, but again unsurprisingly given IOT Operators are commercial operators, the IOT Operators have pursued an objection that would give them betterment of their facilities, rather what is required to ensure such safe and continued operations. Through this process the IOT Operators have demanded ABP deliver changes to the IOT existing infrastructure (in relation to the finger pier and trunkway) which are not required, nor justified on an objective assessment of all the evidence and the controls over navigational safety that will apply both to the construction and operation of the IERRT.

3.11. In addition, the IOT Operators' demands increased during the examination, amounting effectively to an attempt to achieve betterment, as became apparent from the Applicant's detailed consideration of the IOT Beckett Rankine proposal and the way in which IOT enlarged and increased the requirements of this proposal in the process that ensued: see e.g. [**REP 8-031**] and the evidence from Ben Hodgkin at ISH5 [**REP 7-020**]. That betterment is simply not required as a matter of safety or navigation – and in the context of what was eventually being sought by the IOT Operators, would be commercially unjustified. That it is not required is not only a conclusion that the Applicant and its professional navigational experts have reached. It is also the conclusion of the Humber Harbour Master and Port of Immingham Dock Master, responsible for the safety of the River Humber and the Port of Immingham and all existing and future operations. They have unrivaled knowledge and experience of the navigational environment. It is also a conclusion which is fully supported by the exhaustive and extensive analysis of simulations which go far beyond what is actually required for approval of the DCO in any event.

3.12. ABP has, in fact, done far more than is reasonably required to explore and address the IOT Operators' demands. That included the without prejudice examination of a design solution which the navigational risk assessment does not require, but ABP investigated regardless. In so doing, the IOT Operators' demands then expanded significantly so as to seek delivery of a redesigned finger pier that is unnecessary, disproportionate and unfeasible for IERRT to deliver.

3.13. ABP cannot reasonably be required to deliver additional measures, or accept constraints, which are disproportionate, unnecessary and not required on objective assessment of the safety environment. The imposition of such measures and unjustified

[2] The enhanced operational controls provide additional mitigation (in the form of tug(s)) of a risk which is so remote that no one has been able to identify it ever occurring or requires such mitigation in respect of existing operations at the Port. It hypothesizes the type of RoRo vessel to be used for this facility (twin engined with separate thrusters, and with main and separate auxiliary power systems to deal with any emergency failure of the main power system) somehow becoming a completely "dead ship" with no power at all. It is then assumed that no other measures in terms of good seamanship are used, such as deployment of either or both anchors to arrest the vessel and that all of this happens on an ebb tide. This risk is not just improbably remote in terms of the sequence events that would need to occur simultaneously, but it is a notional risk which already exists, and has done for many years for vessels operating at the port of Immingham – and indeed most ports on the UK, without requiring such additional mitigation. Such a notional risk exists in respect of the many vessels that already operate in this area on all states of the tide in accessing the lock of the Port of Immingham, or in maneuvering to use the Immingham Outer Harbour as DFDS does without a requirement for tugs.

betterment through the DCO process that seeks consent for a much needed facility will simply have the corrosive effect on competition and resilience that the NPSfP seeks to avoid.

3.14. This conclusion applies with particular force where the continued protection of navigational safety is already assured by the existing controls that will necessarily apply to the construction and operation of the Proposed Development. Those controls are a legal consequence of - the statutory regulation of safety on the River Humber and Port of Immingham; the control over navigational safety that is exercised by the Humber Harbour Master and the Port of Immingham Dock Master; the duties of ABP itself as SHA and duty holder for marine safety under the Port Marine Safety Code.

3.15. That existing system of regulatory control will necessarily prevent any unsafe operation of the IERRT, or interference with the continued operations of the IOT facility. Such safe and continued operation of the IOT facility is something that is fundamental to ABP itself (as summarised below). The IOT Operators' interest in going beyond issues of safety and continued operations, and pursuing betterment of facilities, is clear from its illogical, unprincipled and wholly unjustified attempts to criticise that system of regulatory control. It is a system that has operated for safe and efficient operations to date. It a system which will continue in the future.

3.16. Faced with such commercial objections and interest, the Applicant has been assiduous throughout this application and examination in: (a) on the one hand, listening to, considering and addressing (where justified) any legitimate points of concern; and (b), on the other hand, distinguishing in the multitude of assertions / claims / requests or demands those which are unjustified on proper objective analysis.

3.17. The latter include variously: (a) attempts to require mitigation to the surrounding highway network, which **none** of the relevant highway authorities requires or considers to be justified; and (b) attempts to impose restrictions on navigational operations of the facility, and separately deliver betterment to existing facilities or operations which are not reasonably required, and again **none** of the relevant navigational authorities considers to be justified to address navigation effects on an objective basis.

3.18. In so doing, the Applicant has acted at all times based on detailed expert advice from independent professional experts. It has sought that expert advice in respect of any contentious matters. It has acted and continues to act in accordance with that advice and appraisals. It has considered carefully any and all points of objection.

3.19. It is also important to note that in responding to such objections, the Applicant is not only acting consistently with that independent expert advice but is also acting consistently with the views of every relevant statutory consultee and independent statutory regulator on the remaining points of controversy being pursued by the objectors[3]. On each of the remaining points of objection, the Applicant's assessment and that of its professional experts is in fact fully aligned with the independent view of

[3] Indeed, the only remaining point of difference with any statutory consultee/regulator on any issue are the residual two points of difference with Natural England on: (1) the detail of the wording of a construction distance requirement in respect of piling noise; and (2) whether there is a risk a potential in-combination effect with the IGET project, not from the Proposed Development on its own, where the IGET project would deal with any such in-combination effect if it were to arise, but no credible evidence has been produced by NE on that issue anyway.

those relevant regulators, be it the relevant statutory highway authorities on transport, or the Health and Safety Executive ("HSE"), the Maritime and Coastguard Agency ("the MCA"), the Humber Harbour Master, the Port of Immingham Dock Master, and ABP's own HAS Board in its capacity as SHA in dealing with any issues of navigation or safety.

3.20. It is therefore inexcusable given this consensus with the relevant statutory consultees/regulators, and where the Applicant has expended such considerable time and patience reviewing every point of objection, no matter how misconceived, the commercial objectors unfairly attempt to portray ABP's conduct as lacking engagement or being dismissive.

3.21. ABP has, in fact, been extremely thorough and patient in dealing with every issue raised, despite how ill-founded it prove to be. Rejecting points from the objectors which are not well-founded, particularly where the relevant statutory consultees/regulators agree it is not well-founded, is not dismissive. The Applicant and its experts, like the statutory consultees are entitled, if not duty-bound, to point out misconceived objections.

3.22. There is a repetitive theme of mischaracterisation in the submissions made by the objectors to the examination and in their last submissions which is unhelpful and misleading. In engaging and testing further points of objection without prejudice to the Applicant's position that they are unjustified or unfounded the objectors have variously: (a) mischaracterised the Applicant as somehow accepting the premise of the objection; or (b) claimed the Applicant is being dismissive when the subsequent testing of the objection demonstrated a point to be misconceived; or (c) fundamentally misrepresented the purpose of such additional testing, or the contributions of those who have participated - as most recently has occurred in the IOT Operators' disturbing misreporting of input from a Stena Master into the most recent simulation (see the categorical refutation by Stena and the Stena Master of the IOT Operators' incorrect claims by Stena in **REP10-025** and the Applicant in **REP 9-011**).

3.23. An example of the first is the sensitivity testing of traffic impacts the Applicant has undertaken (as summarised below). Neither the Applicant's transport expert, nor the relevant highway authorities considered such further sensitivity testing to be required. It was made clear it was undertaken without prejudice to that position. The Applicant has used assumptions requested by DFDS and CLdN which the Applicant's expert considers unreasonable and unrealistic. Nonetheless such sensitivity testing shows that even with such unreasonable and unrealistic assumptions, there remains no impact on the highway network that requires further mitigation, as each of the relevant highway authorities has confirmed. Inexplicably, CLdN has now sought to claim this sensitivity testing in fact represents "base case".

3.24. An example of the second relates to what the Applicant has repeatedly explained are misconceived criticisms of its Navigational Risk Assessment ("**NRA**") – **APP-089,** as now updated by **REP7-011**. That NRA was prepared by leading industry experts. As requested by the Examining Authority, the Applicant updated the NRA to improve its clarity [**REP7-011**], but it has not changed the methodology the justification for which has been fully evidenced. During the examination, two different documents have been produced by another consultancy, separately for IOT Operators and DFDS. These are

described as NRAs[4]. In light of this and the information received during the examination, the Applicant obtained further expert advice on the documents produced by the objectors. It has then required its HAS Board to review the updated NRA along with documents produced by the objectors to reach a fresh decision as to any risks [**REP7-030**]. Having undertaken that process, the HAS Board has confirmed that it remains satisfied that the Proposed Development with its applied controls ensures all risks are both tolerable and ALARP. That is also the professional judgment of the hugely experienced statutory Humber Harbour Master. It is also corroborated by the wide range of simulations that show how the IERRT can be safely accessed even in the most testing conditions. Those simulations also test ever more remote possibilities and ever more extreme conditions to investigate outer operating limits (just as would be the case for any facility).

3.25. Despite doing all of this, the objectors continue to claim that the Applicant has been dismissive or not engaged when the reverse is the case. Not content with this, it now attempts to question the legitimacy or objectivity of the HAS Board's decision in a truly inappropriate way. The HAS Board cannot have any interest in taking forward development which is unsafe. That would be contrary to its functions and harmful to ABP in any event (as summarised below).

3.26. An example of the third are the repeated mischaracterisations or misrepresentations of the various simulations HR Wallingford (the leading industry expert) has undertaken, despite the unrefuted evidence from HR Wallingford that has been provided that explains why such mischaracterisations/misrepresentations are wrong (see eg **REP10-017** and **REP10-020** for the latest responses, but also all earlier documents and evidence provided such as **REP7-020, REP7-026, REP8-023, REP9-012** and indeed the Harbour Master's earlier responses **REP7-067**). These include variously:

3.26.1. The objectors claiming that the simulations have been limited to the Stena Transit vessel, whereas the first feasibility simulations also considered the G9 and then specifically modelled the Jingling class vessel (as it is more sensitive than the G9 so providing a more conservative model) and where the Jinling is of a similar size in terms of length and beam as the design vessel dimensions (see e.g. **REP7-020** and ISH5 evidence);

3.26.2. The objectors claiming that simulations should be done of a notional "design vessel", whereas it has been repeatedly explained that it is not possible or necessary to do a simulation of a notional vessel envelope. It would involve selecting arbitrary assumptions in relation to things like propulsion, hull design, rudder design or thrusters (as explained by Mr Parr of HR Wallingford – see e.g. again **REP7-020** and ISH5 and **REP10-017** identifying earlier representations). It was clearly explained why such modelling would be inappropriate and why it is unnecessary to do. The simulations demonstrate the IERRT facility can be operated in principle with vessels with characteristics such as the Stena Transit class, or the Jinling class. Any future vessel proposed for use at the facility will be

[4] As the Applicant's experts have correctly pointed out these documents from the objectors are not in fact and cannot reasonably purport to be proper NRAs. That is not least because: they have not been undertaken with any involvement or engagement with key stakeholders including the Applicant itself or the Humber Harbour Master; and the claimed judgments on tolerability of risk and ALARP are not those of the Applicant as the duty holder and body required to make, and responsible in respect of the making of, such judgments.

subject to testing with its known characteristics at the time before being permitted to use the facility. That, of course, was exactly the process that occurred for the Immingham Outer Harbour after its construction, when DFDS sought to introduce the new Jinling class. That process occurred without objection from DFDS or IOT Operators and indeed is currently being undertaken by ABP, as noted in its Deadline 10 submissions, in relation to a notional "design vessel" which will operate from ABP's Green Port Hull. This is normal practice.

3.26.3. The objectors seek to give the impression that if any simulated "run" is aborted, marginal or treated as a fail, this is showing a problem with the IERRT facility. As HR Wallingford have explained repeatedly, that is a basic misunderstanding of the basic function of simulations and the reports on them (see eg ISH2 and ISH5 evidence and **REP1-009** and **REP7-020**). Simulations are specifically and deliberately undertaken to test the operation of the IERRT facility at the outer limits of any operating conditions in order to test those limits (just as the IOT Terminal itself and the IOH themselves have operational limits). The runs are therefore intended to explore those limits which themselves demonstrate how the IERRT can be safely operated within those limits, as with any facility. As has been explained by HR Wallingford and endorsed by the Humber Harbour Master, the simulations demonstrate in principle how the IERRT can indeed be operated safely in all expected conditions with the applied controls.

3.26.4. The objectors fail to identify or fairly explain the nature of the extreme conditions that are simulated when advancing criticisms of specific runs. Thus:

3.26.4.1. In commenting on runs relating the use of IOT Berth 8 with IERRT in place, and when a "hard" landing might occur, the IOT Operators ignored the fact that the operating conditions tested were those already beyond the IOT Operators' own operating procedures for use of that berth. The results are not surprising for such operating conditions. They were not a consequence of IERRT and do not show any adverse effect on IOT's operations, as they will continue to be subject to the IOT's own operating procedures.

3.26.4.2. In commenting on the runs that have been carried out of a "dead ship" – the large G9 vessel operated by CLdN - and the use of tugs to arrest such a ship, the IOT Operators completely ignore the type of "emergency" that is being tested and its inherent improbability and the fact that it excluded (at IOT Operators' request) controls of good seamanship such as deployment of anchors. It is, therefore, considering a scenario which is hypothetical and implausibly remote, but considering that even if such a remote event were to occur, would the proposed use of tug(s) arrest the ships tested without impacting any IOT infrastructure. The simulations show that use of tug(s) would. It is a gross misrepresentation to suggest that what has been tested reflects an event with a likelihood of occurring that actually requires mitigation. It does not.

3.27. The Applicant has noted with increasing dismay and deep concern that the objectors have irrationally resorted to attacking the operation of the existing system of regulatory

controls over navigational safety that apply to their own operations, along with the professional integrity of the individuals responsible for their oversight.

3.28. Without any evidential foundation for doing so, criticisms are now advanced for the first time the effective independence of Humber Harbour Master, Captain Firman, in the way he performs or will perform his duties, as well as the Dock Master. Such criticisms are inexplicable, unsupported by any evidence to suggest that those professionals do anything, or would do anything, other than exercise their functions as the statutory scheme requires, to ensure navigational safety. Again, such criticisms make no sense where those professionals already regulate the River Humber and the Port of Immingham with all of its various facilities professionally and rigorously. There is simply no basis for seeking to impugn their integrity nor for seeking to suggest that the governance under which they operate could or would ever compromise their basic approach to safety, or as to why they (or indeed ABP itself) would have any interest in compromising safety in any circumstances. The Applicant deprecates such unreasonable criticisms. They have separately been fully refuted by the Humber Harbour Master himself.

3.29. It is a travesty of the professionalism with which those responsible for safety approach their task objectively and have done so on a day-to-day basis over the many years, applying detailed knowledge and experience of the River Humber and the Port of Immingham to safeguard its safe operation. It also is illogical – no one has explained how or why it would be in the interests of any such person, or ABP as SHA or ABP as a port owner and operator to operate a port environment with an intolerable risk or a risk which had not been reduced to ALARP given the importance to those individuals of ensuring such safe operations.

3.30. These regrettable attacks are only advanced because the professional and objective views of those individuals (supported by extensive simulations involving masters and tug operators) do not fit the objectors' position of objection, where it is the objectors who have commercial conflicts of interest. That is not a proper basis for seeking to criticise the views of the professionals.

3.31. The Applicant's stance in respect of each of the remaining points of objection will be briefly summarised below. Before doing to, it is not only helpful, but necessary to stand back and consider the overall context in which these objections are being framed given the stance of those objectors. There are some basic points which immediately demonstrate and confirm the illogicality of what is being asserted, particularly in relation to those procedures dealing with as the governance of safety.

## 4. Relevant Context for Remaining Objections

ABP as a Port Developer

4.1. The first important point of context to address, is the Applicant's status as a port developer.

4.2. The Applicant seeks consent for a vital piece of new national infrastructure for the Port of Immingham, the River Humber and the UK. It does so in its capacity as a port owner and developer. It is promoting the facility to deliver important additional Ro Ro capacity for the Humber estuary and the UK. It does so as a hugely experienced port

operator in this location and nationally. It has assessed that there is a need and demand for it based on its assessment of the commercially factors.

4.3. ABP's promotion is supported by Stena. Stena is a highly experienced international operator of RoRo freight. Stena has a need to operate from the Proposed Development in this location to deliver exactly the sort of trade the Government seeks to encourage in the NPSfP. Stena has been unable to find any commercially viable alternative location for its needs (see all evidence by Stena to the examination at ISHs, and **REP2-065** and **REP4-038** and **REP7-072** with **REP8-059** and **REP9-029**).

4.4. ABP's delivery of the IERRT would consequently deliver e benefits to the UK economy that increasing such trade inevitably brings. It will also deliver vital new jobs to the area now and for the future, with all the benefits to the local economy that brings. It is a development endorsed by NELC. It is a development that would actually deliver on the Government's levelling-up agenda, where this area is specifically identified as a focus for this to occur.

4.5. In the pursuit of points of objection, whether it be CLdN on need grounds, CLdN on transport (in the face of the assessment by the relevant highway authorities) or IOT Operators, DFDS and CLdN on navigation (in the face of the position of bodies like the MCA, HSE, the Humber Harbour Master) the relevance of ABP's status has been ignored. It is fundamental to a proper consideration of each such remaining objection.

4.6. ABP's experience, expertise and success as a port owner and operator is questioned. ABP has set out factual details of those extensive credentials which have not been challenged.

4.7. ABP is the United Kingdom's leading port group. It has 21 ports supporting 200,000 jobs which contribute £15 billion to the UK economy every year, handling £157 billion of trade each year. Its mission statement "Keeping Britain Trading" could hardly be more apt. ABP's ports, and its approach to ensuring that those ports provide the necessary facilities, competition and resilience to achieve that mission statement are fundamental to the UK. The Port of Immingham is an important part of that portfolio.

4.8. ABP has developed the Port of Immingham over many years. It invested in and developed the IOT Terminal facility operated by the IOT Operators. It remains the landowner of that facility. It invested in and developed the Immingham Outer Harbour now operated by DFDS. All of this existing infrastructure is part of ABP's ownership, part of its Port and part of its own investment. ABP is necessarily committed to ensuring the continued safe operation of all these facilities. It has no interest, and could have no interest, in doing anything to threaten such investments, or inhibiting the safe and continued operations of those facilities.

4.9. Given ABP's responsibilities and dependence on the safe operation of the Port and the harm it would suffer if there any adverse incident, it has even stronger interests than any party to ensure that the safety of the IOT facility is not compromised, that its continued operation is not affected and the continued safe and efficient operation of all the facilities at the Port, including the Western and Eastern Jetty, the Immingham Outer Harbour and the Inner Harbour are not adversely affected by, in terms of safety or operation, the development of the IERRT. It is a statement of the obvious that ABP, as

the owner and operator of the port of Immingham will guard against damage to any of its facilities for which it is responsible and wishes to maintain – and to suggest otherwise is nonsensical.

4.10. It is in that context that ABP is continuing with its programme of investment in the Port for the future through promotion of the IERRT. It does so as envisaged by the NPSfP. It will provide additional RoRo capacity and addressing an identified need in the NPSfP. It will also address the specific needs of an identified operator in this case. It is taking forward the type of investment and commitment in facilities which ensure the safe and efficient operation of its Port as it has done in the past. It does not and cannot have any interest in promoting a new facility that would adversely affect the safety or efficient continuation of existing operations in the Port.

4.11. The Immingham Outer Harbour ("**IOH**") berths are a recent example of just that. Although operated by the Interested Party, DFDS, the IOH is part of ABP's port and was promoted by ABP. The IOH is subject to the same regulatory controls that have ensured its safe operation to date that will apply to IERRT in its construction and future operation by a different operator.

4.12. In bringing forward and then in delivering the IOH berths, ABP successfully addressed their careful design for operation in what is identified as the challenging tidal river environment, in close proximity to existing facilities including the IOT Terminal and the Western Jetty. It adopted the same processes of safety assessment to ensure the delivery of a safe, efficient and operable design in the challenging environment that the River Humber presents to all navigation. It has subsequently ensured the safe operation of the IOH berths through the same process of design, simulation, assessment and oversight by the statutory harbour authorities including the Humber Harbour Master and Dock Master for any new vessel design that has subsequently been introduced by DFDS (including specifically the Jingling class). It has done so adopting the same approach to navigational risk assessment and ensuring that all risks are tolerable and ALARP that is adopting to the IERRT.

4.13. It is therefore illogical and indeed nonsensical for objectors to be claiming that same approach and the same processes deployed in the past to all such developments are somehow not applicable, or not fit for purpose, for the development and subsequent control of safe operation of the IERRT facility.

4.14. ABP retains all of the same fundamental interest in ensuring that the IERRT will be operated safely and without interference to the IOT facility, as well as all the constituent parts of the Port, including the Western and Eastern Jetties, the IOH and the lock and inner harbour. Indeed, that same interest applies to existing operations and any changes to them (such as the introduction of the Jingling class to the IOH). Such safety is currently regulated by the statutory system of navigation controls overseen by the Humber Harbour Master and Immingham Dock Master along with ABP in its capacity as SHA without any asserted claim that there is a problematic lack of independence affecting the way in which those statutory duties are actually performed. It will continue to be so.

4.15. In addition, ABP does so as one of the most experienced port owners, investors and operators in the United Kingdom with the responsibilities for safety in many ports.

This status, along with the reasons for and consequences of it, are disregarded by the objectors in the misconceived pursuit of objections that have been fully assessed as illustrated below.

***Need***

4.16. CLdN alone has sought to question the need for the Proposed Development. Before turning to consider the evidence about that, it is important to note the relevance of ABP's status as an experienced port developer under the NPSfP and its approach to need. That of itself immediately demonstrates why CLdN's objection on need grounds is misconceived in principle, in addition to being misconceived on the facts (dealt with separately later).

4.17. The NPSfP (applicable under ss 5 and 104 of the Planning Act 2008) could not be clearer or more unequivocal as to why CLdN's objection on need grounds is wrong in principle. The NPSfP celebrates the history of British sea ports in supporting the free movement of people and the trade in goods and commodities which is identified as "the basis of our national prosperity". It notes that whilst there have been changes through technology affecting movement of people in particular (for example in the use of air), reliance on ports for the movement of goods, and specifically cargo and Ro-Ro freight, has grown and will continue to grow. Ports are the beating heart of this critical part of the UK's economy. Their future growth, the stimulation of competition and the promotion of resilience are all essential. ABP's mission statement, achieved through delivery of precisely the type of development that is being proposed, has never been more pertinent to that Policy, and that will continue into the future.

4.18. It is for this reason (amongst others) that development of this type of infrastructure has been identified as nationally significant (see paras 1.1 and 1.2 of the NPSfP and section 3). The need for new port infrastructure is comprehensively addressed and established in the NPSfP. It has been covered in detail in the Applicant's representations. However, the NPSfP goes further than simply identifying a need. One of the three consequential objectives of Government policy for ports is set out in direct terms at para 3.3.1 of the NPSfP. The Government seeks to:

*"- allow judgments about when and where new developments might be proposed to be made on the basis of commercial factors by the port industry or port developers operating within a free market environment".*

4.19. CLdN' objection is a frontal attack on that part of Government policy. ABP is not only part of the port industry and a port developer, but it is the UK's leading port group. ABP is doing exactly what the NPSfP envisages and entitles it to do: exercising its judgment about the need for this new port development in this location, based on its assessment of commercial factors and seeking to operate in a free market environment. As it happens, ABP can hardly be better placed to make such an assessment (given its knowledge of and operations of all of its ports on the River Humber). But the fundamental point being made in Government policy is that it should be for ABP to make that assessment, not the Examining Authority or the Secretary of State and certainly not CLdN as a rival RoRo operator that benefits from controlling competition. Government policy articulates a specific policy requirement that port developers like ABP are entitled to make the assessment and to do in that free market environment.

4.20. That itself is enough to satisfy the policy and to show CLdN's objection on need grounds to be misconceived. It is further put beyond doubt by the position of Stena Line, another body within the port industry. It has also assessed the position and exercised its judgment that this new facility is indeed needed for its operations in order to operate in a free market environment.

4.21. CLdN's attempts to obstruct such development on need grounds is the antithesis of the Government's policy. It is in direct conflict with it. Moreover, the attempt to do so exemplifies the exact opposite of a free market environment. CLdN (on its own case) is seeking to retain operational control over what it claims is the only remaining capacity on the River Humber for Ro-Ro expansion at Killingholme. It does so having already ejected one of Stena Line's services from that Port and in circumstances where it is not offering any acceptable commercial terms to allow Stena to return and to operate from there.

4.22. CLdN's attempts to persuade the Examining Authority into the territory of questioning need, or the assessments of ABP or Stena, are therefore contrary to the NPSfP itself and impermissible. It is hard to think of a more compelling factual basis for why Government policy is expressed in the way it is, than this situation where CLdN is opposing new development that would result in restricted competition for the Humber Estuary, and Stena specifically and embody the exact opposite of a free market environment. It has devoted reams of argument to this exercise in pursuit of that commercial objection. It is simply outside the scope of what is permitted within the NPSfP itself as an attack on Government policy.

4.23. The Government's objective in permitting ABP and Stena (as port industry/developers) to make such assessments is reinforced in the further explanation of the Government's own analysis of capacity and future growth.

4.24. The Government has identified a need for new capacity to be provided on its own forecasts. That is also only one facet of the need it identifies, but which CLdN is seeking to frustrate. The Government has also specifically identified the additional nature of the need it has identified. It is not limited to a need to provide capacity to meet forecast growth. It is also a need to go beyond and to have more capacity in order to provide, for example, competition and resilience.

4.25. Paragraph 3.4.13 of the NPSfP is again crystal clear in that respect:

*"UK ports compete with each other, as well as with neighbours in continental Europe ... The Government welcomes and encourages such competition. Competition drives efficiency and lowers costs for industry and consumers, so contributing to the competitiveness of the UK economy. Effective competition requires sufficient spare capacity to ensure real choices for port users. It also requires ports to operate at efficient levels, which is not same as operating at full capacity [as then explained] ... These factors may mean that total port capacity in any sector will need to exceed forecast overall demand if the ports sector is to remain competitive. The Government believes the port industry and port developers are best placed to assess their ability to obtain new business and the level of any new capacity that will be commercially viable, subject to developers satisfying decision-makers that the likely impacts of any proposed development have been assessed and addressed."*

4.26. The likely impacts of this Proposed Development have been fully assessed and addressed (as summarised below) in the Applicant's materials. CLdN's continued objection based on need grounds alone is therefore in flagrant conflict with this policy.

4.27. Such objections on those grounds are a matter which the Examining Authority and the Secretary of State can and should disregard under s106(1)(b) of the Planning Act 2008. CLdN's contentions are not only ones that relate to the merits of the Government policy in the NPSfP in this respect but would seriously undermine policy.

4.28. CLdN have studiously ignored the relevance of ABP's status as a port owner and port developer in framing this objection. Not only is ABP best placed to make an assessment of the need for the Proposed Development, reinforced by Stena's own clear position, but it is an assessment that is left to ABP and Stena under the NPSfP.

4.29. CLdN's has therefore impermissibly and inappropriately engaged the Examining Authority and Secretary of State on an exercise which is contrary to policy.

4.30. Without prejudice to that point (as the Applicant has made clear), the Applicant has responded to the misconceived criticisms of ABP's assessment anyway (as summarised below). But that does not detract from the important starting position that the assessment itself is for ABP and Stena to make as Government policy makes clear.

4.31. Even if the NPSfP permitted debate about the nature of the established and assessed need, CLdN's objections on this ground simply reinforce ABP and Stena's position. If (contrary to ABP and Stena's view) CLdN had a surfeit of capacity that was on offer on commercially acceptable terms, that would not be a basis for objection. If such capacity really existed, one would simply expect it to be taken up by an operator, including Stena itself if it were really available on commercial terms (which it is not). The creation of IERRT providing additional capacity would remain entirely consistent with the NPSfP and providing for the compelling and urgent need for such facilities it has identified.

4.32. In reality, the exact opposite position to that asserted by CLdN is the case. Stena's commercially competitive operation was ejected by CLdN from the Port of Killingholme. Stena Line has been clear in its evidence to the Examination that no alternative has been offered to it on commercially acceptable terms which would allow it to operate at Killingholme for its existing and future operations.

4.33. In that policy environment and those circumstances, it is extraordinary to find CLdN seeking to persuade the ExA or Secretary of State to make its own assessment of need, and to contradict the established need set out in the NPSfP, and to contradict ABP and Stena's own assessment of need. That is not what the NPSfP envisages or permits. Whatever notional capacity does exist at Killingholme, and even if it were ever to be offered on what an operator would regard as commercially acceptable terms, it would not address ABP's assessment of that need, nor Stena's stated needs. It would certainly not be a basis for objection by CLdN to the Proposed Development. The whole point of the free market environment and the stimulation of competition (to drive down prices for the consumer) is to have such additional capacity anyway. It would merely be a good thing if such additional capacity existed at Killingholme, <u>not</u> a basis for

objection at all. As it happens there is no evidence of such capacity being available on commercial terms, as the Applicant has addressed in detail anyway.

4.34. DFDS pragmatically do not seek to contest the need given that policy context. That is hardly surprising given that DFDS has provided evidence that it is operating at close to full capacity and is seeking additional space (although again it has not provided any evidence that it would seek to use Killingholme).

4.35. In that position, however, DFDS also has a commercial interest in preventing the Proposed Development from proceeding and thereby limiting or even preventing a rival operator from operating within a free market environment with the effect on pricing which it will have, in a constrained capacity position where operators simply do not have the space to grow competitively against operators like DFDS in this location. DFDS, despite its protestations to the contrary, similarly directly benefits by preventing further facilities being developed which can be used by rival operators to introduce competition in this important strategic location for RoRo trade in the UK. Its unjustified objections on transport and safety are addressed separately below.

4.36. Prevention of the Proposed Development with the delivery of new RoRo facilities on the River Humber to deliver capacity, competition and resilience will, therefore, be directly contrary to that part of the NPSfP which seeks such development, and the Government's objective of promoting (rather than restricting) will become a "dead letter" here.

***Transport***

4.37. The absence of any proper basis for objecting to the Proposed Development on Transport grounds is summarised below. Nonetheless, the status of ABP as the port operator of the Port of Immingham is also relevant to this. For all the reasons summarised above, ABP has no interest and can have no interest in promoting development that would create traffic and transport difficulties for the operation of the Port of Immingham, including the proper and efficient use of the West and East Gate and the continued operations of DFDS.

***Navigation***

4.38. ABP's status as a port owner and developer is also fundamentally relevant in examining the inherent artificiality of the remaining objections on navigation, and navigational safety, grounds, particularly so far as governance and the effectiveness of the existing regulatory system is concerned.

4.39. The Applicant has fully engaged with all of the stated concerns regarding navigation and safety extensively and gone far beyond what is necessary or required for considering this DCO. But that is without prejudice to some of the points of principle about what is actually necessary to consider for the purposes of the DCO.

4.40. As alluded to above, ABP's position as the UK's leading port provider, and as owner and operator of the Port of Immingham, is inextricably linked with its approach to navigation and safety. ABP's basic existence and the success of it as a port operator depends upon being able to operate such ports safely. ABP has successfully hosted the operations of every operation at the Port of Immingham over the years, including the IOT Operators' operations and those of DFDS.

4.41. At the core of its own business is maintaining navigational safety to its exacting standards, not just as a Statutory Harbour Authority for the River Humber and the Port of Immingham, but also as the port owner and operator of the Port. Success and safety in providing such a Port go hand-in-hand. It would be impossible to be a successful, let alone the leading port provider in the UK, if safety were not at the core of ABP's business. It is a necessary symbiotic relationship.

4.42. In these circumstances, it is not just unprincipled and unevidenced, but absurd to be suggesting that ABP decisions are informed by anything other than the imperative of ensuring safe and continued operations for the Port. In that respect:

4.42.1. As a leading provider of so many ports, ABP has unparalleled experience of how to operate ports in a safe way with all of many tidal and meteorological conditions that occur. That includes, of course, operating the ports on the River Humber, including the Port of Immingham.

4.42.2. Far from there being any conflict of interest in ABP's role as a port owner and developer in the promotion of the Proposed Development, and its role in maintaining safety, those interests are directly aligned. It is nonsensical to suggest that ABP could, or would, have any interest whatsoever in promoting and operating development that posed an unacceptable or unmanageable safety risk within its ports. Such action would actually directly conflict with ABP's <u>own</u> interests. The success of its ports and its operations depend upon safe operations and that is why safety is at the core of its business, as Captain McCartain, ABP's currently Designated Person and hugely experienced mariner on safety, explained in detail at the examination hearings[5].

4.42.3. No one has begun to provide any coherent explanation as to why ABP would contemplate promoting, let alone operate, any facility within its ports if it were unsafe to do so or otherwise adversely affected their existing operations. It has nothing to gain from such a result, but rather so much to lose both financially and reputationally.

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[5] Captain Mike McCartain OBE is ABP's Group Director Safety, Engineering and Marine – from 2016 to date. As such, he is responsible for the Assurance, Safety and Governance and of all Engineering, Marine and Operational activities across the Group, including the commercial activities of ABP's dredging company, UKD. His experience includes the following:

- Member of the Executive Leadership team;
- Currently fulfils the role of ABP's Designated Person for all of ABP's 21 ports until a replacement for the previous post-holder can be appointed;
- Implemented 'Beyond Zero' safety culture programme with subsequent, and considerable, reduction in Marine/Port safety issues since joining in 2016;
- Introduced meetings of the Harbour and Safety Board on a quarterly basis;
- Introduced the Port Marine Safety Code into ABP's marine operations environment; and
- Environmental ISO 50,000 :1 and 14,000:1 accreditation.

His previous experience includes:
Vice President (Marine and H&S Environmental and Security) Carnival UK from 2012 to 2016 He led the introduction of a new Safety Management System for both P&O and CUNARD.

4.42.4. All of these principles apply with the same force to the River Humber and the Port of Immingham. ABP does not have, and never could have, any interest in promoting the Proposed Development if it were not capable of being operated safely and without interference with existing operations in the way that ABP has identified.

4.42.5. It is untenable for commercial operators to express disagreement with ABP's judgments based on ABP's extensive and detailed analysis of navigational safety, the professional advice it has received and the corresponding separate judgments by persons like the Humber Harbour Master to the same effect. In expressing such disagreement, it is in fact those commercial operators that have other conflicting interests in terms of limiting competition or obtaining betterment. It is altogether improper and illogical to suggest that ABP's own judgments are adversely influenced by a conflict of interest. The opposite is self-evidently the case. ABP owns and operates the Port in which all the operations in question need to operate safely. It would be directly contrary to ABP's interests for any unacceptable compromise to be tolerated, or for any incident to occur, including anything which affected the IOT facility, or the continued operations at the Port of Immingham. Unfounded allegations posited on some, as yet, unspecified conflict of interest, or alleged lack of independence in ABP's internal structures are incoherent and illogical. ABP simply cannot have and does not have any interest in promoting or operating an unsafe environment. No one has explained how it could.

4.42.6. For the same basic reason, the allegations of some sort of lack of structural independence internally between ABP in its commercial operation and ABP in relation to its Statutory Harbour Authority functions are unfounded on the facts (such structural division of those functions is respected), but also make no sense anyway. ABP's only true vested interest (financially, reputationally, and practically) is in ensuring safety.

4.42.7. All of this is self-evident when one views the history of the operations of the River Humber and the Port of Immingham to date. The nonsensical, unprincipled and unevidenced attack on ABP's decision making in respect of the Proposed Development is only now being advanced as part of objections from three operators that do have commercial interests that create a conflict. That is in circumstances where the same decision-making by ABP and the arrangements for safety on the River Humber and Port of Immingham have not previously been criticised. So, for example, DFDS itself is an operator from the same Port, using a facility owned and developed by ABP. DFDS has subsequently expanded its operations by the introduction of a new type of vessel, the Jingling class. It did so through a process of simulation and regulatory oversight by ABP and Humber Harbour Master and Port of Immingham Dock Master about which no complaint has been made, whether in relation to alleged lack of independence, or alleged conflict of interest in ABP, or alleged deficiency in its methodology to NRA. ABP performed its functions as port owner and operator as well as its functions as statutory harbour authority in carrying out that assessment. The Humber Harbour Master and Port of Immingham Dock Master provided their oversight in accordance with their statutory functions and ability to control safety. The criticisms of the application of the same processes here are simply incoherent.

4.42.8. The unacceptable and unjustified attacks on the integrity and professionalism of the Humber Harbour Master and the Dock Master lack of any evidential foundation. Both have their own separate duties and powers to ensure safety of operations within the port and across the Humber. Neither can have any interest at all in exercising those powers other than to ensure the safe and efficient operation of the River Humber and the Port of Immingham. They have done so for so many years. Their independence and professionalism has never been impeached to date. No one has begun to explain why the Humber Harbour Master, the Dock Master, any of the pilots, professional simulators like HR Wallingford, and indeed those involved in navigational safety for the Applicant (including the members of the HAS Board and the Applicant's Designated Person) would have any interest in promoting a development what could not be operated safely in exactly the manner described in the assessments. Nor has any rational basis for suggesting that Stena Line itself would ever contemplate or countenance operating its own ships in an unsafe environment. This is all nonsensical in principle.

4.42.9. All of this is before one even considers the statutory duties that apply and the way which practical independence exists between the relevant bodies as extensively set out in the Note [**REP7-066**] and addressed in legal submissions.

4.43. The Applicant therefore strongly refutes any suggestion that its actions in promoting and assessing the Proposed Development are subject to any conflict of interest. There is no basis for suggesting that it has acted with anything other than the impartial objective of ensuring that the Proposed Development can be operated safely has been at the forefront of its decision-making. It would not make sense as a commercial development or investment for ABP to promote something that was unsafe. Moreover, the Applicant has been assiduous in undertaking its own navigational risk assessment and safety assessments so as to ensure that all risks are acceptable (both tolerable and reduced to ALARP). It is not just contrary to its own duties, but completely contrary to its own interests to do anything else.

4.44. There is, in any event, a comprehensive, rigorous and clear set of controls that will apply to the safety of the construction and operation in the normal way (as discussed below). This renders it unnecessary in principle and inappropriate in substance for the objectors to be inviting the Examining Authority and Secretary of State at best to duplicate such controls on the face of the DCO, and more concerningly, to interfere with the future judgments of the statutory harbour authorities on what navigational controls should be imposed on the construction and operation of the IERRT. That is particularly so where those controls will be assessed by those navigation authorities continuously as the project progresses, with the type of soft-start procedures the Harbour Master has identified. The basic premise for such interference is completely misconceived in principle, namely some concern about lack of independence or notional conflict of interest. Both are illusionary as outlined above. The Applicant strongly submits that the evidential basis for any such contention is entirely lacking. It is inappropriate to entertain such contentions.

ABP as a Harbour Authority

4.45. In addition to safety being core to ABP's role as a port owner and operator, it is important to recognise that ABP has a separate statutory role as harbour authority for

the River Humber and the Port of Immingham and the consequences of that statutory role.

4.46. The historical evolution of control of the River Humber and ports mean that there is some complexity in the legislative structure, but the overarching layered protection that ensures the safety of the River Humber and Port of Immingham ensure that this is already a highly regulated environment.

4.47. The Applicant and the Humber Harbour Master, who has been separately represented throughout, have provided a Note which sets out that history, [REP7 - 066]. Without rehearsing that Note again here, the following incomplete summary illustrates the basic point:

4.48. ABP is the owner and operator of the Port of Immingham (as set out above). ABP, however, also has separate functions and consequential duties as:

4.48.1. Statutory Conservancy and Navigation Authority for the River Humber, namely in its role as a statutory harbour authority and conservancy authority for the River denoted by abbreviation "SCNA".
4.48.2. Competent harbour authority for the Port of Immingham for the purposes of pilotage.
4.48.3. Statutory harbour authority for the Port of Immingham.

4.49. The principle of ports being owned by a harbour authority which is also responsible for ensuring safe navigation is well-established. The principle of bodies having different statutory functions which functions are required to be exercised specifically for such statutory purposes is common-place in administrative law: see eg (a) local authorities which can hold and own land and which will also be the local planning authority for that land in respect of any proposed development by that authority; (b) central government owning land and yet also being the decision-maker in respect of development decisions about that land. Judicial review provides sufficient and lawful oversight of the performance of such expert evaluative functions, where the relevant functions will need to be performed lawfully in accordance with the functions and purposes of the relevant legislation and there is no requirement for some form of statutory appeal or decision-making by some other body other than the Courts on judicial review: see *R (Rhuna Begum) v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430, per Lord Hoffmann at [24]-[59] [**REP7-021**].

4.50. In performing these functions under the different statutory provisions that provide for them, ABP is required as a matter of law to exercise those duties and powers for the purposes for which they are provided (under well-known principles of basic constitutional and administrative law).

4.51. In those capacities, ABP itself has specific powers in relation to the control of navigation such as (for example) the ability to make general directions under ss.6 or 8 of the British Transport Docks Act 1972 ("the 1972 Act") for the safety of navigation on the Humber or the Port of Immingham respectively, or s.7 of the Pilotage Act 1987.

4.52. ABP's conservancy functions for the River Humber and its pilotage functions are discharged by Humber Estuary Services ("HES") led by the Humber Harbour Master.

4.53. The Harbour Master Humber is a statutory appointee under s.5 of the 1971 Act who has also has powers of direction in relation to safe navigation on the River Humber. This means that it is rarely necessary for ABP to issue general directions relating to navigation or pilotage, although it has power to do so as necessary.

4.54. The Dock Master is also a statutory appointee, under s.51of the Harbours, Docks and Piers Clauses Act 1847, but concerned with the operation of the docks and jetties of the Port of Immingham and ABP's function as statutory harbour authority of the Port. He too has powers of direction under s.52 of the 1847 Act, as well as under s8(2) and (4) of the 1972 Act and under s.58 of the 1847 Act. The Dock Master is responsible for organizing towage working closely with HES.

4.55. In accordance with the above duties and powers, the position in practice is clear:

4.55.1. ABP has specific functions in its specific capacity as harbour authority for the River Humber and the Port of Immingham to provide for safe navigation.

4.55.2. The Humber Harbour Master has the statutory role of Harbour Master and the functions of discharging conservancy and pilotage on the River Humber and has all necessary powers (by his power to issue directions) to ensure his instructions are given effect. Thus if he were to conclude that any navigation operation on the River Humber were unsafe (including any type of berthing at IERRT) he has power to issue special directions preventing that from occurring or to prohibit entry of any vessel or to require its removal. Those powers apply regardless of any general direction made by ABP and if the Harbour Master considered any unsafe arrangement to arise, including resulting from any decision of the Dock Master, he has power to prevent vessels entering the Port that is within the jurisdiction of the Dock Master. The Dock Master also has such powers to ensure the safe operation of the docks and jetties. Both Harbour Master and Dock Master work closely together.

4.55.3. The duties of both will necessarily have to be exercised for the purposes for which they were given and their actions are susceptible to judicial review if they were performed unlawfully. No one has put forward any basis for suggesting that the powers have even been so exercised or would be so exercised unlawfully.

4.56. The statutory functions and duties of ABP as a harbour authority and the Humber Harbour Master and Dock Master provide a full and comprehensive set of controls over the safety of navigation on the River Humber and the Port of Immingham. These functions can only be discharged for the purposes that have been identified. This provides a separate and complete system of regulation controlling the safe operation of the River and the Port, It will include the Proposed Development. Those functions will necessarily continue to be discharged and matters of safety regulated by the Harbour Master and Dock Master, with the Harbour Master have the overarching powers of direction and control identified.

4.57. There is simply no principled and no evidenced basis for seeking to suggest that either ABP in exercising those statutory functions, or the Humber Harbour Master or the Dock Master, could or would exercise those functions other than for those statutory

purposes. It would be unlawful to exercise them other than for the purposes identified and the Courts have power to prevent that.

4.58. That is quite apart from the fact that ABP in its capacity as port operator and owner has (as already explained) its own aligned interest in ensuring that the Port is operated safely anyway.

4.59. The way in which ABP also discharges its respective functions, including through the house of the Harbour and Safety Board (HASB), has been fully explained. In accordance with the Port Marine Safety Code, the HASB has the benefit of advice from the relevant person. ABP is therefore able to discharge its role as the relevant duty holder through this process.

Controls for Navigational Safety

4.60. Before turning to the residual objections on safety grounds, there is an important point of principle which the Applicant raised at the outset of the examination. It has maintained the point consistently throughout. It is also a point which has also been separately made by the Humber Harbour Master who has been separately represented by experienced administrative specialists, Winckworth Sherwood and Counsel.

4.61. The statutory arrangements explained make it clear that there is a free-standing system of separate statutory regulation and oversight of all navigational and navigational safety matters. This will apply to the construction and operation of the Proposed Development on the River Humber and in the Port of Immingham. Under this, the safety of navigation for IERRT, the IOT facility and the Port as a whole will be under the constant control and regulation of the Humber Harbour Master, as well as the Dock Master having powers and ABP having powers in its capacity as a statutory harbour authority.

4.62. The Courts have repeatedly reiterated that decision makers dealing with development consent are entitled to recognise that the development will be regulated under such other regimes. Such powers of regulation need not be duplicated in the development consent process unless it is clear that the relevant regulatory authorities are bound to regard the matter as unacceptable: see *Gateshead MBC v Secretary of State for the Environment* [1995] Env LR 37 at pp49-50 in the context of emissions regulated by environmental permits:

*"…If it had become clear at the inquiry that some of the discharges were bound to be unacceptable so that a refusal by HMIP to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission. But that was not the situation… The Secretary of State was, therefore, justified in concluding that the areas of concern which led to the Inspector and the assessor recommending refusal were matters which could properly be decided by EPA, and that their powers were adequate to deal with those concerns."*

4.63. That principle was reflected in the national planning policy position in relation to planning control and pollution control cited in the caselaw:

*"It is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies… Nor should planning authorities substitute their own*

*judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over those matters."*

4.64. The same principle is now reflected and reinforced in para.194 of the National Planning Policy Framework:

*"The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. …"*

4.65. Ironically, this part of national planning policy appears in exactly the same section of the NPPF as the "agent of change" principle (considered in the section below) which the objectors invoke. There is a mutual inconsistency in the approach adopted by the objectors. Contrary to the NPPF, but also the history of navigation control on the River Humber and the Port of Immingham as to the successful and continuous operation of the existing controls, the objectors ignore this clear policy position. The policy position is in fact very clear. It should be assumed that the separate processes for controlling navigational safety will operate effectively, just as they have done for many years and continue to do so to this day. There is no reason at all to displace that assumption.

4.66. The principle has been followed and taken forward in various subsequent cases including - *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] Env LR 34 at paras 30, 34 and 38 concerning emissions regulated by the Environment Agency and the absence of a need for an Appropriate Assessment under the HRA. It has been specifically applied to decision-making for development consent orders under the Planning Act 2008 by Patterson J in *R Taisce (The National Trust for Ireland) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin). That concerned the grant of a DCO for Hinkley Point C where various regulatory permits, licences and consents would be required outside the planning regime before the power station could be constructed, commissioned of operated. Patterson J explained at 193:

*"193. In my judgment there is no reason that precludes the Secretary of State from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control. Because of its existence, he was satisfied, on a reasonable basis, that he had sufficient information to enable him to come to a final decision on the development consent application. In short, the Secretary of State had sufficient information at the time of making his decision to amount to a comprehensive assessment for the purposes of the Directive. The fact that there were some matters still to be determined by other regulatory bodies does not affect that finding. Those matters outstanding were within the expertise and jurisdiction of the relevant regulatory bodies which the defendant was entitled to rely upon."*

4.67. The approach of the High Court was affirmed by the Court of Appeal [2014] EWCA Civ. 111 in the judgment of Sullivan LJ. At paragraph 46 and following, Sullivan LJ quoted paragraph 193 of the High Court Judgment and stated that he agreed with the Judge and confirmed the *Gateshead* principle. He concluded that there was also no distinction between reliance upon a pollution regulator applying controls "*which it has already identified in the light of assessments which it has already undertaken on the*

*basis of a scheme which has already been designed"*, which he said was permissible, and reliance upon "*current*" gaps in knowledge "*being filled by the fact of the existence of the pollution regulator [who] will make future assessments… on elements of the project still subject to design changes….*" Sullivan LJ identified:

*"If the environmental impact assessment process is not to be an obstacle to major developments, the planning authority (in this case the Defendant) must be able to grant planning permission so as to give the necessary assurance if it is satisfied that the outstanding design issues – which may include detailed design changes – can and will be addressed by the regulatory process. …."*

4.68. The principle has been applied in many different types of regulatory context, for example, in *R (Frack Free Balcombe Residents Association v West Sussex County Council)* [2014] EWHC 4108 (Admin). That concerned the regulatory position of the Health and Safety Executive ("HSE") which, pursuant to the Borehole Sites and Operations Regulations 1995 (SI 1995/2038) would be addressing the safety aspects of all phases of extraction, including the design and construction of well casings within a borehole and the Judge stated:

*"The prospect of future control by a statutory body is just as capable of being material as what has happened already. The committee had ample material before it that the HSE would be concerned in the overseeing of the drilling works and indeed that they would be an active regulatory body."*

4.69. In light of those principles and the facts as they stand here, it is clear that:

4.69.1. The Humber Harbour Master and the Dock Master have, and will continue to have, full regulatory control over the navigation of ships both during construction and operation of the IERRT. They will have a duty and ability to control how and when and in what conditions and subject to what requirements ships may berth at IERRT. That is quite apart from ABP's own statutory harbour authority functions, under which controls can also be imposed. It is not disputed by anyone that the Humber Harbour Master and Dock Master do indeed have such duties and powers to control each and every vessel that uses the IERRT, and to set conditions and requirements (such as use of tugs) or to make berthing at the IERRT subject to soft-start assessment.

4.69.2. The Examining Authority and Secretary of State can also be in no doubt that the Humber Harbour Master and the Dock Master are already active regulators in that respect. They apply those controls on a day-to-day basis to the existing River and Port. But they have also already participated in principle in the assessment and simulations of the IERRT facility, considering its operating under various different conditions. They have also explained how this is not a substitute for the continued assessment process they will oversee That, of course is a feature of the arrangements including ongoing pilotage requirements.

4.69.3. The Examining Authority and the Secretary of State can also be in no doubt that this is not a case where no assessment has yet taken place, although that would not be a reason in any event for departing from the Gateshead principle.

4.69.4. The Examining Authority and Secretary of State can also be in no doubt that this is not a case where it is being suggested by those regulators that such berthing cannot occur. They have already having already satisfied themselves as to the ability in principle for such manoeuvres to be performed safely and without the need for impact protection measures installed. That does not affect the point that the Humber Harbour Master will continue to monitor and assesses the situation going forward, with soft start measures and further assessments that will have to be undertaken in the implementation of the project. There is a highly precautionary structure already in place.

4.70. Accordingly the NPPF policy and the *Gateshead* principle is not just applicable in principle in this situation, but one where there is a multitude of reasons why it should apply. Control of navigation safety should be exercised by the relevant regulators. They already control navigational safety in the River Humber and the Port of Immingham. That includes existing control in relation to the IOT Facility and DFDS and the lock and the Port generally. There is no good basis for the Examining Authority or Secretary of State to seek to interfere with, or trespass on, the performance of those functions by the highly experienced statutory holders of the duties to ensure safety.

4.71. The application of the *Gateshead* principle obviously does not involve complacency of any kind towards the issue of navigation or navigational safety. That remains at the core of ABP's operations, and the heart of the statutory responsibilities of the navigation authorities. It is simply to recognise that those statutory authorities have always been responsible for that safety and have all the necessary powers and controls to deliver it. They have continue to be so and it must be assumed that they will operate those functions (consistent with their statutory powers) effectively as they have done to date.

4.72. The Examining Authority has already heard how seriously those duties are taken. As one might expect, any matter of navigational safety is dealt with diligently and comprehensively. It includes the processes of continued assessment and soft-start for any novel procedure or vessel, with the accumulation of knowledge. It also includes the process of investigation and taking remedial action in the event of any incident occurring (as explained by the Humber Harbour Master). The Examining Authority has also heard how a rigorous precautionary approach is taken in introducing changes through the soft start procedures and assessment.

4.73. The only reason that anyone has proffered for seeking to intervene is because of some perceived lack of independence and/or conflict of interest. For the reasons already explained such point of concern is entirely illusory. It is an allegation that is illogical, unevidenced and unprincipled.

<u>Agent of Change</u>

4.74. As noted above, whilst ignoring or seeking to set aside the *Gateshead* approach and clear advice in paragraph 194 of the NPPF, the objectors seek to rely upon the "agent of change" principle in the same part of the NPPF. They do so without reference to its terms. What paragraph 193 of the NPPF actually states is (emphasis added):

*"Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places*

*of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have **unreasonable restrictions** placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a **significant adverse effect** on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide **suitable mitigation before the development has been completed**."*

4.75. Thus where the "agent of change" principle is engaged, it is only concerned with the principle of avoiding "unreasonable" restrictions on an existing business arising from a "significant" adverse effect which will others need to be subject to "suitable mitigation" by the proposed new use.

4.76. The reality is that none of the remaining objections begin to show that the Proposed Development would give rise to any issue under the "agent of change" principle.

4.77. The Applicant has demonstrated that the construction and operation of the Proposed Development will not lead to any additional restrictions on the existing operations of any of the objectors, let alone "unreasonable restrictions" being imposed. There are no "adverse effects", let alone "significant adverse effects". As has been explained in detail in the evidence, both the construction and operation of the IERRT will be subject to navigational safety controls in the ordinary way. Such controls over the IERRT facility will necessarily ensure the continued safe operation of the Port (including the IOT facility and Eastern Jetty) in compliance with the relevant statutory duties.

4.78. Moreover, the important adjectives qualify the agent of change principle in the NPPF must also be seen in the context of the national policy in the NPSfP. As already noted, one of the fundamental objectives of NPSfP is to provide extra RoRo capacity in ports to increase competition in a free market environment, not to prevent or inhibit such competition.

4.79. The Applicant has demonstrated that the IOT Operations and DFDS operations can continue without interruption through what is proposed.

4.80. It is wrong in principle for DFDS or others to invoke the change of principle to seek to impose controls that are not required where no significant adverse effect would occur, or to seek to gain prioritisation for its existing operations in respect of the navigational use of the River Humber or the Port of Immingham. That would be directly contrary to the NPSfP. Competitive effects of new RoRo development are specifically desired.

4.81. Indeed, section 4 of the NPSfP is clear about the sort of adverse impacts which might require mitigation (rather than prevention of development in principle) in the event of the success of the project, namely examples such as increased traffic generated by a thriving development (sections 4.4.2 - 4.4.3), or in relation to competition, the consequences in terms of demands on inland access links (as dealt with in section 4.5 of the NPSfP), where the whole thrust of the NPSfP is to encourage competition.

4.82. The Applicant has fully addressed those principles in its EIA, explaining why the maximum increases in navigational traffic can readily be accommodated on the River Humber and the Port of Immingham. That is confirmed by the Humber Harbour Master

with his great knowledge and experience of the River and the Port. Indeed, the evidence shows that there has in fact been a continuing decrease of traffic on the River Humber and in the use of the Port over the years (reflecting larger, but also more manoeuvrable vessels) where there is clearly existing capacity.

4.83. The Applicant has fully assessed the absence of any adverse environmental effects on the use of the River Humber and the Port of Immingham from the resulting increase of 6 movements per day from the IERRT in its Environmental Statement, having undertaken consultation with all the affected stakeholders through the HAZID workshops for the NRA (including IOT Operators and DFDS) : see ES, Ch. 16 [APP-046] as well as Ch 10 Commercial and Recreational Navigation [APP-046] and [APP-066] and [APP-089 updated by REP7-011], ES Ch. 16 and ES Ch. 20 – Cumulative effects for intra-project considerations [APP-052 and APP-074].

4.84. In addition, during the course of the examination, the Applicant has additionally provided data of a day for the River Humber, including the Port of Immingham, which specifically addresses (as requested) a day with challenging met-ocean conditions. The Applicant has robustly selected a busier than average day, on a spring tide and where the high-water Immingham time coincided with arrival and departure times for the vessels for the proposed IERRT terminal, and so at a time when constrained vessels could operate at the IOT facility: see [**REP7-031**] and [**REP7-032**]. This confirms that with the IERRT in place, minimal deconfliction of traffic would be required with only a 5 minute adjustment to a vessel departure time from the IERRT infrastructure being required to allow a vessel to depart from Immingham local ahead of an IERRT vessel. In for this sort of challenging day, where such events coincide, there is no material impact on operations let alone anything beginning to approach a significant adverse impact for the purposes of the "agent of change" principle.

4.85. The response from DFDS in its Closing Remarks has now, typically, been to criticise the Applicant's performance of this exercise, criticising the selection of the challenging day (despite it being chosen to identify the combination events of that would make the traffic management the most challenging as explained in the reports). None of the criticisms have any force as explained by the Applicant in **REP8-023** and **REP10-020**.

4.86. The day reflects a reasonable worst-case scenario because the time selected meaning that passage plan and tidally restricted vessels were being scheduled at the same time as IERRT vessels as well as all other movements. The data provided shows the other vessels moving at the time including tidally restricted vessels contrary to what DFDS has asserted.

4.87. DFDS then seek to provide a list of vessel-types and a proposed theoretical scenario without any evidence of whether it would represent a real-life worst-case scenario and without identifying any day on which such a scenario has occurred or indeed identifying any better example than that provided by the Applicant. The Applicant, therefore, strongly refutes DFDS's claims in this respect. Moreover, it has to be remembered that the issue in question that is being raised is in respect of alleged significant adverse impacts. DFDS do not attempt to explain or evidence a suggestion that even if it could identify an even more unusual "challenging" day, how this would actually have an impact on its operations, let alone a significant adverse impact, generally so as to justify restrictions on competition.

4.88. Likewise, during the course of the examination it has been suggested that the Proposed Development will potentially place demands on tugs operating at the Port of Immingham and it is asserted (although no evidence has been provided) that that might have an adverse impact on their operations. As explained by the Applicant, however, the provision of tugs at the Port readily reflects market demand and tug operators will, and do, simply respond to that demand as one would expect, and are able to relocate or commission for further tugs where there is a demand for them: see [**REP1-013**] and Appendix 5 to **[REP1-008]** and Appendix 2 to **REP7-020**].

4.89. By the same token, the Applicant has responded to each of the various residual points of criticism from objectors, including those submitted by DFDS at the close of the examination in relation to the NRA, the simulations (including tidal flow conditions), the assessment of all the evidence as most recently summarised in [**REP10-017**] and/or [**REP10-20**], including by reference to evidence previously submitted to the Examination.

4.90. In relation to navigation matters for example, each of those residual points is without merit: see eg [**REP10-17**]: Engagement on Navigational Topics (para 4.4-5); Navigational Risk and Cost Benefit Analysis (4.6-413); COMAH and societal risk for NRAs (para 4.14-4.21); the approach to the Design Vessel and simulations (para 4.22-4.23); Impact Protection Measures (para 4.24-4.27); Tidal Flow (para 4.28-4.34); the Navigational Study of Enhanced Control Measures being proposed [**REP8-029**] see paras 4.35-4.40); Navigational studies including the Eastern Jetty (paras 4.41-4.42); and see [**REP10-020**] on: any requirement for a restriction limiting IERRT to Stena T Vessels (para 1.2-1.5); Impact Protection Measures and construction of IERRT (para 1.6-1.11); the Outline Offshore CEMP and the use of IOT facilities including Berth 8 (para 1.12-1.19); the December navigational simulations and what they show in relation to the remote scenarios being tested in terms of vessels, the consequences of any allision, the IERRT infrastructure and its design, and consequences to vessels and tugs (para 1.20-1.45); the response to the misrepresented claims by IOT Operators about the simulations, including the allegation about what a Stena Master said (para 1.46-1.60); the response to the question about hard landings for IOT Vessels and the operating conditions that were being simulated (para 1.61-1.64); the Western Jetty Berth 4 structure and the reasons for its provision (Para 1.64-1.68) and the points DFDS have made about the challenging day as identified above.

4.91. There is therefore no basis on the facts for objecting to what is proposed by reference to the "agent of change" principles. There is no basis for not applying the *Gateshead* principle in the following paragraph of the NPPF as to the assumption of effective navigational safety controls being applied by the relevant statutory harbour authorities, just as they have been applied for the safe navigation of all traffic on the River Humber and the Port of Immingham to date.

4.92. Having dealt with these points of principle, and without prejudice to their application, the Applicant turns to consider the remaining points of objection.

## 5. NEED FOR AND BENEFITS OF THE IERRT

5.1. The Applicant's position on the need for the IERRT and the consequential benefits that will be delivered in meeting that need have been comprehensively addressed in the Applicant's support material and representations including:

5.1.1. Chapter 4 of the Environmental Statement ("the ES") [**APP-040**].

5.1.2. Humber Market Forecast Study Report - ES Appendix 4.1, [**APP-079**].

5.1.3. Representations, (see paragraph 2.1 above).

5.1.4. Update to the Shortsea Market Study, [**REP8-028**].

5.2. The Applicant has always identified that the imperative need for the Proposed Development to provide this additional RoRo freight capacity on the Humber Estuary derives from and is supported by a number of national and local imperatives and objectives, all of which are considered significant including:

5.2.1. The need to ensure the UK has sufficient RoRo freight capacity.

5.2.2. The need to ensure that the sufficient capacity of the right type is provided in the location where it is required.

5.2.3. The need to ensure the UK has a resilient and competitive RoRo freight capacity.

5.2.4. The lack of suitable RoRo facilities on the Humber Estuary to meet the current and future needs of an existing operator – Stena Line.

5.2.5. The implementation of the Government's levelling up agenda and the achievement of local policy objectives.

5.2.6. The move away from reliance upon the short straits for the handling of RoRo freight.

5.3. At the outset of the examination and now at the close the only party that has sought to challenge that need has been CLdN – a rival port owner and owner of a rival RoRo operation.

5.4. By the end of the examination, however (in contrast to what was originally set out in its representations), CLdN has attempted to qualify its attack, in light of the NPSfP paragraphs that were drawn to its attention. It suggests that it is not now disputing that the NPSfP itself establishes a need for this type of development, so that there is no requirement for the Applicant to establish a need. Instead, it is claiming it has only responded to the case on need in order to challenge the notion that there is an urgent and imperative need for the Proposed Development in this location. It now also seeks to suggest that its view of need should affect the weight that the Examining Authority and Secretary of State should attach to any presumption in favour of development or the need that is claimed. Neither suggestion has merit on the face of the NPSfP.

5.5. The Applicant has pointed out the contradictions in CLdN's case and provided a detailed analysis of the correct legal principles and the policy itself: see eg [**REP1-009** including Appendix 6, **REP2-010**, **REP3-007, REP4-009 and REP5-032**]

5.6. In short, the correct position in law and policy is as follows:

5.6.1. The NPSfP itself establishes that there is a need for the Proposed Development. That need has been identified based on the Government's own analysis of growth, the importance of ensuring that there is more RoRo capacity than demand in any event and the central importance attached to the provision of competition and

resilience. The NPSfP remains the relevant NPS for the purposes of s.5 and s.104 of the PA2008 and has not been suspended.

5.6.2. The NPSfP makes clear that the Secretary of State should accept the existence of that need which is compelling. As can be seen in *Clientearth* in the High Court and Court of Appeal, a national policy statement is entitled to set that as the policy framework and establish a need which is fixed by policy. It is then a legal error in such circumstances for an Examining Authority or Secretary of State to require that need to be established.

5.6.3. The Applicant is therefore under no requirement to provide any additional evidence to support the existence of such a need in the NPSfP and the consequential presumption in favour of the proposed development that applies and the substantial weight that the NPSfP sets to the benefits of providing for that compelling need. CLdN's reliance on *Scarisbrick* is misplaced because that was interpreting a different policy statement which did not set, as a matter of policy, the weight to be attached to the question of need or the benefits in the way that the NPSfP does here.

5.6.4. In any event, CLdN's critique of ABP's own assessment of the need for the Proposed Development, as well as that of Stena, is misconceived in principle because the NPSfP makes clear that it is a matter for the port developer's assessment, rather than for the Examining Authority or Secretary of State. The judgment as to whether there is a need for a new facility of this kind is for the port developer based on its assessment of the commercial factors and to give effect to a free market economy consistent with the principles of encouraging competition and resilience. CLdN's attempts to attack ABP's assessment and Stena's assessment conflict with that policy and can and should be disregarded in principle under s106 of the PA 2008. ABP has set out its assessment that there is a need for the Proposed Development and Stena has confirmed that it has such a need and the NPSfP makes clear that is sufficient. It is inappropriate for CLdN, particularly as a rival port and operator, to be inviting the Examining Authority or Secretary of State to question that need in the way they are doing.

5.6.5. Without prejudice to that point, CLdN's critique of ABP's identification of the specific need for the Proposed Development in this location is in any case flawed. The bulk of the critique is involved in debating the question of what capacity exists on the River Humber. The Applicant has addressed this (as summarised below). But CLdN is only considering one facet of need anyway. It has not advanced any meaningful answer to the NPSfP's identified need to increase competition and provide resilience. Even if there were greater capacity, it does not address or undermine the other types of need identified. It would not undermine the identified need for the Proposed Development in providing further RoRo capacity to enhance competition and provide resilience.

5.6.6. Contrary to CLdN's claims, the Applicant's case on need has always comprised all of these constituent elements. They are identified in the original application. They have been repeated throughout the examination. Stena's own needs have been confirmed by Stena itself. There is no substance in the contention that the Applicant's case has shifted or changed to refer to competition and resilience or

the requirements of Stena. Those elements of need have always been part of the need that the Applicant has identified from the outset. CLdN's Closing Submissions and its case generally remain conspicuously silent about Stena's basic point – the absence of any capacity being offered to it by CLdN on commercially acceptable terms that allows it to continue and grow its business.

5.6.7. CLdN's latest attack on the Applicant's provision of an Updated Market Study [**REP8-028**] to reflect the very latest position at the close of the Examination is similarly unfounded. The Applicant has submitted a response which deals in turn with the points made [**REP10-017**] not repeated here. But again, it is an attack which seeks to focus on capacity, rather than any meaningful response to the other elements of need. It criticises ABP for making assumptions about Killingholme - but that was in circumstances where ABP contacted CLdN at the application stage and invited information but was met with silence. ABP instructed professional experts to make an assessment in the form of the Market Study.

5.6.8. In light of information which CLdN has advanced at the examination (rather than before), the Applicant has revisited that assessment and simply considered the position if one were to take what CLdN has said at face value (again without prejudice to whether it is correct). Even then it continues to demonstrate a lack of capacity to meet the forecast growth for the River Humber, something supported by the Government's own forecasts. There is nothing bullish in that. All of this is in an environment of encouraging growth where the Government has emphasised that the policy is not simply about providing sufficient capacity to meet demand but generating competition and choice and resilience by seeking to have more capacity than demand.

5.6.9. CLdN's assertions about the ability to provide even greater capacity without any consent is simply that – an assertion. As the Applicant pointed out when that assertion was first made, reliance on permitted development rights to make this suggestion is misplaced (see eg **REP5-032** and Appendix 3). Permitted development rights do not exist if the development in question has any likely significant effects and CLdN has remained silent as to how it contends it could deliver additional capacity in light of that principle, given the full range of environmental topics which would need to be considered.

5.6.10. Finally, in a surprising submission in its closing remarks CLdN appear to be suggesting that there is the potential to have too much capacity or too much resilience. There is no support for that in any policy. It embodies the anti-competitive approach that the NPSfP is striving to avoid. It is also irrelevant as the position remains that CLdN are not offering any capacity to Stena on commercially acceptable terms. This is precisely why the NPSfP sets the policy it does. It is for the port industry and developers like ABP and Stena to make their own commercial assessment of what is required faced with the commercial realities, not for another rival operator to set the rules and restrict competition which the Secretary of State is being asked to endorse by this objection.

5.7. For these reasons and those set out in much greater detail in the Applicant's extensive analysis and representations, there is no basis for objecting to the Proposed Development on grounds of need. There is no basis for disapplying the presumption

in favour of the Proposed Development given the established urgent and compelling need identified in the NPSfP. There is no basis for disapplying the substantial weight that the NPSfP prescribes to be attached to the positive benefits of the Proposed Development in terms of economic benefit. The assessment of need provided by the Applicant, as well as that specifically identified in terms of Stena's own needs, are both compelling in any event. CLdN's objection on these grounds, or its attempt to diminish the weight to be attached to the need case, are misconceived. The objection from a rival operator and port owner that has ejected one of Stena's services from its harbour only serves to confirm the real existence of the need that the NPSfP is so keen to address.

## 6. Transport

6.1. The Applicant has carried out a comprehensive assessment of the effects of the Proposed Development in terms of transport and traffic. Both DFDS and CLdN have sought to object to the Proposed Development on this ground. Again, through the course of this examination, the Applicant has been at pains to consider every point that has been made through its professionally appointed independent expert who has carried out all of the assessment.

6.2. In addition, whilst the Applicant's own expert does not agree that the assumptions sought by DFDS and CLdN are reasonable or realistic for a sensitivity test of the assessed effects, the Applicant's expert has (without prejudice) carried out that sensitivity testing based on parameters DFDS and CLdN suggested through the transport working group. The end result of that process is that the Applicant has demonstrated that even if one uses what are considered to be unreasonable assumptions for that sensitivity testing adverse to the Proposed Development, there will be no significant adverse effects on any part of the highway network requiring mitigation. That is a position that is agreed by all the relevant highway authorities, North Lincolnshire Council, NELC and National Highways, (NELC [**REP10-014**], NLC [**REP8-008**] and NH [**REP9-005**]).

6.3. The persistence of an objection by DFDS and CLdN in the face of that, and the considered position of the relevant highway authorities, is not reasonable and confirms the Applicant's basic concerns about the commercial reasons for seeking to pursue an objection of this kind.

6.4. In that respect, it is worth noting DFDS's recent claim in DL9 submissions and in their further submissions submitted at DL10 that because Stena is already operating on the Humber, the construction of the IERRT would do nothing to increase existing competition to DFDS. That claim makes no sense for a host of reasons. Stena was operating two lines previously on the River Humber (from Killingholme), but one of those lines was terminated by CLdN and no other commercial acceptable terms have been offered to Stena by CLdN. The Proposed Development is intended to enable an operator like Stena to be able to operate at the River Humber with both such lines and with the ability to grow and deal with its operations in one place, with sufficient landside space and control over its operations to compete effectively. That sort of facility and ability to grow is simply not available to Stena without the Proposed Development, as DFDS know.

6.5. It is therefore wrong to suggest that Stena's limited operations mean that DFDS is not affected by the competition that the Proposed Development would bring. The whole point of the Proposed Development is to provide three new berths to increase RoRo capacity at the Port of Immingham to provide that facility for an operator to operate in competition with DFDS and CLdN and generally on the River Humber in a way which they are unable to do now. DFDS's disavowal also makes no sense in light of its transport objection. Far from suggesting that it is content for any realistic transportation assessment to be based on Stena continuing to operate at its current levels, the basic premise of DFDS's case on transport grounds is that the Proposed Development will generate the consequential by way of growth such that it is appropriate to assess the traffic operating at its maximum capacity.

6.6. It is therefore wrong and completely artificial to suggest that DFDS is not aware or affected by the competition that the Proposed Development will bring on the basis that Stena operate currently on the River Humber. This sort of fig-leaf explanation for the pursuit of the objection (where the evidential basis does not exist) serves more to expose the underlying naked nature of the opposition to the competition the Proposed Development will healthily bring.

6.7. As set out in **[REP9-015]**, the transport implications of the proposed IERRT development have now been subject to an extensive and comprehensive transport assessment. This has included wide comprehensive consultation with the three each of those statutory Highway Authorities – NH, NELC and NLC.

6.8. All three Highway Authorities were consulted on the drafting of the Transport Assessment prior to submission. They have reviewed the relevant submitted information provided as part of the formal Examination including the Transport Assessment Addendum **[REP7-013]** with all corrections and updates that have been provided.

6.9. None of the Statutory Highway Authorities has required any further assessment, information or amendments to either the documentation or the DCO or suggested (as DFDS now appear to be claiming) that they have not had sufficient time to reach an informed and professional view about the Proposed Development.

6.10. Again, DFDS's protestation that it is not making any criticism of these authorities in its representations when it is asserting "no reasonable authority would be able to fully analyse the information in the time given them" is contradictory. In fact the relevant highway authorities have had the necessary time to consider the further information, coming as they do from a highly informed position about their road networks and the previous work that has been undertaken and agreement on the methodology throughout this process. But it is obviously a criticism, and an unfounded one, to suggest that they have not been able to reach a proper view. If any of the highway authorities believed that they had had insufficient time, they would have been bound to make that clear, rather than do what they have done which is to confirm that they are satisfied with the information and have no objection. DFDS's criticisms are therefore necessarily an attack on the professionalism and objectivity of those highway authorities which has no basis.

6.11. As the ExA will be aware, the conclusions of the Highway Authorities have been reached by each Authority separately, based on their own review of the original application documents and the additional relevant data and information that has been collated and submitted in a clear and transparent way as part of the Examination process. All three Highway Authorities have confirmed that they have no objection to the scheme and that they do not consider physical mitigation is required (to deal with either capacity or safety implications of the scheme).

6.12. Requirements to secure the provision of final versions of the Construction Traffic Management Plan, the Operational Freight Management Plan and the Travel Plan are contained with the dDCO in a form approved by those authorities. These are confirmed in the respective Statements of Common Grounds with each of the highway authorities. (NELC [**REP10-014**] NLC **[REP8-008]**, and NH **[REP9-005]**).

6.13. As to the material that has been provided during the examination, the Applicant has actively engaged with consultants acting on behalf of DFDS (GHD) and those for CLdN (RhDHV) as well as the Highway Authorities throughout the Examination.

6.14. A full set of updated assessments (and the Applicant's position on the need for sensitivity testing) was submitted for review by all participants to the Examination (including the Highway Authorities) at Deadline 5 (see **[REP5-027]**, **[REP5-028]** and **[REP5-029]**). The Addendum provided (at the request of the ExA) a clear and concise summary of the final position of the Applicant to which all parties have full transparency (see **[REP9-102]**, paragraphs 5.11- 5.13).

6.15. The conclusions of that work which progressed throughout the examination supports the conclusion of the original TA and ES and confirms the position reached by all Statutory Parties. There is no compelling or reasonable contrary evidence to dispute those conclusions.

6.16. As part of that process, the Applicant has included the recalculations to address the PCU error that had been identified. No party has identified any residual point that requires correction in the final analysis. It is an inherent part of the EIA process itself, set out in Regulation 5 of the Infrastructure (EIA) Regulations 2017, that the production of an ES is followed by consultation and comment. This is so that any points of that kind can be identified and addressed which is what has occurred here. That is exactly what the Courts themselves have pointed out: see *R (Blewett) v Derbyshire CC* [2003] EWHC 2775, as subsequently endorsed by both the Court of Appeal and Supreme Court in subsequent cases. As Sullivan J (as he then was) identified at paragraph 41 in response to criticisms that any deficiency in an ES when first drafted is somehow problematic, that was :

*" ... an example of the unduly legalistic approach to the requirements to .. the Regulations that has been adopted on behalf of claimants in a number of applications for judicial review seeking to prevent the implementation of development proposals. The Regulations should be interpreted as a whole and in a commonsense way. The requirement that "an EIA application" (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in R v North Yorkshire CC ex p Brown [2000] 1 AC 397 at 404, the purpose is " to ensure that planning decisions which may affect the*

*environment are made on the basis of full information." In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible.*"

6.17. That principle applies with even greater force in respect of the sort of correction that has been addressed here by the Applicant in the PCUs. The principle similarly applies where (as here) the Secretary of State is a decision-maker. The "environmental information" is all of the information which has been collated through this process.

6.18. As to the terminal capacity and management, the Applicant's position in terms of terminal capacity is clearly set out in **[REP8-027]**. Section 2 of that document sets out what has been assumed in terms of terminal design requirements and why. The conclusions of that assessment are clear and, indeed, consistent with DFDS's own assessment work presented at **[REP7-056]**), as confirmed by the Applicant at **[REP9-012]**, paragraphs 5.32 – 5.36.

6.19. The terminal is designed to provide flexibility and resilience for at least a 50 year design life. Through that time markets will change and the operator will utilise vessels that meet those market demands, including providing an appropriate proportion of cabins for accompanied freight. This has been appropriately, and thoroughly tested throughout the examination and there is no competing evidence before the Examination which reaches a different conclusion to that of the Applicant.

6.20. In terms of transport assessment, the TA (including the sensitivity testing has provided the consideration of a range of different outcomes of traffic impact). It is clear that a wide range of outcomes have been assessed, and found to be acceptable by the Statutory Highway Authorities. Nonetheless an Operational Freight Management Plan is proposed and all Statutory Highway Authorities support that approach. The final refinement of the OFMP will, as this is secured in the DCO, be dealt with once more detail of final terminal operation is fixed.

6.21. Notwithstanding the clear position of the Statutory Highway Authorities, the two IPS, DFDS at paragraphs 32 and 33 of **[REP9-026]** and CLdN at paragraphs 4.30 – 4.36 of **[REP9-022],** have wrongly claimed there is a need for mitigation and that some mitigation should be sought as a result of the development.

6.22. The Applicant's position on this is set out at Annex A of **[REP7-013]** and in their response to DFDS at **[REP9-012]**, paragraphs 5.16 to 5.20. No such mitigation is required.

6.23. This recalcitrant position of both DFDS and CLdN is completely contrary to the correct interpretation of the data, assessment, and policy requirements. It is also completely contrary to the conclusions reached by all three Statutory Highway Authorities as confirmed in their respective responses to ExQ4 (NELC at **[REP8-039]**), NLC at **[REP8-040]** and NH at **[REP8-036]** and **[REP8-037]**).

6.24. In this regard, as already noted, it is concerning that DFDS and CLdN continue to pursue such points despite the evidence; but they are now either seeking to criticise the expertise and clear position of each statutory highway authority, or the professionalism in expressing the conclusions they have, without any basis for doing so.

6.25. In fact it is the approach advocated by DFDS and CLdN that has no policy or other technical basis. It is seeking to require mitigation which policy does not require. It lacks credibility. The Applicant submits that no weight can be given to those views and claims. No such mitigation is required and none would be appropriate.

6.26. It is in fact another testament to the inherent appropriateness of the Proposed Development that it is able to provide such additional RoRo capacity in the ideal location strategically for the UK and the road network, using the River Humber and the Port of Immingham – an area targeted for levelling up- without any significant adverse impact on the road network that requires mitigation. There is no substance to the continued objections of DFDS and CLdN.

## 7. Navigation

7.1. A considerable amount of time has been expended at the examination in pursuing objections advanced by IOT Operators and DFDS on navigation and navigational safety grounds which the Applicant identified at the outset of the examination has proceeded on an unprincipled basis.

7.2. This has led to an extensive exploration of matters of detail, including a great number of additional simulations exploring ever increasingly improbable scenarios. These are simply beyond any necessary scope of consideration of a DCO of this kind. There is no doubt, and can be no doubt, that matters of navigation and navigational safety are already subject to full and continuous control now and in the future by the relevant harbour authorities, including in particular the actions of the Humber Harbour Master and the Port of Immingham Dock Master to ensure the safety of the Port with the Proposed Development in place (and indeed during its construction).

7.3. As part of the ES for this Proposed Development, the Applicant carried out a Navigational Risk Assessment (NRA) of the Proposed Development. That NRA and the resulting conclusions from it are necessarily a matter for the relevant statutory harbour authority as the "duty holder" under the Port Marine Safety Code. Unfortunately, that process has wrongly been used by the objectors as a basis for purporting to produce their own "NRA"s. That is something which is simply not within the scope of the concept of an NRA which requires a process of engagement with persons like the Harbour Master, and which requires the relevant duty holder to assess the relevant risks .

7.4. In fact those documents said to be NRAs were only produced during the examination itself, rather than in response to the ES (the ES available long before the examination commenced). This has necessarily meant that the Applicant has only been able to respond to such claims and assertions during the examination process itself. The objections and criticisms advance various unprincipled claims and assertions about the respective roles of those responsible for safety. Worse than that, they now resort, to

entirely unwarranted and unevidenced assertions questioning the ability of persons like the Humber Harbour Master or the Port of Immingham Dock Master to make independent judgments about safety – whereas that is in fact their statutory function.

7.5. Similar attacks have been made about ABP in its capacity as duty holder and statutory harbour authority. As set out above, these make no sense and simply have no evidential basis. ABP in that capacity is under statutory duties and responsibilities to make decisions about safety and can have no possible interest in seeking to operate anything other than a safe harbour. ABP as port owner and operator is more invested than any other party in ensuring the safe operation of its Port and the River Humber, including all of the infrastructure that it comprises (as set out above). In all of these respect, the position is fundamentally different to the sort of case where a developer might be seeking to promote development (for example an offshore windfarm) where that developer itself has no responsibility for navigation itself and no interest in ensuring that navigational safety is not adversely affected.

7.6. The Applicant therefore reiterates what is summarised above. Safe navigation, the safe construction and operation of the Proposed Development and the safe and continued operation of the IOT Facility and all the facilities at the Port of Immingham (the Western and Eastern Jetty and the lock and the IOH and the harbour) are fundamental to ABP. It simply would not and could have no reason to promote development which adversely affected any of that.

7.7. Unsurprisingly, the NRA that ABP itself undertook has commissioned from expert professional consultants with great expertise in carrying out such an NRA as the Examining Authority has heard. It did involve engagement with stakeholders, including both DFDS and IOT Operators who took part in identifying the hazards at the various HAZID workshops and then the subsequent simulation process. It involved the full participation of the Humber Harbour Master, pilots and masters with unparalleled knowledge and experience of the marine environment here. The NRA has been peer reviewed by Marico Marine. And more fundamentally it is an NRA which was then scrutinised by ABP in its capacity as duty holder and statutory harbour authority, applying principles of assessment and approach to safety that are replicated over ABP's oversight of 21 ports in the UK.

7.8. As is illustrated by this case, engagement with stakeholders in accordance with the Port Marine Safety Code and seeking to achieve consensus does not mean that consensus will be achieved. Where stakeholders put forward views or approaches which are wrong or not accepted, then consensus on such views will be impossible.

7.9. The nature of the Applicant's NRA and response to the subsequent criticisms of it, and the inappropriate nature in the way these objections have proceeded, is covered in the Applicant's Response to Relevant Representations [**REP1-013**] and Written Representations [**REP3-008** and **REP3-011**], the Applicant's Interim Responses to the DFDS and IOT Operators' NRAs [**REP3-009** and **REP 3-012**], the Applicant's Reviews of the alternative NRAs provided by DFDS and IOT Operators [**REP6-030** and **REP6-031**], the Supplementary Navigation Information Report [**REP7-030**], and various responses at each deadline to comments made by DFDS and IOT Operators [e.g., **REP5-033, REP5-034, REP6-028, REP6-029, REP7-024, REP7-026, REP8-022, REP8-023, REP9-011 and REP9-012**]. That includes identifying the defects in

the methodologies and approach proposed by the IOT Operators and DFDS in, for example: (a) wrongly applying COMAH risk methodology to the marine environment (where it specifically relates to land-side risk and populations) and when the marine environment and its risk has been properly assessed in the NRA; and (b) wrongly asserting that the risks in respect of 100 passengers have not been addressed when they have and, indeed the HSE itself has confirmed it is indeed content with the approach the Applicant has adopted. The Applicant relies on all of that material in full in refutation of each point that has been advanced, without repeating it again laboriously here.

7.10. There is, however, an important preliminary point of principle. There is no doubt that the Applicant has undertaken an NRA to establish the principle of the ability to operate the IERRT in this location alongside existing facilities, and the principle of controls to address any risks that will occur. No one is suggesting that the IERRT cannot operate at all, rather the objections have been focused on particular times of operation or controls over those operations (e.g., at times of ebb tide). As summarised in much greater detail above, this is a clear and obvious case where the *Gateshead* principle has obvious application.

7.11. It is neither necessary nor appropriate for the examination process, or the Secretary of State, to trespass into the judgments on navigational safety and conditions of construction and operation that have been considered in principle in the NRA. That will be fully regulated by the relevant harbour authorities, including in particular the Humber Harbour Master and the Port of Immingham Dock Master with their years of experience, knowledge and expertise and familiarity of pilotage and all of the vessel traffic using this space. Indeed, it would simply be inappropriate for the examination or the Secretary of State to be making such judgments for those authorities, informed as they are not just by detailed experienced and knowledge, but by their own attendance, involvement in and judgments about the NRA and the simulations that have been undertaken. Those processes of control will necessarily apply now and into the future in respect of the construction and operation of the Proposed Development. And the Examining Authority has heard in detail as to the diligence with those functions are performed and the precautionary approach that is adopted. Before any commencement of operations occur, there will not only be further assessment and simulation, but soft start procedures and accumulation of working knowledge to ensure safety is maintained. The notion that in this case (unlike development of the IOT facility or the IOH facility or in relation to new ships being considered for any of those facilities) those controls are insufficient is nonsensical, unprincipled and unevidenced.

7.12. The Applicant, therefore, makes it clear that it considers there is no proper basis for not observing the *Gateshead* principle in this respect and seeking to impose additional requirements or restrictions, let alone purporting to refuse development consent, in circumstances where those statutory authorities have already assessed the principle that operations can occur safely (as has been simulated repeatedly, even in the most challenging conditions), but where those authorities have the full ability to control all of the constructing and operating conditions in any event. The Applicant has addressed this separately in setting out its position on what Requirements are or are not required and the wordings of those Requirements, but where requested has provided alternative wording to the Requirements if (without prejudice to that principal position) any

duplicative or additional controls of that kind are to be imposed by the Secretary of State

7.13. Without prejudice to that basic point, and turning to the conclusions reached in the Applicant's NRA [**REP7-011**], these conclusions were based on a robust and detailed stakeholder engagement process, and account for the views of key port stakeholders, including the Humber Harbour Master and the Immingham Dock Master, IOT Operators and DFDS. The outcomes of the assessment are also affirmed by scenarios tested in the navigation simulation work that has been undertaken to support the IERRT project.

7.14. Turning to the so-called NRAs produced by IOT Operators and DFDS, but by one organisation – Nash Maritime - it is important to deal with some points of principle first. The Applicant has addressed the inherent problems with them in [**REP3-009**] and [**REP3-12**] and [**REP6-030**] and [**REP 6-031**]. Those so-called NRAs simply fail the most basic requirements for an NRA. They are not NRAs with the input of the duty holder which is fundamental. That is because it is only the duty holder that can and is legally responsible for the relevant judgments on tolerability and ALARP in any particular port environment for which it is responsible and, as here, for which it is the statutory harbour authority responsible for safe navigation. Those NRAs also miss - and inevitably omit - basic requirements such as the c engagement which the Applicant undertook involving essential persons such as the Applicant itself, but more importantly the Humber Harbour Master and the Port of Immingham Dock Master, the pilots and tug operators with all the collective expertise they bring. These are simply not NRAs at all as a matter of principle.

7.15. Again without prejudice to those points, as it turns out on a comparison of the risk assessments undertaken by the Applicant [**REP7-011**] and those alternative NRAs produced by DFDS [**REP2-043**] and IOT Operators [**REP2-064**], it reveals that they are not identifying any different or new risk which the Applicant has not already considered. In reality, the risk assessment outcomes are broadly similar notwithstanding obvious flaws in those from DFDS and IOT Operators.

7.16. But where the DFDS/IOT Operators do depart from the Applicant's NRA is when they are unable to provide sensible justifications for departure (not least because they do not involve engagement with the key persons identified above). It is in the subjective judgments they express and the application, in the case of IOT NRA document of the incorrect use of COMAH methodology.

7.17. In addition to all the flaws in DFDS' [**REP2-043**] and the IOT Operators [**REP2-064**] assessments that have been highlighted by the Applicant [see eg **REP 3-009** and **REP 3-012, REP6-030** and **REP6-031**, **REP7-030,** and variously **REP5-033, REP5-034, REP 6-028, REP6-029, REP 7-024, REP7-026, REP8-0222, REP8-023, REP9-011, REP9-012** and **REP 10-017**], including the inappropriate and incorrect use of COMAH methodologies, the resulting main difference between the alternative NRAs produced by IOT Operators and DFDS and the Applicant's NRA then comes with the judgment they seek to impose in respect of the "tolerability" of the assessed risks and judgments about ALARP. These purported alternative NRAs invoke their own subjective judgments which fail to reflect the tolerability thresholds used by ABP as a statutory harbour authority who operates safe and efficient port marine operations

across the Group's 21 ports and harbours. These are therefore surrogate subjective judgments which are divorced from the judgment of the duty holder, divorced from those responsible for regulating the day-to-day navigational operation of the Port (namely the Harbour Master and Dock Master respectively) and are inherently illogical on analysis (as identified in the Applicant's representations).

7.18. Indeed, they simply become irreconcilable with the current operations. No-one claims these to be unacceptable or require any further risk measure reductions. Yet it is now claimed without any justification that the risks associated of an IERRT ship losing all control in certain conditions is unacceptable in this location, but where ships already manoeuvre in proximity to the IOT Terminal (including to enter both the IOH and the lock). Those vessels do so without a general requirement for tugs on ebb tides, even those vessels with a much greater levels of redundancy than Ro-Ro ships operating at IERRT. Thus, for example, single engine ships without the manoeuvrability and back up controls of a RoRo ship regularly pass the IOT Terminal. They enter and exit the lock in any state of the ebb tide, even though there remains a notional risk of total loss of control (but where the loss of such total control is far more remote for an IERRT RoRo vessel with twin engines, much greater vulnerability and much greater redundancies, such as back-up power systems). Rightly no one considers that risk unacceptable given its remoteness. And Ro-Ro vessels already operate at IOH, manoeuvring in the vicinity of the IOT Terminal in the ebb tide without any requirements for tugs. They then continue the manoeuvres into the IOH in extremely close proximity to the Western Jetty which handles ships with hazardous materials. Neither DFDS nor the IOH Operators in all of their claims about the operations of the IERRT (notwithstanding all the control measures identified in the Applicant's NRA), have been able to articulate or explain any principled basis for claiming that the relevant risk in question moves from tolerable to intolerable for the IERRT facility. The objection simply lacks any coherence. It becomes positively perverse when one considers the Enhanced Operational Controls that are now being volunteered. IERRT vessels using Berth 1 in the ebb tide conditions identified will have tugs attached, something which is not the case now for vessels currently passing and manoeuvring close to the IOT facility on ebb tides.

7.19. The position is similar in respect of the criticisms made in respect of the use of the ships in relation to the Eastern Jetty, although not even DFDS suggest that this is something which cannot be controlled operationally (through whatever tugs or restrictions the Harbour Master decides appropriate).

7.20. To compound matters, the IOT Operators' NRA document wrongly seeks to introduce COMAH assessment of landside risk. That is in fact fact concerned with the exposure of populations in respect of landside infrastructure as corroborated by the HSE. It has no application to a navigational risk in quantifying risk outcomes. The IOT Operators similarly make of misconceived use of statistical information in relation to capsize events that relates to data that is obviously inapplicable to this context.

7.21. The Applicant has provided detailed responses to these points (see **REP 6-030** and **REP06-31** and other representations identified above). It has done so without prejudice to the basic point that embarking upon that sort of surrogate assessment process is wrong in principle for the reasons explained. That includes the fact that the relevant persons with statutory responsibility for the safety in this location, the Humber

Harbour Master and the Port of Immingham Dock Master have satisfied themselves of the conclusions in the NRA, having participated in full in all of the assessment process and simulation exercise.

7.22. As a matter of further principle, the Applicant submits that it remains of crucial importance, that the Harbour and Safety Board (HASB), as Duty Holder, consider that the risks associated with the IERRT development, taking account of the proposed Applied Controls, are tolerable and ALARP. The Applicant cannot overstate enough that it would not, in any way, be in the interest of ABP to construct a terminal that it did not consider to be safe.

7.23. IOT and DFDS have sought to make various comments relating to the cost benefit analysis (CBA) for the IERRT project with respect to the Applied Controls identified in the NRA, in addition to producing their own purported NRAs.

7.24. In fact the Applicant's approach to CBA has been consistent throughout the examination and the Applicant has provided further details of that process (the details of which were not set out in the NRA process or records) as requested. Furthermore, given that navigational safety is and will remain an ongoing matter of interest to the Applicant, as the Examining Authority has identified, the Applicant has taken all of the further information made available at the examination, including the NRA documents from the IOT Operators and DFDS and considered it again, alongside the Supplementary Navigation Information Report [**REP7-030**]. This is also now covered again in **REP 10-017**. This has resulted in a further consideration by the HAS Board.

7.25. In addition, the Applicant has gone beyond what is required by the NRA process and assessments by offering Enhanced Operational Controls from the start of operations (as advised in the IERRT NRA) in relation to the use of the main berth of concern to the IOT Operators in berthing during an ebb tide. At the same time, it has proposed authorisation for physical impact action measures to be delivered if they were ever required. All of the assessments to date from the NRA, now supplemented by the offer of Enhanced Operational Controls, show that such impact protection measures are not required to make any residual risk tolerable and ALARP. But in recognition that safety is always a matter for continued review and the continuing assessments that will be undertaken by the Humber Harbour Master, it is seeking the powers to provide such measures if they are deemed necessary for any reason.

7.26. The Applicant has therefore adopted an entirely appropriate approach, going beyond what its own NRA identifies as necessary and a correct approach in the context of ongoing marine operations at the Port.

7.27. On this basis, the Applicant has no doubt that the risks associated with construction and operation of IERRT, as assessed in the NRA with the applied controls, are indeed tolerable and ALARP. That was determined by the Duty Holder at the meeting of the HASB on 12th December 2022 and reaffirmed by the Duty Holder at the meeting of the HASB on Friday 8th December 2023 [**REP7-011]**. It is supported by the detailed assessment work undertaken and the considered and clear views of the highly experienced and knowledgeable Humber Harbour Master. Those risks will be continuously monitored and operating conditions remain subject to the control of the Humber Harbour Master in any event.

7.28. At the request of the Examining Authority, the Applicant has provided alternative wording for any requirement that could be imposed in principle if the Secretary of State considered it necessary to impose additional controls – which now include the Enhanced Operational Controls" – although the introduction of such controls has been incorporated in the draft DCO without prejudice to the Applicant's position that such controls are not necessary or appropriate. The same applies to the principle of requiring the impact protection measures to be installed prior to construction or operation of the IERRT.

7.29. At the conclusion of the examination the IOT Operators and DFDS appear to be claiming that consent for the DCO should be refused on the basis of concerns about navigational safety. Quite apart from all the points above which show why their concerns are not justified, a suggestion that the DCO should not be approved at all does not withstand scrutiny. It is clear that any concerns the are expressing in relation to residual risk in respect of the IOT facility or the use of the Eastern Jetty are ones that they themselves do not suggest cannot be overcome by operational controls (such as use of tugs or timing of operations). There therefore could not be any rational basis even on their own evidence for maintaining a suggestion that the DCO should be refused altogether.

7.30. For these reasons and again those set out in much more detail in the Applicant's evidence, the Applicant submits that there is no basis for objection to the DCO on navigational safety grounds and navigational safety is fully controlled and addressed by the statutory regime that will continue to apply to the River Humber and the Port of Immingham. ABP as port owner and operator and ABP as statutory harbour authority has its own paramount interest in ensuring that the Proposed Development is operated safely and ensuring no unacceptable risk to the IOT facility or any other facility anyway.

## 8. Ecology

8.1. The IERRT project's effect on biodiversity, ecology and the natural environment, in particular the integrity of the Humber Estuary Special Area of Conservation (SAC), Special Protection Area (SPA) and Ramsar site (known together as the Humber Estuary European Marine Site (EMS)), has been assessed within the submitted Habitats Regulations Assessment (HRA) report and the Environmental Statement (ES).

8.2. The assessments were based on a robust evidence base supported by extensive baseline surveys covering the last two decades. ABPmer, who led the assessments, has worked on multiple projects on the Humber Estuary and has a detailed understanding of the local baseline environment and potential impacts associated with port development.

8.3. The Applicant, along with ABPmer as its technical expert consultants, have extensively consulted with the Marine Management Organisation (MMO) (and Cefas as the MMO's technical advisors), the Environment Agency, and Natural England.

8.4. Without repeating an exhaustive list of matters discussed during examination, which is provided in the respective Statements of Common Ground (SoCGs), the key issues raised by the MMO included:

8.4.1. Underwater noise effects during piling activities and effects on migratory fish and marine mammals;

8.4.2. Suitability of the proposed migratory fish restrictions; and

8.4.3. Sediment contamination and the suitability of dredged material for disposal at sea.

8.5. The Applicant is pleased to report agreement on all of these matters raised by the MMO, as recorded in the SoCG [**REP10-011**] with the Applicant. On that basis, with mitigation in place, underwater noise effects are not considered significant and will not result in an AEOI on the Humber Estuary SAC or Ramsar site. Further, the dredge material is considered suitable for disposal at sea as proposed by the Applicant.

8.6. At the outset of the examination, Natural England identified 47 issues, in relation to air quality, coastal waterbirds, benthic habitats, migratory fish, marine mammals, and in-combination effects. All but two of the comments raised throughout the examination process have been resolved through engagement with Natural England and the provision of detailed evidence, but in circumstances where Natural England have failed to participate in the examination itself.

8.7. By the end of the examination, there are only residual issues that remain outstanding consisting of:

8.7.1. Noise and visual disturbance to coastal waterbirds during construction and the proposed mitigation measures using a 200 m disturbance distance; and

8.7.2. Direct and indirect loss of intertidal habitat in-combination with other plans and projects.

8.8. As to the first, this simply relates to the wording of a condition in the Draft Marine Licence (DML) affecting construction and whether the distance should be 200m or 300m.

8.9. The Applicant and its expert advisers and ornithologist remains firmly of the view, having regard to all of the available scientific evidence and data, that the proposed winter construction restriction within a 200 m distance of exposed intertidal mudflat is entirely appropriate in a port environment and more than sufficient to address any construction noise impacts on birds.

8.10. This will ensure with a very high confidence that there will not be an AEoI when considered against the site's conservation objectives. Natural England has not produced any information in the context of an operational port or an already disturbed environment to support any contrary position and so its position cannot and should not be accepted. Mere assertion of a risk in this context is not sufficient. Some credible evidence must be produced that this is a real rather than a hypothetical risk which requires consideration: see eg *Boggis v Natural England* [2009] EWCA Civ. 1061 at paragraph 37. No such evidence has been produced and the increased restriction is not justified on the scientific evidence which the Applicant has produced.

8.11. This is not inconsequential to the delivery of the IERRT project. Any further restrictions, in this case an additional spatial restriction on works within 300 m of exposed mudflat (as opposed to 200 m as currently proposed), would disproportionately extend the overall construction period for the project. Given the complex and comprehensive nature of the overall mitigation measures, the addition of further restrictions is likely to have a disproportionate effect on the overall construction programme therefore creating a greater exposure for birds as well as other receptors. So the concern is not only unjustified, but there is good reason not to accept it.

8.12. Notwithstanding the points above, the point of difference does not fundamentally detract from the environmental acceptability of the scheme and relates only to the wording of the DML which has been agreed with the Marine Management Organisation, but it is important in principle that the requirement reflects the evidential position rather than a hypothetical risk which is not real.

8.13. As to the position in terms of intertidal loss of habitat, this is only a concern that is identified in respect of an "in-combination" effect with the IGET project which has been submitted for examination. The IGET project has agreed that if any in-combination effects of the type identified above could not be ruled out, the IGET project would address these. So this concern cannot realistically be a reason for concluding that the Proposed Development will result in AEoI.

8.14. Again, the concern being expressed is not justified and not supported by any credible evidence from Natural England. Natural England merely assert that an AEoI cannot be ruled out in relation to the Humber Estuary SAC, but do not explain the evidential basis for this in contrast to what the Applicant has provided. In this context it should also be noted that Natural England clearly state loss is not considered AEoI with respect to the SPA.

8.15. The Applicant's experts strongly disagree with Natural England's assertion on this, as explained in the Applicant's Response to Natural England's Deadline 9 Submission (submitted at Deadline 10 [**REP10-018**]). The area of intertidal loss caused by the IERRT project not just on its own, but also in-combination with other projects, is of negligible ecological value, is not significantly contributing towards the conservation objectives of the site, and does not constitute an AEoI. So the Applicant has no hesitation in submitting that the Secretary of State should reject this concern as it is not supported by an evidence and appears to reflect a basic misunderstanding of the factual position by Natural England, not assisted by the fact that Natural England has chosen not to participate in the examination where such points of misapprehension could have been resolved.

8.16. Without prejudice to the Applicant's position, and that any in-combination effect would be addressed by IGET if it were found to arise, the Applicant has provided a Derogation Report [**REP10-018**] as requested by the ExA in the event that a different view is reached by the Secretary of State. It is noted that Natural England agree with the suitability of the compensation proposed and the Applicant submits that there can be little doubt that the other elements of lack of alternatives and IROPI would be made out, particularly when considering the extremely limited AEOI that is being asserted.

## 9. Other Matters

Compulsory Acquisition Powers

9.1. From the outset and throughout the examination process, the Applicant has engaged proactively and constructively with those parties identified with rights that might be affected by the IERRT (as identified in the Book of Reference [**APP-016**], Land Plans including Crown Land [**APP-006**], and Statement of Reasons [**APP-017**] submitted with the application).

9.2. As noted in the updated Book of Reference [**REP8-006**], Land Plans including Crown Land [**REP8-030**] and Statement of Reasons Addendum [**REP9-004**] all issues arising in relation to the majority of the originally identified parties subject to powers of compulsory acquisition – all of whom are tenants of ABP (apart from The Crown Estate) - have been satisfactorily resolved, save in respect of two parties where acquisition negotiations are ongoing.

9.3. Mr Drury, Drury Engineering Services Limited, P.K. Construction (Lincs) Limited, and Malcolm West Fork Lifts (Immingham) Limited (Plots 1 -6 in the Book of Reference [**REP8-006**]. As explained by the Applicant in response to ExQ4 CA.4.01 [**REP8-020**], Heads of Terms are in circulation with these parties together with drafts of proposed agreements for review. All of the parties wish to remain on site as is also the wish of the Applicant as evidenced by the fact that each of the parties have provided Letters of Comfort to the Examination confirming that they are confident they will be able to settle the necessary property agreements to their mutual satisfaction. (see [**REP8-034**], [**REP8-035**] and [**REP9-016**];

9.4. Volkswagen Group United Kingdom Limited (Plot 9 in the Book of Reference [**REP8-020**]) – as most recently explained by the Applicant at Deadline 10 (see Appendix 2 to [**REP10-001**]), the Applicant has been in active discussions with VWG since September and remains hopeful that the parties will reach a satisfactory agreement bearing in mind, as indicated by the Applicant at ISH6, VWG are anxious to relocate to the Port of Grimsby, owned and operated by the Applicant and the delay has only arisen as a result of extended negotiations as to lease terms.

9.5. Notwithstanding the positive progress that is being made, the Applicant does not consider that negotiations in relation to Drurys and the subtenants and VWG will be settled prior to close of the Examination on 25 January 2024. Accordingly, the Applicant considers compulsory acquisition powers will need to be retained in the dDCO [**REP10-004**], noting that it will continue engaging with the parties noted above to reach agreement in respect of the affected interests and will keep the Examining Authority and the Secretary of State informed as to any developments in this respect.

9.6. The Applicant submits that there is a compelling case in the public interest for making such provision for such acquisition in the circumstances for the delivery of IERRT and such acquisition is necessary and proportionate.

Wording of the DCO and Protective Provisions

9.7. The Applicant considers that any remaining points of dispute regarding the wording of the DCO as between it and the objectors are very limited. The Applicant has set out its position on the wording it has identified, having accepted in principle various changes through the course of the examination.

9.8. By way of example, CLdN continue to raise an issue as to whether or not the NRA is specifically identified as a certified document and criticises the Applicant in this respect. Again, there is no basis for doing so. The Applicant originally identified the NRA as a document to be referenced in the DCO. The Examining Authority queried whether it was necessary to do so. In response, the Applicant recognised that it is not necessary to do so given that the process of risk assessment will continue and be controlled by the navigational authorities as summarised above. The NRA is in any event part of the ES which is certified. The Applicant therefore does not consider it is necessary to reference it specifically, but ultimately remains neutral if that course were to be adopted.

9.9. The Applicant's approach to protective provisions recognises that, as it is the freehold owner of the port estate, statutory undertakers' apparatus within the red line are already protected by existing legal agreements – lease/licence/easement with ABP. Many of these are long standing agreements and all were entered into in contemplation of everyday port operations and activities, providing sufficient protections for the undertakers' interests and apparatus in these circumstances.

9.10. The Applicant recognises, however, that the construction of the proposed development is a special case during which the existing agreements may not afford sufficient protections to these bodies. As such, the Applicant has offered proportionate and reasonable additional protections to these statutory undertakers for the construction period, on the basis that, once construction has finished and the port has returned to 'business as usual' the relationship between the parties should revert back to that which is extant. The degree to which the protective provisions contained in the Applicant's final dDCO [**REP10-004**] are agreed has been recorded in the Protective Provisions Tracker document submitted at Deadline 9 [**REP9-009**].

9.11. It is perhaps unsurprising that the Applicant has not been able to agree protective provisions with the three main objectors, DFDS, CLdN and IOT Operators, each of which have asserted that the protections offered by the Applicant are insufficient.

9.12. The Applicant has provided substantive explanations of its position in relation to these parties, and would refer the Secretary of State to [**REP7-029**] and [**REP9-012**] in relation to DFDS, [**AS-070**] and [**REP9-010**] in respect of CLdN, and [**REP7-029**] and [**REP9-011**] in relation to IOT Operators.

9.13. In short, the Applicant considers that the objectors are seeking disproportionate protections and restrictions (some of which even fall beyond the ability of the Applicant to provide) in order to protect and secure a competitive advantage (in the case of DFDS and CLdN) or which would impose unnecessary protections (in light of the betterment IOT Operators have sought) that would threaten the proposed development's viability and deliverability (IOT Operators).

9.14. Cadent Gas and Anglian Water have also made submissions regarding the Applicant's proposed protective provisions and having been unwilling to agree with the Applicant's requirement for proportionate and time limited protections. Both parties have existing agreements with the Applicant. These parties have instead resisted engaging with the substance of the proposed development and are requiring that their precedent terms should be accepted by the Applicant regardless of the circumstances. The Applicant queries whether those bodies have actually understood or considered what the IERRT proposals actually comprise, and have instead just proposed their own standard precedents.

9.15. As a consequence, the Applicant has outlined the reasons for the amendments which it is seeking to the relevant protection provisions in [**REP9-006**] (Anglian Water) and [**REP10-001**] (Cadent Gas).

## 10. S.104 and the Planning Balance

10.1. In light of all the evidence, the Applicant commends this DCO to the Secretary of State and invites the Examining Authority to recommend that it is made.

10.2. It provides essential infrastructure for the Humber Estuary that contributes to meeting an urgent and compelling need identified in the NPSfP and a specific assessed need for this facility in this location. It will deliver substantial benefits. It will do so with no material adverse impacts.

10.3. It will be constructed and operated safely and will not adversely affect the operations of the IOT or any other operator in the Port of Immingham (let alone significantly). It will deliver a significant boost to the local economy and delivery of jobs in an area identified for levelling up.

10.4. It is vital national infrastructure for that economy and the economy of the nation.

# Immingham Eastern Ro-Ro Terminal

## Appendix

Neutral Citation Number: [2020] EWHC 1303 (Admin)

Case No: CO/4498/2019

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**PLANNING COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2020

**Before** :

**THE HON. MR JUSTICE HOLGATE**

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**Between :**

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|---|---|
| **The Queen on the application of ClientEarth** | **Claimant** |
| **- and -** | |
| **Secretary of State for Business, Energy and Industrial Strategy** | **Defendant** |
| **-and-** | |
| **Drax Power Ltd** | **Interested Party** |

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**Mr Gregory Jones QC and Ms Merrow Golden** (instructed by **ClientEarth**) for the **Claimant**
**Mr Andrew Tait QC and Mr Ned Westaway** (instructed by **Government Legal Department**) for the **Defendant**
**Mr James Strachan QC and Mr Mark Westmoreland Smith** (instructed by **Pinsent Masons LLP**) for the **Interested Party**

Hearing dates: 28th – 30th April 2020

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# Approved Judgment

**Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 14:00 on the 22th May 2020**

**Mr Justice Holgate :**

## Introduction

1. The Claimant, ClientEarth, applies under s. 118 of the Planning Act 2008 ("PA 2008") for judicial review of the decision by the Defendant, the Secretary of State for Business, Energy and Industrial Strategy, on 4 October 2019 to grant the application made by Drax Power Limited ("Drax") for a development consent order ("DCO") for a "nationally significant infrastructure project" ("NSIP"): the construction and operation of two gas-fired generating units situated at the existing Drax Power Station near Selby in North Yorkshire ("the development"). The Order made by the Secretary of State is The Drax Power (Generating Stations) Order 2019 (SI 2019 No. 1315) ("the Order").

2. The Claimant is an environmental law charity. Its charitable objects include the enhancement, restoration, conservation and protection of the environment, including the protection of human health, for the public benefit.

3. This challenge raises important issues on (a) the interpretation of the Overarching National Policy Statement for Energy ("EN-1") and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure ("EN-2"), both of which applied to the proposal, and (b) their legal effect in the determination of the application for a DCO, particularly as regards the need for the development and greenhouse gas emissions ("GHG"). These National Policy Statements ("NPSs") were designated in July 2011.

4. The proposal by Drax gave rise to a number of controversial issues which were considered during the examination of the application. Some of those issues are raised in grounds of challenge in these proceedings. It is important to emphasise at the outset that it is not for the court to consider the merits of the proposed development or of the objections made to it. It is only concerned with whether an error of law was made in the decision or in the process leading up to it.

5. On 29 May 2018 Drax made its application under s. 37 of PA 2008 for the Order. On 26 June 2018 the Secretary of State accepted the application under s. 55. On 16 July 2018 a panel comprising two members was appointed to be the examining authority (the "ExA" or "Panel"). Their responsibility was to conduct the examination of the application and to report on it to the Secretary of State with conclusions and a recommendation as to how it should be determined (under chapters 2 and 4 of Part 6 of PA 2008). The examination began on 4 October 2018 and was completed on 4 April 2019.

6. The Panel produced their report dated 4 July 2019. They recommended that consent for the development be withheld. The Secretary of State disagreed with that recommendation and on 4 October 2019 decided to make the Order (with minor modifications). The decision was taken by the Minister of State acting on behalf of the Defendant.

*The development*

7. The development involves the construction of two gas-fired units (units X and Y) utilising some of the existing infrastructure of two coal-fired units currently in operation at the site (units 5 and 6 with a total output of 1320 MW), which are due to be decommissioned in 2022. Each unit would comprise combined cycle gas turbine ("CCGT") and open cycle gas turbine ("OCGT") technology, with a capacity of up to 1,800 MW. Each unit would also have battery storage of up to 100 MW, giving the development an overall capacity of up to 3,800 MW.

8. The development also includes switchgear buildings, a natural gas reception facility, an above ground gas installation, an underground gas pipeline, underground electrical connections, temporary construction areas, a reserve space for Carbon Capture Storage ("CCS"), landscaping and biodiversity measures, demolition and construction of sludge lagoons, removal of an existing 132 kV overhead line, pylons and further associated development. The development would also involve a 3 km gas pipeline connecting to the National Grid Feeder lying to the east of the site.

9. The construction of Unit X was expected to begin in 2019/2020 and be completed by 2022/2023. If Unit Y were to be built, the construction was expected to start in 2024 and be completed by 2027. The development is designed to operate for up to 25 years, after which Drax has stated that it would review the development's continued operation. The Order does not contain any condition restricting the period for which the facility may be operated.

*Need for the development*

10. The Claimant participated in the examination, by attending hearings and submitting a number of written representations. The Claimant objected to the development on the grounds that its adverse impacts outweighed its benefits, both as assessed under the NPSs and through the application of the balancing exercise required by s 104(7) of PA 2008 (see below). The Claimant's position was that there was no need for the proposed development and that it would have significant adverse environmental impacts, particularly in respect of likely GHG emissions, the risk of "carbon lock-in" and impact on climate change.

11. Drax's position throughout the examination was that the need for the development, being a type of generating station identified in Part 3 of NPS EN-1, was established through that NPS and that substantial weight should be attributed to the contribution the development would make to meeting the needs for additional energy capacity (both security of supply and to assist in the transition to a low carbon economy). Drax contended that the substantial weight attributable to the development's actual contribution to meeting needs identified in EN-1 was not outweighed by the adverse impacts of the development.

*Climate change and GHG emissions*

12. The Environmental Statement ("ES") submitted with the application contained an assessment of the likely significant effects of the development upon climate change. It estimated that the development would cause GHG emissions to increase from 188,323,000 tCO2e to 287,568,000 tCO2e over the period 2020 to 2050 against the baseline position, a 90% net increase. But at the same time, there would be an increase in the maximum generating capacity from 1320 MW to 3600 MW for the

development (excluding the battery storage capability), representing an increase of 173% in the maximum electricity generating capacity.

13. Relating the emissions produced to the generating capacity, the ES assessed that the GHG emissions *intensity* for the existing coal fired units would be 840 gCO2e/kWh in the period 2020 to 2025 and fall to 450 gCO2e/kWh in the period 2026 to 2050 in the baseline scenario. For the development, the figure would be 380 gCO2e/kWh, representing a 55% reduction in GHG intensity for the period 2023 to 2025 and a 16% reduction in the period 2026 to 2050.

14. According to the Claimant's assessment, the development would result in a 443% increase in emissions intensity (using an average baseline emissions intensity of 70 gCO2e/kWh) and a 488% increase in total GHG emissions.

15. There was no disagreement as to the possible extent of future emissions from the proposed development; the disagreement was over the baseline against which they should be assessed and thus the likely net effect of the development. It was common ground between the parties during the examination that an increase in total GHG emissions of 90% represented a significant adverse effect.

*An overview of the conclusions of the Panel and the Secretary of State*

16. The Panel concluded that "a reasonable baseline was likely to be somewhere in between" the figures assessed by Drax and by the Claimant and so the increase in GHG emissions was likely to be higher than had been estimated by Drax (paras. 5.3.22 and 5.3.27-5.3.28).

17. The Panel concluded that whilst the NPSs supported a need for additional energy infrastructure in general, Drax had not demonstrated that the development itself met an identified need for gas generation capacity when assessed against EN-1's overarching policy objectives of security of supply, affordability and decarbonisation. It found that the development would not accord with the Energy NPSs and that it would undermine the Government's commitment to cut GHG emissions, as set out in the Climate Change Act 2008 ("CCA 2008") (paras. 5.2.4, 5.3.27, 7.2.7, 7.2.10, and 11.1.2)

18. Applying the balancing exercise in s. 104(7) of the PA 2008, the Panel concluded that the adverse impacts of the development outweighed the benefits, the case for development consent had not been made out and so consent should be withheld (section 7.3).

19. The Secretary of State disagreed with the Panel's recommendation and decided that the Order should be made, concluding at DL 7.1 that "there is a compelling case for granting consent for the development" and that:-

> "…The Secretary of State considers that the Development would be in accordance with the relevant NPSs and, given the national need for such development as set out in the relevant NPSs, the Secretary of State does not believe that its benefits are outweighed by the Development's potential adverse impacts, as mitigated by the proposed terms of the Order. As such, the Secretary of State has decided to make the Order granting development consent ….."

20. The Secretary of State disagreed with the Panel on need. In summary, she decided that EN-1 assumed a general need for fossil fuel generation and did not draw any distinction between that general need and the need for any particular proposed development. She also stated that substantial weight should be given to a project contributing to that need.

21. The Secretary of State noted the significant adverse impact that the development would have, through the amount of GHGs that would be emitted to the atmosphere, but at DL 4.15-4.16 she relied upon paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2 to conclude that those emissions did not afford a reason for refusal of consent or to displace the presumption in the policy in favour of granting consent (see also DL 6.7).

22. In DL 6.8 and 6.9 the Secretary of State referred to negative visual and landscape impacts and to the positive effects of the development regarding biodiversity and socio-economic matters and the proposed re-use of existing infrastructure at the power station. She concluded that "there are strong arguments in favour of granting consent for the full, two gas units and two battery storage units, 3.8 GW project because of its contribution to meeting the need case set out in the NPSs". She therefore considered that the benefits of the proposal outweighed its adverse effects for the purposes of s. 104(7) of the PA 2008.

23. Originally the Claimant advanced 9 grounds of challenge to the Secretary of State's decision. In summary the raised the following issues:

> **Ground 1:** The Defendant misinterpreted the NPS EN-1 on the assessment of the "need" for the Development.
>
> **Ground 2:** The Defendant failed to give adequate reasons for her assessment of the "need" for the Development.
>
> **Ground 3:** The Defendant misinterpreted NPS EN-1 on the assessment of GHG emissions.
>
> **Ground 4:** The Defendant misinterpreted and misapplied section 104(7) of the Planning Act 2008.
>
> **Ground 5:** The Defendant failed to assess the carbon-capture readiness of the Development correctly in accordance with EN-1.
>
> **Ground 6:** The Defendant failed to comply with the requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.
>
> **Ground 7:** The Defendant's consideration of the net zero target was procedurally unfair and, or in the alternative, the Defendant failed to give adequate reasons for her consideration of the net zero target.
>
> **Ground 8:** The Defendant failed to fully consider the net zero target, including whether to impose a time-limiting condition on the Development.
>
> **Ground 9:** The Decision was irrational.

24. This judgment is structured as follows (with paragraph numbers):-



25. Before going any further, I would like to express my gratitude for the way in which this case was presented and argued by Counsel and Solicitors on all sides and for the help which the court received. There was a good deal of co-operation in the production of electronic bundles to ensure that these complied with the various protocols and guidance on remote hearings and were relatively easy to use despite the amount of material which needed to be included.

## The Planning Act 2008

*The White Paper: Planning for a Sustainable Future*

26. The statutory framework of the Planning Act 2008 was summarised by the Divisional Court in R (Spurrier) v Secretary of State for Transport [2020] PTSR 240 at [20] to [40]. This bespoke form of development control for NSIPs had its origins in the White Paper published in May 2007, "Planning for a Sustainable Future" (Cm. 7120). A key problem which the legislation was designed to tackle was the lack of clear statements of national policy, particularly on the national need for infrastructure. This had caused, for example, significant delays at the public inquiry stage because national policy had to be clarified and need had to be established through the inquiry process for each individual application. Sometimes the evidence at individual inquiries might not have given a sufficiently full picture. Furthermore, there was no prior consultation

process by which the public and interested parties could participate in the formulation of national policy, which might only emerge through ad hoc decisions by ministers on individual planning appeals.

27. Paragraph 3.2 of the White Paper pointed out that the absence of a clear national policy framework can make it more difficult for developers to make investment decisions which by their nature are often long term in nature and "therefore depend on government policy and objectives being clear and reasonably stable."

28. Paragraph 3.4 stated that NPSs:-

> "would integrate the Government's objectives for infrastructure capacity and development with its wider economic, environmental and social policy objectives, including climate change goals and targets, in order to deliver sustainable development."

29. Paragraph 3.8 explained that NPSs would need to reflect differences between infrastructure sectors, so that in contrast to projects dependent on public funding where Government has a large influence on what goes ahead:-

> "where government policy is primarily providing a framework for private sector investment determined by the market, policy statements are likely to be less prescriptive."

Likewise, paragraph 3.9 recognised that in the energy sector:-

> "the precise energy mix, and therefore the nature of infrastructure needed to meet demand, is determined to a large extent by the market."

30. Paragraph 3.11 stated:-

> "There should therefore be no need for inquiries on individual applications for development consent to cover issues such as whether there is a case for infrastructure development, what that case is, or the sorts of development most likely to meet the need for additional capacity, since this will already have been addressed in the national policy statement. It would of course be open to anyone to draw the Government's attention to what they believe is new evidence which would affect the current validity of a national policy statement. Were that to happen, the relevant Secretary of State would then decide whether the evidence was both new and so significant that it warranted revisions to national policy. The proposer of the new evidence would be informed of the Secretary of State's decision. This would ensure that inquiries can focus on the specific and local impacts of individual applications, against the background of a clear assessment of what is in the national interest. This, in turn, should result in more focused and efficient inquiry processes."

31. So the object was for policies on matters such as the need for infrastructure to be formulated and tested through the process leading up to the decision to adopt a national policy statement and to that extent they would not be open to challenge through subsequent consenting procedures. New evidence, such as a change in circumstance since the policy was adopted, would be addressed by the Secretary of

State making a revision to the policy, in so far as he or she judged that to be appropriate. In essence, the 2008 Act gave effect to these principles.

*Statutory Framework*

32. Section 5(1) of the 2008 Act enables the Secretary of State to designate a NPS setting out national policy on one or more descriptions of development. Before doing so the Secretary of State must carry out an appraisal of the sustainability of the policy (s.5(3)). In addition, the Secretary of State will normally be required to carry out a strategic environmental assessment ("SEA") in compliance with the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No 1633). The SEA process itself involves consultation with the public and relevant authorities.

33. The Secretary of State must also comply with the publicity and consultation requirements laid down by s.7 and the proposed NPS must undergo Parliamentary scrutiny under s.9.

34. Section 5(5)(a) provides that a NPS may "set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area." Thus, policy in a NPS may determine the need for a particular infrastructure project, or development of a particular type (Spurrier at [99]). It may describe that need in quantitative or qualitative terms, or a mixture of the two.

35. Section 5(5)(c) enables policy in a NPS to determine "the relative weight to be given to specific criteria." So, for example, a NPS may determine that the need for a development should be given "substantial weight" in the decision on an application for a DCO.

36. Section 5(7) requires a NPS to "give reasons for the policy set out in the statement." As the Divisional Court explained in Spurrier, that obligation deals with the supporting rationale for the policies in the NPS which the Secretary of State decides to include ([118] to [120]). In that context, section 5(8) requires those reasons to include "an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."

37. Section 6(1) obliges the Secretary of State to review a NPS whenever he thinks it appropriate to do so. Under section 6(3):-

> "In deciding when to review a national policy statement the Secretary of State must consider whether—
>
> > (a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,
> >
> > (b) the change was not anticipated at that time, and
> >
> > (c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different."

Section 6(4) employs the same three criteria for reviews of part of a NPS.

38. So the Secretary of State must consider not only whether there has been a significant change in circumstance on the basis of which policy in the NPS was decided, and which was not anticipated when the NPS was first published, but also whether if that change had been so anticipated, the policy would have been materially different. If not, then the power to review is not engaged and the NPS continues in force unamended. But if a review is carried out, any revised policy is also subject to sustainability appraisal, SEA, publicity, consultation and Parliamentary scrutiny. Thus, the 2008 Act proceeds on the legal principle that significant changes in circumstances affecting the basis for, or content of, a policy may only be taken into account through the statutory process of review under s.6 (Spurrier at [108]).

39. Section 10(2) requires the Secretary of State to exercise his functions under ss.5 or 6 "with the objective of contributing to the achievement of sustainable development." By s.10(3) the Secretary of State must (in particular) have regard to the desirability of *inter alia* "mitigating, and adapting to, climate change." In Spurrier the Divisional Court held that the PA 2008 and the CCA 2008 should be read together. They were passed on the same day and the language which is common to ss.5(8) and 10(3) of the PA 2008 refers to the very objective of the CCA 2008. As Hansard shows that is confirmed by the way in which these provisions were introduced into the legislation (see Spurrier at [644] to [647]).

40. Thus, EN-1 and EN-2 had to satisfy all these statutory requirements, including the obligation to promote the objective of CCA 2008, before they could finally be designated. Even then, they could have been the subject of legal challenge by way of judicial review under s.13 of PA 2008.

41. Once a NPS has been designated, sections 87(3), 94(8) and 106(1) enable the examining authority during the examination of an application for a DCO, and the Secretary of State when determining an application for a DCO, to disregard *inter alia* representations, including evidence, which are considered to "relate to the merits of policy set out in a national policy statement."

42. Mr. Tait QC for the Secretary of State and Mr. Strachan QC for Drax submitted that these provisions give effect to the principle that the policy laid down in an NPS, for example on the need for particular infrastructure, is to be treated as settled for the purposes of examining and determining an application for a DCO, and thus not open to challenge in that process. That principle has been considered by the courts in R (Thames Blue Green Economy Limited) v Secretary of State for Communities and Local Government [2015] EWHC 727 (Admin); [2015] EWCA Civ 876; [2016] J.P.L. 157; R (Scarisbrick) v Secretary of State for Communities and Local Government [2017] EWCA Civ 787; and Spurrier at [99] to [111], to which I return below.

43. The Claimant in this case seeks to protect environmental and health interests of great public importance which it says argue strongly against any development of the kind proposed taking place. But those matters are not freestanding. There are also other public interest issues which operate in favour of such development, such as its contribution to security and diversity of energy supply and the provision of support for the transition to a low carbon economy. Policy-making in this area involves the

striking of a balance in which these and a great many other issues are assessed and weighed, This is carried on at a high strategic level and involves political judgment as to what is in the public interest.

44. The scheme in the PA 2008 for the making of national policy accords with well-established constitutional principles. As the Divisional Court said in Spurrier [2020] PTSR 240 at [153]:-

> "Under our constitution policy-making at the national level is the responsibility of democratically-elected governments and ministers accountable to Parliament. As Lord Hoff mann said in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras 69 and 74: "It does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires."

45. Also in Alconbury Lord Clyde stated at [140]:-

> "Planning and the development of land are matters which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured."

and at [141]:-

> "Once it is recognised that there should be a national planning policy under a central supervision, it is consistent with democratic principle that the responsibility for that work should lie on the shoulders of a minister answerable to Parliament."

46. Under the PA 2008 responsibility for the content and merits of policy in a NPS, or for the merits of revising any such policy, lies with the relevant Secretary of State who is accountable to Parliament. For example, it is open to Parliament to raise questions with a Minister as to whether a NPS needs to be reviewed because of a change in circumstances. The court's role is limited to the application of principles of public law in proceedings for judicial review brought in accordance with the terms of the Act.

47. Part 3 of PA 2008 defines those developments which qualify as NSIPs to which the DCO code and the relevant NPS apply. By s.15 a generating station with a capacity in excess of 50 MW if located onshore or 100 MW if located offshore, is treated as a NSIP. Smaller scale generating projects are excluded from this statutory scheme and fall within the normal development control regime under the Town and Country Planning Act 1990 ("TCPA 1990").

48. Section 104 applies to the determination of an application for a DCO where a NPS is applicable. Section 104(2) requires the Secretary of State to have regard to (inter alia) a relevant NPS. Section 104(3) goes further:-

> "The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies."

It is important to note the words in s.104(3) "except to the extent that", recognising that an exception in subsections (4) to (8) may only have the effect of disapplying the obligation in s.104(3) as regards part of a NPS, or perhaps part of a project.

49. Section 104(5) provides:-

> "This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment."

50. Section 104(7) provides:-

> "This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits."

51. Where an application is made for a DCO for development to which a NPS applies, and the Secretary of State considers that the NPS should be reviewed under s.6 before the application is determined, he may suspend the examination of that application until the review is completed (s.108).

52. Section 116 imposes on the Secretary of State an obligation to give reasons for the decision under s.114 whether to grant or refuse development consent.

**The National Policy Statements on energy infrastructure**

*EN-1*

53. EN-1 sets out the overarching policy for delivery of major energy infrastructure. It is to be read alongside 5 technology-specific NPSs for the energy sector (para. 1.7). In the present case EN-2 is relevant.

54. EN-1 falls into 5 parts. Following an introductory section, Part 2 sets out Government policy on "energy and energy infrastructure development", including section 2.2 "The road to 2050". Part 3 is devoted to the Government's policy on the need for new NSIPs in the energy sector. Part 4 contains assessment principles for matters not falling within Parts 3 or 5. Part 5 addresses "generic impacts", in the sense of impacts arising from any type of energy infrastructure covered by the NPSs, or impacts arising in similar ways in relation to at least two energy NPSs. Technology-specific impacts are generally covered in the relevant NPS (para. 5.1.1).

55. Section 1.7 refers to the Appraisal of Sustainability ("AoS") carried out for all the energy NPSs, incorporating material required for SEA. The primary function of the AoSs was to inform consultation on the draft NPSs by providing an analysis of the environmental, social and economic impacts of granting DCOs for large-scale energy infrastructure projects in accordance with those policies (para. 1.7.1).

56. Paragraph 1.7.2 states that the energy NPSs should speed up transition to a low carbon economy and thus help to realise UK climate change commitments; but it recognised uncertainty because of difficulty in predicting "the mix of technology that will be delivered by the market against the framework set by the Government".

57. In accordance with the requirements of the 2004 Regulations for SEA, the AoS assessed "reasonable alternatives" to the policies set out in EN-1 at a strategic level (para. 1.7.5). Alternative A3 placed more emphasis on reducing $CO_2$ emissions which would be beneficial for climate change (para.1.7.8). It was concluded that it would not be possible to give practical effect to that alternative *through the planning system* in the next 10 years or so without adverse risks to the security of supply. Alternative A3 was not preferred to the policies in EN-1, but the Government said that it would consider other ways in which to encourage industry to accelerate progress towards a low carbon economy, particularly through the Electricity Market Reform project addressed in section 2.2 of the NPS (para.1.7.9). Paragraph 1.7.12 explained that because all the alternatives were "assessed as performing less well than EN-1 against one or more of the criteria for climate change or security of energy supply that are fundamental objectives of the plan" the Government's preferred option was to proceed with EN-1 to EN-6.

58. The Government's policy on energy infrastructure development in Part 2 of EN-1 is critical to understanding the policies on need, on which key parts of this challenge have focused.

59. Paragraph 2.1.1 states that there are three key goals, namely reducing carbon emissions, energy security and affordability. Large scale infrastructure plays a "vital role" in ensuring security of supply (para. 2.1.2).

60. Section 2.2 of EN-1 is entitled "the road to 2050". It was based upon the target then enshrined in the CCA 2008 of reducing GHG in 2050 by at least 80% compared to 1990 levels. Analysis of "pathways" produced to 2050 shows that this requires not only cleaner power generation but also the electrification of much of the UK's heating, industry and transport (para. 2.2.1). That "electrification" could itself double the demand for electricity over the period to 2050 (para. 2.2.22). In the same vein, paragraph 3.3.14 states that in order to be robust in all weather conditions the total capacity of electricity generation may need to more than double. If there were to be, for example, "very strong electrification of market demand and a high level of dependence on intermittent electricity generation" (e.g. renewables), then the capacity of electricity generation might need to triple.

61. Delivery of this "transformation" is to take place "within a market based system" and so the Government's focus is "on developing a clear, long-term policy framework which facilitates investment in the necessary new infrastructure (by the private sector) …" (para. 2.2.2).

62. Paragraph 2.2.4 states:-

> "…the planning system is only one of a number of vehicles that helps to deliver Government energy and climate change policy. The role of the planning system is to provide a framework which permits the construction of whatever Government – and players in the market responding to rules, incentives or signals from

> Government – have identified as the types of infrastructure we need in the places where it is acceptable in planning terms."

63. The transition to a low carbon economy is dealt with at paragraphs 2.2.5 to 2.2.11. The UK needs to wean itself off a high carbon energy mix, to reduce GHG emissions, and to improve the security, availability and affordability of energy through diversification. Under some of the "illustrative" 2050 pathways electricity generation would need to become virtually emission-free (para. 2.2.6).

64. The CCA 2008 has been put in place in order to drive the transition needed, by delivering emission reductions through a series of 5 year carbon budgets setting a trajectory to 2050 (para. 2.2.8).

65. Paragraphs 2.2.12 to 2.2.15 explain how the EU Emissions Trading System ("EU ETS") "forms the cornerstone of UK action to reduce greenhouse gas emissions from the power sector." The system sets a cap on emissions for different sectors of industry, including electricity generation. The cap translates to a finite number of allowances to emit GHG, which can be traded between operators, creating a carbon price, which in turn makes the production of electricity from carbon intensive power stations less attractive and creates an incentive for investment in cleaner electricity generation. The Government proposed to increase the emissions reduction target from 20% to 30% by 2020 and intended to go further than EU ETS to ensure developers invest in low carbon generation "to decarbonise the way in which we produce electricity and reinforce our security of supply, …" through its "Electricity Market Reform project" described in paragraphs 2.2.16 to 2.2.19. Paragraph 2.2.17 of EN-1 described a package of reforms which included an emissions performance standard.

66. Paragraph 2.2.19 makes this important statement:-

> "The Planning Act and any market reforms associated with the Electricity Market Reform project will complement each other and are consistent with the Government's established view that the development of new energy infrastructure is market-based. While the Government may choose to influence developers in one way or another to propose to build particular types of infrastructure, it remains a matter for the market to decide where and how to build, as market mechanisms will deliver the required infrastructure most efficiently. Against this background of possibly changing market structures, developers will still need development consent for each proposal. Whatever incentives, rules or other signals developers are responding to, the Government believes that the NPSs set out planning policies which both respect the principles of sustainable development and are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to help us maintain safe, secure, affordable and increasingly low carbon supplies of energy."

67. It is fundamental to a proper understanding of the policies in Part 3 on need that they be seen within the overall policy context in EN-1. Thus, planning operates in a market-based system and is only one of a number of vehicles for the delivery of energy and climate change policy. Planning provides a framework which allows the construction of whatever Government, or "players in the market" responding to rules, incentives or signals from Government, identify as the types of infrastructure needed

in locations acceptable in planning terms. The "incentives" and "signals" (further explained in para. 2.2.24) may be given through the EU ETS and Electricity Market Reforms.

68. Paragraph 2.2.20 to 2.2.26 address security of energy supplies. It is said to be "critical" for the UK to continue to have secure and reliable supplies of electricity as it makes the transition to a low carbon economy. To manage the risks to supply, the country must have sufficient capacity to meet variations in demand at all times, both simultaneously and continuously, given that electricity cannot be stored. This requires a safety margin of spare capacity to meet unforeseen fluctuations in supply or demand. There is a need for diversity in terms of technologies and fuels.

69. Paragraph 2.2.23 states that:

> "The UK must therefore reduce over time its dependence on fossil fuels, particularly unabated combustion. The Government plans to do this by improving energy efficiency and pursuing its objectives for renewables, nuclear power and carbon capture and storage. However some fossil fuels will still be needed during the transition to a low carbon economy."

70. According to paragraph 2.2.25 the two main challenges to security of supply during that transition are:-

> "• increasing reliance on imports of oil and gas as North Sea reserves decline in a world where energy demand is rising and oil and gas production and supply is increasingly politicised; and
>
> • the requirement for substantial and timely private sector investment over the next two decades in power stations, electricity networks and gas infrastructure."

71. Part 3 begins with the following policies for decision-making:-

> "3.1.1 The UK needs all the types of energy infrastructure covered by this NPS in order to achieve energy security at the same time as dramatically reducing greenhouse gas emissions.
>
> 3.1.2 It is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set targets for or limits on different technologies.
>
> 3.1.3 The IPC should therefore assess all applications for development consent for the types of infrastructure covered by the energy NPSs on the basis that the Government has demonstrated that there is a need for those types of infrastructure and that the scale and urgency of that need is as described for each of them in this Part.
>
> 3.1.4 The IPC should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent under the Planning Act 2008."

The functions of the "IPC" (the Infrastructure Planning Commission) for determining applications for DCOs were transferred to the Secretary of State by the Localism Act 2011.

72. Mr. Jones QC for the Claimant laid much emphasis on the reference in paragraph 3.1.4 to the contribution made by a project to satisfying need, which also appears towards the end of paragraph 3.2.3:-

> "This Part of the NPS explains why the Government considers that, without significant amounts of new large-scale energy infrastructure, the objectives of its energy and climate change policy cannot be fulfilled. However, as noted in Section 1.7, it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts. This Part also shows why the Government considers that the need for such infrastructure will often be urgent. The IPC should therefore give substantial weight to considerations of need. The weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure."

73. However, Mr. Jones QC accepted that although paragraph 3.1.3 states that the "scale" and "urgency" of need is described for each type of infrastructure, EN-1 does not seek to define need in quantitative terms (save in the limited respects mentioned below). In my judgment, this is consistent with (a) the broad indications of the potential need to double or treble generating capacity by 2050 previously given in Part 2 of the NPS (see paragraph 60 above) and (b) the unequivocal statement in paragraph 3.1.2 that it is inappropriate for planning policy to set targets for, or limits on, different types of technology.

74. One aspect of quantitative need concerns the requirement to replace power stations which have to be closed (paras. 3.3.7 to 3.3.9). Within the UK at least 22 GW of existing generating capacity will need to be replaced, particularly during the period to 2020, as the result of stricter environmental standards and ageing power stations. The closure of about 12 GW capacity relates to coal and oil power stations and results from controls under the Large Combustion Plant Directive (Directive 2001/80/EC) on emissions of sulphur and nitrogen dioxide. In addition, approximately 10 GW of nuclear generating capacity is expected to close by about 2031. The imposition of even stricter limits on emissions of sulphur and $NO_X$ is likely to result in additional closures of power stations. It will be recalled that the present proposal is for the construction of two gas fired units in place of 2 coal fired units which are to be decommissioned in 2022.

75. The second element of need which has been quantified is that required by a "planning horizon of 2025" for energy NPSs in general and nuclear power in particular. It is within the context of that "interim milestone" that the following passage in paragraph 3.3.16 appears, upon which Mr. Jones QC placed some reliance:-

> "A failure to decarbonise and diversify our energy sources now could result in the UK becoming locked into a system of high carbon generation, which would make it very difficult and expensive to meet our 2050 carbon reduction target. We cannot afford for this to happen."

76. Paragraph 3.3.18 warned that it was not possible to make an accurate prediction of the size and shape of demand for electricity in 2025, but used "Updated Energy and Emissions" projections ("UEP") published by the former Department of Energy and Climate Change ("DECC") as a "starting point" to get "a sense of the possible scale of future demand to 2025". It is also essential to note the further warning that:-

> "The projections do not reflect a desired or preferred outcome for the Government in relation to the need for additional electricity generating capacity or the types of electricity generation required."

Paragraph 3.3.21 added that the projections helped to illustrate the scale of the challenge faced by the UK and the Government to understand *how the market might respond.*

77. Based on one of the scenarios studied, paragraph 3.3.22 indicated that by 2025 the UK would need at least 113 GW of total electricity generating capacity, compared to 85 GW in 2011, of which 59 GW would be new build. Around 33 GW of new capacity by 2025 would need to come from renewable sources, and it would be for industry to determine the exact mix of the remaining 26 GW within the strategic framework set by Government. After allowing for projects already under construction, the NPS suggested that 18 GW remained to be provided as new non-renewable capacity by 2025. The Government stated that it would like a significant proportion of that balance of 18 GW to be provided by new low carbon generation and, in principle, nuclear power should be free to contribute as much as possible towards this need up to the interim milestone of 2025. Footnote 36 expressed the judgment that it would not be prudent when determining national policy to take into account consents for other energy projects where construction had yet to begin.

78. Paragraph 3.3.23 stated that:-

> "To minimise risks to energy security and resilience, the Government therefore believes it is prudent to plan for a *minimum* need of 59 GW of new electricity capability by 2025." (emphasis added)

79. To avoid any misunderstanding of the exercise carried out in paragraphs 3.3.15 to 3.3.23 of EN-1, paragraph 3.3.24 repeated the approach which had already been clearly laid down in Part 2 and in paragraph 3.1.2:-

> "It is not the Government's intention in presenting the above figures to set targets or limits on any new generating infrastructure to be consented in accordance with the energy NPSs. It is not the IPC's role to deliver specific amounts of generating capacity for each technology type. The Government has other mechanisms to influence the current delivery of a secure, low carbon, affordable electricity mix. Indeed, the aim of the Electricity Market Reform project (see Part 2 of this NPS for further details) is to review the role of the variety of Government interventions within the electricity market."

80. Thus, it is plain that, apart from indicating need for a *minimum* amount of new capacity by 2025, the references to need in EN-1 were not expressed in quantitative terms. That is said to be consistent with the market-based system under which

electricity generation is provided and the other non-planning mechanisms by which Government seeks to influence the operation of the market.

81. Instead, EN-1 focuses on qualitative need such as functional requirements. Thus, paragraph 3.1.1 states that the UK needs all types of energy infrastructure covered by the NPS in order to achieve energy security while at the same time dramatically reducing GHG. Paragraphs 3.3.2 to 3.3.6 explain how those twin objectives should be addressed.

82. Paragraphs 3.3.2 to 3.3.3 state:-

> "3.3.2 The Government needs to ensure sufficient electricity generating capacity is available to meet maximum peak demand, *with a safety margin or spare capacity to accommodate unexpectedly high demand and to mitigate risks such as unexpected plant closures and extreme weather events. This is why there is currently around 85 GW of total generation capacity in the UK, whilst the average demand across a year is only for around half of this*.
>
> 3.3.3 The larger the difference between available capacity and demand (i.e. the larger the safety margin), the more resilient the system will be in dealing with unexpected events, and consequently the lower the risk of a supply interruption. This helps to protect businesses and consumers, including vulnerable households, from rising and volatile prices and, eventually, from physical interruptions to supplies that might impact on essential services." (emphasis added)

83. Paragraph 3.3.4 explains the need for a diverse mix of all types of power generation, so as to avoid dependency on any one type of generation or source of fuel or power and to help ensure security of supply. The different types of electricity generation have different characteristics complementing each other:-

> "• fossil fuel generation can be brought on line quickly when there is high demand and shut down when demand is low, thus complementing generation from nuclear and the intermittent generation from renewables. However, until such time as fossil fuel generation can effectively operate with Carbon Capture and Storage (CCS), such power stations will not be low carbon (see Section 3.6).
>
> • renewables offer a low carbon and proven (for example, onshore and offshore wind) fuel source, but many renewable technologies provide intermittent generation (see Section 3.4); and
>
> • nuclear power is a proven technology that is able to provide continuous low carbon generation, which will help to reduce the UK's dependence on imports of fossil fuels (see Section 3.5). Whilst capable of responding to peaks and troughs in demand or supply, it is not as cost efficient to use nuclear power stations in this way when compared to fossil fuel generation."

84. Accordingly, in order to meet the twin challenges of energy security and climate change the Government "would like industry to bring forward many new low carbon developments, renewables, nuclear and fossil fuel generation with CCS" within the period up to 2025 (para. 3.3.5). This section then concludes in paragraph 3.3.6 by bringing the reader back to the policy contained in section 3.1.2:-

> "Within the strategic framework established by the Government it is for industry to propose the specific types of developments that they assess to be viable. This is the nature of a market-based energy system. The IPC should therefore act in accordance with the policy set out at in Section 3.1 when assessing proposals for new energy NSIPs."

85. Paragraphs 3.3.10 to 3.3.12 address an important subject, namely the need for additional electricity capacity *to support* the required increase in supply from renewables. Paragraph 3.3.11 explains:-

> "An increase in renewable electricity is essential to enable the UK to meet its commitments under the EU Renewable Energy Directive. It will also help improve our energy security by reducing our dependence on imported fossil fuels, decrease greenhouse gas emissions and provide economic opportunities. However, some renewable sources (such as wind, solar and tidal) are intermittent and cannot be adjusted to meet demand. As a result, the more renewable generating capacity we have the more generation capacity we will require overall, to provide back-up at times when the availability of intermittent renewable sources is low. If fossil fuel plant remains the most cost-effective means of providing such back-up, particularly at short notice, it is possible that even when the UK's electricity supply is almost entirely decarbonised we may still need fossil fuel power stations for short periods when renewable output is too low to meet demand, for example when there is little wind."

This paragraph draws an important distinction between the capacity of a power station and the periods for which it is operational.

86. Paragraph 3.3.12 then makes a statement which was directly relevant to the present case:-

> "It is therefore likely that increasing reliance on renewables will mean that we need more total electricity capacity than we have now, with a larger proportion being built only or mainly to perform back-up functions."

87. It will be recalled that paragraph 3.1.3 of EN-1 says that the "scale" and "urgency" of the need for each type of infrastructure is indicated in the following sections of Part 3. Section 3.4 describes the important role of renewable electricity generation. Paragraph 3.4.1 refers to the UK's commitment to producing 15% of its total energy from renewable sources by 2020. Paragraph 3.4.5 states:-

> > "To hit this target, and to largely decarbonise the power sector by 2030, it is necessary to bring forward new renewable electricity generating projects as soon as possible. The need for new renewable electricity generation projects is therefore urgent."

88. Section 3.5 addresses the role of nuclear power. It is a low carbon, proven technology, which is anticipated to play an increasingly important role in the move to diversifying and decarbonising sources of electricity (para. 3.5.1). According to paragraph 3.5.2, "it is Government policy that new nuclear power should be able to contribute as much as possible to the UK's need for new capacity", before going on to acknowledge that

it is not possible to predict whether or not there will be a reactor (or more than one reactor) at each of the eight sites identified in EN-6.

89. Paragraph 3.5.6 states that new nuclear power forms one of the three key elements of the strategy for moving towards a decarbonised, diverse electricity sector by 2050 comprising (i) renewables, (ii) fossil fuels with CCS and (iii) new nuclear capacity. With regard to "urgency of need", paragraph 3.5.9 says that it is important that new nuclear power stations are constructed and start to generate electricity "as soon as possible and significantly earlier than 2025." In 2011 it was thought to be realistic for new nuclear power to begin to be operational from 2018.

90. Section 3.6 of EN-1 deals with the role of fossil fuel electricity generation. Paragraph 3.6.1 states:-

> "Fossil fuel power stations play a vital role in providing reliable electricity supplies: they can be operated flexibly in response to changes in supply and demand, and provide diversity in our energy mix. They will continue to play an important role in our energy mix as the UK makes the transition to a low carbon economy, and Government policy is that they must be constructed, and operate, in line with increasingly demanding climate change goals."

91. Paragraph 3.6.2 states:-

> "Fossil fuel generating stations contribute to security of energy supply by using fuel from a variety of suppliers and operating flexibly. Gas will continue to play an important role in the electricity sector – providing vital flexibility to support an increasing amount of low-carbon generation and to maintain security of supply."

92. Paragraph 3.6.3 states:-

> "Some of the new conventional generating capacity needed is likely to come from new fossil fuel generating capacity in order to maintain security of supply, and to provide flexible back-up for intermittent renewable energy from wind. The use of fossil fuels to generate electricity produces atmospheric emissions of carbon dioxide. The amount of carbon dioxide produced depends, amongst other things, on the type of fuel and the design and age of the power station. At present coal typically produces about twice as much carbon dioxide as gas, per unit of electricity generated. However, as explained further below, new technology offers the prospect of reducing the carbon dioxide emissions of both fuels to a level where, whilst retaining many of their existing advantages, they also can be regarded as low carbon energy sources."

This passage needs to be read together with paragraphs 3.3.12 (see paragraph 86 above) and 3.3.14 (see paragraph 60 above).

93. Paragraph 3.6.4 explains the importance of Carbon Capture and Storage ("CCS") which has the potential to reduce carbon emissions from fossil fuel generation by up to 90%. Whilst there is a high level of confidence that CCS technology will be effective, there is uncertainty about its impact on the economics of power station operation and hence its development. CCS needs to be demonstrated on a commercial scale. Consequently, the Government was providing support for four commercial

scale demonstration projects on coal fired stations (paras. 3.6.5 and 4.7.4). Paragraph 3.6.6 requires all commercial fossil fuel power stations with a capacity over 300 MW to be constructed Carbon Capture Ready ("CCR"). This requirement is explained in more detail in paragraphs 4.7.10 to 4.7.17 of EN-1.

94. The need for fossil fuel electricity generation was addressed in paragraph 3.6.8:-

> "As set out in paragraph 3.3.8 above, a number of fossil fuel generating stations will have to close by the end of 2015. Although this capacity may be replaced by new nuclear and renewable generating capacity in due course, it is clear that there must be some fossil fuel generating capacity to provide back-up for when generation from intermittent renewable generating capacity is low and to help with the transition to low carbon electricity generation. It is important that such fossil fuel generating capacity should become low carbon, through development of CCS, in line with carbon reduction targets. Therefore there is a need for *CCR fossil fuel generating stations* and the need for the CCS *demonstration* projects is *urgent*." (emphasis added)

95. We have seen that paragraphs 3.1.4 and 3.2.3 address the weight to be given to the contribution which a project makes to the need for a particular type of infrastructure. In the "Assessment Principles" in Part 4, paragraph 4.1.2 sets out a presumption in favour of granting consent to applications for energy NSIPs:-

> "Given the level and urgency of need for infrastructure of the types covered by the energy NPSs set out in Part 3 of this NPS, the IPC should start with a presumption in favour of granting consent to applications for energy NSIPs. That presumption applies unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused. The presumption is also subject to the provisions of the Planning Act 2008 referred to at paragraph 1.1.2 of this NPS."

*EN-2*

96. EN-2 applies to fossil fuel electricity generating infrastructure, including gas-fired power stations with a capacity over 50 MW (para. 1.8.1). It is to be read in conjunction with EN-1, which covers *inter alia* the need and urgency for new energy infrastructure to be consented and built with the objective of contributing to a secure, diverse, and affordable energy supply and supporting the Government's politics on sustainable development, in particular by mitigating and adapting to climate change (para. 1.3.1). Paragraph 1.1.1 refers to the "vital role" played by fossil fuel generating stations in "providing reliable electricity supplies and a secure and diverse energy mix as the UK makes the transition to a low carbon economy."

97. The Government's policy is to require a substantial proportion of the capacity of all new coal-fired stations to be the subject of CCS. It is expected that new stations of that type will retrofit CCS to their "full capacity" during the lifetime of the plant. Other fossil fuel generating stations are expected to be "carbon capture ready". All such stations will be required to comply with Emissions Performance Standards (para. 1.1.2).

**General Legal Principles**

98. The general principles upon which the court may be asked under s.288 of the TCPA 1990 to review a planning appeal decision have been summarised in, for example, Seddon Properties Limited v Secretary of State for the Environment (1981) 42 P & CR 26, 28 and Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2017] PTSR 1283 at [19]. The basis upon which the court may review the legal adequacy of the reasons given in a decision has been explained more fully in Save Britain's Heritage v Number 1 Poultry Limited [1991] 1 WLR 153 and South Bucks District Council v Porter (No. 2) [2004] 1 WLR 1953. The same approach applies to a judicial review under s.118 of the PA 2008 to a decision on a DCO application, so long as the specific requirements of that statutory code are kept in mind.

99. In R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] PTSR 221 the Supreme Court endorsed the legal tests in Derbyshire Dales District Council [2010] 1 P & CR 19 and CREEDNZ Inc v Governor General [1981] 1 NZLR 172, 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is *not* irrelevant or immaterial, and therefore something which the decision-maker is *empowered or entitled* to take into account. But a decision-maker does not *fail* to take a relevant consideration into account unless he was *under an obligation* to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account.

100. It is also plain from the endorsement by the Supreme Court in Samuel Smith at [31] of Derbyshire Dales at [28], and the cross-reference to Bolton Metropolitan Borough Council v Secretary of State for the Environment [2017] PTSR 1063 but solely to page 1071, that principles (2) and (6) in the judgment of Glidewell LJ in Bolton at p 1072 (which were relied upon in the Claimant's skeleton under grounds 3 and 4) are no longer good law.

*Interpretation of Policy*

101. The general principles governing the interpretation of planning policy have been set out in a number of authorities, including Tesco Stores Limited v Dundee City Council [2012] PTSR 983; Hopkins Homes Limited v Secretary of State for Communities and Local Government [2017] 1 WLR 1865; East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 88; R (Mansell) v Tonbridge and Malling Borough Council [2019] PTSR 1452; St Modwen Developments Limited v Secretary of State for Communities and Local Government [2018] PTSR 746; Canterbury City Council v Secretary of State for Communities and Local Government [2019] PTSR 81; and Samuel Smith [2020] PTSR 221.

102. These principles apply also to the interpretation of a NPS, as was held by Lindblom LJ in Scarisbrick at [19]:-

> "The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the Supreme Court in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, in particular the judgment of Lord Reed at paragraphs 17 to 19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd. and Richborough Estates Partnership LLP v Cheshire East Borough Council* [2017] UKSC 37, at paragraphs 22 to 26). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see paragraph 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council*). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see paragraph 18 of Lord Reed's judgment in *Tesco v Dundee City Council*). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paragraphs 24 to 26 of Lord Carnwath's judgment in *Suffolk Coastal District Council*). It is not suggested that those basic principles are inapplicable to the NPS – notwithstanding the particular statutory framework within which it was prepared and is to be used in decision-making."

103. In Samuel Smith the Supreme Court reinforced the distinction between the proper scope of the legal interpretation of policy by the courts and the use of planning judgment in the application of policy. They did so when considering the concept of "openness" in paragraph 146 of the National Planning Policy Framework (2019), holding that the issue of whether visual effects may be taken into account is not a matter of legal principle. It is not a mandatory consideration which legislation or policy requires to be taken into account. Instead, it is a matter of judgment for the decision-maker whether to have regard to that factor, subject to the legal test whether, in the circumstances of the case, it was so "obviously material" as to require consideration ([30] to [32] and [39]).

104. Planning policies should not be interpreted as if they were statutory or contractual provisions. They are not analogous in nature or purpose to a statute or a contract. Planning policies are intended to guide or shape practical decision-making, and should be interpreted with that purpose in mind. They have to be applied and understood by planning professionals and by the public to whom they are primarily addressed. Decision-makers are entitled to expect both national and local planning policy to be as clearly and simply stated as it can be and, however well or badly it may be expressed, the courts to provide a straightforward interpretation of such policy (Mansell at [41]; Canterbury at [23]; Monkhill at [38]).

*The Planning Act 2008*

105. The Secretary of State and Drax relied upon the legal analysis by the Divisional Court in Spurrier at [99] to [112]. This was not the subject of any criticism by the Claimant.

106. The merits of policy set out in a NPS are not open to challenge in the examination process or in the determination of an application for a DCO. That is the object of ss.87(3), 94(8) and 106(1).

107. Furthermore, section 104(7) cannot be used to circumvent s.104(3), so, for example, where a particular NPS stated that there was a need for a particular project and ruled out alternatives, it was not permissible for that subject to be considered under s.104(7), even where a change of circumstance has occurred or material has come into existence after the designation of the NPS (see Thames Blue Green Economy Limited [2015] EWHC 727 (Admin) at [8] to [9] and [37] to [43] and [2016] JPL 157 at [11] to [16]; Spurrier at [103] to [105] and [107]).

108. This inability to use s. 104(7) to challenge the merits of policy in a NPS also precludes an argument that there has been a change in circumstance since the policy was designated so that reduced, or even no, weight should be given to it. Although that is a conventional planning argument in development control under the TCPA 1990, it "relates to the merits of policy" for the purposes of the PA and therefore is to be disregarded. The appropriate procedure for dealing with a contention that a policy, or the basis for a policy, has been overtaken by events, or has become out of date, is the review mechanism in s.6 (Spurrier at [107] to [108]).

109. The NPS for Hazardous Waste considered in Scarisbrick is expressed in much more general terms than the highly specific NPS considered in Thames Blue Green Economy. Paragraph 3.1 identified a national need for additional hazardous waste facilities and a range of technologies that could be put forward to meet that need. However, the NPS did not indicate the scale of the need to be met, whether on a national or any regional or local basis. It did not indicate how much weight should be given to need, unlike EN-1.

110. The Hazardous Waste NPS was set in the context of the "waste hierarchy" in the Waste Framework Directive, which placed landfill at the bottom. There was to be a reduction in the use of landfill, which was only to be considered as a last resort. Nevertheless, the NPS identified a need for NSIPs falling within "generic types" which included hazardous waste landfill (Scarisbrick [14] to [16]). Paragraph 4.1.2 of the NPS set out a presumption in favour of granting consent for hazardous waste NSIPs which clearly met the need established in the NPS. Potential benefits were said to include "the contribution" of a project "to meeting the need for hazardous waste infrastructure" (para. 4.1.3).

111. The preclusive or presumptive effect of a NPS is dependent upon the wording of the policy and its proper interpretation, applying the principles set out above.

112. The Court of Appeal held in Scarisbrick that the language of the NPS established the need for *all*, not merely some, NSIPs falling within the generic types to which paragraph 3.1 referred. The policy identified a general, qualitative need for such facilities. It did not define a quantitative need or set an upper limit to the number or capacity of the facilities required. It created a "general assumption" of need for the facilities identified, applicable to "every relevant project capable of meeting the identified need, regardless of the scale, capacity and location of the development proposed." An applicant for a DCO was entitled to proceed on that basis ([24]). But the presumption in favour of granting consent was "not automatically conclusive of

the outcome of a particular application" for a DCO. The balancing exercise in s.104(7) remained to be carried out ([28]). Given that the NPS in the Scarisbrick case did not prescribe the weight to be given to need, that weight remained to be assessed as a matter of planning judgment in the particular circumstances of each case ([31]).

113. In his decision letter in the Scarisbrick case the Secretary of State agreed with the examining authority that by paragraph 3.1 of the NPS need was taken to be established for the proposed development and that the applicant had not been required to demonstrate a specific local or regional need. He gave "considerable weight" to the need identified in the NPS ([47] to [48]).

114. Mr. Scarisbrick contended that the Secretary of State had misunderstood the NPS by treating it as requiring him to assume a need for a facility falling within the scope of the policy, irrespective of the size proposed and precluding any evaluation of evidence and submissions on the extent of the real need for the project proposed ([53]). The argument was similar to that advanced by ClientEarth in the present case.

115. The Court of Appeal rejected that argument. The examining authority and the Secretary of State had gone no further than to decide that the NPS had established a generic, qualitative need for the type of project proposed; without going on to say that the NPS identified a requirement for a facility of a particular size. The existence of that national need according to the policy did not depend upon the scale, capacity or location of the facility proposed. The NPS did not set any target level of provision, or limit to the capacity or location of new facilities, leaving it to operators to use their judgment on those matters ([57] to [59]). In my judgment, that NPS is similar to EN-1 in this respect.

116. The Court of Appeal went on to hold that no legal criticism could be made of the Secretary of State for having given "considerable weight" to the need established by the NPS. That had been a matter of planning judgment for him, subject only to a challenge on the grounds of irrationality (Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759 per Lord Hoffmann at p.780F). The Court held that to give "considerable weight" to that need was consistent with the presumption in the NPS in favour of granting consent (a similar presumption to that contained in paragraph 4.1.2 of EN-1). The Secretary of State had not increased that weight because of the large size of the project, nor had he treated the need established by the NPS as a conclusive or automatically overriding factor ([62] to [63] and [72]). The Court did not accept that the Secretary of State had been obliged to assess the individual contribution that the proposed development would make to meeting national need.

**Grounds 1 and 2**

117. It is convenient to take these two grounds together.

*Ground 1*

118. Under ground 1 the Claimant submits that on a proper interpretation of EN-1 the decision-maker is required to assess the individual contribution that any particular project will make towards satisfying the general need for a type of infrastructure set out in the NPS. This is said to be based upon paragraphs 3.1.4 of EN-1, which accords

substantial weight to the "contribution" which a project makes towards satisfying "this need" (i.e. the need described in 3.1.1 to 3.1.3), and paragraph 3.2.3 which states that the weight attributable to need in any given case should be "proportionate" to that contribution. Mr. Jones QC submits that the Secretary of State erred in law in deciding that there was no requirement for the individual need for the proposal to be assessed. The decision-maker wrongly assumed that because the proposal fell within one of the types of infrastructure said to be needed, it would necessarily contribute to that need for the purposes of EN-1. The Claimant argues that a quantitative assessment was required by the NPS (paras. 46, 52 and 74 of skeleton). It is also submitted that the Secretary of State misinterpreted paragraph 3.2.3 of EN-1 by posing the question whether there was any reason for not giving substantial weight to the need for the proposal in accordance with paragraph 3.1.4.

119. Under ground 2, the Claimant criticises DL 4.19 to 4.20 for failing to give legally adequate reasons for disagreeing with the Panel's conclusions as to why no weight should be given to the need for the proposed development (paras. 7.2.4 and 7.2.7 of the Panel Report). It is submitted that where the Minister disagreed with specific findings of the Panel, she was under a heightened duty to provide "fuller" reasons for that disagreement, seeking to rely upon Horada v Secretary of State for Communities and Local Government [2016] PTSR 1271.

*The examination*

120. In summary, the case for ClientEarth in the examination was that there was no need for the proposal, having regard to Government projections of energy infrastructure and consents already granted. Indeed, ClientEarth went so far as to say that "the UK does not need *any* new-build large gas power capacity to achieve energy security" (emphasis added) (paras. 4.2.4 and 5.2.32 to 5.2.34 of the Panel's Report).

121. The Panel first considered whether the issue of the individual need for the proposal was a matter for the examination. Drax submitted that it was not, whereas the Claimant said that it was relying upon paragraph 3.2.3 of EN-1. The Panel asked Drax to justify the need for the proposal with regard to "national targets and UK energy need/demand", and the specific need for the proposed units X and Y (Report para. 5.2.12). Another objector, Biofuelwatch, relied upon 3.3.18 of EN-1 to argue that it was implicit in the NPS that "the assessment of need should be informed by the latest government models and projections alongside the NPS." Drax responded that material of that kind, and the issue of whether the weight given by policy to need should change, were matters for a future review under s.6 of the PA 2008, and not for determination through individual applications for DCO (para. 5.2.14 of the Report).

122. However, the Panel concluded that because EN-1 had been based on "a road map and direction of travel for future energy generation sources," it was necessary, when applying paragraphs 3.1.3 and 3.2.3 of the NPS, to take account of the changes in energy generation capacity during the passage of time since its publication in 2011. Because the need to increase low carbon technology and to reduce the dependence on fossil fuels had "become increasingly significant" over that period, the Panel concluded that it should consider current information on energy generation and the "individual contribution of the proposed development to meeting the overarching policy objectives of security of supply, affordability and decarbonisation" and hence to meeting the need for infrastructure (paras. 5.2.22 to 5.2.26 of the Report).

123. In relation to security of supply the Panel concluded in summary that:-

(i) Current models and projections, in particular BEIS's 2017 UEP, "should be taken into account in determining the need for fossil fuel generation in the proposed development" (para. 5.2.40);

(ii) Gas generation capacity for which consents had already been granted exceeded the capacity projected in the 2010 and 2017 UEP projections. Although not all that capacity was guaranteed to be delivered, the realistic likelihood was that "some" would be built out, thereby calling into question the need for more fossil fuel development and, in particular, the proposal (para. 5.2.41 to 5.2.42);

(iii) The need for the proposed development was likely to be limited to "system inertia".[1] Plants such as Drax may sometimes be brought on, ahead of, or as a replacement to, renewable generation, to maintain an adequate level of system inertia. This amounted to "low level need and urgency" (para. 5.2.42). The need for the proposal was otherwise limited to providing flexibility to support renewable energy generation (para. 5.2.42 to 5.2.43).

124. The Secretary of State referred to the Panel's view that EN-1 drew a distinction between the need for energy NSIPs in general and the need for any particular development and so it had been appropriate to consider changes in energy generation since its publication in 2011 (DL 4.4 to 4.5). Having referred to a number of policies in EN-1, the Secretary of State decided that the proposal was for a type of infrastructure to which EN-1 applied and so the presumption in paragraph 4.1.2 in favour of granting consent applied (DL 4.9 to 4.12). In DL 4.13 the Secretary of State explained why she considered that EN-1 continued to provide policies which are capable of facilitating, for the foreseeable future, the consenting of energy infrastructure on the scale and of the kinds necessary to meet the objectives of the NPS. In her view the policies in EN-1 took account of the need to achieve security of supply, affordability and decarbonisation at a high strategic level and there was no requirement for a decision-maker to assess whether a proposed development would meet an identified need for gas generation capacity by reference to those objectives. The Secretary of State then addressed issues relating to GHG emissions and decarbonisation (DL 4.14 to 4.17).

125. She returned to the subject of need at DL 4.18 to 4.20 and DL 6.6:-

> "4.18 The ExA's views on the need for the Development and how this is considered in the planning balance have also been scrutinised by the Secretary of State. As set out above, paragraphs 3.1.3 of EN-1, and the presumption in favour of the Development already assume a general need for CCR fossil fuel generation. Furthermore, paragraph 3.1.4 of EN-1 states: *"the [decision maker] should give substantial weight to the contribution which projects would make towards satisfying this need when considering applications for development consent".* The ExA recommends that no weight should be given to the Development's contribution towards meeting this need within the overall

[1] It is agreed that "system inertia" is necessary to address imbalances between electricity generation and variations in demand, resulting in changes to frequency on the network. The greater the system inertia, the slower the change in frequency and therefore the more time the network operator has to restore the balance between generation and demand.

planning balance. This is predicated on its view that EN-1 draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development. The Secretary of State disagrees with this approach. The Secretary of State considers that applications for development consent for energy NSIPs for which a need has been identified by the NPS should be assessed on the basis that they will contribute towards meeting that need and that this contribution should be given significant weight.

4.19 The Secretary of State notes that paragraph 3.2.3 of EN-1 states that *"the weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure"*. The Secretary of State has, therefore, considered whether, in light of the ExA's findings, there is any reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case. In particular, she has considered the ExA's views on the changes in energy generation since the EN-1 was published in 2011, and the implications of current models and projections of future demand for gas-fired electricity generation and the evidence regarding the pipeline of consented gas-fired infrastructure which the ExA considered to be relevant [ER 5.2.40-43].

4.20 The Secretary of State's consideration of the ExA's position is that (i) whilst a number of other schemes may have planning consent, there is no guarantee that these will reach completion; (ii) paragraph 3.3.18 of EN-1 sets out that the Updated Energy and Emissions Projections (on which the ExA partially relies on to reach its conclusions on current levels of need) do not *"reflect a desired or preferred outcome for the Government in relation to the need for additional generating or the types of electricity required*"; and (iii) paragraph 3.1.2 of EN-1 explains that *"[i]t is for industry to propose new energy infrastructure projects within the strategic framework set by Government. The Government does not consider it appropriate for planning policy to set target for or limits on different technologies"*. These points are reinforced elsewhere in EN-1, for example in paragraphs 2.2.4 and 2.2.19, which explain that the planning system will complement other commercial and market based mechanisms and rules, incentives and signals set by Government to deliver the types of infrastructure that are needed in the places where it is acceptable in planning terms – decisions on which consented energy schemes to build will therefore also be driven by these factors. In light of this, the Secretary of State does not accept that the ExA's findings on these issues should diminish the weight to be attributed to the Development's contribution towards meeting the identified need for CCR gas fired generation within the overall planning balance. The Secretary of State considers that this matter should be given substantial weight in accordance with paragraph 3.1.4 of EN-1. The Secretary of State's overall conclusions on the planning balance are set out at paragraphs 6.1 – 6.14 below.

6.6 The Secretary of State considers that the ExA's interpretation of the need case set out in the NPSs is incorrect. In taking the position it did on need and GHG emissions, the ExA arrived at a position where it recommended that consent for the Development should be refused. The Secretary of State considers that the NPSs support the case for new energy infrastructure in general and, in particular,

> the need for new CCR fossil fuel generation of the kind which the Development would provide. While acknowledging the GHG emissions from the Development, the generating capacity of the Development in either two- or one-unit configurations is a significant argument in its favour, with a maximum of 3.8GW possible if the Applicant builds out both gas-fired and battery storage units as proposed. Therefore, the Secretary of State considers, that the Development would contribute to meeting the identified need for CCR fossil fuel generation set out in the NPS and that substantial weight should be given to this in the planning balance." (original emphasis)

*Analysis*

126. The essential issue under ground 1 is whether the Secretary of State misinterpreted EN-1 when she rejected the Panel's view that the NPS draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development (DL 4.18). She added that applications for a DCO for energy NSIPs for which a need has been identified in EN-1 should be assessed on the basis that they will contribute towards meeting that need and that contribution should be given significant weight. Nonetheless, the Secretary of State went on to consider whether the Panel's findings provided any reason for not giving that weight to the proposal (DL 4.19 to 4.20).

127. It is common ground between the parties that the interpretation and legal effect of the NPS in order to resolve the issue under ground 1 are objective questions of law for the Court. I have summarised relevant principles in paragraphs 101 to 116 above.

128. The Claimant's argument places great emphasis upon the use of the word "contribution" in paragraphs 3.1.4 and 3.2.3 of EN-1 in order to justify a requirement that the need for a proposed project should be individually assessed. The Claimant goes so far as to contend that that individual need must be assessed on a quantitative basis (see paragraph 118 above). Indeed, it is necessary for the Claimant to advance this argument because the Panel's reasoning, with which the Secretary of State disagreed, was based upon its quantitative assessment (see Report at 5.2.40 to 5.2.42, 7.3.2 and 7.3.14). The Panel considered that the evaluation of need for this project should be based upon the changes in generation capacity since 2011, the latest UEP projections, and the "pipeline" of consented gas-fired infrastructure.

129. But it is necessary to read EN-1 as a whole, rather than selectively. It is plain that the NPS (as summarised in paragraphs 53 to 97 above) does not require need to be assessed in quantitative terms for any individual application. The only quantitative assessments in the document related to the need to replace certain fossil-fuel plant and the estimate of a *minimum* need requirement for new build capacity by the "interim milestone" of 2025, along with the broad statement that overall generating capacity might need to be doubled or trebled by 2050 (see paragraphs 73 to 78 above). It is not suggested that either ClientEarth or the Panel sought to relate the capacity of the Drax proposal to any of those matters.

130. The NPS does not set out a general requirement for a quantitative assessment of need in the determination of individual applications for DCOs. Putting to one side the "interim milestone" which did not feature in the discussion in this case, there are no benchmarks against which a quantitative analysis (eg. consents in the pipeline or

projections of capacity) could be related. Indeed, the document makes it clear that the 2010 UEP projections should not be taken as expressing "a demand or preferred outcome" in relation to need for additional generating capacity or types of generation required (para. 3.3.18). Paragraph 3.3.20 explained that those projections assumed that electricity demand would be no greater in 2025 than in 2011, but went on to add that that demand could be underestimated as moves to decarbonise may lead to increased use of electricity (see eg. paragraph 60 above). Both paragraphs 3.1.2 and 3.3.24 make it plain that it is not the function of planning policy to set targets or limits for different technologies and the 2010 UEP figures were not to be used for that purpose (see paragraphs 75 to 80 above). As Mr Tait QC explained, EN-1 adopts a market-based approach and relies in part upon market mechanisms for the delivery of desired objectives.

131. Given those clear statements of policy in EN-1 there was no justification for the Panel to have regard to the 2017 UEP projections in order to assess the contribution of the Drax proposal to meeting the qualitative need identified in the NPS. Likewise, an analysis of the consents for gas-fuelled power stations was irrelevant for that purpose. Moreover, the Panel's assessment was benchmarked against the 2017 UEP projections, which self-evidently do not form the basis for the policy contained in EN-1.

132. The case advanced by ClientEarth was a barely disguised challenge to the merits of the policy. As we have seen, they contended that because of what had taken place since 2011 there was no need for any future new large gas-fuelled power stations to be built. Indeed, the conclusions reached by the Panel would be equally applicable to any other similar proposal. That flies in the face of EN-1 which states that there is a qualitative need for such development, for example the vital contribution it makes to the provision of reliable electricity supplies (para. 3.6.1), security of energy supply from different sources and vital flexibility to support an increasing amount of low carbon generation (para. 3.6.2). ClientEarth's case and the conclusions of the Panel effectively involved rewriting those and other passages (e.g. paragraph 3.6.8). Consequently, whereas EN-1 specifically gives substantial weight to the qualitative need it establishes, the logic of the Panel's reasoning led them to give effectively no weight to that need.

133. Mr Jones QC described the role of the proposed development as merely to provide back-up to renewable sources (referring to paras. 5.2.39 and 5.2.42 of the Panel's report). But paragraphs 3.3.11 and 3.3.12 of EN-1 explain the importance given to that role (see paragraphs 85 to 86 above). The Secretary of State had those matters well in mind (see e.g. DL 4.10). The Secretary of State assessed the contribution which the proposed development would make to need in terms of both function and scale (eg. DL 4.12 to 4.13, 4.18 to 4.20, 5.5, 6.6 and 6.9).

134. Whatever may be the merits of ClientEarth's arguments which found favour with the Panel (something which it is not for this court to consider), they were not matters which should have been taken into account in the examination (s.87(3) of PA 2008). Instead, these arguments about the current or continuing merits of the policy on need could be relevant to any decision the Secretary of State might be asked to make on whether or not to exercise the power to review the NPS under s.6 of PA 2008. No such decision has been taken and this claim has not been brought as a challenge to an alleged failure to act under s.6.

135. The effect of the interpretation of EN-1 advanced by ClientEarth, and accepted by the Panel, is that any applicant for a DCO for gas-fuelled power generation would need to demonstrate a quantitative need for the development proposed. Indeed, because paragraphs 3.1.3 and 3.2.3 of the NPS apply to all types of energy infrastructure, their interpretation would apply across the board. There is no reason to think that that could have been the object of these policies. It would run counter to the thinking which lay behind the introduction of the PA 2008 and the energy NPSs. EN-1 has not been drafted in such a way as to produce that result.

136. The Panel considered that all that EN-1 established was that "the principle of need for energy NSIPs in general is not for debate" but it was appropriate to consider the specific need for the development proposed "because of the evidence presented into this examination" (paras. 5.2.23 and 5.2.69). Thus, in paragraph 5.2.24 they considered that because the evidence showed that energy generation is moving to lower carbon sources, in line with the policy objective in EN-1 requiring transition to a low carbon economy over time, "it follows that requirements from each energy NSIPs must too continually change with time, to reflect the transitioning energy market." I do not accept the proposition that the proper interpretation of a policy such as a NPS, an objective question of law, depends on the evidence which happens to be presented in one particular examination.

137. It may well be that the Panel thought that they had moved on to the *application* of policy in EN-1. That, of course is a separate matter which should not be elided or confused with the interpretation of policy (Tesco [2012] PTSR 983 at [18] to [19]; Hopkins [2017 1 WLR 1865 at [26]; Scarisbrick [2017] EWCA Civ 787 at [19]; and Samuel Smith [2020] PTSR 221 at [21] to [22]). But the problem with the Panel's approach is that it begs the prior question whether they had understood EN-1 correctly. Here, EN-1 contained no language to indicate that the "requirements" or "needs" for each type of energy NSIP set out in EN-1 should be reassessed from time to time, in the consideration of individual applications for a DCO, or were dependent upon quantitative need being shown. That approach would amount to a revision of the policy and belongs to the process of review under s.6.

138. The policy on need in EN-1 is analogous to that considered in Scarisbrick. Mr. Jones QC sought to support the Claimant's interpretation of the need policies in EN-1 by referring also to paragraph 4.1.3 which provides that in "considering any proposed development" the Secretary of State should take into account (inter alia) "its contribution to meeting the need for energy infrastructure" (skeleton para. 30). This may have been the passage which the Panel had in mind in paragraphs 5.2.23 and 5.2.69 of their Report. But it does not support their approach to the policy on need. The same policy appeared in the NPS considered in Scarisbrick (see [17]) and yet the Court of Appeal rejected the argument of the Claimant in that case, that the NPS required the Secretary of State to assess project-specific need when determining an application for a DCO. The policy created a "general assumption of need" for all infrastructure proposals of a type falling within its ambit, to which the Secretary of State had been entitled to give considerable weight ([24], [53] and [57] to [59] – see paragraphs 112 to 116 above).

139. In Scarisbrick the Court of Appeal also stated that the weight to be given to the "general assumption" of need established by the NPS was a matter to be evaluated in each case, but in that case the policy did not prescribe the weight to be given to the

identified need [31]. Here, EN-1 is different, in that it expressly provides that "substantial weight" is to be given to the contribution which a project makes to that need (para. 3.1.4). The "need" is that defined in paragraph 3.1.3 which is said to be described in the following sections in terms of "scale" and urgency for each type of infrastructure. Given that EN-1 does not set targets or limits for different types of technology, "scale" could only refer to the expression of *minimum* need by the "interim milestone" of 2025 (paras. 3.3.16 and 3.3.22 to 3.3.24), which was not in play in this challenge.

140. The other factor referred to in paragraph 3.1.3 is "urgency of need". So, for example, paragraph 3.5.9 refers to the importance of new nuclear power stations being constructed as soon as possible and significantly earlier than 2025. Similarly, paragraph 3.4.5 states that it is necessary to bring forward renewable generating projects as soon as possible. The importance of fossil fuelled power stations is explained in section 3.6 of EN-1. In that context paragraph 3.3.12 explains that increasing reliance on renewables will mean that total electricity capacity will need to increase, with "a larger proportion being built *only or mainly* to perform back-up functions" (see also para. 3.3.14).

141. Paragraph 3.2.3 does not alter this analysis. It states that the weight attributable to need in any given case should be proportionate to the extent to which the project would actually contribute "to satisfying *the need for a particular type of infrastructure*" (emphasis added). It does not call for that contribution to be assessed relative to the need for each type of infrastructure covered by EN-1 Paragraph 3.2.3 is therefore entirely consistent with paragraphs 3.1.3 and 3.1.4. The need for fossil fuel generation is dealt with by reference to section 3.6 and related paragraphs which describe the role played by that technology. Paragraph 3.2.3 does not require an assessment of quantitative need for gas-fired generation. Bearing in mind that EN-1 does not express the need for energy infrastructure in quantitative terms (other than figures given for the 2025 "interim milestone"), the words "proportionate", "extent" and "contribution" are consistent with need being assessed in qualitative terms.

142. For these reasons, the interpretation of EN-1 for which ClientEarth has contended, and which the Panel accepted, and upon which ground 1 is dependent, must be rejected. The Secretary of State was entirely correct to dismiss that approach at DL 4.13 and 4.18.

143. The Claimant raises a subsidiary issue criticising DL 4.19 in which the Secretary of State went on to apply the last sentence of paragraph 3.2.3 of EN-1 by asking whether, in the light of the Panel's findings, there was "any reason why she should not attribute substantial weight to the Development's contribution to meeting the identified need for new CCR fossil fuel generation infrastructure in this case." The Claimant submits that this involved asking the wrong question or applying the wrong policy test; in other words something which was not compatible with EN-1.

144. There is nothing in this point. The Secretary of State's decision did not involve increasing the weight attributed to need beyond "substantial". Logically therefore, she devoted her reasoning in the circumstances of this case to the merits of the arguments as to why that weight should be *reduced*. That was an entirely proper approach to take to paragraphs 3.14 and 3.2.3 of EN-1 in the context of the issues which were raised before her in this case.

145. For all these reasons ground 1 must be rejected.

*Ground 2*

146. I cannot accept the Claimant's submission that the Secretary of State's decision to disagree with the Panel's conclusions gave rise to a heightened obligation to give fuller reasons (see para. 119 above). True enough, Horada was a case where the Secretary of State disagreed with the reasons given by the Inspector for recommending that the compulsory purchase order should not be confirmed, but the Court of Appeal did not lay down any more stringent test for judging the legal adequacy of his reasoning than is generally applied. That would have been inconsistent with the decision of the House of Lords in the Save case (see Lord Bridge at [1991] 1 WLR 153, 165H to 166H and see also the Court of Appeal in Secretary of State for Communities and Local Government v Allen [2016] EWCA Civ 767 at [19]). It would also be inappropriate to judge the adequacy of the reasoning in the decision letter in this case by making a comparison with that criticised by the Court of Appeal in Horada, an exercise which the Court of Appeal firmly discouraged in Mordue v Secretary of State for Communities and Local Government [2016] 1 WLR 2682 at [27].

147. I accept the submission made for the Secretary of State and for Drax that if, as I have concluded, the Panel's interpretation of EN-1 was wrong and that of the Secretary of State was correct, then ground 2 adds nothing to ground 1. The Secretary of State had no need to address the reasons given by the Panel for attributing no weight to the case on need, because they involved discounting that need by reference to a quantitative assessment.

148. In saying that, I acknowledge that the Panel did also rely upon one qualitative aspect, namely their view that "the need for the proposed development in the context of the consented gas generation capacity, is likely to be limited to system inertia" which they treated as showing "low level need and urgency" (para. 5.2.42). They subsequently broadened that to add "flexibility to support renewable energy generation" (paras. 5.2.43 and 5.2.71). Mr. Jones QC submits that the Secretary of State failed to address that factor in DL 4.20.

149. In a reasons challenge, there is a single indivisible question, namely whether the claimant has been substantially prejudiced by an inadequacy in the reasons given (Save at p. 167D). In other words, it is insufficient for a claimant simply to show one of the examples of "substantial prejudice" given by Lord Bridge at p. 167F-H. In addition, it must be shown that the reasons given may well conceal a public law error, or that they raise a substantial doubt as to whether the decision is free from any flaw which would provide a ground for quashing the decision (p. 168B-E).

150. It is plain from the cross-reference at the end of DL 4.19 to the Panel's report that the Secretary of State had well in mind their views on the function or role of the proposed development. It cannot be said that there is anything to indicate a substantial doubt about whether she had regard to that matter. Furthermore, I accept the Secretary of State's submission that this factor is built into the relevant parts of EN-1. That is plain from the analysis of the NPS set out earlier in this judgment. The Secretary of State made that very point in DL 4.13. She even referred specifically to the proposed battery storage units and the "important role" they play under EN-1, reinforcing her

conclusion on weight in DL 4.20 (see DL 5.5). There is nothing in the Claimant's criticism.

151. As the Claimant pointed out (para. 67 of skeleton), the three quantitative aspects of the Panel's findings were concerned with:-

(i) Changes in energy generation capacity since 2011;

(ii) The implications of current models and projections of future demand for gas-fired electricity generation; and

(iii) The pipeline of consented gas-fired infrastructure.

152. Although the Secretary of State was under no legal obligation to give further reasons on these matters because (as I have already explained) they all arose from the Panel's misinterpretation of EN-1, which she had already addressed, and moreover they involved questioning the merits of NPS policy, she nonetheless gave legally adequate reasoning on each of them in DL 4.20. This was sufficient to enable a participant in the examination, familiar with the issues, to understand why the Secretary of State did not consider that all or any of these matters justified reducing the weight to be given to the need for the proposal. She was entitled to do so by relying (in part) upon relevant passages in EN-1, which she correctly understood. In relation to point (iii), it is obvious from DL 4.20 that the Secretary of State was treating the uncertainty about the implementation of consents previously granted as a significant factor.

153. For the reasons set out above ground 2 must be rejected.

**Ground 3**

154. This ground is concerned with the way in which the Secretary of State treated the assessment of GHG emissions from the proposed development, having regard to EN-1 and EN-2.

155. Paragraph 5.2.2 of EN-1 states:-

> "$CO_2$ emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies, as noted in Part 3 of this NPS, and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS (see Section 2.2 above), Government has determined that $CO_2$ emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of $CO_2$ emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address $CO_2$ emissions or any Emissions Performance Standard that may apply to plant."

156. Paragraph 2.5.2 of EN-2 states:-

> "$CO_2$ emissions are a significant adverse impact of fossil fuel generating stations. Although an ES on air emissions will include an assessment of $CO_2$ emissions, the policies set out in Section 2.2 of EN-1 will apply, including the EU ETS. The IPC does not, therefore need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address $CO_2$ emissions or any Emissions Performance Standard that may apply to plant."

157. The Panel addressed GHG emissions primarily in section 5.3 of their report. They concluded that the percentage increase in these emissions from the baseline position would lie somewhere between the estimates presented by ClientEarth and by Drax. They acknowledged that it was difficult to establish an accurate baseline in view of the wide range of assumptions involved and the potential for rapid changes over a relatively long time frame (para. 5.3.22). It had been agreed between the parties at the examination that the total percentage increase in emissions, as estimated in the ES produced by Drax, should be treated as "a significantly adverse effect". Consequently, the Panel concluded that their finding indicated an impact of greater severity and that this was a negative factor in the planning balance (paras. 5.3.27 to 5.3.28, 7.2.11 and 7.3.6). They added that whether the DCO should be granted turned on the balancing exercise under s.104(7) (para. 7.3.7).

158. When the Panel came to consider the application of s.104 of PA 2008, they identified firstly a number of positive benefits, namely bio-diversity, socio-economics and the re-use of existing infrastructure which attracted "significant weight" (paras. 7.3.11 to 7.3.12). They then identified various factors which were judged to have a neutral effect (para. 7.3.13). Finally, they brought together the negative impacts of the proposal in paragraph 7.3.14:-

(i) the decarbonisation objective would be undermined by increasing gas-fired capacity where that already exceeds UEP forecasts;

(ii) a significant increase in GHG emissions would have a significant adverse effect on climate change;

(iii) the development would have a significant adverse effect on landscape and visual receptors.

159. The Panel attached "considerable weight" to (i) and (ii), but they said that (iii) had "not weighed heavily" in their overall conclusions. The Panel struck the overall balance in paragraph 7.3.15, concluding that factors (i) and (ii) outweighed the benefits of the proposal. In reaching that judgment they relied upon their assessment that the *actual* contribution that would be made by the proposed development to need was "minimal" and so no significant weight should be given to that matter.

160. It is therefore apparent that the Panel's overall conclusion turned on the significance they attached to the UEP projections compared to consented capacity and the implications that had for their assessment of the proposal's contribution to need and the decarbonisation objective, weighed against the benefits of the proposal.

161. In her decision letter the Secretary of State noted at DL 4.15 the explanation in section 2.2 of EN-1 as to how climate change and GHG has been taken into account in the

preparation of the Energy NPSs (see paragraphs 60 to 70 above). She then quoted paragraph 5.2.2 of EN-1.

162. In DL 4.16 and 4.17 she stated:-

> "4.16 This policy is also reflected in paragraph 2.5.2 of EN-2. It is the Secretary of State's view, therefore, that, while the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere is acknowledged, the policy set out in the relevant NPSs makes clear that this is not a matter that that should displace the presumption in favour of granting consent.
>
> 4.17 In light of this, the Secretary of State considers that the Development's adverse carbon impacts do not lead to the conclusion that the Development is not in accordance with the relevant NPSs or that they would be inconsistent with the CCA. The Secretary of State notes the need to consider these impacts within the overall planning balance to determine whether the exception test set out in section 104(7) of the 2008 Act applies in this case. The ExA considers that the Development will have significant adverse impacts in terms of GHG emissions which the Secretary of State accepts may weigh against it in the balance. However, the Secretary of State does not consider that the ExA was correct to find that these impacts, and the perceived conflict with NPS policy which they were found to give rise to, should carry determinative weight in the overall planning balance once the benefits of the project are properly considered, including in particular its contribution towards meeting need as explained below."

163. It is important to note that in the middle of DL 4.17 the Secretary of State accepted that GHG emissions did represent "significant adverse impacts" which could be weighed in the balance against the proposed development. But she considered that once the project's contribution to policy need and, thus its overall benefits, were correctly evaluated, the adverse carbon and GHG impacts were not determinative. In other words, she considered that the weight to be given to those disbenefits was outweighed by the benefits of the proposal. The submission in paragraph 89 of the Claimant's skeleton that the Secretary of State did not weigh the GHG impacts in that manner fails to read the paragraph as a whole and instead focuses unrealistically on a single word "may". That approach to reading the decision letter involves excessive legalism of the kind deprecated in a number of authorities, including East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 88 at [50].

164. In DL 6.6 (quoted in paragraph 125 above) the Secretary of State returned to the subject of need and went on to address GHG emissions and the overall balance in DL 6.7:-

> "In assessing the issue of GHG emissions from the Development and the ExA's conclusions in this matter, the Secretary of State notes that the Government's policy and legislative framework for delivering a net zero economy by 2050 does not preclude the development and operation of gas-fired generating stations in the intervening period. Therefore, while the policy in the NPS says GHG emissions from fossil fuel generating stations are accepted to be a significant adverse impact, the NPSs also say that the Secretary of State does not need to assess them

> against emissions reduction targets. Nor does the NPS state that GHG emissions are a reason to withhold the grant of consent for such projects. It is open to the Secretary of State to depart from the NPS policies and give greater weight to GHG emissions in the context of the Drax application but there is no compelling reason to do so in this instance."

165. In summary, the Claimant criticises the decision letter on the grounds that the Secretary of State misinterpreted EN-1 as requiring the decision-maker to treat the GHG emissions of the proposal either as irrelevant or as having no weight.

*Analysis*

166. Treating a consideration as irrelevant is not the same thing as giving it no weight. As Lord Hoffmann pointed out in Tesco [1995] 1 WLR 759, 780F-G, there is a distinction between deciding whether a consideration is relevant, which is a question of law for the court, and deciding how much weight to give to a relevant consideration which is a question of fact for the decision-maker. If a consideration is relevant, it is entirely a matter for the decision-maker (subject only to Wednesbury irrationality) to determine how much weight to give to it, which includes giving no weight to it. A determination that no weight should be given to a matter does not mean that it has been treated as legally irrelevant.

167. In fact, it is plain from the passages in the decision letter to which I have already referred that the Secretary of State did not treat GHG emissions as irrelevant, nor did she treat them as something to which no weight should be given. In DL 4.17 the Secretary of State moved from her conclusions on s.104(3) and s.104(5) to considering the balance under s.104(7). She accepted that the Panel's finding on the significant adverse impacts of GHG emissions from the development could be weighed in the balance against the proposal. But she disagreed with the Panel's evaluation of the benefits of the proposal, including its contribution towards meeting policy need. Once those benefits were correctly weighed, she found that the impact of GHG emissions should not "carry determinative weight in the overall planning balance." That can only mean that the disbenefits did not carry more weight than the benefits. Rather, it was the other way round. Thus, in DL 4.17 the Secretary of State was describing a straight forward balancing exercise which was in no way dependent upon the terms of paragraphs 5.2.2 of EN-1 or 2.5.2 of EN-2. She returned to this exercise in DL 6.3 to DL 6.9.

168. The Claimant's criticisms are really directed at the Secretary of State's reliance upon EN-1 and EN-2 in DL 4.16 and DL 6.7. It should be noted, however, that DL 4.16 forms part of the Secretary of State's reasoning in support of the conclusion that the proposal accorded with the NPSs for the purposes of s.104(3), not the balancing exercise under s.104(7). On the other hand, DL 6.7 formed part of the balancing exercise under section 104(7) carried out between DL 6.3 and DL 6.9.

169. Before examining the passages in the decision letter criticised by the Claimant, it is necessary to consider the meaning of the relevant policies in the NPS. Paragraph 5.2.2 of EN-1 plainly states that the $CO_2$ emissions from a proposed energy NSIP do not provide a reason for refusing an application for a DCO. The rationale for that statement is that such emissions are adequately addressed by the regimes described in section 2.2 of EN-1. There has been no challenge to the legality of that part of EN-1.

Any such challenge would now be precluded by the ouster clause in s.13(1) of PA 2008.

170. In any event, I do not see how it could be legally objectionable for a NPS to state that a particular factor is insufficient by itself to justify refusal of a planning consent because it is addressed by other regimes. Section 5(5)(c) enables a NPS to prescribe how much weight is to be given to a particular factor in a decision on a DCO application, which could include giving no weight to it. The approach in paragraph 5.2.2 is also supported by established case law on the significance of alternative systems of control (see e.g. Gateshead Metropolitan Borough Council v Secretary of State for the Environment (1996) 71 P & CR 350) and, to some extent, by Regulation 21(3)(c) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) (see Ground 6 below).

171. In DL 4.16 the Secretary of State merely said that the policy in the NPSs makes it clear that GHG emissions are "not a matter which should displace the presumption in favour of granting development." That was a reference to the presumption in paragraph 4.1.2 of EN-1 (see paragraph 95 above). Given that EN-1 also states that the matter of GHG emissions should not itself be treated as a reason for refusal, it is plain that that would not be sufficient to override the presumption in paragraph 4.1.2 of EN-1. The Secretary of State's reliance upon those NPS policies in that way when considering the application of s.104(3) of PA 2008 is wholly unobjectionable.

172. In DL 6.7 the Secretary of State was in the midst of carrying out the exercise required by s.104(7). No criticism can be made of either of her statements that (a) she did not need to assess GHG emissions against emissions reduction targets or (b) such emissions are not a reason for refusing to grant consent. They accurately summarise relevant parts of paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2. Neither of those policies treat GHG emissions as an irrelevant consideration in a DCO application or as a disbenefit to which no weight may be given. The Secretary of State did not suggest otherwise in her decision letter, either in her reliance upon those policies or in her treatment of the subject.

173. For all these reasons ground 3 must be rejected.

**Ground 4**

174. ClientEarth submits that the Secretary of State failed to comply with her obligation under s.104(7) of PA 2008 to weigh the adverse impact of the proposed development against its benefits. Instead, the Secretary of State merely repeated the assessment she had already carried out under s.104(3). It is said that she unduly fettered her discretion on the issue posed by s.104(7) by looking at that matter exclusively through the lens of the NPSs.

175. ClientEarth accepts (skeleton paras. 106-107) that policy contained in the NPSs is relevant to the exercise under s.104(7), for example the statement of national need (see Thames Blue Green Economy at [16]). However, the Claimant criticises the decision taken in this case because the same approach was taken to (i) need at DL 6.6 (see paragraph 125 above) and (ii) GHG emissions at DL 6.7 (see paragraph 164 above) as had previously been applied in the consideration of NPS policies under s.

104(3) (skeleton para. 109). ClientEarth submits that the same policy tests should not be applied when s.104(7) is considered.

*Analysis*

176. The relationship between s.104(3) and (7) should also be considered in the context of ss.87(3) and 106(2). The object of the latter provisions is that matters settled by a NPS which has been subjected to SEA and has satisfied all the procedural requirements of the legislation should not be revisited or reopened in the DCO process. Where the Secretary of State considers it appropriate, policy in a NPS can be reviewed under s.6 of PA 2008, a process which is subject to the same requirements for *inter alia* SEA, consultation, public participation and parliamentary scrutiny. That statutory scheme also avoids policy being made *ad hoc* or even "on the hoof". Section 104(7) may not be used to circumvent the application of ss.87(3), 104(3) and 106(2) (Thames Blue Green Economy in the High Court and the Court of Appeal; Spurrier [103] to [108]).

177. For the reasons I have already given under ground 1, both ClientEarth and the Panel misunderstood the policy in EN-1 on need. The Secretary of State was legally entitled to reject their approach and to give "substantial weight" to the need case in accordance with the NPS. As Thames Blue Green Economy confirms (e.g. Sales LJ at [16]), the Secretary of State was fully entitled to take that assessment into account under s.104(7). No possible criticism can be made of DL 6.6.

178. As we have seen under ground 3, EN-1 and EN-2 do not state that GHG emissions may not be taken into account in the DCO process. They do not prescribe how much weight should be given to such emissions as a disbenefit, except to say that this factor does not in itself justify a refusal of consent, given the other mechanisms for achieving decarbonisation. The NPSs proceed on the basis that there is no justification in *land use planning terms* for treating GHG emissions as a disbenefit which in itself is dispositive of an application for a DCO.

179. In DL 6.7 the Secretary of State repeated these considerations, as she was entitled to do. She also stated that GHG emissions are treated in the NPS as a significant adverse impact (see EN-2 para. 2.5.2) and then went on to consider whether, in the s.104(7) balance, that factor should be given greater weight in the case of the Drax proposal. The NPSs did not preclude that possibility, so long as GHG emissions were not treated as a freestanding reason for refusal. In this case the proposal also gave rise to landscape and visual impacts which were treated as further disbenefits (DL 6.5 and 6.8). Plainly the suggestion that the Secretary of State looked at the balance under s.104(7) solely through the lens of, or improperly fettered by, the NPSs is untenable.

180. The Secretary of State decided not to give greater weight to GHG emissions because she found there to be "no compelling reason in this instance." ClientEarth criticise that phrase as improperly introducing a "threshold test". Once again, this is an overly legalistic approach to the reading of the decision letter. The Secretary of State was simply expressing a matter of planning judgment. She was simply saying that there was no sufficiently cogent reason for giving more weight to this matter. She was entitled to exercise her judgment in that way. The Secretary of State then went on to weigh all the positive and negative effects of the proposal before concluding that the benefits outweighed the adverse effects of the proposal (DL 6.9).

181. For all these reasons, ground 4 must be rejected.

**Ground 5**

182. ClientEarth submits that the Secretary of State failed to assess the compliance of the proposal with policy requirements for CCR contained primarily in EN-1 in particular the economic feasibility of CCS forming part of the development during its lifetime.

183. These policy requirements are based upon Article 33 of the EU Directive on the Geological Storage of Carbon Dioxide (Directive 2009/31/EC), which inserted Article 9a into the Large Combustion Plants Directive (Directive 2001/80/EC). These provisions have been transposed into domestic law by the Carbon Capture Readiness (Electricity Generating Stations) Regulations 2013 (SI 2013 No. 2696) ("the 2013 Regulations"). No criticism is made of that transposition.

184. The effect of Regulation 3(1) is that the Secretary of State may not make a development consent order for the construction of a "combustion plant" (as defined) with a rated electrical output of 300 MW or more unless she has determined whether "the CCR conditions" are met in relation to that proposal. The Drax proposal engaged this provision. Regulation 2(2) defines how the CCR conditions are to be met:-

> "For the purposes of these Regulations, the CCR conditions are met in relation to a combustion plant, if, in respect of all of its expected emissions of $CO_2$—
>
> (a) suitable storage sites are available;
>
> (b) it is technically and economically feasible to retrofit the plant with the equipment necessary to capture that $CO_2$; and
>
> (c) it is technically and economically feasible to transport such captured $CO_2$ to the storage sites referred to in subparagraph (a)."

185. So it is necessary for it to be shown that sites suitable for the storage of carbon dioxide emissions from the plant are available, and that it is technically and "economically feasible" to retrofit the plant necessary to capture those emissions and to transport them to those storage sites. When the Directive and Regulations were passed the practical and commercial feasibility of CCS technology had not been demonstrated. Hence, it is necessary to reserve land for that purpose and to consider the retrofitting of the technology. This demonstration of technical and economic feasibility involves looking into the future.

186. Regulation 3(2) requires that the Secretary of State's determination under regulation 3(1) be made on the basis of a CCR assessment proposed by the applicant for a DCO (in this case Drax) and "any other available information, particularly concerning the protection of the environment and human health."

187. The Claimant does not suggest that there has been any failure to comply with the 2013 Regulations as such. Instead, it is said that there was a failure to comply with one aspect of the policy in EN-1 which elaborates upon those statutory requirements. Paragraph 4.7.13 of EN-1 states:-

> "Applicants should conduct a single economic assessment which encompasses retrofitting of capture equipment, $CO_2$ transport and the storage of $CO_2$. Applicants should provide *evidence of reasonable scenarios*, taking into account the cost of the capture technology and transport option chosen for the technical CCR assessments and the estimated costs of $CO_2$ storage, which make operational CCS economically feasible for the proposed development." (emphasis added)

188. Paragraph 4.7.10 of EN-1 also refers to guidance given by the Secretary of State in November 2009 which stated that the Government would not grant consent where the applicant could not "envisage any reasonable scenarios under which operational CCS would be economically feasible."

189. Inevitably a CCR assessment has to involve projections into the future. The projections upon which Drax relied involved making assumptions about future carbon trading prices. The Claimant makes no criticism about that as a matter of principle. But instead, drilling down into the evidence before the Panel, the complaint is that Drax only put forward certain carbon price scenarios in which CCS would be economic "and did not clarify that these were reasonable." This is said to be "crucial" (paras. 121 and 123 of the Claimant's skeleton).

*Analysis*

190. The Panel was satisfied that the requirements of the 2013 Regulations and of EN-1 in relation to CCR were met, including the economic and technical feasibility requirements (paras. 3.3.49 to 3.3.53 and 5.4.1 to 5.4.12 of the Report). The Secretary of State agreed in DL 4.29 to 4.31. I would have thought that it was obviously implicit that a conclusion that it would be "economically *feasible*" to install and operate CCS in future was based upon reasonable assumptions. There would be little point in legislating for this matter on the basis that unreasonable projections would be compliant. The "reasonable scenarios" criterion seems to be no more than a statement of the obvious and in reality is not a separate or additional requirement.

191. Mr. Jones QC accepted that during the examination ClientEarth did not raise any issue regarding the "reasonable scenarios" criterion. Their case was that a condition should be imposed requiring the provision of CCS from the outset (which was, in effect, a challenge to the merits of policy in the NPS which makes it plain that proposals for new fossil fuel plants only have to demonstrate that they are Carbon Capture Ready).

192. Although there is no absolute bar on the raising of a new point which was not taken in a planning inquiry or examination, one factor which may weigh strongly against allowing the point to be pursued is where it would have been necessary or appropriate for submissions or evidence to have been advanced, so that the decision-maker would have been able to make specific findings on the point (see e.g. Trustees of the Barker Mill Estates v Test Valley Borough Council [2017] PTSR 408 at [77]). There is a public interest in points being raised at the appropriate stage in the appropriate fact-finding forum, partly in order to promote finality and to reduce the need for legal challenge. If ClientEarth had followed that normal approach to the narrow issue now raised under ground 5, the matter could, if necessary, have been dealt with by some brief clarification of the material before the examination. If there was a genuine dispute about the matter, it could have been tested through cross-examination, or by the production of evidence to the contrary, in the normal way. However, I am satisfied

that the material before the Panel and the Secretary of State adequately addressed this point in any event.

193. Paragraph 4.7.14 of EN-1 puts this ground of challenge into a sensible context:-

> "The preparation of an economic assessment will involve a wide range of assumptions on each of a number of factors, and Government recognises the inherent uncertainties about each of these factors. There can be no guarantee that an assessment which is carried out now will predict with complete accuracy either in what circumstances it will be feasible to fit CCS to a proposed power station or when those circumstances will arise, but it can indicate the circumstances which would need to be the case to allow operational CCS to be economically feasible during the lifetime of the proposed new station."

194. The CCR statement by Drax put forward scenarios and explained why those met the requirements of the 2013 Regulations and EN-1 and EN-2 and the Government's Guidance on CCR. Paragraph 40 of a submission to the Panel by ClientEarth, responded to submissions by Drax on CCS in the following terms:-

> "In line with this principle, the courts have established that is possible to impose a condition prohibiting the implementation of a consent until that condition has been met – even where there are no reasonable prospects of the condition being met. However, in the context of the present application, the Applicant appears to believe that there is a reasonable prospect of CCS being economically and technically feasible "by the mid-2020s"."

195. In other written representations ClientEarth commented favourably on the reasonableness of the assumptions made about future prices in the CCR assessment by Drax in contrast to its treatment elsewhere of the baseline for climate change analysis:-

> "Moreover, it has made its assumption of economic feasibility entirely contingent on "the end price of electricity" without assessing the reasonableness of such assumptions about future prices. This is in contrast to the approach taken in the Applicant's CCR Statement where the Applicant has carried out a detailed assessment of the future economics, including wholesale electricity prices, to arrive at a set of justified conclusions about the economic feasibility of CCS."

196. The attempt by Mr. Hunter-Jones (the Solicitor representing ClientEarth) in his second witness statement to explain certain of these passages, with respect, amounts to no more than special pleading.

197. Ground 5 is wholly without merit. It should not have been raised.

**Ground 6**

198. ClientEarth submits that the Secretary of State failed to comply with requirements in regulations 21 and 30 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the 2017 Regulations") regarding measures for the monitoring of GHG emissions. A "monitoring measure" is defined by regulation 3(1) as:-

> "a provision requiring the monitoring of any significant adverse effects on the environment of proposed development, including any measures contained in a requirement imposed by an order granting development consent"

199. Regulation 21 deals with the consideration of whether a DCO should be granted. Paragraph (1) provides:-

> "When deciding whether to make an order granting development consent for EIA development the Secretary of State must—
>
> (a) examine the environmental information;
>
> (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;
>
> (c) integrate that conclusion into the decision as to whether an order is to be granted; and
>
> (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures."

200. It will be noted that sub-paragraphs (a) to (c) apply irrespective of whether the decision is to grant or to refuse consent. However, the consideration under sub-paragraph (d) of whether monitoring measures should be imposed only arises if it is decided that the DCO should be granted. In that event, regulation 21(3) provides:-

> "When considering whether to impose a monitoring measure under paragraph (1)(d), the Secretary of State must—
>
> (a) if monitoring is considered to be appropriate, consider whether to make provision for potential remedial action;
>
> (b) take steps to ensure that the type of parameters to be monitored and the duration of the monitoring are proportionate to the nature, location and size of the proposed development and the significance of its effects on the environment; and
>
> (c) consider, in order to avoid duplication of monitoring, whether any existing monitoring arrangements carried out in accordance with an obligation under the law of any part of the United Kingdom, other than under the Directive, are more appropriate than imposing a monitoring measure."

201. The Claimant submits that Regulation 21 must be interpreted in the context of the preventative and precautionary principles of EU law (Article 191 of the Treaty on the Functioning of the European Union).

202. Regulation 30 provides for the contents of decision notices. Regulation 30(1) requires that the notice of the decision on the application for a DCO must contain the information specified in paragraph (2) which provides (in so far as relevant):-

> "The information is—

(a) information regarding the right to challenge the validity of the decision and the procedures for doing so; and

(b) if the decision is —

(i) to approve the application—

(aa) the reasoned conclusion of the Secretary of State or the relevant authority, as the case may be, on the significant effects of the development on the environment, taking into account the results of the examination referred to, in the case of an application for an order granting development consent in regulation 21, and in the case of a subsequent application, in regulation 25;

(bb) where relevant, any requirements to which the decision is subject which relate to the likely significant environmental effects of the development on the environment;

(cc) a description of any features of the development and any measures envisaged in order to avoid, prevent or reduce and, if possible, offset, likely significant adverse effects on the environment; and

(dd) any monitoring measures considered appropriate by the Secretary of State or relevant authority, as the case may be; or

(ii) ..…"

203. Regulation 30(2)(b)(i)(aa) requires a reasoned conclusion to be given by the decision-maker on the significant effects of the development taking into account the examination of environmental information under Regulation 21(1). In effect, the reasoned conclusion required under regulation 30(2) relates to the requirements in Regulation 21(1)(a) to (c), but not sub-paragraph (d). There is no requirement in regulation 30 to give a "reasoned conclusion" in relation to any "monitoring measures" considered appropriate. Instead, Regulation 30(2)(b)(i)(dd) simply requires the decision notice to set out the monitoring measures considered to be appropriate. There is no requirement in the 2017 Regulations to give "reasoned conclusions" on that matter. Mr. Jones QC did not argue to the contrary.

204. The Claimant submits that there is no indication in the decision letter that the Secretary of State considered whether monitoring measures would be appropriate "particularly (but not only) in relation to GHG emissions (para. 142 of skeleton).

*Analysis*

205. Mr. Tait QC pointed out that the decision made by the Secretary of State, which includes the DCO itself, involved the imposition of a number of monitoring measures. They are set out in schedule 2 to the Order under requirements 8(1) -(2), 15(3), 16(5), 21(2)-(3) and 23 and cover monitoring of such matters as ecological mitigation, ground contamination mitigation, archaeological interest, noise, and CCR. These

matters are addressed where appropriate in the Panel's report and in the decision letter.

206. I therefore agree that the Secretary of State had well in mind the requirement in Regulation 21 to consider whether it was appropriate to impose monitoring measures.

207. The legislation to which I have referred makes it plain that there is no requirement for the Secretary of State to give reasons for a decision not to impose a particular monitoring measure, for example, in respect of GHG emissions, whether because it would be inappropriate or because other existing monitoring arrangements required by law are more appropriate. Accordingly, I accept Mr. Tait's submission that the Secretary of State's obligation under s.116(1) of PA 2008 to give reasons for her decision would only apply to the "principal important controversial issues" in the examination (see Save [1991] 1 WLR 153 at p.165 and South Bucks District Council [2004] 1 WLR 1953 at [34] and [36]).

208. In the present case the Panel referred to the need for Drax to obtain a Greenhouse Gas Permit from the Environmental Agency under the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (SI 2012 No. 3038) ("the 2012 Regulations") to deal with GHG emissions from the proposed development (see Report at para. 1.7.1).

209. Ordinarily, a monitoring measure is imposed to see that a development conforms to certain parameters, failing which remedial measures may be taken, or to ensure that mitigation measures are effective. The 2017 Regulations do not require the imposition of monitoring simply for the sake of monitoring. This may be seen in recital (35) of Directive 2014/52 (which inserted article 8a into Directive 2011/92/EU) :-

> "Member States should ensure that mitigation and compensation measures are implemented, and that appropriate procedures are determined regarding the monitoring of significant adverse effects on the environment resulting from the construction and operation of a project, inter alia, to identify unforeseen significant adverse effects, in order to be able to undertake appropriate remedial action."

210. Mr. Jones QC submitted that the monitoring of GHG emissions under the 2017 Regulations was necessary here because of the wide divergence in the estimates before the Panel of the percentage increase in emissions (para. 141 of skeleton). This is a wholly spurious point. As paragraph 12 of the Agreed Statement of Facts prepared for this hearing plainly states, there was no disagreement over the projections of the total emissions that would be produced by the proposed development. The disagreement related instead to the baseline scenarios, the existing coal-powered generation or replacement thereof elsewhere on the National Grid (see the Panel's Report at paras. 5.3.7 to 5.3.17). Plainly, monitoring measures imposed on the new gas-fired power station could achieve nothing whatsoever in relation to that difference.

211. It is common ground that during the examination process no one, including ClientEarth, suggested that the DCO should contain a monitoring measure for GHG and what significant purpose that would achieve which would not otherwise be achieved under the 2012 Regulations.

212. I have already referred to the approach taken by the courts to the raising of a new point in a legal challenge which could have been, but was not, pursued in a public inquiry or examination (paragraph 192 above). If ClientEarth had raised the matter in the normal way in the examination, issues of the kind which are now mentioned in paragraph 147 of their skeleton could have been covered and if necessary tested at that stage and appropriate findings made by the Panel. Although I will address the remaining arguments under ground 6, I do so with some hesitation as to whether it is appropriate.

213. The 2012 Regulations were made in order to give effort to a series of EU Directives establishing a scheme for trading in emission allowances for GHG, otherwise referred to in EN-1 as EU ETS. The monitoring arrangements they contain were made in order to give effect to EU Regulation 601/2012 and EU Regulation 2018/2067. The scheme is focused on achieving decarbonisation.

214. Regulation 9 prohibits the carrying on of a "regulated activity" at an "installation" without a permit issued by the Environment Agency. This would apply to the operation of the gas-fired generating units. The application for a GHG emissions permit may be granted if the Agency is satisfied that the applicant will be able to monitor and report emissions from the installation in accordance with the requirements of the permit (Regulation 10(4)). An application for a permit must contain a defined monitoring plan and procedures (paragraph 1(1) of schedule 4). The permit must contain (inter alia) the monitoring plan, monitoring and reporting requirements (to cover "the annual reportable emissions of the installation") and a requirement for verification of the report (para. 2(1) of schedule 4).

215. In relation to the anti-duplication provision in Regulation 21(3)(c) of the 2017 Regulations, ClientEarth submits that the GHG permit regime does not qualify as an "existing" monitoring arrangement. I cannot accept that argument. The statutory requirement for a permit is in place along with a detailed specification of what the permit must contain in order to comply with the "Monitoring and Reporting Regulation" (i.e. EU Regulation 601/2012). The content of these requirements is sufficiently defined to qualify as an "existing monitoring arrangement" for the purposes of regulation 21(3)(c) of the 2017 Regulations. No specific case was advanced by ClientEarth which would enable the court to conclude otherwise.

216. The 2017 Regulations operate within the EU ETS regime summarised in EN-1 at paragraphs 2.2.12 to 2.2.15. All of this must have been well-known to the Panel and the Secretary of State. The ETS scheme involves a gradually reducing cap on GHG emissions from large industrial sectors such as electricity generation which translates into finite allowances to emit GHG available to specific operators. Paragraph 5.2.2 of EN-1 envisages that the decarbonising of electricity generation is to be achieved through the regimes described in section 2.2. I therefore accept the Secretary of State's submission that EN-1 proceeds on the basis that GHG emissions will be separately controlled. It is unsurprising therefore, that no one suggested during the examination that GHG emissions should be controlled under the PA 2008, or what cap or caps should be imposed, without which it is difficult to see what purpose GHG monitoring under the terms of the DCO would serve. Ultimately, Mr. Jones QC submitted that monitoring would enable it to be seen whether the projected total emissions had been estimated accurately. It was not explained why that could not be achieved under the 2012 Regulations, if that was thought to be necessary.

217. Looking at the position as a whole, I am satisfied that no breach of Regulation 21 of the 2017 Regulations has occurred. However, even if I had taken a different view, I am also certain that it would be inappropriate to grant any relief. The focus of the Statement of Facts and Grounds and of the Claimant's skeleton is to seek an order quashing the DCO. In R (Champion) v North Norfolk District Council [2015] 1 WLR 3710 the Supreme Court held that even where a breach of EIA Regulations is established, the Court may refuse relief where the applicant has in practice been able to enjoy the rights conferred by European legislation and there has been no substantial prejudice [54].

218. I accept the submissions for the Secretary of State and Drax that in substance the requirements and objectives of Regulation 21 have been met and no substantial prejudice has occurred. The legal issue raised under ground 6 would not affect whether the project is consented and may go ahead. There is an existing monitoring regime under the 2012 Regulations. GHG emissions will be monitored, recorded, validated and passed to the EA. This is within the context of the ETS regime which is focused on achieving decarbonisation over time. No evidence has been filed to explain how any real prejudice has been caused by the alleged breach of regulation 21 (see, for example, Ouseley J in R (Midcounties Co-operative Limited) v Wyre Forest District Council [2009] EWHC 964 (Admin) at [104]-[116]). ClientEarth has not indicated the nature of any monitoring condition (including measures consequent upon the results obtained) which, they say, ought to have been imposed on the DCO. It is simply said that monitoring measures could be linked to further "requirements" in the DCO, without saying what they might be (paragraph 147 of the Claimant's skeleton). If there had been any real substance in such points, ClientEarth had every opportunity to raise them during the examination process in the normal way; but they did not take it. This is a hollow complaint.

219. I have also been asked to consider applying s.31(2A) of the Senior Courts Act 1981. Given the need for compliance with the GHG permitting regime and for the other reasons set out above, I am satisfied that if the monitoring of GHG emissions under the DCO had been addressed during the examination or in the Secretary of State's consideration of the matter, it is highly likely that the outcome would not have been substantially different. The DCO would still have been granted and there is no reason to think, on the material before the court, that GHG monitoring would have been included as an additional requirement of the order. Nothing has been advanced which would justify the grant of relief in reliance upon s.31(2B).

220. One further point has been raised by the Claimant which the Secretary of State has addressed in paragraph 90 of her skeleton:-

> "[Paragraph 150 of the Claimant's skeleton] introduces a separate and unparticularised assertion that "*the Secretary of State failed lawfully to comply with* …… Reg.30 of the EIA Regulations. The point made appears to be that the Secretary of State did not include a "*reasoned conclusion … on the significant effects of the development on the environment*" as required by Reg.30(2)(b)(i)(aa). That is a new ground outside the scope of the SFG that has nothing to do with monitoring and is baseless. The DL, read with the ExA, sets out detailed conclusions on the environmental impacts of the Drax Power proposal."

I agree.

221. For all these reasons ground 6 must be rejected.

**Ground 7**

*Introduction*

222. On 27 June 2019 the target for the UK's net carbon account for 2050 set out in s.1 of the CCA 2008 was changed from 80% to 100% below the 1990 baseline (see the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019 No. 1056)). This is referred to as "the net zero target". In paragraph 3.4.2 the Panel explained that because this amendment had occurred after the close of the examination and only one week before they were to submit their report to the Secretary of State, it had not formed the basis for their examination of the application or had any bearing upon their final conclusions. They suggested that it would, nonetheless, be a matter for the Secretary of State to consider in the planning balance.

223. Although in paragraphs 7.2.10 and 7.3.6 of their report the Panel concluded that the projected increase in total GHG emissions of more than 90% above the current baseline for Drax would undermine the Government's commitment to cut GHG emissions, as contained in the CCA 2008, at paragraph 7.3.8 the Panel stated that they had received no evidence that the proposed development would in itself lead to a breach of s.1 of that Act. Accordingly, they concluded that the exception to s.104(3) provided by s.104(5) (see paragraph 49 above) did not apply.

224. In DL 4.28 the Secretary of State agreed with the conclusion at paragraph 7.3.8 of the Panel's Report and said that the implications of the amendment to the CCA 2008 would be addressed subsequently. At DL 5.7 she stated that the "net zero target" was "a matter which was both important and relevant to the decision on whether to grant consent for the [proposed] development and that regard should be had to it when determining the application."

225. At DL 5.8 to 5.9 the Secretary of State stated:-

> "5.8 The Secretary of State notes with regard to the amendment to the CCA that it does not alter the policy set out in the National Policy Statements which still form the basis for decision making under the Act. Section 2.2 of EN-1 explains how climate change and the UK's GHG emissions targets contained in the CCA have been taken into account in preparing the suite of Energy NPSs. As paragraph 2.2.6 of EN-1 makes clear, the relevant NPSs were drafted considering a variety of illustrative pathways, including some in which *"electricity generation would need to be virtually [greenhouse gas] emission-free, given that we would expect some emissions from industrial and agricultural processes, transport and waste to persist."* The policies contained in the relevant NPSs regarding the treatment of GHG emissions from energy infrastructure continue to have full effect.
>
> 5.9 The move to Net Zero is not in itself incompatible with the existing policy in that there are a range of potential pathways that will bring about a minimum 100% reduction in the UK's emissions. While the relevant NPSs do not preclude the granting of consent for developments which may give rise to emissions of GHGs provided that they comply with any relevant NPS policies or requirements which support decarbonisation of energy infrastructure (such as CCR

> requirements), potential pathways may rely in future on other infrastructure or mechanisms outside the planning regime offset or limit those emissions to help achieve Net Zero. Therefore, the Secretary of State does not consider that Net Zero currently justifies determining the application otherwise than in accordance with the relevant NPSs or attributing the Development's negative GHG emissions impacts any greater weight in the planning balance. In addition, like the ExA, the Secretary of State does not consider there to be any evidence that granting consent for the Development would in itself result in a direct breach of the duties enshrined in the CCA, given the scope of the targets contained in the CCA which apply across many different sectors of the economy. This remains the case following the move to Net Zero and therefore she does not consider that the exception in section 104(5) of the 2008 Act should apply in this case." (original emphasis)

226. In summary the Secretary of State concluded that:-

(i) The policy in the NPSs had not been altered by the amendment to the CCA 2008 and still remained the basis for decision-making under the 2008 Act;

(ii) The UK's target of an 80% reduction in GHG emissions had been taken into account in the preparation of the energy NPSs;

(iii) The net zero target was not in itself incompatible with those policies, given that there was a range of potential pathways that will bring about a minimum 100% reduction in GHG by 2050;

(iv) Developments giving rise to GHG emissions are not precluded by the NPSs provided that they comply with any relevant NPS policy supporting decarbonisation of energy infrastructure, such as CCR requirements. Potential pathways may rely in future on other infrastructure or mechanisms outside the planning regime to offset or limit those emissions to help achieve net zero;

(v) Accordingly, the net zero target did not justify determining the application otherwise than in accordance with the NPSs or increasing the negative weight in the planning balance given to GHG emissions from the development;

(vi) Given that the targets in the CCA 2008 apply across many different sectors of the economy, there was no evidence that the proposed development would in itself result in a breach of that Act and so s.104(5) did not apply.

227. In DL 6.12 the Secretary of State concluded:-

> "In the case of section 104(5), notwithstanding the ExA's conclusions on the Development's adverse climate change impacts, it also found that there was no evidence to suggest that granting consent for the Development would in itself lead to the Secretary of State to be in breach of the duty set out in the CCA to ensure that the UK's target for 2050 is met. The Secretary of State agrees with this conclusion."

228. At DL 6.18 to 6.20 the Secretary of State dealt with "late submissions", that is representations made by Pinsent Masons on behalf of Drax after the close of the

examination. This challenge is only concerned with their 11 page letter dated 4 September 2019, which sought to address the amendment of the CCA 2008. At DL 6.20 the Secretary of State stated that:-

> "In respect of the second submission, the Secretary of State does not consider that this provides any information that alters her conclusions set out in paragraphs 5.6 – 5.9 and 6.7 above."

229. Under ground 7A ClientEarth submits that the Secretary of State acted in breach of her duty to act fairly by having regard to the letter dated 4 September without supplying a copy of it to the other participants in the examination and giving them an opportunity to make representations about its contents.

230. ClientEarth does not challenge the evidence in the witness statement of Mr. Gareth Leigh (Head of the Energy Infrastructure Planning Team in the Energy Development and Resilience Directorate of BEIS) that the letter from Pinsent Masons was not taken into account by the Secretary of State herself. Nonetheless, it is accepted that it was read by officials to see whether it was a matter that should be referred to the Minister, and so ClientEarth submits it has influenced, or there is a risk that it has influenced, the advice that they did in fact give to her on the decision to be taken.

231. In response to a question from the court, ClientEarth submits in the alternative that, putting the letter from Pinsent Masons to one side, it was in any event unfair for the Secretary of State to have regard to the issue whether the amendment to the CCA 2008 had implications for her decision on the application for a DCO without giving the Claimant and other participants in the examination to make representations on that matter. This became the subject of an application to amend the Statement of Facts and Grounds to rely upon this contention as an additional ground 7B. It was agreed between the parties that the question of whether permission to amend should be granted depended on whether this additional ground is arguable. Counsel for the Secretary of State and Drax confirmed that they were able to deal with the point during the hearing and on the material already before the court. Accordingly, it was agreed that the question of whether the permission to amend should be granted ought to be left to be dealt with in this judgment.

*Ground 7A*

232. Mr. Jones QC referred to Rule 19(3) of the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010 No. 103) ("the 2010 Rules") which provides that:-

> "(3) If after the completion of the Examining authority's examination, the Secretary of State-
>
> > (a) differs from the Examining authority on any matter of fact mentioned in, or appearing to the Secretary of State to be material to, a conclusion reached by the Examining authority; or
> >
> > (b) takes into consideration any new evidence or new matter of fact, and is for that reason disposed to disagree with a recommendation made by the

> Examining authority, the Secretary of State shall not come to a decision which is at variance with that recommendation without —
>
> > (i) notifying all interested parties of the Secretary of State's disagreement and the reasons for it; and
> >
> > (ii) giving them an opportunity of making representations in writing to the Secretary of State in respect of any new evidence or new matter of fact."

233. Mr. Jones QC accepts that this case does not fall within sub-paragraph (b), given that the Secretary of State did not disagree with the Panel's recommendations because of the letter from Drax's Solicitors. However, it is well-established that procedural rules of this nature may not necessarily exhaust the requirements of natural justice. He relies upon the purpose and spirit of rule 19(3).

234. More particularly, Mr. Jones QC relies upon statements in Bushell v Secretary of State for the Environment [1981] AC 75 at 102A and Broadview Energy Developments Limited v Secretary of State for Communities and Local Government [2016] EWCA Civ 562 at [25] to [26], to the effect that a decision-maker should not "accept" fresh evidence from one side supporting their case without giving other parties an opportunity to deal with it. In a much earlier authority, Errington v Minister of Health [1935] 1 KB 249, it was held that the Minister had acted unlawfully by taking into account and relying upon material from one side (the authority promoting a housing clearance order) without giving landowners an opportunity to make representations about it. Broadview was in some ways a striking case where the Minister received oral representations privately from the local constituency MP. But the court did not intervene because the representations had not added materially to what had been addressed at the public inquiry and they could not have materially influenced the outcome.

235. The present case is very different. As I have said, neither the letter from Pinsent Masons, nor a summary of its contents was provided to the Secretary of State. She had no actual knowledge of any such material. In R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 the Court of Appeal held at [23] to [38] that what is known to the officials in a Minister's department is not to be imputed to the Minister when he or she reaches a formal decision. A Minister is treated as having taken into account only those matters about which he or she actually knew.

236. Mr. Jones QC accepted that this principle applied in the present case. But he submitted that the process had nonetheless been unfair because the officials who advised the Secretary of State read the letter from Pinsent Masons and those representations influenced, or may have influenced, their briefing to the Secretary of State.

237. I do not accept that submission. The position has been very clearly explained in the witness statement of Mr. Leigh, in particular at paragraphs 20 to 24. The conclusions in the decision letter to which I have already referred were informed by internal communications with other officials in the Department dealing with the net zero target. They were asked to advise on the implications of the amended target for the

policy in EN-1 and EN-2 dealing with unabated gas fired electricity generation. The approach set out in their response reflected the existing policy in the NPSs.

238. The reasoning in DL 5.8 clearly relates to material in EN-1. In a written note Mr. Tait QC showed how relevant parts of DL 5.9 related back to passages in EN-1. Thus, when paragraph 17 of Mr. Leigh's witness statement is read in the context of the later parts of his evidence, and with the further explanation provided by Mr. Tait QC, I accept that DL 5.6 to 5.9 were essentially dealing with matters of existing Government policy set out in EN-1. One of the main conclusions in DL 5.9 was the Secretary of State's judgment that the policies in the relevant NPSs on the treatment of GHG emissions from energy infrastructure continued to have full effect. That is why Mr. Leigh stated that neither the Secretary of State nor her officials needed submissions on policy from Drax. They had reached their own conclusions on those matters for themselves.

239. I appreciate that the letter from Pinsent Masons also covered matters other than the implications of the net zero target for EN-1, but those matters did not form any part of the reasoning in the decision letter, or the briefing to the Secretary of State. Mr. Jones QC did not suggest otherwise.

240. I have therefore reached the firm conclusion that the advice actually given by officials to the Secretary of State was not influenced or tainted by the letter from Pinsent Masons. There was no requirement for the Secretary of State to refer that letter to ClientEarth and to other parties for comment before she reached her decision in order to discharge her duty to act fairly.

241. But even if I had taken the contrary view ground 7A would still fail. The relevant legal test for determining both grounds 7A and 7B is whether "there has been procedural unfairness which materially prejudiced the [claimant]" (Hopkins Developments Limited v Secretary of State for Communities and Local Government [2014] PTSR 1145 at [49]). This reflects the principle previously stated by Lord Denning MR in George v Secretary of State for the Environment (1979) 77 LGR 689 that:-

> "there is no such thing as a 'technical breach of natural justice'… One should not find a breach of natural justice unless there has been substantial prejudice to the applicant as the result of the mistake or error that has been made."

and by Lord Wilberforce in Malloch v Aberdeen Corporation [1971] 1 WLR 1578, 1595 that:-

> "A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts unless behind it there is something of substance which has been lost by the failure."

242. Mr. Jones QC identified the prejudice upon which ClientEarth relies in terms of the additional submissions and/or evidence which it would have wished to produce to the Secretary of State had it been given an opportunity to comment, as summarised in paragraphs 21 to 34 of Mr. Hunter-Jones's first witness statement and paragraphs 11 to 18 of his second witness statement. It is plain that the object of these submissions would have been to undermine the basis upon which policies in EN-1 on GHG

emissions and gas fired electricity generation were prepared and adopted. By way of example, it is said that to be compatible with the net zero target, gas fired power stations would have to operate with CCS, and not merely be consented with CCR. Alternatively, a "more rigorous standard" than CCR should have been required in this case. In addition, ClientEarth would have contended that the DCO should have been subject to a condition preventing the operation of the facility beyond 2050 without CCS. It is plain that the thrust of ClientEarth's contentions is that the net zero target is incompatible with existing policy in EN-1 and EN-2.

243. I accept the submission made by the Secretary of State and by Drax that ClientEarth's contentions would have been disregarded under s.106(1) of PA 2008 as relating to the merits of policy in the NPSs. Mr. Jones QC did not argue to the contrary. The import of ClientEarth's points is that key policies in EN-1 and EN-2 are out of date by virtue of the net zero target enshrined in the CCA 2008. It is not the function of the court to say whether that view is right or wrong. But it is the function of the court to say that this line of argument undoubtedly falls outside the scope of the process created by Parliament by which an application for a DCO is examined and determined. Instead, it is a matter which could only be addressed through a decision to carry out a review under s.6 of PA 2008 (see above). There has been no such decision and no claim for judicial review relating to any allegation of failure to institute such a review.

244. It therefore follows that the way in which the Secretary of State's officials handled the letter from Pinsent Masons has not caused the Claimant to lose an opportunity to advance a case which would have been admissible under PA 2008 or could have affected the determination of Drax's application for a DCO. The Claimant has not shown that any relevant prejudice has been suffered by virtue of the matters about which it complains.

245. For all these reasons ground 7A must be rejected.

*Ground 7B*

246. ClientEarth's additional argument is that it was unfair for the Secretary of State to have regard to the issue whether the substitution of the net zero target in section 1 of the CCA 2008 had implications for the determination of the application for the DCO without giving the parties an opportunity to make submissions.

247. Mr. Jones QC accepted that ordinarily a Minister is entitled to reach a decision on a planning appeal or an application for a DCO relying upon advice from officials without disclosing that advice to the parties so that they can make representations. If that were not so, the system would be unworkable. This was recognised by the Court of Appeal in R v Secretary of State for Education ex parte S [1995] ELR 71, subject to one qualification, namely where a new point is raised by the advice upon which the parties have not had any opportunity to comment (see also the National Association of Health Stores case at [34]). Mr. Jones QC submits that the implications of the amendment to the CCA 2008 amounted to a new point and participants in the examination had had no opportunity to address it before that process was completed.

248. A similar situation arose in Bushell. Following the closure of the public inquiry into a motorway scheme, the relevant Government department issued (a) new design standards that treated the capacity of existing roads as greater than had previously

been assumed and (b) a revised national method of predicting traffic growth that produced lower estimates of future traffic than had previously been given. So objectors to the scheme asked for the inquiry to be reopened so that they could contend that the need for the new scheme had been undermined. The Secretary of State refused to reopen the inquiry and in his decision letter stated that the new publications did not materially affect the evidence on which the Inspector had decided to recommend that the scheme should be approved; the estimation of traffic need using the revised methods did not differ materially from the earlier assessment. The House of Lords held that this procedure had not involved any unfairness because the objectors were not entitled to use the forum of a local inquiry to criticise and debate the merits of the revised methods, which were a form of Government policy ([1981] AC at 99-100 and 103D).

249. Thus, the duty to act fairly may not entitle a party to be given an opportunity to make representations on a "new point" in so far as his challenge relates to the *merits* of a new Government policy, for example whether it should be applied nationally to the assessment of schemes. This aspect of the decision in Bushell presaged the approach taken by Parliament in ss.6, 87(3) and 106(1) of PA 2008. Challenges to the merits of existing policy in a NPS are not a matter for consideration in the examination and determination of individual applications for a DCO. Such policy is normally applicable to many DCO applications and the appropriate forum for arguments of that nature is a review under section 6.

250. As I have already explained when dealing with Ground 7A, the additional arguments that ClientEarth says it would have wished to advance fall outside the legitimate ambit of the DCO process and therefore no prejudice has occurred. Accordingly, ground 7B is unarguable, it must be rejected and the application for permission to amend the Statement of Facts and Grounds refused.

251. For completeness I mention a faint suggestion by ClientEarth that the Secretary of State failed to comply with her duty to give reasons in relation to this topic. With respect, that contention is hopeless.

*Conclusion*

252. For all the above reasons, grounds 7A and 7B must be rejected.

**Ground 8**

253. There was some overlap in the arguments advanced by the Claimant under grounds 7 and 8. It was said that the advice which Mr. Leigh's team took from other officials on the implications of the net zero target for EN-1 and EN-2 in relation to unabated gas-fired electricity generation ought to have been made publicly available before it was taken into account. I have dealt with that issue under ground 7.

254. Then it was submitted that officials and the Secretary of State asked the wrong question, namely whether the proposed development would lead to a breach of the CCA 2008 or would result in incompatibility with the net zero target, because those questions cannot be answered at this point in time (para. 174 of skeleton). However, the Secretary of State did address those questions and concluded that the proposed development was not incompatible with the net zero target (DL 5.9 and 6.12). That

was a matter of judgment for the Secretary of State which could only be challenged on the grounds of irrationality. Here it is appropriate to have in mind the discussion of the Divisional Court in Spurrier on intensity of review ([2020] PTSR 240 at [141] et seq.) and in particular cases dealing with challenges to consents, such as Newsmith Stainless Limited v Secretary of State for the Environment, Transport and the Regions [2017] PTSR 1126 at [6] to [8] and R (Mott) v Environment Agency [2016] 1 WLR 4338 at [75] et seq. ClientEarth have put forward reasons as to why they disagree with the Secretary of State on this subject, but the Court is in no position to say on the material which has been produced that her judgment was irrational.

255. Next, the Claimant submitted that the Defendant failed to "fully consider, and grapple with, the impact of the Development on achieving Net Zero by 2050 and whether current NPS policy concerning unabated fossil fuel generation was consistent with the new target" (para. 174 of skeleton and see also paras. 176-178). A criticism that a decision-maker has failed to take into a material consideration is now to be dealt with in accordance with the principles settled in the Samuel Smith case (see paragraphs 99 to 100 above). As I have already explained under ground 7, the Secretary of State did in fact address that question.

256. Where a decision-maker decides to have regard to a matter then it is generally a matter for his or her judgment as to how far to go into it, something which may only be challenged on the grounds of irrationality (R (Khatun) v Newham London Borough Council [2005] QB 37 at [35]. Mr. Jones QC relied upon the requirement in Article 8a(4) of Directive 2011/92/EU (as amended) that Member States shall ensure that measures are implemented by the developer to avoid, prevent, reduce or offset "significant adverse effects on the environment" and regulation 21(1)(b) and 30(2)(b) of the 2017 Regulations. However, the general approach to judicial review of the adequacy of compliance with requirements of this nature, whether in the context of SEA or EIA, is for the court to intervene only if the decision-maker has acted irrationally (see e.g. Spurrier [2020] PTSR 240 at [434] and R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214 at [126] to [144]). Once again, there is no material here upon which the court could conclude that the Secretary of State's approach was irrational.

257. Mr Tait QC and Mr Strachan QC submitted that as a matter of judgment the Secretary of State was entitled to rely upon other mechanisms outside the planning system, such as the Electricity Market Reform and the EU ETS, to control emissions from fossil fuel electricity generation when potential pathways are drawn up to help achieve the net zero target, consistently with policies contained in EN-1 (DL 5.9). I agree that that reasoning does not disclose any error of law.

258. ClientEarth takes a different view on the compatibility of NPS policy with the net zero target, but for the reasons previously given this was not a matter which, even if it had been raised by ClientEarth between the amendment of CCA 2008 and the issuing of the decision letter, could properly have been considered and resolved in a determination on an application for a DCO. It would have been a matter for review under s.6 of the Act (with all the related procedural safeguards) if the Secretary of State considered that to be appropriate in terms of s.6(3). No challenge has been made by ClientEarth in these proceedings to a failure on the part of the Secretary of State to act under s.6. It does not appear that ClientEarth raised the review mechanism under s.6 as a matter which the Secretary of State ought to address.

259. In paragraph 179 to 181 of their skeleton ClientEarth submit that the Secretary of State failed to consider whether a "time-limiting condition" was necessary to address GHG emissions from the proposed development after 2050. It is suggested that the Secretary of State should at the very least have "considered" imposing a condition preventing the development from being operated after 2050 without "further consideration of appropriate offsetting and/or CCS requirements." It is plain that the Secretary of State had regard to the position up to 2050 and beyond. She dealt with the CCS issue in accordance with the policy in EN-1 and EN-2. For the reasons I have already given, she was entitled in law to do so. The implication of the complaint that those policies should be revised was not a matter for consideration in the DCO process, nor is it a matter for this court in this challenge to the decision to grant the DCO.

260. For all these reasons ground 8 must be rejected.

**Ground 9**

261. This was a bare allegation that the decision to grant the DCO was irrational because the decision "did not add up" or was tainted by erroneous reasoning which "robbed the decision of logic." No particulars were given. Mr. Jones QC withdrew ground 9. He was right to do so. Ground 9 added nothing.

**Conclusion**

262. For the reasons set out above, the claim for judicial review must be dismissed.

House of Lords

# Runa Begum *v* Tower Hamlets London Borough Council (First Secretary of State intervening)

[2003] UKHL 5

2003 Jan 15, 16; Feb 13

Lord Bingham of Cornhill, Lord Hoffmann, Lord Hope of Craighead, Lord Millett and Lord Walker of Gestingthorpe

*Local government — Homeless person — Refusal of offer of accommodation — Local authority officer reviewing offer and concluding that accommodation suitable — Homeless person appealing to county court — Whether statutory scheme for review and appeal compatible with homeless person's right to fair determination of civil rights — Housing Act 1996 (c 52), ss 202, 204 — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 6(1)*

The local authority accepted that R was homeless and that it had a duty to secure accommodation for her. She was offered permanent accommodation, which she viewed but rejected, stating that the area was characterised by drug problems and racism, that she had been attacked by two youths shortly after viewing the property and that her estranged husband frequently visited the building. An internal review of the accommodation offer was conducted under section 202 of the Housing Act 1996[1] by a local authority officer, who concluded that the accommodation offered was suitable for R and her household and that it would have been reasonable for her to accept it. R appealed to the county court under section 204 of the Act. On the hearing of a preliminary issue R asserted that since there were disputed facts the local authority, in order to comply with article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998[2], should have at least considered using its statutory powers to direct a review by an independent body rather than conducting a final review by its own officer. The judge held that the failure to make such a reference or to consider doing so to a wholly independent tribunal signified that the procedure adopted under section 202 contravened R's right to a fair determination of her civil rights under article 6 of the Convention. He accordingly allowed her appeal. On the local authority's appeal the Court of Appeal reversed the judge's order.

On R's appeal—

*Held*, assuming without deciding that R's "civil right" was engaged, (1) that, since the council officer, in conducting the internal review pursuant to section 202 of the 1996 Act, was considering the council's own decision and the extent of its statutory duties, she was manifestly not an independent tribunal for the purposes of article 6(1) of the Convention (post, paras 1, 3, 27, 73, 95–97, 108).

(2) Dismissing the appeal, that, having regard to the scope of article 6(1) as extended to administrative decisions which were determinative of civil rights, such a decision might properly be made by a tribunal which did not itself possess the necessary independence to satisfy the requirements of article 6(1) so long as measures were in place to safeguard the fairness of the proceedings and the decision was subject to ultimate judicial control by a court with jurisdiction to deal with the case as its nature required (post, paras 1, 6, 11, 30–31, 33, 73, 94, 99–101, 104, 108).

(3) That, since Part VII of the 1996 Act was part of a far-reaching statutory scheme regulating housing, administered largely by local housing authorities, since

[1] Housing Act 1996, ss 202, 204: see post, paras 15, 17.
[2] Human Rights Act 1998, Sch 1, Pt I, art 6(1): see post, para 75.

A any factual issues they resolved were only preliminary to the exercise of their broader judgment in performing their duties under the scheme, and since the review process under section 202 was conducted at a senior administrative level and subject to detailed statutory rules to ensure fair decision-making, the context did not require a full fact finding jurisdiction in the appellate court; and that, accordingly, the county court's appellate jurisdiction under section 204, exercising the normal judicial review jurisdiction of the High Court, was sufficient to satisfy the requirements of
B article 6(1) (post, paras 1, 7, 9, 11, 36, 43–44, 46–47, 50–58, 60, 72, 73, 105–107, 108, 113).

*Bryan v United Kingdom* (1995) 21 EHRR 342 and *Kingsley v United Kingdom* (2000) 33 EHRR 288; (2002) 35 EHRR 177 applied.

Decision of the Court of Appeal [2002] EWCA Civ 239; [2002] 1 WLR 2491; [2002] 2 All ER 668 affirmed.

C The following cases are referred to in the opinions of their Lordships:

*Adan v Newham London Borough Council* [2001] EWCA Civ 1916; [2002] 1 WLR 2120; [2002] 1 All ER 931, CA
*Benthem v The Netherlands* (1985) 8 EHRR 1
*Bryan v United Kingdom* (1995) 21 EHRR 342
*De Cubber v Belgium* (1984) 7 EHRR 236
*Deumeland v Germany* (1986) 8 EHRR 448
D *Edwards v Bairstow* [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)
*Feldbrugge v The Netherlands* (1986) 8 EHRR 425
*Ferrazzini v Italy* (2001) 34 EHRR 1068
*Golder v United Kingdom* (1975) 1 EHRR 524
*ISKCON v United Kingdom* (1994) 18 EHRR CD 133
*Kaplan v United Kingdom* (1980) 4 EHRR 64
*Kingsley v United Kingdom* (2000) 33 EHRR 288; (2002) 35 EHRR 177
E *König v Federal Republic of Germany* (1978) 2 EHRR 170
*Masson v The Netherlands* (1995) 22 EHRR 491
*Mathews v Eldridge* (1976) 424 US 319
*Mennitto v Italy* (2000) 34 EHRR 1122
*Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306, CA
*O'Rourke v Camden London Borough Council* [1998] AC 188; [1997] 3 WLR 86; [1997] 3 All ER 23, HL(E)
F *R v Brent London Borough Council, Ex p Awua* [1996] AC 55; [1995] 3 WLR 215; [1995] 3 All ER 493, HL(E)
*R v Camden London Borough Council, Ex p Pereira* (1998) 31 HLR 317, CA
*R v Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330; [1999] 2 WLR 974, HL(E)
*R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484; [1986] 2 WLR 259; [1986] 1 All ER 467, HL(E)
G *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514; [1987[ 2 WLR 606; [1987] 1 All ER 940, HL(E)
*R v Wicks* [1998] AC 92; [1997] 2 WLR 876; [1977] 2 All ER 801, HL(E)
*R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 735; [2002] 1 WLR 2515, CA
*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR
H 1389; [2001] 2 All ER 929, HL(E)
*R (Beeson's Personal Representatives) v Dorset County Council* [2001] EWHC Admin 986 (unreported) 30 November 2001, Richards J; [2002] EWCA Civ 1812; The Times, 2 January 2003, CA
*R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)

*R (McLellan) v Bracknell Forest Borough Council* [2001] EWCA Civ 1510; [2002] QB 1129; [2002] 2 WLR 1448; [2002] 1 All ER 899, CA
*Ringeisen v Austria (No 1)* (1971) 1 EHRR 455
*Salesi v Italy* (1993) 26 EHRR 187
*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; [1976] 3 WLR 641; [1976] 3 All ER 665, CA
*Stefan v United Kingdom* (1997) 25 EHRR CD 130
*X v United Kingdom* (1998) 25 EHRR CD 88
*Zumtobel v Austria* (1993) 17 EHRR 116

The following additional cases were cited in argument:

*Albert and Le Comte v Belgium* (1983) 5 EHRR 533
*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; [1947] 2 All ER 680, CA
*Brown v Stott* [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
*Campbell and Fell v United Kingdom* (1984) 7 EHRR 165
*Cocks v Thanet District Council* [1983] 2 AC 286; [1982] 3 WLR 1121; [1982] 3 All ER 1135, HL(E)
*De Falco v Crawley Borough Council* [1980] QB 460; [1980] 2 WLR 664; [1980] 1 All ER 913, CA
*Ealing London Borough Council v Surdonja* [2001] QB 97; [2000] 3 WLR 481; [2000] 2 All ER 597, CA
*Ghosh v General Medical Council* [2001] UKPC 29; [2001] 1 WLR 1915, PC
*Håkansson and Sturesson v Sweden* (1990) 13 EHRR 1
*Holding & Barnes plc v United Kingdom* Application No 2352/02 (unreported) 12 March 2002, ECHR
*James v United Kingdom* (1986) 8 EHRR 123
*Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711
*Le Comte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1
*Machatova v Slovak Republic* (1997) 24 EHRR CD 44
*Mellacher v Austria* (1989) 12 EHRR 391
*Oerlemans v The Netherlands* (1991) 15 EHRR 561
*O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 WLR 1096; [1982] 3 All ER 1124, HL(E)
*Pinder v United Kingdom* (1982) 7 EHRR 464
*Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465, HL(E)
*R v Kensington and Chelsea Royal London Borough Council, Ex p Bayani* (1990) 22 HLR 406, CA
*R (Cummins) v Camden London Borough Council* [2001] EWHC Admin 1116
*R (Husain) v Asylum Support Adjudicator* [2001] EWHC Admin 852; The Times, 15 November 2001
*R (Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36; [2003] 1 AC 920; [2002] 3 WLR 1276; [2002] 4 All ER 800, HL(E)
*Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405
*Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35
*Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249
*Vogt v Germany* (1995) 21 EHRR 205
*Wilson v Nithsdale District Council* 1992 SLT 1131
*Yazar, Karatas, Aksoy and People's Labour Party v Turkey* (2002) 36 EHRR 59
*Zander v Sweden* (1993) 18 EHRR 175

**APPEAL** from the Court of Appeal

The applicant, Runa Begum, appealed with leave of the House of Lords (Lord Slynn of Hadley, Lord Hutton and Lord Millett), granted on 30 June

A 2002, from the Court of Appeal (Lord Woolf CJ, Laws and Dyson LJJ) which on 6 March 2002, allowed an appeal by Tower Hamlets London Borough Council from Judge Roberts sitting at Bow County Court who, on 21 December 2001 on the applicant's appeal under section 204 of the Housing Act 1996, concluded that the procedure for internal review of the local authority's homelessness functions under section 202 of the Act was
B not compliant with article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The judge accordingly allowed her appeal from the local authority's decision, made on a review under section 202, that their offer of accommodation which she had refused would have been suitable for her and her family, that it would have been reasonable for her to have accepted it and that no further duty was owed to her under the homelessness legislation.

C On 20 November 2002 an Appeal Committee of the House of Lords (Lord Bingham of Cornhill, Lord Hoffmann and Lord Walker of Gestingthorpe) granted the First Secretary of State leave to intervene on the appeal.

The facts are stated in the opinion of Lord Hoffmann.

*Paul Morgan QC* and *Steven Woolf* for R. In order to attract the
D guarantees set out in article 6(1) R must demonstrate that she has a right recognised under domestic law which constitutes a "civil right" for the purposes of article 6(1) within the autonomous meaning given to those words under the Convention for the Protection of Human Rights and Fundamental Freedoms: see *König v Federal Republic of Germany* (1978) 2 EHRR 170.

E A civil right will be involved where the proceedings are directly determinative of private rights and obligations. Where the dominant characteristics of the particular dispute affect personal, economic or property rights, or where a statutory scheme confers on citizens rights to receive social or welfare benefits, the proceedings will ordinarily be seen as decisive of private rights and so will engage article 6: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and*
F *the Regions* [2003] 2 AC 295; *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455; *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35; *Håkansson and Sturesson v Sweden* (1991) 13 EHRR 1; *Oerlemans v The Netherlands* (1991) 15 EHRR 561; *Zander v Sweden* (1993) 18 EHRR 175; *Feldbrugge v The Netherlands* (1986) 8 EHRR 425; *Deumeland v Germany* (1986) 8 EHRR 448; *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405;
G *Mennitto v Italy* (2000) 34 EHRR 1122 ; *Salesi v Italy* (1993) 26 EHRR 187 and *R (Husain) v Asylum Support Adjudicator* The Times, 15 November 2001.

R has a right to accommodation under section 193 of the Housing Act 1996: see *Adan v Newham London Borough Council* [2002] 1 WLR 2120. Although a benefit in kind, rather than in cash, it is personal, economic and results from specific statutory rules. Although the local housing authority
H has a discretion as to the nature of the accommodation it provides, R is entitled to the due performance of the authority's full housing duty. That right is not negated by lack of a private law cause of action for damages for a breach of that duty: see *O'Rourke v Camden London Borough Council* [1998] AC 188. R also has a right, determined by the reviewing officer, to

continue as a tenant in the temporary accommodation allocated to her by the authority: see *R (McLellan) v Bracknell Forest Borough Council* [2002] QB 1129. A

The reviewing officer, as an employee of the authority adjudicating on a dispute between R and the authority as to the extent of the latter's duties under Part VII of the 1996 Act, was clearly not an independent and impartial tribunal within article 6(1): see *Adan v Newham London Borough Council* [2002] 1 WLR 2120. Accordingly, the question arises whether the county court, exercising its appellate jurisdiction under section 204 of the 1996 Act, which is essentially that of the High Court on judicial review, possesses "full jurisdiction" (see *Albert and Le Comte v Belgium* (1983) 5 EHRR 533) so as to guarantee compliance with article 6(1). To comply with article 6 there must be (1) a fair and (2) public hearing (3) within a reasonable time (4) by an independent and impartial tribunal established by law: see *Porter v Magill* [2002] 2 AC 357 and *Brown v Stott* [2003] 1 AC 681. B C

Where a case turns wholly or partly on factual issues, arrangements must be made for there to be an independent and impartial tribunal with power to determine the relevant facts: see the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 (SI 1996/3205). If the tribunal itself is not independent and impartial, it must be subject to subsequent control by a judicial body with full power to determine issues of facts: see *Le Comte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1; *Bryan v United Kingdom* (1995) EHRR 342; the *Alconbury* case [2001] 2 WLR 1389; *McLellan's* case [2002] QB 1129; *Adan's* case [2002] 1 WLR 2120; *Zumtobel v Austria* (1993) 17 EHRR 116 and *ISKCON v United Kingdom* (1994) 18 EHRR CD 133. Since the limited jurisdiction conferred by section 204 does not enable the county court on an appeal to deal adequately with disputed factual issues, that court does not possess full jurisdiction for the purposes of article 6 and cannot cure the lack of independence and impartiality inherent in the authority's review under section 202. D E

*Ashley Underwood QC* and *Kelvin Rutledge* for the local authority. Article 6 applies only where administrative decisions affect or determine "civil rights", namely, rights arising in private law: see the *Alconbury* case [2003] 2 AC 295; *Ferrazzini v Italy* (2001) 34 EHRR 1068; *O'Reilly v Mackman* [1983] 2 AC 237; *Cocks v Thanet District Council* [1983] 2 AC 286 and *De Falco v Crawley Borough Council* [1980] QB 460. Whether a right conferred by statute is a "civil right" for the purposes of article 6(1) depends on the domestic law: see *James v United Kingdom* (1986) 8 EHRR 123 and *König v Federal Republic of Germany* 2 EHRR 170. F G

An individual entitled to performance of a statutory duty does not ordinarily have a private law right to have it performed. Whether a statutory scheme confers a right or a discretion by which a public authority may dispense a benefit depends on the scheme: see *R (Husain) v Asylum Support Adjudicator* The Times, 15 November 2001. Discretion to confer a benefit will be incompatible with the existence of a civil right whereas predictability of outcome will indicate its existence: see *Machatova v Slovak Republic* (1997) 24 EHRR CD 44 and *Masson v The Netherlands* (1995) 22 EHRR 491. H

A Part VII of the 1996 Act creates a scheme designed to assist the homeless both for their benefit and for that of the community in general. An application for housing under Part VII is not intended to give rise to private law rights: see *O'Rourke v Camden London Borough Council* [1998] AC 188 and *Mellacher v Austria* (1989) 12 EHRR 391. The operation of the scheme is heavily dependent on value judgments and factual assessments by
B the local authority: see *R v Camden London Borough Council, Ex p Pereira* (1998) 31 HLR 317; *Wilson v Nithsdale District Council* 1992 SLT 1131; *R v Kensington and Chelsea Royal London Borough Council, Ex p Bayani* (1990) 22 HLR 406 and *R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484; and contrast *Mennitto v Italy* 34 EHRR 1122. The scheme creates no rights recognised in domestic law and, therefore, article 6 is not engaged by the operation of the scheme.

C Suitable accommodation is not an absolute concept and may be determined by reference to the authority's resources. After the authority has made a decision the applicant has no entitlement to further interim accommodation pending review: the authority has an unfettered discretion whether to permit his continued occupation of the accommodation.

In any event, the reviewer was sufficiently independent and impartial as a
D tribunal. There was no adversarial relationship between the authority and an applicant seeking review: the interests of the applicant were not in conflict with those of the authority, but with other applicants and the role of the authority was entirely neutral in performing its duties under the Act. The review procedure introduced by the 1996 Act in place of the single remedy of judicial review is intended to be a fair and transparent procedure under which the reviewing officer acts quasi-judicially: see sections 184(3),
E 202(1), 203(4),(5) of the 1996 Act; section 106(5) of the Housing Act 1985; regulations 2, 6, 8 of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (SI 1999/71) and *Ealing London Borough Council v Surdonja* [2001] QB 97.

Article 6 permits the public interest to be taken into account in deciding what the right to a fair trial requires in a particular context, and national
F courts may accord deference to the legislature in appropriate cases: see *Brown v Stott* [2003] 1 AC 681. Substantial deference should be paid to the intention of Parliament in the creation of the scheme: judicialisation of the section 202 procedure so as to require a wholly independent review would inevitably lead to loss of local accountability, delay in the decision-making process, added cost to the authority and a loss of privacy to the applicant. None of these would be in the public interest.

G The county court's appellate jurisdiction under section 204 is similar to that exercised by the High Court in judicial review proceedings: see *Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306. The process of judicial review is capable of providing an effective remedy: see *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920. If the decision is unsupported by evidence it is not lawful, and section 204 in
H providing oversight confers full jurisdiction to deal with the case as the nature of the decision requires.

*Philip Sales* and *Sarah Moore* for the intervener. Article 6(1) will not apply to decisions concerned merely with the operation of public law in relation to the individual, but will apply where the administrator's decision

directly determines the individual's ability to exercise or enforce some right he enjoys in private law in relation to other individuals or to his own property: see *Ringeisen v Austria (No 1)* 1 EHRR 455; *König v Federal Republic of Germany* 2 EHRR 170; *Benthem v The Netherlands* (1985) 8 EHRR 1; *Sporrong and Lönnroth v Sweden* 5 EHRR 35; the *Alconbury* case [2003] 2 AC 295; and *Holding & Barnes plc v United Kingdom* Application No 2352/02; (unreported) 12 March 2002. An administrative decision will not generally be directly decisive of private rights where the relevant administrative authority is simply exercising its own public law functions in relation to the individual. However, article 6 can apply to an administrative decision if the rights and obligations arising in respect of the administrative authority's public law functions are so closely analogous to rights and obligations arising under private law that they should be regarded as "civil" in character.

Where a social welfare legislative scheme is alleged to give rise to a "civil right" for the purposes of article 6 the proper approach is to assess whether the public law elements or any elements analogous to those arising in a private law dispute predominate. Important indicators of the latter are that the right in question is pecuniary, financial or economic in nature and that there is an absence of any substantial discretion on the public authority's part in the fulfilment of its relevant legislative functions: see *Schuler-Zgraggen v Switzerland* 16 EHRR 405; *Feldbrugge v The Netherlands* 8 EHRR 425; *Deumeland v Germany* 8 EHRR 448; *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249; *Salesi v Italy* 26 EHRR 187 and *Mennitto v Italy* 34 EHRR 1122; and contrast *Masson v The Netherlands* 22 EHRR 491. However, a right must be a "civil right" as an autonomous concept before article 6 will have any application: see *Yazar, Karatas, Aksoy & People's Labour Party v Turkey* (2002) 36 EHRR 59. The mere fact that an administrative decision may involve determining financial entitlements and obligations does not of itself mean that a "civil right" is being determined if the proceedings are none the less regarded as falling within the public law sphere: see *Ferrazzini v Italy* 34 EHRR 1068.

It would be inappropriate for English courts to develop their own qualifying test of a "civil right" for article 6 purposes. The proper approach is to seek to identify and apply the relevant principles to be derived from the case law of the European Court of Human Rights.

The functions of housing authorities under Part VII of the 1996 Act are classic public law functions involving democratically responsible officers, accountable to the local authority, which itself is accountable to the electorate. The legislation provides for the assumption by the state of the welfare duty to provide housing for those unable to do so themselves and operation of the scheme is dependent on the evaluative judgments made and discretions exercised by those public officers. The decisions taken by the reviewing officer under section 202 were discretionary and lay within the field of public law and, accordingly, could not be regarded as determining R's "civil right" and article 6 was not therefore engaged: see *R v Brent London Borough Council, Ex p Awua* [1996] AC 55; *R v Camden London Borough Council, Ex p Pereira* 31 HLR 317; *R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484; *O'Rourke v Camden London Borough Council* [1998] AC 188 and contrast *R (McLellan) v Bracknell Forest Borough Council* [2002] QB 1129; *R (Husain) v Asylum*

*Support Adjudicator* The Times, 15 November 2001 and *R (Beeson's Personal Representatives) v Dorset County Council* The Times, 2 January 2003. In the statutory context the provision of temporary accommodation by way of a non-secure tenancy was a mechanism by which the authority fulfilled one of its functions under the scheme; but no "civil right" thereby existed for the purposes of article 6(1).

The reviewing officer does not constitute an independent and impartial tribunal within the meaning of article 6: see [2002] 1 WLR 2491, 2504–2505, paras 27–30.

Compliance with article 6 can be achieved even if the decision-making body, itself being non-compliant, is subject to subsequent control by a judicial body with "full jurisdiction" which is itself compliant with article 6. "Full jurisdiction" is a term of art, its precise content depending on the nature of the decision falling for review by the court. Article 6(1) does not require in all situations an appeal to, or judicial review by, a court with unlimited jurisdiction to determine a dispute on facts, law and overall merits: see *Albert and Le Comte v Belgium* 5 EHRR 533; *Bryan v United Kingdom* 21 EHRR 342 and the *Alconbury* case [2001] 2 WLR 1389; *Zumtobel v Austria* 17 EHRR 116; *R (Cummins) v Camden London Borough Council* [2001] EWHC Admin 1116 and *Matthews v Eldridge* (1976) 424 US 319.

The purpose of the Convention is to reinforce and promote democratic decision-making in its proper sphere alongside judicial protection for human rights: see *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711. Since courts are not well equipped to be and are not appropriate arbiters in respect of issues of policy, and since they are not in a position to second-guess judgments of public authorities made with the benefit of particular knowledge or expertise, the more restricted role for the courts on appeal or on judicial review is compatible with article 6(1) in areas of administrative decision-making, particularly where the relevant facts have been established by a first-instance administrative decision-maker in the course of a fair procedure governed by many of the safeguards required by article 6(1): see *ISKCON v United Kingdom* 18 EHRR CD 133; *Bryan v United Kingdom* 21 EHRR 342 and the *Alconbury* case [2003] 2 AC 295.

In an area where policy or resource allocation issues and issues of disputed fact are both relevant to a decision it is legitimate to combine both in the decision-maker, subject only to the remedy of judicial review by a court for error of law. The principle of legal certainty justifies clear rules for the application of statutory schemes and it is legitimate for states to frame legal rules designed to promote that principle: see *James v United Kingdom* 8 EHRR 123; *Stefan v United Kingdom* (1997) 25 EHRR CD 130; *X v United Kingdom* (1998) 25 EHRR CD 88; *Kingsley v United Kingdom* (2000) 33 EHRR 288; 35 EHRR 177; *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165 and *Pinder v United Kingdom* (1982) 7 EHRR 464.

On an appeal under section 204 the county court exercises an appellate, not a supervisory, jurisdiction, applying judicial review principles: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. [Reference was also made to the *Alconbury* case [2003] 2 AC 295; *R v Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330; *Secretary of State for Education and Science v Tameside Metropolitan Borough*

*Council* [1977] AC 1014; *Bryan v United Kingdom* 21 EHRR 342; *Ghosh v General Medical Council* [2001] 1 WLR 1915; the *McLellan* case [2002] QB 1129; *Vogt v Germany* (1995) 21 EHRR 205 and *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.]

The decision as to the suitability of the offer of housing made to R was an exercise of discretionary judgment by an expert, properly informed and democratically accountable body. The nature of the decision was therefore such that the county court on appeal under section 204 is to be regarded as possessing "full jurisdiction" for the purposes of article 6(1).

*Morgan QC* replied.

Their Lordships took time for consideration.

13 February. **LORD BINGHAM OF CORNHILL**

1 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann, and for the reasons which he gives I would dismiss this appeal.

2 The parties were agreed that the appeal raised three questions, which they expressed in this way. (1) Was Mrs Hayes's decision of 27 July 2001, taken under section 202 of the Housing Act 1996, a determination of Runa Begum's "civil rights" within the meaning of article 6(1) of the European Convention on Human Rights? (2) If so, did Mrs Hayes constitute an "independent and impartial tribunal" for the purposes of article 6(1) of the Convention? (3) If not, did the county court, on appeal under section 204 of the Housing Act 1996, possess "full jurisdiction" so as to guarantee compliance with article 6(1) of the Convention? Lord Hoffmann has clearly explained how, on the facts and the relevant legislation and authorities, these questions arise.

3 The second of these questions permits of a summary answer. It cannot plausibly be argued that Mrs Hayes, a rehousing manager employed by the local housing authority, was independent of that authority when deciding whether the authority had discharged its admitted duty to Runa Begum. So to hold is not in any way to disparage the conscientiousness or impartiality or professionalism of Mrs Hayes. It is simply to recognise an integral feature of the statutory scheme.

4 One other question, inherent in the first question, also lends itself to a summary answer: whether for purposes of domestic law Runa Begum enjoyed anything properly recognised as a right. It was suggested on behalf of the authority that, because of the broad discretionary area of judgment entrusted to it under the statutory scheme, she enjoyed no right. I cannot accept this. Section 193(2) imposed a duty on the authority to secure that accommodation was available for occupation by Runa Begum. This was a duty owed to and enforceable by her. It related to a matter of acute concern to her. Although section 206(1) permitted the authority to perform its duty in one of several ways, and although performance called for the exercise of judgment by the authority, I think it plain that the authority's duty gave rise to a correlative right in Runa Begum, even though this was not a private law right enforceable by injunction and damages. Thus the first question, differently expressed, is whether Runa Begum's right recognised in domestic law was also a "civil right" within the autonomous meaning given to that expression for purposes of article 6(1) of the Convention.

5 The importance of this case is that it exposes, more clearly than any earlier case has done, the interrelation between the article 6(1) concept of "civil rights" on the one hand and the article 6(1) requirement of "an independent and impartial tribunal" on the other. The narrower the interpretation given to "civil rights", the greater the need to insist on review by a judicial tribunal exercising full powers. Conversely, the more elastic the interpretation given to "civil rights", the more flexible must be the approach to the requirement of independent and impartial review if the emasculation (by over-judicialisation) of administrative welfare schemes is to be avoided. Once it is accepted that "full jurisdiction" means "full jurisdiction to deal with the case as the nature of the decision requires" (per Lord Hoffmann, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, 330, para 87), it must also be accepted that the decisions whether a right recognised in domestic law is also a "civil right" and whether the procedure provided to determine that right meets the requirements of article 6 are very closely bound up with each other. It is not entirely easy, in a case such as the present, to apply clear rules derived from the Strasbourg case law since, in a way that any common lawyer would recognise and respect, the case law has developed and evolved as new cases have fallen for decision, testing the bounds set by those already decided.

6 The European Court's approach to rights deriving from social welfare schemes has been complicated by differences of legal tradition in various member states, as Lord Hoffmann explains. But comparison of *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 and *Deumeland v Germany* (1986) 8 EHRR 448 with *Salesi v Italy* (1993) 26 EHRR 187 and *Mennitto v Italy* (2000) 34 EHRR 1122 shows movement from a narrower towards a broader interpretation of "civil rights". Further cases may no doubt continue that trend. To hold that the right enjoyed by Runa Begum is a "civil right" for purposes of article 6 would however be to go further than the Strasbourg court has yet gone, and I am satisfied, in the light of a compelling argument on this point by Mr Sales, that the decision of that court would not, by any means, necessarily be favourable to Runa Begum. So I would prefer to assume, without deciding, that Runa Begum's domestic law right is also a "civil right", and to consider whether, on that assumption, but having regard to the nature of the right, the statutory provision of an appeal to the county court on a point of law satisfies the requirements of article 6.

7 Although the county court's jurisdiction is appellate, it is in substance the same as that of the High Court in judicial review: *Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306. Thus the court may not only quash the authority's decision under section 204(3) if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1030, per Scarman LJ) if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact. In the present context I would expect the county court judge to be alert to any indication that an applicant's case might not have been resolved by the authority in a fair, objective and even-handed way, conscious of the authority's role as decision-maker and of the immense importance of its

decision to an applicant. But I can see no warrant for applying in this context notions of "anxious scrutiny" (*R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 531G, per Lord Bridge of Harwich) or the enhanced approach to judicial review described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 546–548. I would also demur at the suggestion of Laws LJ in the Court of Appeal in the present case [2002] 1 WLR 2491, 2513, para 44 that the judge may subject the decision to "a close and rigorous analysis" if by that is meant an analysis closer or more rigorous that would ordinarily and properly be conducted by a careful and competent judge determining an application for judicial review.

**8** Is this quality of review sufficient to meet the requirements of article 6(1) on the assumption that a "civil right" is in issue? It is plain that the county court judge may not make fresh findings of fact and must accept apparently tenable conclusions on credibility made on behalf of the authority. The question is whether this limitation on the county court judge's role deprives him of the jurisdiction necessary to satisfy the requirement of article 6(1) in the present context.

**9** In approaching this question I regard three matters as particularly pertinent.

(1) Part VII of the 1996 Act is only part of a far-reaching statutory scheme regulating the important social field of housing. The administration of that scheme is very largely entrusted to local housing authorities. While the homelessness provisions are of course intended to assist those individuals who are or may become homeless, there is a wider public dimension to the problem of homelessness, to which attention was drawn in *O'Rourke v Camden London Borough Council* [1998] AC 188, 193C–E.

(2) Although, as in the present case, an authority may have to resolve disputed factual issues, its factual findings will only be staging posts on the way to the much broader judgments which the authority has to make. In deciding whether it owes the full housing duty to an applicant under section 193(1) the authority has to be "satisfied" of three matters and "not satisfied" of another. Under section 193(7)(b) the authority ceases to be subject to the full housing duty if it is "satisfied that the accommodation [offered to the applicant] was suitable for [the applicant] and that it was reasonable for him to accept it". Thus it is the authority's judgment which matters, and it is unlikely to be a simple factual decision. This is exemplified by the letter of 27 July 2001 written to Runa Begum by Mrs Hayes following the review, which included this passage:

> "I consider that the property offered is both suitable for you and your children in that the physical attributes are in accordance with the council's allocation criteria, and I further consider that it is reasonable to expect yourself and your household to occupy the property offered as I consider that the area in which Balfron Towers is located is no different to any other area within the London Borough of Tower Hamlets . . ."

(3) Although it seems to me obvious, as I have said, that the reviewer is not independent of the authority which employs him or her, section 203 of the 1996 Act and the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (SI 1999/71) do provide safeguards that the review will be fairly conducted. Thus the reviewer must be senior to the

original decision-maker (section 203(2)(a), regulation 2), plainly to avoid the risk that a subordinate may feel under pressure to rubber-stamp the decision of a superior. The reviewer must not have been involved in making the original decision (section 203(2)(a), regulation 2), to try to ensure that the problem is addressed with a genuinely open mind. The applicant has a right to make representations, and must be told of that right (regulation 6(2)). Such representations must be considered (regulation 8(1)). The applicant is entitled to be represented (regulation 6(2)). If the reviewer finds a deficiency or irregularity in the original decision, or in the manner in which it was made, but is nonetheless inclined to make a decision adverse to the applicant, the applicant must be informed and given an opportunity to make representations (regulation 8(2)). The reviewer must give reasons for a decision adverse to the applicant (section 203(4)). The applicant must be told of his right to appeal to the county court on a point of law (section 203(5)). These rules do not establish the reviewer as an independent and impartial tribunal, but they preclude unreasoned decision-making by an unknown and unaccountable bureaucrat whom the applicant never has a chance to seek to influence, and any significant departure from these procedural rules prejudicial to the applicant would afford a ground of appeal.

10 In the course of his excellent argument, Mr Paul Morgan submitted that where, as in the present case, factual questions rise they should be referred for decision by an independent fact-finder. This solution received some support from the Court of Appeal in *Adan v Newham London Borough Council* [2002] 1 WLR 2120. I have very considerable doubt whether the resolution of applications for review, or any part of such process, is a function of the authority within the scope of article 3 of the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 (SI 1996/3205), from which authority to refer was said to derive. But even if that question were resolved in Runa Begum's favour, the proposed procedure would, in cases where it was adopted, (a) pervert the scheme which Parliament established, and (b) open the door to considerable debate and litigation, with consequent delay and expense, as to whether a factual issue, central to the decision the reviewer had to make, had arisen. I fear there would be a temptation to avoid making such explicit factual findings as Mrs Hayes, very properly, did.

11 In relation to the requirements of article 6(1) as applied to the review by a court of an administrative decision made by a body not clothed with the independence and impartiality required of a judicial tribunal, the Strasbourg jurisprudence (as in relation to "civil rights") has shown a degree of flexibility in its search for just and workmanlike solutions. Certain recent authorities are of particular importance: *Zumtobel v Austria* (1993) 17 EHRR 116, 132–133, para 32; *ISKCON v United Kingdom* (1994) 18 EHRR CD 133, 144–145, para 4; *Bryan v United Kingdom* (1995) 21 EHRR 342, 354 (concurring opinion of Mr Bratza) and p 361, para 47; *Stefan v United Kingdom* (1997) 25 EHRR CD 130, 135; *X v United Kingdom* (1998) 25 EHRR CD 88, 97; *Kingsley v United Kingdom* (2000) 33 EHRR 288, 302–303, paras 52–54; (2002) 35 EHRR 177, 186–188, paras 32–34. None of these cases is indistinguishable from the present, but taken together they provide compelling support for the conclusion that, in a context such as this, the absence of a full fact-finding jurisdiction in the

tribunal to which appeal lies from an administrative decision-making body does not disqualify that tribunal for purposes of article 6(1). This is a conclusion which I accept the more readily because it gives effect to a procedure laid down by Parliament which should, properly operated, ensure fair treatment of applicants such as Runa Begum.

**LORD HOFFMANN**

**12** My Lords, on 1 February 2000 Runa Begum, estranged from her husband and no longer welcome at her mother's house in Wapping, presented herself to the Tower Hamlets London Borough Council as threatened with homelessness. In accordance with its duty under section 184 of the Housing Act 1996, the council made inquiries to ascertain whether she was eligible for assistance and if so, what duty she was owed under Part VII of the Act. Meanwhile, as provided in section 188, she and her child were provided with temporary accommodation; first in an hotel and then in a flat in Limscott House, Bruce Road, Bow, under a non-secure tenancy, terminable upon a month's notice. After making its inquiries the council wrote to her on 11 April 2000 saying that it was satisfied that she was homeless, eligible for assistance and in priority need. Accordingly it owed a duty under section 193 to secure that accommodation was available for her.

**13** In discharge of this duty, the council wrote to her on 6 July 2001 offering her, under Part VI of the Act, a secure tenancy of a two-bedroom flat on the third floor of Balfron Tower in Poplar. The letter warned her that if she unreasonably refused the offer, the council's duties in respect of her would be discharged and she would be required to leave the flat in Bow. This reflected section 193(7), which provides that if an applicant, having been informed of the possible consequence of refusal, refuses to accept an offer under Part VI and the authority are satisfied "that the accommodation was suitable for him and that it was reasonable for him to accept it", it may give the applicant notice that its duty under section 193 has ceased.

**14** Runa Begum did not like Balfron Tower and wrote on 12 July 2001 giving four reasons. First, the area was "drug addicted". Secondly, it was racist. Thirdly, she had actually been robbed by two youths near the property after a visit. Fourthly, her husband frequently visited the block to see friends.

**15** Under section 202 Runa Begum was entitled "to request a review of" the council's decision. The procedure for a review is prescribed by the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999. The reviewing officer must be someone who was not involved in the original decision and senior to the officer who made it (regulation 2). The council must notify the applicant of the procedure to be followed and her right to make representations in writing.

**16** Runa Begum requested a review, which was conducted by Mrs Sue Hayes, the council's rehousing manager. Mrs Hayes asked the estate officer about the character of the area and inquired of the police about the robbery. The investigating officer expressed scepticism about Runa Begum's credibility; she had contradicted herself and he thought it was a bogus report. Runa Begum wrote another letter on 16 July (about her husband's friends in the block) and a council officer interviewed her on the same day. On 27 July Mrs Hayes gave her decision. She rejected Runa Begum's reasons for refusal as unreasonable: the estate officer had satisfied her that

A there were no serious drug or racial problems in the area; she noted discrepancies in the accounts Runa Begum had given of the robbery to council officers and the police and indicated that she was not persuaded that it had happened. She was also not satisfied that the relationship between Runa Begum and her husband made it intolerable that she should risk meeting him in the vicinity of the flats.

B **17** Section 204 provides that an applicant who is dissatisfied with a decision on review may appeal to the county court on "any point of law arising from the decision". This enables the applicant to complain not only that the council misinterpreted the law but also of any illegality, procedural impropriety or irrationality which could be relied upon in proceedings for judicial review: *Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306.

C **18** The original grounds of appeal raised the normal judicial review grounds: the council acted irrationally, it failed to make proper inquiries, did not have regard to material factors and so on. But on 14 December 2001, the Court of Appeal gave judgment in *Adan v Newham London Borough Council* [2002] 1 WLR 2120. In that case the council had decided that an applicant for Part VII accommodation was ineligible because she was not

D habitually resident in the United Kingdom. The reviewing officer confirmed the decision and she appealed to the county court. The appeal was heard and allowed (on the ground of irrationality); the decision was quashed and the matter remitted to the council for a fresh review. Judgment was given on 6 October 2000, a few days after the Human Rights Act 1998 had come into force. The judge noted that section 6 of that Act made it unlawful for the council, as a public authority, to act in a way which was incompatible with a

E Convention right. He was concerned that the council, when conducting the fresh review, should not infringe the applicant's right under article 6 to have her civil rights determined by an "independent and impartial tribunal established by law". He directed that the review should be conducted by a different reviewing officer who, in respect of independence and impartiality, complied with article 6.

F **19** The Court of Appeal set aside the judge's direction on the ground that the county court had no jurisdiction to make an order of mandamus and that was what the judge had done. The council would know that it had to comply with section 6(1); the judge, though no doubt only trying to be helpful, could not tell them how to do so.

**20** Having allowed the appeal on that ground, the court went on, in an

G extended obiter dictum, to consider the effect of article 6 on decisions under Part VII. In order that article 6 should apply at all, it was necessary that the council's decision should determine a "civil right" of the applicant within the meaning of the Convention. That is a question not without complexity, as will appear later, but in *Adan's* case counsel were content to proceed on the assumption that it did. The next question was whether the original reviewing officer, employed by the council, was an independent and

H impartial tribunal; again, it was conceded that he was not. The third question was whether, notwithstanding the lack of independence of the reviewing officer, the composite procedure of his decision subject to an appeal on law to an independent county court was sufficient to satisfy article 6.

**21** The Court of Appeal [2002] 1 WLR 2120 considered that in practice the composite procedure would in most cases be sufficient. It would not however be adequate if the housing officers had to "resolve a dispute of fact which [was] material to the decision": see Brooke LJ, at p 2128. As there was no appeal on fact, there was in that respect no composite procedure.

**22** What in such a case was the council to do? The answer which recommended itself to a majority of the Court of Appeal was that it should exercise its powers under article 3 of the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 which provides in general terms that any function of an authority under Part VII "may be exercised by . . . such person . . . as may be authorised in that behalf by the authority". Thus they could contract out their reviewing functions as a whole or those which they thought likely to give rise to material disputes of fact. Hale LJ had very considerable reservations about whether this was a sensible idea and preferred to give an extended meaning to the right of appeal on points of law, so as to enable the county court to deal with most questions of fact, but this did not appeal to the majority.

**23** A few days after the decision in *Adan* had been handed down, Runa Begum's solicitors wrote to the council to say that they proposed to amend the grounds of appeal to allege that it had acted in breach of section 6 of the 1998 Act by failing to contract out a review decision which turned on questions of disputed fact. When the appeal came before Judge Roberts on 21 December 2001, he dealt with this ground as a preliminary point and, with some reservations, followed the majority dicta in *Adan's* case and quashed the decision.

**24** The Court of Appeal (Lord Woolf CJ, Laws and Dyson LJJ) allowed the council's appeal. On that occasion Mr Underwood, on behalf of the council, made no concessions on the issues of whether Runa Begum's "civil rights" were engaged or whether Mrs Hayes was an independent and impartial tribunal. But the court, in a judgment delivered by Laws LJ, found against him on both points. It was on the third question, as to whether the composite procedure satisfied article 6 despite the appeal being only on law, that the Court of Appeal disagreed with the dicta in *Adan's* case and allowed the appeal. Laws LJ said that one could not have different systems of adjudication according to the degree of factual dispute. One had to look at the scheme of Part VII as a whole. If it was systematically likely to throw up issues of primary fact, it might be necessary to have either an independent reviewer or a full right of appeal. On the other hand, if it was systematically likely to require the exercise of discretion or the application of policy, an appeal limited to the grounds for judicial review would be sufficient. He considered that Part VII fell into the second category.

**25** Runa Begum appeals to your Lordships' House and all three of the issues decided by the Court of Appeal have been argued by Mr Morgan for Runa Begum and Mr Underwood for the council. In addition, the First Secretary of State was, on account of the general importance of the case for the public administration, given leave to intervene. Mr Sales on his behalf advanced arguments in support of the council's position on the first issue—the existence of civil rights to be determined—and the third issue on the composite procedure.

**26** He did not however feel able to support the council on the question of whether Mrs Hayes was an independent and impartial tribunal.

A Mr Underwood's submission was that there is no adversarial relationship between the council, on whose behalf Mrs Hayes made the decision, and Runa Begum. It is the business of the council to secure accommodation for eligible applicants and if a flat which Runa Begum preferred was not available, it was not because the council was keeping it for itself but because it had let it to someone else. Runa Begum's interests are not in conflict with those of the council but rather with those of other applicants; the council is B neutral between them and Mrs Hayes is only concerned to be fair to everyone. In carrying out the review she has to comply with the fairness requirements of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 and therefore acts quasi-judicially.

**27** I am sure that this is a correct description of Mrs Hayes's position and the way she does her job. But the argument misses the point. One of the C purposes of article 6, in requiring that disputes over civil rights should be decided by or subject to the control of a judicial body, is to uphold the rule of law and the separation of powers: see *Golder v United Kingdom* (1975) 1 EHRR 524. If an administrator is regarded as being an independent and impartial tribunal on the ground that he is enlightened, impartial and has no personal interest in the matter, it follows there need not be any possibility of D judicial review of his decision. He is above the law. That is a position contrary to basic English constitutional principles. It is also something which the Strasbourg court has been unable to accept. I need refer only to the series of cases, cited in paragraph 83 of the opinions in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, in which it has been held that Sweden was in breach of article 6 because there was no possibility of any form of judicial E review of government decisions determining civil rights. It is no disrespect to Mrs Hayes to say that she is not an independent tribunal simply because she is an administrator and cannot be described as part of the judicial branch of government.

**28** I therefore return to the other two issues in dispute. But before looking at them in any detail, it is necessary to notice how they are related to each other. The dissenting opinion in *Feldbrugge v The Netherlands* (1986) F 8 EHRR 425, 444 explains persuasively, by reference to the travaux préparatoires and other background to the Convention, that the term "civil rights and obligations" was originally intended to mean those rights and obligations which, in continental European systems of law, were adjudicated upon by the civil courts. These were, essentially, rights and obligations in private law. The term was not intended to cover administrative decisions G which were conventionally subject to review (if at all) by administrative courts. It was not that the draftsmen of the Convention did not think it desirable that administrative decisions should be subject to the rule of law. But administrative decision-making raised special problems which meant that it could not be lumped in with the adjudication of private law rights and made subject to the same judicial requirements of independence, publicity and so forth. So the judicial control of administrative action was left for H future consideration.

**29** In fact there has been no addition to the Convention to deal with administrative decisions and the Strasbourg court has been left to develop the law. It has done so in two ways. First, it has been concerned to ensure that state parties do not exploit the gap left in article 6 by changing their law

so as to convert a question which would ordinarily be regarded as appropriate for civil adjudication into an administrative decision outside the reach of the article. It has done this by treating "civil rights and obligations" as an autonomous concept, not dependent upon the domestic law classification of the right or obligation, which a citizen should have access to a court to determine. Otherwise, as the court said in *Golder v United Kingdom* 1 EHRR 524, 536, para 35:

> "a contracting state could, without acting in breach of [article 6], do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to [the rule of law] and which the court cannot overlook."

30 The second development has been the doctrine, starting with *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, by which the Strasbourg court has extended article 6 to cover a wide range of administrative decision-making on the ground that the decision determines or decisively affects rights or obligations in private law. I traced some of the history of this doctrine in my speech in the *Alconbury* case [2003] 2 AC 295, 327–330, paras 77–88, and need not cover the same ground. More recently the scope of article 6 has also been extended to public law rights, such as entitlement to social security or welfare benefits under publicly funded statutory schemes, on the ground that they closely resemble rights in private law: *Salesi v Italy* (1993) 26 EHRR 187.

31 I shall have more to say about these extensions of article 6 when I come to deal with the first issue, but for the moment it is sufficient to note that from an early stage the Strasbourg court has recognised that the extension of article 6 into administrative decision-making has required what I called in the *Alconbury* case [2003] 2 AC 295, 329, para 84, "substantial modification of the full judicial model". The most explicit recognition of the problem was by the Commission in *Kaplan v United Kingdom* (1980) 4 EHRR 64, 90, para 161, where, after noting the limited scope of judicial review in many contracting states and in the law of the European Union, it said:

> "An interpretation of article 6(1) under which it was held to provide a right to a full appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most of the contracting states."

32 The Commission in *Kaplan* offered what would seem to an English lawyer an elegant solution, which was not to classify the administrative decision as a determination of civil rights or obligations, requiring compliance with article 6, but to treat a dispute on arguable grounds over whether the administrator had acted *lawfully* as concerned with civil rights and obligations, in respect of which the citizen was entitled to access to a fully independent and impartial tribunal. By this means a state party could be prevented from excluding any judicial review of administrative action (as in the Swedish cases which I have mentioned) but the review could be

A confined to an examination of the legality rather than the merits of the decision.

33 The Strasbourg court, however, has preferred to approach the matter in a different way. It has said, first, that an administrative decision within the extended scope of article 6 is a determination of civil rights and obligations and therefore prima facie has to be made by an independent tribunal. But, secondly, if the administrator is not independent (as will B virtually by definition be the case) it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient. Thirdly, it will be sufficient if the appellate (or reviewing) court has "full jurisdiction" over the administrative decision. And fourthly, as established in the landmark case of *Bryan v United Kingdom* (1995) 21 EHRR 342, "full jurisdiction" does not necessarily C mean jurisdiction to re-examine the merits of the case but, as I said in the *Alconbury* case [2003] 2 AC 295, 330, para 87, "jurisdiction to deal with the case as the nature of the decision requires".

34 It may be that the effect of *Bryan* is that the Strasbourg court has arrived by the scenic route at the same solution as the Commission advocated in *Kaplan*, namely that administrative action falling within article 6 (and a good deal of administrative action still does not) should be D subject to an examination of its legality rather than its merits by an independent and impartial tribunal. Perhaps that is a larger generalisation than the present state of the law will allow. But, looking at the matter as an English lawyer, it seems to me (as it did to the Commission in *Kaplan*) that an extension of the scope of article 6 into administrative decision-making must be linked to a willingness to accept by way of compliance something E less than a full review of the administrator's decision.

35 In this way the first and third issues are connected with each other. An English lawyer can view with equanimity the extension of the scope of article 6 because the English conception of the rule of law requires the legality of virtually all governmental decisions affecting the individual to be subject to the scrutiny of the ordinary courts. As Laws LJ pointed out in the Court of Appeal [2002] 1 WLR 2491, 2500, para 14, all that matters is that F the applicant should have a sufficient interest. But this breadth of scope is accompanied by an approach to the grounds of review which requires that regard be had to democratic accountability, efficient administration and the sovereignty of Parliament. As will appear, I think that the Strasbourg jurisprudence gives adequate recognition to all three of these factors.

36 With that introduction, I turn to the two issues. I propose to take the G third issue first. Assuming that the duty owed by the council to Runa Begum under section 193 was a "civil right", does the right of appeal on law under section 204 enable it to be determined by an independent and impartial tribunal?

37 This resolves itself, following the Strasbourg reasoning which I have described, into the question of whether the county court had jurisdiction to deal with the case as the nature of the decision required. Mr Morgan said H that *Bryan* and *Alconbury* showed that when a decision turns upon questions of policy or "expediency", it is not necessary for the appellate court to be able to substitute its own opinion for that of the decision maker. That would be contrary to the principle of democratic accountability. But, when, as in this case, the decision turns upon a question of contested fact, it

is necessary either that the appellate court have full jurisdiction to review the facts or that the primary decision-making process be attended with sufficient safeguards as to make it virtually judicial. A

**38** *Bryan* 21 EHRR 342, said Mr Morgan, fell into the second of these categories. The court drew attention, at pp 360–361, para 46, to the

> "uncontested safeguards attending the procedure before the inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality." B

**39** In the present case, while Mrs Hayes was no doubt an experienced local government officer and statutory procedures existed to ensure basic fairness, there was nothing like the panoply of quasi-judicial safeguards which attend a planning inquiry. It follows that nothing less than a full appeal on the facts will do. Mr Morgan relied, entirely reasonably, upon a dictum of my own in the *Alconbury* case [2003] 2 AC 295, 338, para 117: C

> "It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal." D

**40** I have to confess that I think that was an incautious remark. The question in the *Alconbury* case, was whether the appellate tribunal had to be able to review the Secretary of State's decisions based on policy. The extent to which it had to be able to review questions of fact did not arise. To decide that question, it is necessary to have another look at *Bryan*. E

**41** *Bryan* was certainly a case about the application of article 6 to decisions on fact. In that respect it was distinguishable from the *Alconbury* case. But when one comes to consider what *Bryan* decided, it is important to notice not only what the question was (whether buildings were designed for the purposes of agriculture) but also the context in which it arose, namely, as a ground of appeal against an enforcement notice. The inspector's decision that Bryan had acted in breach of planning control was binding upon him in any subsequent criminal proceedings for failing to comply with the notice: *R v Wicks* [1998] AC 92. This part of the appeal against the enforcement notice was closely analogous to a criminal trial and, as I noted in the *Alconbury* case [2003] 2 AC 295, 330–332, paras 89–97, used to come before the magistrates. F G

**42** A finding of fact in this context seems to me very different from the findings of fact which have to be made by central or local government officials in the course of carrying out regulatory functions (such as licensing or granting planning permission) or administering schemes of social welfare such as Part VII. The rule of law rightly requires that certain decisions, of which the paradigm examples are findings of breaches of the criminal law and adjudications as to private rights, should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators. Nor is the possibility of an appeal sufficient to H

compensate for lack of independence and impartiality on the part of the primary decision maker: see *De Cubber v Belgium* (1984) 7 EHRR 236.

**43** But utilitarian considerations have their place when it comes to setting up, for example, schemes of regulation or social welfare. I said earlier that in determining the appropriate scope of judicial review of administrative action, regard must be had to democratic accountability, efficient administration and the sovereignty of Parliament. This case raises no question of democratic accountability. As Hale LJ said in *Adan's* case [2002] 1 WLR 2120, 2138, para 57:

> "The policy decisions were taken by Parliament when it enacted the 1996 Act. Individual eligibility decisions are taken in the first instance by local housing authorities but policy questions of the availability of resources or equity between the homeless and those on the waiting list for social housing are irrelevant to individual eligibility."

**44** On the other hand, efficient administration and the sovereignty of Parliament are very relevant. Parliament is entitled to take the view that it is not in the public interest that an excessive proportion of the funds available for a welfare scheme should be consumed in administration and legal disputes. The following passage from the joint dissenting opinion in *Feldbrugge v The Netherlands* 8 EHRR 425, 443, para 15 did not persuade the majority to restrict the application of article 6 but nevertheless seems to me highly material when one comes to consider the procedures which will comply with it:

> "The judicialisation of dispute procedures, as guaranteed by article 6(1), is eminently appropriate in the realm of relations between individuals but not necessarily so in the administrative sphere, where organisational, social and economic considerations may legitimately warrant dispute procedures of a less judicial and formal kind. The present case is concerned with the operation of a collective statutory scheme for the allocation of public welfare. As examples of the special characteristics of such schemes, material to the issue of procedural safeguards, one might cite the large numbers of decisions to be taken, the medical aspects, the lack of resources or expertise of the persons affected, the need to balance the public interest for efficient administration against the private interest. Judicialisation of procedures for allocation of public welfare benefits would in many cases necessitate recourse by claimants to lawyers and medical experts and hence lead to an increase in expense and the length of the proceedings."

**45** In similar vein, Powell J, delivering the opinion of the United States Supreme Court in *Mathews v Eldridge* (1976) 424 US 319, 347 commented on the requirements of "due process" in the administration of a disability benefit scheme:

> "In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased

> number of hearings and the expense of providing benefits to ineligible recipients pending decision . . . We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial."

In *Adan's* case, counsel for Newham London Borough Council told the Court of Appeal that the housing department received 3,000 applications a year under Part VII, of which 500 went on to a review: [2002] 1 WLR 2120, 2126, para 10. This is of course only a part of the duties of the housing department and, by contrast with this experience of a single London borough, the number of appeals received by the Planning Inspectorate for the whole of England in the year 2001–2002 was 16,776 (www.planning-inspectorate.gov.uk/forms/report_statistical_2001_2002.pdf). In most cases there will probably also be more urgency about a decision on homelessness than a planning appeal.

**46** It therefore seems to me that it would be inappropriate to require that findings of fact for the purposes of administering the homelessness scheme in Part VII should be made by a person or body independent of the authority which has been entrusted with its administration. I certainly see nothing to recommend the recourse to contracting out which was suggested by the majority in *Adan's* case. Some of the arguments against it are well made by Hale LJ, at p 2144, paras 77–78. Four points seem to me important. First, if contracting out is not adopted across the board, it would be bound to generate disputes about whether the factual questions which had to be decided by the housing officer were sufficiently material to require contracting out. Secondly, if it were adopted in every case, it would add significantly to the cost and delay. Thirdly, it would mean that the housing officer, instead of being able to exercise his discretionary powers, such as whether he considered accommodation suitable for the applicant, on a first-hand assessment of the situation, would be bound by a written report from the independent fact finder. Fourthly, I am by no means confident that Strasbourg would regard a contracted fact finder, whose services could be dispensed with, as more independent than an established local government employee. In *Adan's* case, at pp 2134–2135, para 44, Brooke LJ declined to become involved in "the practical difficulties that may arise when trying to ensure that the third party has the requisite independence" but they are worth thinking about.

**47** Although I do not think that the exercise of administrative functions requires a mechanism for independent findings of fact or a full appeal, it does need to be lawful and fair. It is at this point that the arguments which Mr Underwood urged about the impartiality of Mrs Hayes and the regulations for the conduct of reviews become relevant. To these safeguards one adds the supervisory powers of the judge on an appeal under section 204 to quash the decision for procedural impropriety or irrationality. In any case, the gap between judicial review and a full right of appeal is seldom in practice very wide. Even with a full right of appeal it is not easy for an appellate tribunal which has not itself seen the witnesses to differ from the decision-maker on questions of primary fact and, more especially relevant to this case, on questions of credibility.

A 48 Mr Sales drew attention to the expanding scope of judicial review which, he said, may, in a suitable case allow a court to quash a decision on the grounds of misunderstanding or ignorance of an established and relevant fact: see the views of Lord Slynn of Hadley in *R v Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330, 344–345 and in the *Alconbury* case [2003] 2 AC 295, para 53 or, at least in cases in which
B Convention rights were engaged, on the ground of lack of proportionality: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532. He said that this should be taken into account in deciding whether the jurisdiction of the county court was adequate.

49 I do not think that it is necessary to discuss the implications of these developments. No doubt it is open to a court exercising the review jurisdiction under section 204 to adopt a more intensive scrutiny of the
C rationality of the reviewing officer's conclusions of fact but this is not the occasion to enter into the question of when it should do so. When one is dealing with a welfare scheme which, in the particular case, does not engage human rights (does not, for example, require consideration of article 8) then the intensity of review must depend upon what one considers to be most consistent with the statutory scheme. In this case, Laws LJ [2002] 1 WLR
D 2491, 2513, para 44, said that the county court judge was entitled to subject Mrs Hayes's decision to "a close and rigorous analysis". On the other hand 17 years ago Lord Brightman, speaking for a unanimous Appellate Committee in *R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484, 518, made it clear that their Lordships contemplated a fairly low level of judicial interventionism:

E > "Parliament intended the local authority to be the judge of fact. The Act abounds with the formula when, or if, the housing authority are satisfied as to this, or that, or have reason to believe this, or that. Although the action or inaction of a local authority is clearly susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should
F be exercised in giving leave to proceed by judicial review."

50 All that we are concerned with in this appeal is the requirements of article 6, which I do not think mandates a more intensive approach to judicial review of questions of fact. These nuances are well within the margin of appreciation which the Convention allows to contracting states and which, in a case like this, the courts should concede to Parliament. So
G I do not propose to say anything about whether a review of fact going beyond conventional principles of judicial review would be either permissible or appropriate. It seems to me sufficient to say that in the case of the normal Part VII decision, engaging no human rights other than article 6, conventional judicial review such as the Strasbourg court considered in the *Bryan* case 21 EHRR 342 is sufficient.

H 51 Is this view consistent with the Strasbourg jurisprudence and with *Bryan* in particular? I think it is. The great principle which *Bryan* decided, 21 EHRR 342, 360, para 45, was that

> "in assessing the sufficiency of the review . . . it is necessary to have regard to matters such as the subject matter of the decision appealed

against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal." A

**52** In this case the subject matter of the decision was the suitability of accommodation for occupation by Runa Begum; the kind of decision which the Strasbourg court has on several occasions called a "classic exercise of an administrative discretion". The manner in which the decision was arrived at was by the review process, at a senior level in the authority's administration B and subject to rules designed to promote fair decision-making. The content of the dispute is that the authority made its decision on the basis of findings of fact which Runa Begum says were mistaken.

**53** In my opinion the Strasbourg court has accepted, on the basis of general state practice and for the reasons of good administration which I have discussed, that in such cases a limited right of review on questions of fact is sufficient. In *Bryan*, at p 361, para 47, the court said: C

"Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by article 6(1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member states." D

**54** The word "particularly" indicates that the court did not think that the full range of "safeguards" which exist at a planning inquiry would always be needed and I have already explained why I think that *Bryan* was an exceptional case in which the court could reasonably have been expected to show some anxiety on the question of safeguards. In the normal case of E an administrative decision, however, fairness and rationality should be enough.

**55** This interpretation is in my view confirmed by dicta of the court cited with approval by the Grand Chamber in *Kingsley v United Kingdom* (2002) 35 EHRR 177, 187. That concerned a decision by the Gaming Board as to whether Kingsley was a fit and proper person to hold a management F position in the gaming industry. The question turned entirely upon the truth of allegations by the Board that he had been involved in various undesirable practices. After a hearing, the Board decided that the allegations were proved. One of the complaints made by Kingsley and upheld both in the English courts and in Strasbourg was that the chairman of the Board had shown bias by prejudging his case. But the English courts said that no G domestic remedy existed because the Gaming Board, including its chairman, was the only body with statutory power to decide whether he was a fit and proper person or not. The Strasbourg court (2000) 33 EHRR 288 held that because there was no remedy, English law was in breach of article 6. None of this is relevant to our present concerns. But Kingsley also made a general complaint about the adequacy of the hearing. This the court rejected, at p 302, para 53: H

"The court notes that the present case concerns the regulation of the gaming industry, which, due to the nature of the industry, calls for particular monitoring. In the United Kingdom, the monitoring is undertaken by the Gaming Board pursuant to the relevant legislation.

A The subject matter of the decision appealed against was thus a classic exercise of administrative discretion, and to this extent the current case is analogous to the case of *Bryan,* where planning matters were initially determined by the local authority and then by an inspector . . . The court does not accept the applicant's contentions that, because of what was at stake for him, he should have had the benefit of a full court hearing on both the facts and the law."

B

**56** The key phrases in the judgments of the Strasbourg court which describe the cases in which a limited review of the facts is sufficient are "specialised areas of the law" (*Bryan's* case 21 EHRR 342, 361, para 47) and "classic exercise of administrative discretion" (*Kingsley's* case 33 EHRR 288, 302, para 53). What kind of decisions are these phrases referring to? C I think that one has to take them together. The notion of a specialised area of the law should not be taken too literally. After all, I suppose carriage of goods by sea could be said to be a specialised area of the law, but no one would suggest that shipping disputes should be decided otherwise than by normal judicial methods. It seems to me that what the court had in mind was those areas of the law such as regulatory and welfare schemes in which decision-making is customarily entrusted to administrators. And when the D court in *Kingsley* spoke of the classic exercise of administrative discretion, it was referring to the ultimate decision as to whether Kingsley was a fit and proper person and not to the particular findings of fact which had to be made on the way to arriving at that decision. In the same way, the decision as to whether the accommodation was suitable for Runa Begum was a classic exercise of administrative discretion, even though it involved preliminary E findings of fact.

**57** National traditions as to which matters are suitable for administrative decision and which require to be decided by the judicial branch of government may differ. To that extent, the Strasbourg court will no doubt allow a margin of appreciation to contracting states. The concern of the court, as it has emphasised since *Golder's* case 1 EHRR 524 is to uphold the rule of law and to insist that decisions which on generally F accepted principles are appropriate only for judicial decision should be so decided. In the case of decisions appropriate for administrative decision, its concern, again founded on the rule of law, is that there should be the possibility of adequate judicial review. For this purpose, cases like *Bryan* and *Kingsley* make it clear that limitations on practical grounds on the right to a review of the findings of fact will be acceptable.

G **58** For these reasons I agree with the Court of Appeal that the right of appeal to the court was sufficient to satisfy article 6. I should however say that I do not agree with the view of Laws LJ that the test for whether it is necessary to have an independent fact finder depends upon the extent to which the administrative scheme is likely to involve the resolution of disputes of fact. I think that a spectrum of the relative degree of factual and discretionary content is too uncertain. I rather think that Laws LJ himself, H nine months later, in *R (Beeson's Personal Representatives) v Dorset County Council* [2002] EWCA Civ 1812, had come to the same conclusion. He said, at para 15: "There is some danger, we think, of undermining the imperative of legal certainty by excessive debates over how many angels can stand on the head of the article 6 pin."

**59** Amen to that, I say. In my opinion the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact. The schemes for the provision of accommodation under Part III of the National Assistance Act 1948, considered in *Beeson's* case; for introductory tenancies under Part V of the Housing Act 1996, considered in *R (McLellan) v Bracknell Forest Borough Council* [2002] 2 WLR 1448; and for granting planning permission, considered in *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 WLR 2515 all fall within recognised categories of administrative decision making. Finally, I entirely endorse what Laws LJ said in *Beeson's* case, at paras 21–23, about the courts being slow to conclude that Parliament has produced an administrative scheme which does not comply with constitutional principles.

**60** This conclusion makes it unnecessary for me to decide whether the council's decision did determine Runa Begum's civil rights. I have proceeded so far on the assumption that it did. But the assumption was vigorously contested by Mr Underwood and Mr Sales and so I shall say something about it.

**61** As I mentioned earlier, the Strasbourg court has extended the notion of a determination of civil rights in two ways: first, to administrative decisions which determine or affect rights in private law and secondly to entitlements under public social security or welfare schemes which are sufficiently well defined to be analogous to rights in private law. Mr Morgan relies upon both of these doctrines. He says, taking them in reverse order, that Runa Begum's right to accommodation under section 193 was within the doctrine by which rights under social welfare schemes may be classified as civil rights. Alternatively, the council's decision that it owed Runa Begum no further duty under section 193 had a decisive effect upon her private law rights as a non-secure tenant of her temporary accommodation in Bow. It enabled the council to terminate that tenancy and they did in fact serve her with a notice to quit.

**62** The starting point for the jurisprudence on social security and social welfare schemes is the decisions of the Court in *Feldbrugge v The Netherlands* 8 EHRR 425 and *Deumeland v Germany* (1986) 8 EHRR 448, two cases in which the judgments were delivered on the same day and are for practical purposes identical. Both concerned claims to social security benefits: Mrs Feldbrugge was claiming a sickness allowance because she said she had been unfit for work and Frau Deumeland was claiming a supplementary widow's pension on the ground that her husband had died in consequence of an industrial accident. Mrs Feldbrugge complained that she had not received a fair hearing from the administrative tribunal which rejected her claim. Frau Deumeland complained that the Berlin Social Security Court had not accorded her a hearing "within a reasonable time". But in both cases the question was whether the claim to the benefit was a "civil right".

**63** In both cases the right was created by public legislation which laid down the qualifying conditions and the rates of payment. It was an assumption by the state of responsibility for the financial security of employees and their dependants. But it had certain affinities with private

A insurance—employees paid contributions—and, as the court said in a critical passage in *Feldbrugge* 8 EHRR 425, 434, para 37:

> "Mrs Feldbrugge was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but in her personal capacity as a private individual. She suffered an interference with her means of subsistence and was claiming a right flowing from
B specific rules laid down by the legislation in force. For the individual asserting it, such a right is often of crucial importance; this is especially so in the case of health insurance benefits when the employee who is unable to work by reason of illness enjoys no other source of income. In short, the right in question was a personal, economic and individual right, a factor that brought it close to the civil sphere."

C **64** For these reasons, and despite a powerful dissent from seven members of the court who said that the distinction between public and private law rights was being eroded in a way which would create great uncertainty, the majority decided that the features of private law were cumulatively predominant. It was therefore a civil right within the meaning of article 6.

D **65** There was a further development in *Salesi v Italy* 26 EHRR 187, when the principle of *Feldbrugge* was applied to welfare payments which lacked the insurance analogy of social security payments. They were not contributory and unrelated to employment. But the court decided unanimously that the claim was a civil right. It repeated the passage I have cited from *Feldbrugge* and said that the most important feature of the right to a social welfare payment was that it is individual, economic and flowing
E from specific statutory rules. In reliance on these decisions and also *Mennitto v Italy* (2000) 34 EHRR 1122, in which *Salesi* was followed, Mr Morgan submitted that the right to accommodation under section 193, although a benefit in kind rather than cash, is also personal, economic and flowing from specific statutory rules. The fact that it is a benefit in kind necessarily means that the council has discretion about the nature of the
F accommodation it will provide, but in principle there is a right to accommodation and not merely a claim to the exercise of the council's discretion.

**66** That was the view taken by Hale LJ in *Adan's* case [2002] 1 WLR 2120, 2137, para 55. Although, as I have said, the point was conceded, she said:

G > "Once the local authority are satisfied that the statutory criteria for providing accommodation exist, they have no discretion. They have to provide it, irrespective of local conditions of demand and supply. Hence this is more akin to a claim for social security benefits than it is a claim for social or other services, where the authorities have a greater degree of discretion and resource considerations may also be relevant."

H **67** Mr Underwood, on the other hand, drew attention to the elements of discretion both in the steps leading up to the acceptance of a duty under section 193 and in the ways in which it may be discharged. By section 206(1) the council may discharge its duty by providing accommodation itself, or by securing that an applicant obtains accommodation from someone else, or by giving him such advice and assistance as will secure that suitable

accommodation is available from someone else. The whole scheme is shot through with discretions in which either the council's duty is dependent upon it being "satisfied" of some state of affairs or can be discharged in various ways of its own choosing. By contrast, in *Mennitto* 34 EHRR 1122, 1130, para 25, the court said that the management committee of the local public health service "After verifying that the applicant satisfied the conditions for entitlement to the allowance . . . should simply have made an arithmetical calculation of the quantum."

**68** The existence of a fair amount of discretion was one of the matters taken into account by the House when it decided in *O'Rourke v Camden London Borough Council* [1998] AC 188 that Part VII (or rather, its predecessor in the Housing Act 1985) did not give rise to rights in private law, whether for damages or an injunction. But I think it is fair to say that the main ground of decision was that a scheme of social welfare which creates a statutory duty to provide benefits in kind will not ordinarily be taken to confer upon the beneficiaries private law rights in addition to their rights in public law to secure compliance with the duty: see p 193. *O'Rourke* is certainly authority for the proposition that the rights created by Part VII are not actionable in English private law, but that is very different from the question of whether they are civil rights within the autonomous meaning of that expression in article 6. It is one thing to say that the Parliament did not intend a breach by the council of its statutory duty under Part VII to be actionable in damages; it is quite another to say that the actions of the local authority should be immune from any form of judicial review.

**69** For my part I must say that I find the reasoning of Hale LJ in *Adan's* case persuasive. But then, as Laws LJ has said, both in the present case [2002] 1 WLR 2491, 2500, and in *Beeson's* case [2002] EWCA Civ 1812 at [17]–[19], an English lawyer tends to see all claims against the state which are not wholly discretionary as civil rights and to look with indifference upon the casuistry that finds the need to detect analogies with rights in private law. On the other hand, I think that to apply the *Salesi* doctrine to the provision of benefits in kind, involving the amount of discretion which is inevitably needed in such cases, is to go further than the Strasbourg court has so far gone. This would not matter—domestic courts are perfectly entitled to accord greater rights than those guaranteed by the Convention—provided that it was acceptable that the scope of judicial review should be limited in the way it is by section 204. If, however, it should be decided in Strasbourg that the administration of social welfare benefits falling within the *Salesi* principle requires a more intrusive form of judicial review, I would not wish to place any obstacle in the way of the UK Government arguing that, in a case such as this, the principle does not apply at all.

**70** For that reason only, I would prefer not to decide whether rights under section 193 should be classified as civil rights. It is sufficient to say that, assuming that they are, the right of appeal under section 204 is sufficient to satisfy article 6. As for Mr Morgan's alternative argument, I think that it is highly artificial and I would reject it. Runa Begum's private law rights as an unsecured tenant of the council were unaffected by its decision as to whether or not it continued to owe a duty under section 193. The council was entitled to terminate the tenancy by notice at any time, whatever its duties under Part VII might be. If it terminated her tenancy when she was still owed a duty—for example, because it thought that flat

A was more suitable for another person—it would have had to find her somewhere else to live. But that statutory duty would not affect her private law rights in respect of the flat in Limscott House.

71 Mr Morgan relied upon the decision of the Court of Appeal in *R (McLellan) v Bracknell Forest Borough Council* [2002] QB 1129, in which it was held that a decision to terminate an introductory tenancy granted under Part V of the 1996 Act affected the tenant's private law rights under his B tenancy. It is not necessary to comment upon that case because in my view it is plainly distinguishable. Part V requires the authority to give reasons why it proposes to terminate an introductory tenancy and section 129(2) gives the tenant the right to require the authority to review its decision to terminate. Thus the rights which the Act confers upon the tenant, such as the right to ask for a review, affect his rights as a tenant in private law C because unless the authority complies with the Act, it cannot terminate the tenancy. That is quite different from the present case in which the Act contains no restraint upon a decision of the council to terminate a tenancy granted by way of providing temporary accommodation under Part VII.

72 For these reasons I would dismiss the appeal.

**LORD HOPE OF CRAIGHEAD**

D 73 My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann. I agree with them, and for the reasons which they have given I too would dismiss the appeal.

**LORD MILLETT**

E 74 My Lords, the questions with which this appeal is concerned arise out of a dispute whether the statutory duties under Part VII of the Housing Act 1996 which the council owed to Runa Begum as an unintentionally homeless person continued to subsist (as she contended) or had ceased (as the council contended). This turned on whether the accommodation which the council had offered her and which she had refused was suitable for her and whether it was reasonable for her to accept it. An officer of the council F decided these questions adversely to Runa Begum. She exercised her statutory right to ask for an internal review of the decision. In accordance with the applicable Regulations the review was conducted by Mrs Hayes, the council's rehousing manager, an officer of the council who was not involved in the original decision and was senior to the officer who made it. She made her own investigations into the reasons which Runa Begum gave for refusing G the accommodation and confirmed the original decision. Runa Begum then appealed to the county court under section 204 of the Act. This provides that an applicant who is dissatisfied with a decision on review may appeal to the county court but on a point of law only.

75 The question for your Lordships is whether Runa Begum has been denied her Convention rights under article 6(1) of the European Convention on Human Rights. In the determination of a person's "civil rights and H obligations" article 6(1) guarantees him or her "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Runa Begum contends that she has been denied such a hearing because (i) her civil rights have been determined on review by an officer of the council, who was not an independent and impartial tribunal as

required by article 6(1); and (ii) the defect could be cured only by a right of appeal to a court with "full jurisdiction", which the county court did not possess because it lacked any power to reverse any findings of fact which the reviewing officer had made.

**76** Three issues arise: (i) whether the decision of the reviewing officer determined Runa Begum's "civil rights", for if it did not then article 6(1) is not engaged at all; (ii) whether the reviewing officer was an independent tribunal for the purposes of article 6; and (iii) if she was not, whether her want of independence was cured by a right of appeal to a court on a point of law only.

**77** These issues are closely interrelated, for the greater the scope of article 6(1) the more necessary it becomes to temper its requirements, and in particular the requirement of independence, in the interests of the efficient administration of justice.

*The first issue: is article 6(1) engaged?*

**78** The question here is whether the reviewing officer's decision that the council no longer owed its full housing duty to Runa Begum constituted a determination of her "civil rights" within the meaning of article 6(1). The European Court of Human Rights ("the Strasbourg Court") has repeatedly stated that the first step is to ascertain whether there was a *contestation* (dispute) over a "right" which can be said, at least on arguable grounds, to be recognised under national law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and the outcome of the proceedings must be directly decisive of the right in question: see, for example, *Mennitto v Italy* (2000) 34 EHRR 1122, 1129, para 23.

**79** This requirement is clearly satisfied in the present case. Once a local housing authority is satisfied that an applicant is homeless, eligible for assistance, and has a priority need, and is not satisfied that the applicant has become homeless intentionally, it is under a statutory duty to secure that accommodation is made available for his or her occupation. It is not a duty to secure the provision of accommodation if it thinks fit, which would make the outcome of the application unpredictable. It is a duty to secure the provision of accommodation in the case of any applicant who satisfies the statutory criteria. Once the duty arises, the applicant has a corresponding legal right to its performance. The housing authority has a wide discretion as to the manner in which it will perform its duty, but that is not inconsistent with the existence of a corresponding right. An applicant has a legal right, recognised by our domestic law, to have the duty performed by the local housing authority in one or other of the ways which are open to it.

**80** Runa Begum fulfilled the relevant criteria and accordingly, as the council acknowledged, it owed her the full housing duty and she had a corresponding legal right to its performance. But it claimed that its statutory duty, and with it her corresponding right, had ceased, because it had offered her suitable accommodation and she had unreasonably refused it.

**81** Whether the accommodation which the council had offered to her and whether it was reasonable for her to occupy it depended in large measure on housing conditions prevailing in the area. The determination of the dispute therefore called for an exercise of judgment on the part of a reviewing officer with experience of such conditions. These factors made the

dispute one which was eminently suitable for determination by a senior officer of the council's housing department, but they do not prevent it from involving a determination of her legal rights.

**82** Whether those rights should be classified as "civil rights" within the meaning of article 6(1) is, however, a very difficult question. According to the consistent case law of the Strasbourg court the concept of "civil rights and obligations" is autonomous. Its scope cannot be determined solely by reference to the domestic law of the respondent state: *König v Federal Republic of Germany* (1978) 2 EHRR 170, 192–193, para 88; *Benthem v The Netherlands* (1985) 8 EHRR 1, 9, para 34. Any other conclusion could lead to results incompatible with the object and purpose of the Convention, since it would be open to contracting states, by reclassifying the rights granted by their own domestic legal systems, to exclude particular categories of civil actions from the operation of article 6(1). The fact that Runa Begum's statutory rights fall to be classified by English law as rights in public law is, therefore, not conclusive.

**83** While the concept of "civil rights" is autonomous, however, the content of the right in question under domestic law is highly relevant. As the Strasbourg court observed in *König v Federal Republic of Germany* 2 EHRR 170, 193, para 89:

> "Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right—and not its legal classification—under the domestic law of the state concerned. In the exercise of its supervisory functions, the court must also take account of the object and purpose of the Convention and of the national legal systems of the other contracting states."

**84** The difficulty in deciding whether Runa Begum's claim to accommodation was an assertion of her "civil rights" within the meaning of article 6(1) arises from the fact that the jurisprudence of the Strasbourg court in relation to the scope of article 6(1) is still in course of development.

**85** Article 6(1) was originally intended to have a more limited application than a common lawyer would suppose. It is confined to the determination of civil rights and criminal charges, and in civilian systems these do not cover the whole field. There are three systems of justice in Europe, civil, criminal, and administrative, the last-named covering all actions against the state. In *Ferrazzini v Italy* (2001) 34 EHRR 1068 the Strasbourg court held that the article 6(1) guarantee of a fair trial within a reasonable time does not apply to tax cases. Taxation is a core prerogative of the state and in civilian systems does not involve the taxpayer's civil rights. Many alleged criminals and civil litigants have obtained rulings from the Strasbourg court that the long delays inherent in the Italian justice system infringe article 6(1); but ordinary taxpayers cannot do so.

**86** This is not because taxpayers are ranked lower than bogus asylum seekers, suspected terrorists and alleged criminals, including those charged with tax fraud, but because article 6(1) was intended to be supplemented by further measures in relation to the making of administrative decisions. These would, no doubt, have included guarantees of fairness, impartiality and a hearing within a reasonable time; but any requirement that the hearing should be in public before an independent tribunal would have serious

consequences for efficient administration. The background is described in the dissenting opinion in *Feldbrugge v The Netherlands* (1986) 8 EHRR 425, 444, and is summarised in the speech of my noble and learned friend Lord Hoffmann.

**87** No such measures have been introduced, and in their absence the Strasbourg court has found it necessary to extend the scope of article 6(1) to cover some, but not all, administrative decisions. The process has been a gradual one, and may not yet be complete. Underlying the process there must, I think, have been a desire not to restrict the guarantees of a fair hearing within a reasonable time by an impartial tribunal. But the Strasbourg court has not proceeded by reference to principle or on policy grounds; instead it has adopted an incremental and to English eyes disappointingly formalistic approach, making it difficult to know where the line will finally come to be drawn.

**88** At a relatively early stage the Strasbourg court held that article 6(1) extends beyond private law disputes in the traditional sense, that is to say between individuals or between an individual and the state acting as a private individual and subject to private law: it covers all proceedings which are decisive of private rights and obligations: *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, 489–490, para 94. The character of the national legislation and that of the authority which is invested with jurisdiction in the matter are not determinative: "only the character of the right at issue is relevant": *König v Federal Republic of Germany*, at p 194, para 90.

**89** The next step was taken in *Feldbrugge v The Netherlands* 8 EHRR 425 and *Deumeland v Germany* (1986) 8 EHRR 448. The former was concerned with sickness allowance; the latter with industrial injury benefits. Both involved administrative decisions in the grant of contributory social security benefits. The Strasbourg court held that the dispute in each case had features of a public law character—the character of the legislation, the compulsory nature of the insurance, and the assumption by the state of responsibility for social protection; but these were outweighed by features of a private law nature—the personal and economic nature of the right asserted, the close connection with the contract of employment, and the affinities with insurance under the ordinary law. The right asserted was therefore a "civil right" within article 6(1). The decision in each case was strongly dependent on the contributory nature of the scheme and the analogy with private insurance.

**90** This is not a principled basis on which to draw the distinction between "civil rights" which are within the protection of article 6(1) and other rights which are not, and it is not surprising that the line could not be held. The meaning of "civil rights" and hence the scope of article 6(1) was extended further in *Salesi v Italy* (1993) 26 EHRR 187 and most recently in *Mennitto* 34 EHRR 1122. Both cases were concerned with non-contributory disability allowances. In *Salesi* the court referred to "the development in the law initiated by" the judgments in *Feldbrugge* and *Deumeland* and commented that the differences between social insurance and welfare assistance could not be regarded as fundamental "at the present stage of development of social security law". In these passages the Strasbourg court recognised that its jurisprudence was still developing. The decisions had the effect of extending article 6(1) to disputes in connection

with non-contributory welfare schemes. In each case the critical feature which brought it within article 6(1) was that the claimant "suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the Constitution" (26 EHRR 187, 199, para 19).

**91** The present case undoubtedly goes further still. It has four features which take it beyond the existing case law: (i) it is concerned with a benefit in kind; (ii) it therefore involves priority between competing claimants. There is only a finite amount of housing stock, whether it belongs to the local housing authority or is bought in; and if one applicant is allowed to remain on the unintentionally homeless register it will be to the detriment of other homeless persons; (iii) the housing authority has a discretion as to the manner in which it will discharge its duties; and (iv) ultimately the question for determination calls for an exercise of judgment: whether the applicant has behaved reasonably in refusing an offer of accommodation, having regard to all the circumstances, and in particular housing conditions in the area.

**92** I do not suppose that the first of these is significant in itself; a right to be housed is not a right to subsistence, though it would be invidious to distinguish the two. But it leads to the others, which are significant. Runa Begum cannot be said to be claiming "an individual, economic right flowing from specific rules laid down in a statute".

**93** It is not difficult to conclude that the nature of the dispute in her case makes it inappropriate for determination by the ordinary judicial process. But it is more difficult, at least in principle, to justify withdrawing it from the protection of article 6(1). Most European states possess limited judicial control of administrative decisions; and if such decisions are outside the scope of article 6(1) then judicial control could be dispensed with altogether. The individual could be left without any right to a tribunal which was impartial or to a hearing within a reasonable time. This would be incompatible with the fundamental human right which article 6(1) was designed to secure.

**94** I am persuaded by these considerations that extending the scope of article 6(1) is a desirable end in itself, but needs to go hand in hand with moderating its requirements in the interests of efficient administration where administrative decisions are involved. In the light of the unsettled state of the jurisprudence of the Strasbourg court, therefore, I am content to assume, without deciding, that Runa Begum's claim involved a determination of her civil rights within the meaning of article 6(1).

*The second issue: was Mrs Hayes an independent tribunal?*

**95** There is no reason to doubt Mrs Hayes's impartiality. My noble and learned friend Lord Bingham of Cornhill has referred to the many safeguards in place to avoid the danger that she might be unfairly influenced by the decision which she was reviewing, and there is no suggestion that she had any personal interest in the outcome.

**96** But I do not see how she can sensibly be said to be independent. The question she had to decide was whether the council was under a continuing duty towards Runa Begum. She was an officer of the very council which was alleged to owe the duty. The council contended that it had no interest in the outcome either. It was concerned to house the homeless, not to avoid

performing its statutory duty; the real dispute was not between Runa Begum and the council, but between her and others on the homeless register. But these considerations go to Mrs Hayes's impartiality, not to her independence, which is a separate requirement. The review which Mrs Hayes conducted was an internal review carried out by the council itself in order to determine the extent of its own statutory obligations. The want of independence is manifest.

**97** It was suggested that where, as in the present case, factual disputes arise for decision, the case should be referred to an external fact-finder independent of the local housing authority. Like my noble and learned friend Lord Bingham, I doubt that the exercise of quasi-judicial powers is a function of the authority within the meaning of the relevant Order, which is concerned in very general terms with deregulation and the subcontracting of ordinary local authority functions. But in any case I do not see how a person appointed ad hoc by the authority directly concerned and lacking any kind of security of tenure could constitute an "independent . . . tribunal established by law" as required by article 6(1). Moreover, while the legality of farming out the decision-making function in relation to disputes of fact which arise in the course of the hearing is open to doubt, there can be no doubt that it would create an administrative nightmare. It is notable that Parliament has established no similar procedure for any of the great number and variety of decisions that it has devolved to administrative bodies.

*The third issue: did the county court have "full jurisdiction"?*

**98** The fact that, on an appeal under section 204 of the Act, the county court has been said to possess the full judicial review jurisdiction (see *Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306) should not obscure the fact that its jurisdiction is appellate and not merely supervisory. Before the Act there was no right of appeal to the county court, and decisions of local housing authorities could be challenged only by way of judicial review in the High Court. This was both expensive and inconvenient, and a right of appeal to the county court on a point of law was substituted. The change was made in the interests of the efficient administration of justice and was not intended to cut down the scope for judicial control by excluding, for example, challenges based on procedural unfairness or impropriety or the adequacy of the reasons given for the decision.

**99** Where, however, the jurisdiction of the court to entertain an appeal depends on whether it involves a question of fact or law, there is no need to refer to the supervisory jurisdiction of the court in judicial review. The controlling authority is *Edwards v Bairstow* [1956] AC 14, which explains the scope of an appeal on a point of law. It is accurately summarised in *Bryan v United Kingdom* (1995) 21 EHRR 342, 349–350, paras 25, 26. A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error of law; if the decision cannot be supported the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law. The court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; and

A questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-making authority and not the court. But these are the only significant limitations on the court's jurisdiction, and they are not very different from the limitations which practical considerations impose on an appellate court with full jurisdiction to entertain appeals on fact or law but which deals with them on the papers only and without hearing oral evidence.

B **100** Where an administrative decision is determinative of the claimant's civil rights, including his or her right to social security benefits or welfare assistance, the Strasbourg court has accepted that it may properly be made by a tribunal which is not itself possessed of the necessary independence, provided that measures to safeguard the impartiality of the tribunal and the fairness of its procedures are in place and its decisions are subject to ultimate C judicial control by a court with "full jurisdiction".

**101** It is clear from the decision of the Strasbourg court in *Bryan v United Kingdom* 21 EHRR 342 that "full jurisdiction" in this context does not necessarily mean full jurisdiction on fact or law but, as my noble and learned friend Lord Hoffmann described it in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, 330, para 87, "jurisdiction to deal with the case as the D nature of the decision requires".

**102** *Bryan* was concerned with the decision of a planning inspector whose decision was subject to appeal to the High Court on a point of law. The question was whether buildings which had been erected in the Green Belt could, from their appearance and layout, be considered to have been designed for the purposes of agriculture. This was a question of fact and E degree. The Strasbourg court ruled that, despite the many safeguards in place, the inspector was not an independent tribunal for the purpose of article 6(1). But it also held that the jurisdiction of the High Court was sufficient to comply with article 6(1), even though it could not substitute its own decision on the merits for that of the inspector. The decision of the Strasbourg court was a strong one, for while the primary facts were not in F dispute the inspector's decision was a conclusion of fact drawn from the primary facts.

**103** In *Bryan* the Strasbourg court held that in assessing the adequacy of the appellate procedure which was available to the claimant, regard must be paid to the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal. The court noted the extensive G jurisdiction of the High Court and that, while it could not substitute its own conclusion for that of the inspector, it was bound to satisfy itself that his conclusion was neither perverse nor irrational. The court observed that such an approach to questions of fact was a feature of the systems of judicial control of administrative decisions found throughout the member states of the Council of Europe; and held that such an approach could reasonably be H expected "in specialised areas of the law" such as the one at issue.

**104** Given the context in which these words were used, the Strasbourg court can hardly have meant areas of specialised law such as patent or trade mark law. It must have meant areas which called for some special knowledge or experience on the part of the decision-maker. In *Edwards v Bairstow* [1956] AC 14, which was a tax case, Lord Radcliffe explained that

the reservation of the fact-finding process to the exclusive jurisdiction of the special commissioners was not based on the specialised nature of tax law but was necessary in the interests of the efficient administration of justice. A

105 In the present case the subject matter of the decision was the distribution of welfare benefits in kind, and critically depended upon local conditions and the quality and extent of available housing stock. The content of the dispute related to the reasonableness of the claimant's behaviour in refusing an offer made to her which, if refused by her, would have to be offered to others on the homeless register. Any factual issue arising in the course of the dispute, even if critical to the outcome, would be incidental to the final decision. In my opinion the subject matter of the decision and the content of the dispute demanded that the decision be made by an administrative officer with experience of local housing conditions, subject to a proper degree of judicial control; and that a right of appeal to the court on law only was sufficient for this purpose. B C

106 Although the question involves the claimant's individual Convention rights and falls to be decided on a case by case basis, I think that it is the system which is the essential subject of the inquiry. The question in every case is whether the claimant's Convention rights have been satisfied by giving him or her access to the system of decision-making which Parliament has established. They were not satisfied in *Kingsley v United Kingdom* (2000) 33 EHRR 288; (2002) 35 EHRR 177, because the court could not direct a rehearing before another tribunal where the only body which Parliament had authorised to make the decision had shown bias. But there is no reason to suppose that the Strasbourg court would have reached the same conclusion had the nature of the claimant's complaint been different. D

107 In the present case, for the reasons I have given, as well as those of your Lordships, with which I agree, I consider that the county court had sufficient jurisdiction to deal with Runa Begum's case to comply with article 6(1). I would dismiss the appeal. E

**LORD WALKER OF GESTINGTHORPE**

108 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it and for the reasons which he gives I would dismiss this appeal. I add a few remarks of my own on the "civil rights" issue because of its interest and importance. F

109 Lord Hoffmann has in his speech in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, 327–330, paras 78–88, clearly summarised the development of the autonomous meaning of "civil rights and obligations" and the consequential problems which have arisen in relation to judicial review of administrative decision-making. As he has observed, the original intention of the draftsmen of the Convention to restrict "civil rights and obligations" to those under private law is now of no more than historical interest. But the inroads made into the intended exclusion of a citizen's rights and obligations under public law have not been entirely consistent. In particular, the European Court of Human Rights has recently, in *Ferrazzini v Italy* (2001) 34 EHRR 1068, reaffirmed the exclusion of tax proceedings from the ambit of article 6(1). But it did so only by a majority of 11 to 6, and the dissenting opinion of Judge Lorenzen (joined by five other judges) merits attention. G H

A **110** Mr Ferrazzini wished to run a business providing farm holidays in Italy, and for that purpose he transferred assets to a company which he controlled. This gave rise to liability to several different Italian taxes and there were disputes both about valuations and about the availability of a reduced rate for agricultural property. Various assessments were made in 1987. Three sets of proceedings ensued before district and regional tax courts. One set of proceedings concluded in 1998 and the other two were B still pending in 2000. Mr Ferrazzini complained that he had not had a hearing within a reasonable time.

**111** The majority of the court took the view that article 6(1) was not engaged, at p 1075, para 29:

> "The court considers that tax matters still form part of the hard core of C public-authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant . . . It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer."

The dissenting opinion challenged that view. The whole opinion merits attention, but its general theme appears from pp 1078–1079, para O-II4: D

> "it is hard to accept that the travaux préparatoires dating more than 50 years back and partly based on preconditions that have not been fulfilled or are no longer relevant should remain a permanent obstacle to a reasonable development of the case law concerning the scope of article 6—in particular to areas where there is an obvious need to extend the protection granted by that article to individuals. The present case law E clearly demonstrates in fact that the Convention institutions have not felt bound to maintain a restrictive attitude, but have extended the applicability of article 6(1) to a considerable number of relationships between individuals and governments which originally must have been held to be excluded."

F **112** Further development in the case law may therefore be expected. The existing Strasbourg jurisprudence most directly in point is the line of cases starting with *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 and leading to *Salesi v Italy* (1993) 26 EHRR 187 and *Mennitto v Italy* (2000) 34 EHRR 1122. These indicate that article 6(1) is likely to be engaged when the applicant has public law rights which are of a personal and economic nature and do not involve any large measure of official discretion: see G *Masson v The Netherlands* (1995) 22 EHRR 491, 511, para 51.

**113** In the present case the applicant's rights (arising from her unintentional homelessness and her priority need) were personal and economic (at least in the sense of meeting her need for the necessities of life). Superficially they did not involve any large measure of discretion: once it was established that she satisfied the statutory conditions, the local housing authority owed her the full statutory duty under section 193(2) of the H Housing Act 1996 and she had a correlative right to the performance of that duty. On that basis it was argued that the applicant had not only a right under national law, but also a civil right in the autonomous Convention sense, a right (as it was put in *Feldbrugge* 8 EHRR 425, 434, para 37 "flowing from specific rules laid down by the legislation in force").

**114** However it is necessary to take a closer look, both at the process by which a homeless person becomes entitled to the performance of the full housing duty, and to the content of that duty. It is apparent that the process involves some important elements of official discretion, and also issues which (although not properly described as involving the exercise of discretion) do call for the exercise of evaluative judgment. The following points seem to me particularly significant, though the list is by no means exhaustive.

(1) Establishing priority need may call for the exercise, and sometimes for a very difficult exercise, of evaluative judgment. There was no problem in the applicant's case because of her family circumstances, but the identification of a "vulnerable" person may present real problems (see section 189(1)(c) of the Act and *R v Camden London Borough Council, Ex p Pereira* (1998) 31 HLR 317).

(2) A local housing authority may at its discretion perform its full housing duty in any of the three ways specified in section 206 of the Act, which include (section 206(1)(c)) giving such advice and assistance as will secure that suitable accommodation is available to the applicant from some other person. Moreover under section 206(2) the authority has quite a wide discretion as to making charges to a successful applicant.

(3) The period for which the accommodation is to be secured is a minimum period of two years; after that the authority has a discretion (see section 193(3) and (4) and section 194 of the Act, embodying changes made after the decision of your Lordships' House in *R v Brent London Borough Council, Ex p Awua* [1996] AC 55).

(4) The local housing authority's duty comes to an end if an applicant refuses an offer of accommodation which the authority are satisfied is suitable (see section 193(5) and (7) of the Act). Here again there are potentially difficult exercises of judgment to be made.

**115** These points, taken together, amount to a considerable qualification of the notion that a successful applicant is enjoying a quantifiable right derived from specific statutory rules. If the local housing authority's duty does create a civil right within the autonomous Convention meaning, it must in my view lie close to the boundary of that aggregation of rights. I do not think it is necessary, in order to dispose of this appeal to express a definite view. On this point I am in full agreement with the observations in paragraphs 69 and 70 of Lord Hoffmann's speech. I would dismiss this appeal.

*Appeal dismissed.*

*Solicitors: Maxim Solicitors; Solicitor, Tower Hamlets London Borough Council.*

D E C P

# GATESHEAD METROPOLITAN BOROUGH COUNCIL v. SECRETARY OF STATE FOR THE ENVIRONMENT

COURT OF APPEAL

(Glidewell, Hoffman, and Hobhouse L.JJ.): May 12, 1994

*Clinical waste incinerator—overlap between the functions of the local planning authority and HMIP—information on air quality not available to Secretary of State in reaching decision on a planning appeal—evaluating this issue properly within the competence of HMIP—HMIP would be justified in refusing an authorisation notwithstanding grant of planning permission if criteria not met*

The Northumbrian Water Group plc ("NWG") wanted to construct and operate an incinerator for the disposal of clinical waste on a disused sewage treatment works at Wardley in Gateshead. Under the Town and Country Planning Act 1990 planning permission is necessary for the construction and use of the incinerator. Incineration is a prescribed process within section 2 of the Environmental Protection Act 1990 and Schedule 1 to the Environmental Protection (Prescribed Processes and Substances) Regulations 1991 as amended. An authorisation to carry on the process of incineration is required by section 6 of the Environmental Protection Act. The enforcing authority responsible for granting an authorisation is HM Inspectorate of Pollution ("HMIP").

Two applications were made to Gateshead Metropolitan Borough Council ("the Council") for planning permission. The appeal was only concerned with the second, which was an outline application submitted on October 26, 1991. This application was refused by the Council on February 4, 1991. NWG appealed against the refusal to the Secretary of State. An inquiry into the appeal was heard. The Inspector recommended that permission be refused, but the Secretary of State, disagreed with the Inspector's recommendation, allowed the appeal and granted outline permission subject to conditions.

The Council applied to the High Court under section 288 of the Town and Country Planning Act 1990 for an order that the Secretary of State's decision be quashed. On September 19, 1993 the High Court dismissed the application. The Council appealed.

The relevant provisions of the Town and Country Planning Act comprise sections 54A, 72(2) and 79(4) whereby the Secretary of State was

required to decide in accordance with the provisions of the Development Plan unless material considerations indicated otherwise. The Inspector, having considered the advice of his assessor and having set out the evidence and submissions concluded that save for the effect of discharges from the plant on air quality and thus on the environment generally, all the other criteria in the Structure Plan Policy and all other possible objections were met. However, he dismissed the appeal given his concern that "the impact on air quality and agriculture in this semi-rural location is insufficiently defined, despite the efforts of the main parties at the inquiry, and public disquiet regarding fears as to environmental pollution and in particular dioxin emissions cannot be sufficiently allayed to make the proposed development of a clinical waste incinerator on this site acceptable."

The Secretary of State disagreed with this finding and at paragraph 36 to his decision letter said "the Secretary of State is satisfied that, in the event of planning permission being granted, these concerns could and would be addressed by HMIP in the pollution control authorisation process. While noting the Inspector's view that emission standards set by HMIP would be more stringent that those in document NW9, the Secretary of State considers that the standards in document NW9 simply represent the likely starting point for the HMIP authorisation process, and do not in any way fetter their discretion to determine an application for an authorisation in accordance with the legal requirements under the Environmental Protection Act 1990."

The Council argued:

(1) the Secretary of State did not give proper or adequate reasons for rejecting the Inspector's recommendation and the reasoning which led the Inspector to his recommendation. This was a failure to comply with "relevant requirements" set out in the Town and Country Planning Inquiry Procedure Rules 1992, rule 17.1. Thus, this is a ground upon which, provided prejudice be shown to the Council, action can be taken to quash the Secretary of State's decision under section 288(1)(b);

(2) once planning permission had been granted, there was in practice no prospect of HMIP using their powers to refuse to authorise the operation of the plant. Thus, whatever the impact of the emissions on the locality will be, HMIP were likely to do no more than ensure that the best available techniques not entailing excessive costs be used, which may leave the amounts of deleterious substances released at an unacceptable level. This could be prevented by refusing planning permission, which would then leave it to NWG, if they were able to do so, to seek additional evidence to support a new application which would overcome the Inspector's concerns. The Secretary of State was wrong to say at paragraph 20 of his decision that the controls under the Environmental Pollution Act are

adequate to deal with the emissions and the risk to human health. By so concluding, the Secretary of State:

(a) misunderstood the powers and the functions of HMIP;
(b) contravened the precautionary principle, and/or
(c) reached an irrational conclusion.

**Held,** dismissing the appeal:

(1) It is a commonplace that a decision-maker, including both a Local Planning Authority when refusing permission and particularly the Secretary of State when dealing with an appeal, must give reasons for the decision. The rules so provide. The courts have held that those reasons must be "proper, adequate and intelligible" (*per* Lord Scarman in *Westminster City Council v. Great Portland Estate* [1985] A.C. 661 at 683). In this decision letter, the Secretary of State says, in effect, "I note that the Inspector says that the impact of some of the maximum emission limits indicated in document NW9 would not be acceptable in a semi-rural area. But HMIP will not be obliged, if they grant an authorization, to adopt those limits. On the contrary, they have already indicated that the limits they would adopt would be lower. Thus, HMIP will be able to determine what limits will be necessary in order to render the impact of the emissions acceptable, and impose those limits." This was sufficiently coherent and clear reasoning to fulfil the test.

(2) The decision made on the appeal to the Secretary of State lay in the area in which the regimes of control under the Town and Country Planning Act and the Environmental Protection Act overlapped. If it had become clear at the inquiry that some of the discharges were bound to be unacceptable so that a refusal by HMIP to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission. This was not the case here as at the end of the inquiry there was no clear evidence about the quality of the air in the vicinity of the site. These issues were clearly within the competence and jurisdiction of HMIP once information about air quality had been obtained. If in the end the Inspectorate concluded that the best available techniques, etc., would not achieve the results required by section 7(2) and 7(4) of the Environmental Protection Act, the proper course would be for them to refuse an authorisation.

## Case cited:

*Westminster City Council v. Great Portland Estate* [1985] A.C. 661 at 683.

*Mr D. Mole* and *Mr T. Hill* on behalf of the applicant.
*Mr S. Richards* and *Mr R. Drabble* on behalf of the first respondent.
*Mr W. Hicks* and *Mr R. Harris* on behalf of the second respondent.

**GLIDEWELL L.J.:** This appeal relates to an activity which, in general terms, is subject to planning control under the Town and Country Planning Act, and to control as a prescribed process under Part I of the Environmental Protection Act 1990. The main issue in the appeal is, what is the proper approach for the Secretary of State for the Environment to adopt where these two statutory regimes apply and, to an extent, overlap?

The Northumbrian Water Group Plc ("NWG") wish to construct and operate an incinerator for the disposal of clinical waste on a site some nine acres in extent, comprising about half of the area of the disused Felling Sewage Treatment Works at Wardley in the Metropolitan Borough of Gateshead. Under the Town and Country Planning Act planning permission is necessary for the construction of the incinerator and for the commencement of its use thereafter. The proposed incineration is a prescribed process within section 2 of the Environmental Protection Act 1990 and Schedule 1 of the Environmental Protection (Prescribed Processes, etc.) Regulations 1991 as amended. An authorisation to carry on the process of incineration is therefore required by section 6 of the Environmental Protection Act. In this case, the enforcing authority which is responsible for granting such an authorisation is HM Inspectorate of Pollution ("HMIP").

Two applications were made to Gateshead, the Local Planning Authority, for planning permission for the construction of the incinerator. This appeal is only concerned with the second, which was an outline application submitted on October 26, 1991. The application was refused by Gateshead by a notice dated February 4, 1991 for six reasons which I summarise as follows. The proposal is contrary to the provisions of the approved Development Plan, both the Local Plan and the County Structure Plan; the use of the land for waste disposal purposes conflicts with the allocation of neighbouring land for industrial and/or warehousing purposes and could prejudice the development of that land; since there was no national or regional planning framework which identified the volume of clinical waste which was likely to arise, the proposal was premature; the applicants have failed to supply sufficient information that the plant could be operated without causing a nuisance to the locality; the applicants have failed to demonstrate that the overall effects on the environment, particularly in relation to health risk, have been fully investigated and taken account of. Then there was finally a ground relating to the reclamation and development of the site stating that no proposals have been submitted demonstrating how contamination arising from its previous use could be treated. That point does not arise in this appeal.

NWG appealed against the refusal to the Secretary of State. An inquiry into the appeal was heard by an Inspector of the Department of the

Environment, Mr C. A. Jennings BSc CEng, with the assistance of Dr Waring, a Chemical Assessor, between April 9 and May 1, 1991. The Inspector and the assessor reported to the Secretary of State on August 3, 1992. The Inspector recommended that permission be refused. The Secretary of State by letter dated May 24, 1993 allowed the appeal and granted outline permission subject to conditions. Gateshead applied to the High Court under section 288 of the Town and Country Planning Act 1990 for an order that the Secretary of State's decision be quashed. On September 29, 1993 Mr Jeremy Sullivan Q.C. sitting as Deputy High Court Judge dismissed the application. Gateshead now appeal to this Court. The relevant provision of the Town and Country Planning Act comprises sections 54A, 72(2) and 79(4). The effect of those sections is that, in determining the appeal the Secretary of State was required to decide in accordance with the provisions of the Development Plan unless material considerations indicated otherwise, and to decide in accordance with other material considerations.

In the Environmental Protection Act 1990, section 2(1) provides:

> "The Secretary of State may, by regulations, prescribe any description of process as a process for the carrying on of which after a prescribed date an authorisation is required under section 6 below."

It is agreed that the operation of the incinerator is such a process. By section 6(1)

> "No person shall carry on a prescribed process after the date prescribed or determined for that description of process by ..."

relevant regulations,

> "except under an authorisation granted by the enforcing authority and in accordance with the conditions to which it is subject."

The enforcing authority in this case means, strictly, the Chief Inspector, but in practice HMIP. Section 6(2) provides:

> "An application for any authorisation shall be made to the enforcing authority in accordance with Part I of Schedule 1 of the Act ..."

Section 6 continues:

> (3) "Where an application is duly made to the enforcing authority, the authority shall either grant the authorisation subject to the conditions required, authorisation to be imposed by section 7 below or refuse the application."
> (4) "An application shall not be granted unless the enforcing authority considers that the applicant will be able to carry on the process so as to comply with the conditions which would be included in the authorisation."

Section 7(1) deals with conditions which are required to be attached to any authorisation. By 7(1)(a)

> "There shall be included in an authorisation—such specific conditions as the enforcing authority considers are appropriate ... for achieving the objectives specified in subsection (2) below."

Those objectives are:

> "(a) ensuring that, in carrying on a prescribed process, the best available techniques not entailing excessive cost will be used—
>
> (i) for preventing the release of substances prescribed for any environmental medium into that medium or, where that is not practicable by such means, for reducing the release of such substances to a minimum and rendering harmless any such substances which are so released; and
>
> (ii) for rendering harmless any other substances which might cause harm if released into any environmental medium."

Finally by subsection (4)

> "Subject to subsections (5) and (6) below, there is implied in every authorisation a general condition that, in carrying on the process to which the authorisation applies, the person carrying it on use make the best available techniques not entailing excessive cost for ..."

precisely the same purposes as those set out in subsection (2). When the inquiry was held an application had been made to HM Inspectorate for an authorisation, but that had not yet been determined.

The Development Plan consisted of the approved Tyne and Wear Structure Plan, together with a Local Plan for the area. In the structure plan the relevant policy is numbered EN16. It reads:

> "Planning applications for development with potentially noxious or hazardous consequences should only be approved if the following criteria can be satisfied:—
>
> (a) adequate separation from other development to ensure both safety and amenity;
>
> (b) the availability of transport routes to national networks which avoid densely built-up areas and provide for a safe passage of hazardous materials;
>
> (c) acceptable consequences in terms of environmental impact."

It was agreed at the inquiry, and is agreed before us, that criteria (a) and (b) are met. The issue revolves around criterion (c), whether the development will have "acceptable consequences in terms of environmental impact".

I comment first about the relationship between control under the Town and Country Planning Act and the Environmental Protection Act. In very broad terms the former Act is concerned with control of the use of land, and the Environmental Protection Act with control (at least in the present

respect) of the damaging effect on the environment for process which causes pollution. Clearly these control regimes overlap.

Government policy overall is set out in a White Paper called "This Common Inheritance, Britain's Environmental Strategy", which is Cm. 1200. The main part of this to which reference was made during the hearing of the appeal and before the Learned Deputy Judge is paragraph 6.39 which reads:

> "Planning control is primarily concerned with the type and location of new development and changes of use. Once broad land uses have been sanctioned by the planning process it is the job of the pollution control to limit the adverse effects the operations may have on the environment. But in practice there is common ground. In considering whether to grant planning permission for a particular development a local authority must consider all the effects including potential pollution; permission should not be granted if that might expose people to danger."

There is also an earlier passage which is relevant in paragraph numbered 1.18 headed precautionary action. The latter part of that paragraph reads:

> "Where there are significant risks of the damage to environment, the Government will be prepared to take precautionary action to limit the use of potentially dangerous materials or the spread of potentially dangerous pollutants, even where scientific knowledge is not conclusive, if the balance of likely costs and benefits justifies it. This precautionary principle applies particularly where there are good grounds for judging either that action taken promptly at comparatively low cost may avoid more costly damage later, or that irreversible effects may follow if action is delayed."

More specific guidance relating to the application of Planning Control under the Planning Act is to be given in a Planning Policy Guidance Note. That was in draft at the time of the inquiry. The Draft of Consultation was issued in June 1992 and, as I understand it, is still in that state. However, reference was made to it during the inquiry and Mr Mole, for Gateshead, has referred us to two paragraphs in particular. These are:

> 125. "It is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies (including local authorities in their non-planning functions). Planning controls are not an appropriate means of regulating the detailed characteristics of industrial processes. Nor should planning authorities substitute their own judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over those matters.
> 126. While pollution controls seek to protect health in the environment, planning controls are concerned with the impact of development on the use of land and the appropriate use of land. Where the potential for harm to man and the environment affects the use of land (e.g. by precluding the use of neighbouring land for a particular purpose or by making use of that land

> inappropriate because of, say, the risk to an underlying aquifer) then planning and pollution controls may overlap. It is important to provide safeguards against loss of amenity which may be caused by pollution. The dividing line between planning and pollution control considerations is therefore not always clear-cut. In such cases close consultation between planning and pollution control authorities will be important at all stages, in particular because it would not be sensible to grant planning permission for a development for which a necessary pollution control authorisation is unlikely to be forthcoming."

Neither the passages which I have read from the White Paper nor those from the draft Planning Policy Guidance are statements of law. Nevertheless, it seems to me they are sound statements of common sense. Mr Mole submits, and I agree, that the extent to which discharges from a proposed plan will necessarily or probably pollute the atmosphere and/or create an unacceptable risk of harm to human beings, animals or other organisms, is a material consideration to be taken into account when deciding to grant planning permission. The Deputy Judge accepted that submission also. But the Deputy Judge said at page 17 of his judgment, and in this respect I also agree with him,

> "Just as the environmental impact of such emissions is a material planning consideration, so also is the existence of a stringent regime under the EPA for preventing or mitigating that impact for rendering any emissions harmless. It is too simplistic to say, 'The Secretary of State cannot leave the question of pollution to the EPA'."

The Inspector, having considered the advice of his assessor and having set out the evidence and submissions made to him in very considerable detail in his report, concluded that save for the effect of discharges from the plant on air quality and thus on the environment generally, all the other criteria in the Structure Plan Policy and all other possible objections were met.

In particular, summarising, first all the responsible authorities agreed that incineration was the proper solution to the problem of the disposal of clinical waste. It followed also that one or more incinerators for that purpose were needed to be constructed in the area generally. Secondly, this site was at an acceptable distance from a built-up area and the road access to it is satisfactory. Thirdly, the Inspector found that the construction of this plant on the site might inhibit some other industrial processes, particularly for food processing, from being established nearby. But it certainly would not inhibit many other industrial processes. Therefore that was not sufficient to justify a refusal. Fourthly, he and the assessor considered in some detail the possible malfunction of the plant. Indeed, we are told that this occupied a major part of the time of the inquiry. In conclusion, the Inspector said in paragraph 488 of his report:

"I am therefore satisfied that an appropriate plant could be designed with sufficient safeguards included, such that a reliability factor, within usual engineering tolerances, could be achieved."

He summarised his conclusions at paragraphs 505 and 506 of his report. In 505 he said:

"... I have examined each of the subject areas that led to GMBC refusing the application and have come to the following main conclusions:

(1) The maximum emission limits specified by the Appellants accord with the appropriate standards.

(2) It would be possible to design a plant to perform within those limits in routine operation.

(3) It would be possible to design sufficient fail-safe and stand-by systems such that the number of emergency releases could be reduced to a reasonable level.

(4) While some visual detriment would occur from the presence of the stack and some industrialists might be deflected from the locality, neither effect would be sufficient to justify refusal of the proposal on those grounds alone.

(5) The background air quality of the area is ill-defined and comparison with urban air standards for this semi-rural area gives an incomplete picture.

(6) Discharges of chemicals such as cadmium, although within set limits, are unacceptable onto rural/agricultural areas.

(7) In relation to public concern regarding dioxin emissions, the discharge data is only theoretical and insufficient practical experience is available for forecasts to be entirely credible.

506. I am therefore satisfied that while an appropriate plant would be built to meet the various standards, the impact on air quality and agriculture in this semi-rural location is insufficiently defined, despite the efforts of the main parties at the inquiry, and public disquiet regarding fears as to environmental pollution and in particular dioxin emissions cannot be sufficiently allayed to make the proposed development of a clinical waste incinerator on this site acceptable. I have reached this conclusion in spite of the expectation that all of the conditions suggested would be added to any permission and in spite of the suggestion that the valuable Section 106 agreement could be provided."

Therefore, in paragraph 507 he recommended that the appeal be dismissed.

In his decision letter, the Secretary of State considered environmental impact and the Inspector's conclusions in the passage leading up to the paragraphs to which I have just referred, in paragraphs 19, 20 and 21. In paragraph 19 he said that "the other principal environmental impact would be that of emissions to the atmosphere from the plant". He noted that NWG, for the purposes of assessing the impact, indicated that the

maximum emission limits for normal operation to which they were prepared to tie themselves were set out in a document numbered NW9, and that that became part of the description of the plant, the subject of the application permission. The Inspector

> "... also notes the view of the assessor that these limits were in keeping with current United Kingdom prescriptive standards and that HMIP accepted these limits were a valid starting point for their authorisation procedures under Part I of the Environmental Protection Act 1990. He further notes the Inspector's statement that any emission standards set by HMIP in a pollution control authorisation for the plant would be lower than those indicated in document NW9. The Secretary of State accepts it will not be possible for him to predict the emission limits which will be imposed by HMIP but he is aware of the requirements for conditions which must be included in an authorisation under section 7 of the Environmental Protection Act 1990.
>
> 20. The Inspector's conclusion that the impact of some of the maximum emission limits indicated in document NW9 are not acceptable in a semi-rural area is noted. While this would weigh against your clients' proposals, the Secretary of State considers that this conclusion needs to be considered in the context of the Inspector's related conclusions. Should planning permission be granted the emission controls for the proposed incinerator will be determined by HMIP. Draft Planning Policy Guidance on 'Planning and Pollution Controls' was issued by the Department of the Environment for consultation in June 1992. It deals with the relationship between the two systems of control and takes account of many of the issues which concerned the Inspector. While the planning system alone must determine the location of facilities of this kind, taking account of the provisions of the development plan and all other material considerations, the Secretary of State considers that it is not the role of the planning system to duplicate controls under the Environmental Protection Act 1990. Whilst it is necessary to take account of the impact of potential emissions on neighbouring land uses when considering whether or not to grant planning permission, control of those emissions should be regulated by HMIP under the Environmental Protection Act 1990. The controls available under Part I of the Environmental Protection Act 1990 are adequate to deal with emissions from the proposed plan and the risk of harm to human health.
>
> 21. An application for a pollution control authorisation had been made when the inquiry began, but HMIP had not determined it. However, in view of the stringent requirements relating to such an authorisation under Part I of the Environment Protection Act 1990, the Secretary of State is confident that the emission controls available under the Environmental Protection Act 1990 for this proposal are such that there would be no unacceptable impact on the adjacent land. He therefore concludes that the proposed incinerator satisfies the criteria in Policy EN16 and is in accordance with the development plan. This is a key point in favour of the proposal."

His overall conclusions are set out in paragraphs 36, 37 and 38 of the decision letter.

> "36. The Secretary of State agrees that it would be possible to design and operate a plant of the type proposed to meet the standards which would be likely to be required by HMIP if a pollution control authorisation were to be granted. It is clear that the predicted maximum emission levels set out in document NW9 which your clients were prepared to observe raised some concerns with respect to their impact on a semi-rural area. However the Secretary of State is satisfied that, in the event of planning permission being granted, these concerns could and would be addressed by HMIP in the pollution control authorisation process. While noting the Inspector's view that emission standards set by HMIP would be more stringent than those in document NW9, the Secretary of State considers that the standards in document NW9 simply represent the likely starting point for the HMIP authorisation process, and do not in any way fetter their discretion to determine an application for an authorisation in accordance with the legal requirements under the Environmental Protection Act 1990.
>
> 37. Those issues being capable of being satisfactorily addressed, the remaining issue on which the decision turns is whether the appeal site is an appropriate location for a special industrial use, taking into account the provisions of the development plan. The proposal does not conflict with the development plan and it is clear that its impact in visual and environmental terms on the surrounding land would not be adverse. Its impact on the development potential of the surrounding land is more difficult to assess but, while the Secretary of State accepts the view that an incinerator may deter some types of industry, he also accepts that the overall impact would not be clear-cut and possible deterrence to certain industries is not sufficient to justify dismissing the appeal.
>
> 38. The Secretary of State therefore does not accept the Inspector's recommendation and for these reasons has decided to allow your clients' appeal."

He therefore granted permission subject to a substantial list of conditions.

Mr Mole's argument on behalf of Gateshead on this appeal falls under two heads. First, the Secretary of State did not give proper or adequate reasons for rejecting the Inspector's recommendation and the reasoning which led the Inspector to that recommendation. This, submits Mr Mole, is a failure to comply with "relevant requirements". The requirements are to be found set out in the Town and Country Planning Inquiry Procedure Rules 1992, rule 17.1. Thus, this is a ground upon which, provided prejudice be shown to Gateshead (and Mr Mole submits it is) action can be taken to quash the Secretary of State's decision under section 288(1)(b).

It is a commonplace that a decision-maker, including both a Local Planning Authority when refusing permission and particularly the Secretary of State when dealing with an appeal, must give reasons for the

decision. The rules so provide. The courts have held that those reasons must be "proper, adequate and intelligible". The quotation is from the speech of Lord Scarman in *Westminster City Council v. Great Portland Estate* [1985] A.C. 661 at 683. While of course accepting that it is necessary to look and see whether the Secretary of State's reasons are proper, adequate and intelligible, I do not accept Mr Mole's argument that they are not. In the paragraphs of his decision letter to which I have referred, the Secretary of State says, in effect, "I note that the Inspector says that the impact of some of the maximum emission limits indicated in document NW9 would not be acceptable in a semi-rural area. But HMIP will not be obliged, if they grant an authorisation, to adopt those limits. On the contrary, they have already indicated that the limits they would adopt would be lower. Thus, HMIP will be able to determine what limits will be necessary in order to render the impact of the emissions acceptable, and impose those limits." That seems to me to be coherent and clear reasoning. It depends upon the proposition which I accept, and I understand Mr Mole to have accepted in argument, that in deciding what limits to impose HMIP are entitled, indeed are required, to take into account the nature of the area in which the plant is to be situated and the area which will be affected by the maximum deposit of chemicals from the stack.

That brings me to Mr Mole's main argument. I summarise this as follows. Once planning permission has been granted, there is in practice almost no prospect of HMIP using their powers to refuse to authorise the operation of the plant. Thus, whatever the impact of the emissions on the locality will be, HMIP are likely to do no more than ensure that the best available techniques not entailing excessive costs be used, which may leave the amounts of deleterious substances released at an unacceptable level.

This, submits Mr Mole, could be prevented by refusing planning permission, which would then presumably leave it to NWG, if they were able to do so, to seek additional evidence to support a new application which would overcome the Inspector's concerns. The Secretary of State was thus wrong to say at paragraph 20 of his decision that the controls under the Environmental Pollution Act are adequate to deal with the emissions and the risk to human health. By so concluding, the Secretary of State,

(1) misunderstood the powers and the functions of HMIP;
(2) contravened the precautionary principle, and/or
(3) reached an irrational conclusion.

I comment first that the matters about which the Inspector and his assessor expressed concern were three. First, the lack of clear information about the existing quality of the air in the vicinity of the site, which was a necessary starting point for deciding what impact the emission of any polluting

substances from the stack would have. It was established that such substances would include dioxins, furans and cadmium. Secondly, in relation to cadmium though not in relation to the other chemicals, any increase in the quantity of cadmium in the air in a rural area is contrary to the recommendations of the World Health Organisation. This, however, would not be the case in an urban area. In other words, an increase would not of itself contravene World Health Organisation recommendations relating to an urban area. Thirdly, there is much public concern about any increase in the emission of these substances, especially dioxin, from the proposed plant. In the absence of either practical experience of the operation of a similar plant or clear information about the existing air quality, those concerns cannot be met. It was because of those concerns that the Inspector recommended refusal. I express my views as follows. Public concern is, of course, and must be recognised by the Secretary of State to be, a material consideration for him to take into account. But if in the end that public concern is not justified, it cannot be conclusive. If it were, no industrial development—indeed very little development of any kind—would ever be permitted.

The central issue is whether the Secretary of State is correct in saying that the controls under the Environmental Pollution Act are adequate to deal with the concerns of the Inspector and the assessor. The decision which was to be made on the appeal to the Secretary of State lay in the area in which the regimes of control under the Planning Act and the Environmental Pollution Act overlapped. If it had become clear at the inquiry that some of the discharges were bound to be unacceptable so that a refusal by HMIP to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission.

But that was not the situation. At the conclusion of the inquiry, there was no clear evidence about the quality of the air in the vicinity of the site. Moreover, for the purposes of deciding what standards or recommendations as to emissions to apply. The Inspector described the site itself as "semi-rural", whilst the area of maximum impact to the east he described as "distinctly rural".

Once the information about air quality at both those locations was obtained, it was a matter for informed judgment (i) what, if any, increases in polluting discharges of various elements into the air were acceptable, and (ii) whether the best available techniques etc. would ensure that those discharges were kept within acceptable limits.

Those issues are clearly within the competence and jurisdiction of HMIP. If in the end the Inspectorate conclude that the best available techniques etc. would not achieve the results required by section 7(2) and 7(4), it may well be that the proper course would be for them to refuse an

authorisation. Certainly, in my view, since the issue has been expressly referred to them by the Secretary of State, they should not consider that the grant of planning permission inhibits them from refusing authorisation if they decide in their discretion that this is the proper course.

Thus, in my judgment, this was not a case in which it was apparent that a refusal of authorisation will, or will probably be, the only proper decision for HMIP to make. The Secretary of State was therefore justified in concluding that the areas of concern which led to the Inspector and the assessor recommending refusal were matters which could properly be decided by HMIP, and that their powers were adequate to deal with those concerns.

The Secretary of State was therefore also justified in concluding that the proposed plant met, or could by conditions on an authorisation be required to meet, the third criterion in policy EN16 in the Structure Plan, and thus accorded with that plan.

For those reasons, I conclude that the Secretary of State did not err in law, nor did he reach a decision which was irrational or in any other way outside his statutory powers.

I have not in terms referred to much of the judgment given by the Deputy Judge. This is mainly because the matter was somewhat differently argued before us. Nevertheless, I agree with the conclusions he reached in his careful and admirable judgment. So agreeing and for the reasons I have sought to set out, I would dismiss this appeal.

*Solicitors*—Sharp Pritchard on behalf of the appellant; Treasury Solicitors on behalf of the first respondent; McKenna & Co. for the second respondent.

## COMMENTARY

Here the Court of Appeal upheld the first instance decision of Mr J. Sullivan Q.C. reported at [1994] Env.L.R. 11. The case again emphasises the difficulty of drawing a line between "planning" and "pollution" controls. Understandably, the Council questioned the basis upon which the Secretary of State was able to overrule his Inspector when the Inspector had formed a view on the facts that the "impact on air quality was sufficiently defined" and that "fears as to environmental pollution and in particular dioxin emissions" could not "be sufficiently allayed ...".

From the judgments—here and in the High Court—it appears that there was insufficient information before the Inspector to enable him to reach a fully informed decision on this point. It seems that left with a perceived risk to amenity he recommended refusing permission on the basis that it was an unacceptable risk to take. If so, this was a qualitative

planning decision based on the premise that a clinical waste incinerator (perhaps otherwise acceptable in technical terms to HMIP) was unacceptable on this particular site in planning terms.

Whilst air quality and the application of the BPEO and BATNEEC criteria are properly within the ambit of HMIP (as this case makes it clear) what is less clear is whether HMIP can (or should) assess as part of its determination procedure whether an incinerator, otherwise acceptable to HMIP in technical terms, can be unacceptable in a particular location. Current government guidance in PPG 23 "Planning and Pollution Control" suggests that it is not for HMIP to take that qualitative decision. So it becomes possible (as the Council submitted in this case) for information not available to a local planning authority (which would otherwise justify a refusal of planning permission) to come to light at the HMIP authorisation stage when it's too late to do anything about it.

This case emphasises the importance of extensive and thorough consultation on the part of the local planning authorities when dealing with potentially polluting development. If authorities are to successfully resist development, otherwise acceptable in pollution control terms, then they will need to substantiate the nature of the risk, particularly the social, economic and environmental factors embodied within it, that make the development unacceptable in planning terms. In practice this will mean comprehensive consultations with HMIP and the maximum use of powers available to ensure that the applicant discloses sufficient information to enable the authority to reach an informed decision.

# CORNWALL WASTE FORUM ST DENNIS BRANCH v SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

COURT OF APPEAL (CIVIL DIVISION)

Arden, Carnwath and Moore-Bick L.JJ.: March 29, 2012

[2012] EWCA Civ 379; [2012] Env. L.R. 34

Appropriate assessments; Environmental impact; EU law; Legitimate expectation; Planning permission; Pollutants; Special areas of conservation; Waste treatment sites

H1 *Nature conservation—Town and Country Planning—Habitats Regulations—consideration of need for an "appropriate assessment" of impacts of waste incinerator project—multiple "competent authorities"—Environment Agency conclusion that no assessment required—whether legitimate expectation that Secretary of State would act as competent authority—whether open to Inspector to leave air quality issues as a matter wholly for the Agency—whether "1 per cent" rule in Agency's guidance based on material error of law or principle—whether claimant denied opportunity to challenge guidance*

H2 The appellant (S) had granted planning permission for a waste incinerator on appeal, following a local inquiry. The County Council had rejected the application on grounds including the effect of the proposed development on nature conservation interests; the site being close to two Special Areas of Conservation (SACs). The development required both planning permission and a permit from the Environment Agency. The respondent (C) made an application under s.288 of the Town and Country Planning Act 1990, seeking to quash the grant of planning permission. It submitted that the planning inspectorate had indicated that the Inspector would consider as part of his remit whether an "appropriate assessment" under the Habitats and Species Regulations 2010 was needed and, if so, would give his views on what that assessment should require. Instead, the Inspector accepted the views of the Environment Agency, which indicated that it would grant a permit as it considered that there could not be any adverse effects so that an appropriate assessment was not required. Regulation 65(2) of the 2010 Regulations on co-ordination where there was more than one competent authority, provided that nothing in reg.61(1) required a competent authority "to assess any implications of a plan or project which would be more appropriately assessed under that provision by another competent authority". C argued that, as a result of representations express or implied, made before and during the inquiry, the inspector and through him S had been legally committed to making the assessment themselves, but failed to do so. More specifically, C submitted that they had failed to address an important issue,

raised by objectors, as to the methodology adopted by the Agency for assessing significance; the so-called "1 per cent rule". That rule was that if the long term "process contribution" for a pollutant was less than 1 per cent of the relevant Air Quality Standard, its effects were deemed "insignificant". C argued that the rule should not be applied where pollution levels were already substantially above the "critical load". At first instance, the planning permission was quashed. S appealed arguing that: (1) there had been no representation in language "clear, unambiguous and devoid of relevant qualification" such as would be necessary to found a legitimate expectation; (2) the representations relied on did not address the issue of allocation of responsibility under reg.65(2); and (3) there had been no misdirection as the inspector had not said that the emissions were irrelevant to the planning decision, but was simply following the well-established principle approved in *Gateshead MBC v Secretary of State for the Environment* as to the division of responsibilities between planning and pollution control authorities.

H3 **Held,** in allowing the appeal:

H4 (1) There were three reasons why the legitimate expectation, based on the representations made before or during the inquiry, could not lead to C's conclusion. In the first place, as a technical matter, the relevant "competent authority" was the Secretary of State, not the Planning Inspectorate or the Inspector. They had no authority to commit the Secretary of State to an election under reg.65(2), or to the form of his decision. Secondly, and more importantly, the representations reflected the circumstances as they were at the time they were made. At that stage the question of appropriate assessment was thought to depend on a range of factors not confined to emissions from the incinerator stack. It was understandable that it was assumed by all that the decision-maker under the Directive would be S. The issue of an election under reg.65(2) was not addressed because it did not arise. Nothing said then could be treated as a binding commitment as to the position under the regulation if circumstances changed, as they did, so that the only relevant issues were ones within the competence of the Agency. Thirdly, in the context of the planning appeal the debate about responsibility under the Directive was in itself of no practical significance. Whether or not S remained the decision-maker for the purposes of the Habitats Directive, he could not avoid responsibility for the planning decision, one aspect of which was whether there would be "harm to acknowledged nature conservation interests". In so far as the possibility of harm to those interests arose from stack emissions, he had been entitled to be guided by the expertise of the relevant specialist agencies. It would be only if their guidance was shown to be flawed in some material way that his own decision, relying on that guidance, would become open to challenge for the same reason. Thus the legitimate expectation argument on its own took C nowhere.

H5 (2) C's claim was based upon an arguable issue being raised that the Agency's guidance was based on material error of law or principle. By ignoring it, C argued that S had deprived it of its right to a reasoned decision on a significant issue in the case, and at the same time had unfairly deprived it of the chance to raise it by way of judicial review of the permit itself. S had, however, decided the issue, by implicitly accepting the reasoning of the Agency, which included reliance on the 1 per cent rule. Any defect in their use of the rule affected S's decision as much as that of the Agency. In short, C had not been unfairly deprived of anything. The only substantive criticism of S's decision was in relation to his reliance, through the Agency, on the 1 per cent rule as a test of "significance" under the Directive.

The evidence before the inquiry was that the rule had been used in published guidance by the Agency, with the agreement of Natural England, for a number of years without legal challenge. C had chosen not to challenge its legality either by way of judicial review of the Permit, or as part of the present proceedings. The court was asked instead to send the issue back to S so that he may address it, purely on the basis that it had not been shown to be unarguable, and without any persuasive reason to think that ultimate decision would be any different. C had failed to show any valid grounds to justify that course.

H6 (3) The criticisms as to alleged misdirection stemmed from a misunderstanding of the inspector's language. The inspector had been making a point, not about emissions in general, but about the position in the instant case, reflecting the fact that by the end of the inquiry the only remaining issue for the SAC related to emissions from the incinerator stack. He observed correctly that the control of such emissions in that case was a matter for the Environment Agency. Although the overall planning judgment was one for S, he was entitled to be guided on that issue by the agreed position of the two specialist agencies. That was entirely consistent with the familiar approach approved in cases such as Gateshead.

H7 **UK cases referred to:**

*Gateshead MBC v Secretary of State for the Environment* [1995] Env. L.R. 37

*R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2009] 1 A.C. 453

*R. (on the application of Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363

H8 **EU case referred to:**

*Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) [2005] All E.R. (EC) 353; [2004] E.C.R. I-7405; [2005] Env. L.R. 14

H9 **Legislation referred to:**

Town and Country Planning Act 1990 s.288

Directive 92/43 (Habitats)

Conservation of Habitats and Species Regulations 2010 (SI 2010/490) regs 7, 61, 65

H10 *Mr R. Warren*, instructed by Treasury Solicitors, appeared on behalf of the First Appellant.

*Mr R. Phillips QC* and *Mr M. Westmoreland Smith*, instructed by Bond Pearce LLP, appeared on behalf of the Second Appellant.

*Mr D. Wolfe QC*, instructed by Leigh Day & Co, appeared on behalf of the respondent.

**JUDGMENT**

**CARNWATH L.J.:**

**Introduction**

1 These are appeals by the Secretary of State and by SITA Cornwall Ltd ("SITA") against the judgment of Collins J. on October 13, 2011, on an application under s.288 of the Town and Country Planning Act 1990 by Cornwall Waste Forum St Dennis Branch ("the Forum"). The judge quashed a planning permission granted to SITA by the Secretary of State, for a waste treatment plant on land at St Dennis, Cornwall. The judge held, in short, that the Secretary of State had acted unfairly in his treatment of the Forum's arguments relating to the European Habitats Directive (92/443), and regulations made under it.

2 The site lies on the edge of an extensive area of existing and former china clay workings to the north and north-west of St Austell. It is close to two Special Areas of Conservation (SACs) designated under the Habitats Directive. One, St Austell Clay Pits SAC, is notable for a particularly rare species, the Western Rustwort ("Marsupella profunda"), which attracts the strongest level of protection under the Directive. The Directive is transposed into domestic law by the Habitats and Species Regulations 2010, (SI 2010/490) (replacing 1994 Regulations in similar terms, which were in force in the earlier part of the inquiry).

3 The proposal required two forms of consent: planning permission, granted by the relevant planning authority (the County Council) or by the Secretary of State; and an environmental permit, granted by the Environment Agency. The procedures were operated in parallel:

i) On March 20, 2008 SITA applied to the County Council for planning permission, which they refused on March 31, 2009. SITA's appeal was on October 9, 2009 recovered for determination by the Secretary of State (rather than an inspector) as a development of more than local significance. A public inquiry was held over 36 days, beginning on March 16 and ending on October 7, 2010. On March 3, 2011 the inspector reported to the Secretary of State, who on May 19, 2011 issued his decision granting permission.

ii) SITA applied to the Environment Agency for an environmental permit in July 2008. On January 28, 2010 the Agency indicated that it was minded to issue the permit. On July 8, 2010 an advance copy of the draft permit was provided to the inquiry, and on August 20, 2010 the draft permit was issued for public consultation. Comments on the draft permit were received by the Inspector both before and after the end of the inquiry. The final permit was issued on December 6, 2010, after the close of the inquiry, but all parties were notified and offered a further opportunity to comment to the inspector.

4 Underlying the arguments is an issue as to the allocation of responsibility, as between the Secretary of State and the Environment Agency, to undertake the assessment required by the Habitats Regulations. To show how this arises I turn to the relevant regulations.

**The Habitats Regulations**

5 There is no dispute that both the Secretary of State and the Environment Agency were "competent authorities" as defined (reg.7). Decision-making was governed by Pt 6, in particular regs 61 and 65:

> "i) Regulation 61 ('Assessment of Implication for European Sites … '):
>
> (1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which —
>
> (a) is likely to have a significant effect on a European site …. (either alone or in combination with other plans or projects), and
> (b) is not directly connected with or necessary to the management of that site must make an appropriate assessment of the implications for that site in view of that site's conservation objectives …
>
> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.
>
> (4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site …
>
> ii) Regulation 65 ('Co-ordination where more than one competent authority is involved'):
>
> '(1) This regulation applies where a plan or project —
>
> …
>
> (b) requires the consent, permission or other authorisation of more than one competent authority; …
>
> ….
>
> (2) Nothing in reg.61(1) … requires a competent authority to assess any implications of a plan or project which would be more appropriately assessed under that provision by another competent authority …'"

6 It can be seen that reg.61(1) envisages a two-stage approach: first, consideration whether the proposal is "likely to have a significant effect"; secondly, if it is, an "appropriate assessment" of its implications for the SAC.

7 I note here a criticism made by Mr Phillips (for SITA) of the judge's summary of the two stage-approach. He had said (at [12]):

> "First, consideration … is given to whether it can be shown that no adverse effect can possibly result. This is a negative consideration; that is to say if it is not possible to say that no adverse effect might be occasioned then appropriate assessment must be made. That appropriate assessment will then decide whether the project is likely to have a significant effect on the site."

This, says Mr Phillips, misstates the test at both stages. At stage one, the test is not whether *no adverse effect* can *possibly* result, but whether there is a *likelihood* of *significant* effects. Conversely, at stage two, likelihood of significant effects is not the question; this has been decided at stage one. The question is the implications of those effects in relation to the conservation objectives of the site. He makes a similar criticism of the judge's comments at [36] ("the approach should be that if it is not possible to rule out any adverse effects then appropriate assessment should be made … ")

8 While I see some force in this criticism, it is clear that the first stage sets a lower hurdle that the strict wording might be thought to imply. This appears from the decision of the European Court in *Waddenzee* (127/02) [2005] Env. L.R. 14. According to that judgment (at [45]), an "appropriate assessment" will be required in relation to any project:

> "…if it cannot be excluded on the basis of objective information that it will have a significant effect on that site … "

9 In any event the arguments in the present case have turned not on the nature of the test, but on allocation of responsibility for applying it. This depends principally on reg.65(2). On its face that allowed, but did not require, the Secretary of State to leave the assessment under the regulations to the Environment Agency, if in the circumstances the project would be "more appropriately assessed" by them.

10 The Forum's case was that, as a result of representations express or implied, made before and during the inquiry, the inspector and through him the Secretary of State were legally committed to making the assessment themselves, but failed to do so. More specifically, it is said, they failed to address an important issue, raised by the objectors, as to the methodology adopted by the Agency for assessing significance.

11 This was the so-called "1% rule": that is, that if the long term "process contribution" for a pollutant is less than 1 per cent of the relevant Air Quality Standard, its effects are deemed "insignificant" (see Environmental Permit para.A3.1(ii)). It was the case of the County Council at the inquiry, supported by the Forum, that this rule should not be applied where pollution levels were already substantially above the "critical load" (see e.g. Power of Cornwall "Post-Closing response" para.4-3–4).

**Representations**

12 The sequence of exchanges on which the Forum relies is set out in the judgment. A summary here is sufficient. The following occurred before the opening of the inquiry:

i) In November 2009, when rejecting an email request from the objectors that an appropriate assessment be carried out before the inquiry, Mr Bolton for the Planning Inspectorate said:

> "The inspector, on behalf of the Secretary of State, cannot … carry out an appropriate assessment before the inquiry. Evidence of discussion at the inquiry may contribute to the judgment on any likely significant effect … "

ii) In an email of November 20, 2009 the Environment Agency agreed with the Council that the Agency should not be "the lead authority" for assessment under the regulations.

iii) An email from Natural England dated January 12, 2010, commenting on the latest assessment of significant effect, stated that "the Planning Inspectorate is now the competent authority … ", and suggested that a conclusion on significance should await the outcome of the planning inquiry.

iv) A "Procedural Note" dated February 4, 2010, issued by the inspector himself in response to an email from a Miss Larke of the objectors, indicated the procedure by which he expected the issue of appropriate assessment to be considered at the inquiry, concluding:

> '6 The question of appropriate assessment is a matter at first instance for the inspector in making a report to the Secretary of State. However the ultimate decision on this point, as on the appeal itself, lies with the Secretary of State. In coming to a view on appropriate assessment the inspector will rely on the evidence that has been placed before the inquiry and tested by cross-examination.'

v) Finally on March 15, 2010, the day before the inquiry began, the Chief Executive of the Inspectorate wrote in response to a letter from the local MP, who was concerned that, if the appropriate assessment were left until after the inquiry, information from it would not be fed into the planning decision. She said:

> "I can confirm that as part of the inquiry process the inspector will consider the effect of the proposal under the Habitats Directive. If he deems it to have significant adverse effect he will undertake an appropriate assessment, having first ensured that he has the necessary evidence to do so. The appropriate assessment will then form part of the inspector's report to the Secretary of State."

13 I say at once that the last seems to me the most significant. Unlike the earlier statements which read as relatively informal exchanges in the run-up to the inquiry, the last is a clear and considered representation, made in response to a question from an MP with the authority of the Chief Executive of the Inspectorate. As Mr Warren for the Secretary of State accepts, it reflects what was indeed the expectation at that time: that is, that the evidence necessary for an assessment of significance under the regulations, and if required the appropriate assessment, would be collected at the inquiry, and that the decision on those matters would be made by the Secretary of State on the basis of the Inspector's report. On the other hand, the context of the letter is also relevant. The MP's concern was the timing of the assessment, not who was to carry it out. Further, it was written at a time when the environmental issues included the effects of traffic pollution from outside the site and other matters, as well as those of emissions from the stack.

14 As to what was the understanding at the inquiry itself, we heard conflicting submissions. Mr Phillips pointed to the evidence of his planning witness, Mr Picksley, who had proposed that the appropriate authority should be the Environment Agency. On the other hand, the Inspector's list of topics to be included in closing submissions, issued on July 29, 2010, included no indication that allocation of that responsibility, as between the Secretary of State and the Agency, was itself a live issue on which submissions were required. It included the following topic:

> "The weight to be given to the views of the Environment Agency and Natural England in making an appropriate assessment under the Habitats Regulations."

To my mind, this formulation implies that, even at this late stage (after the draft Environmental Permit had become available), the Inspector was still anticipating that he would be advising the Secretary of State on this issue, taking account of the Environment Agency's views, rather than leaving the decision to them.

15 The scope of the debate between the parties on these issues is apparent from the inspector's record of the final submissions of the main parties. SITA noted the acceptance by the County Council witnesses that impacts in relation to hydrology, water quality and dust, and also traffic emissions, were insignificant, while the question of emissions from the stack was "manifestly the territory of the Environment Agency and not the Waste Planning Authority" (at [187]). Reference was made to the respective roles of the "competent authorities" under reg.65(1). As I read the report, this was not so much to support a submission that the Secretary of State should leave this issue to the Agency, but rather that the pollution control regimes should "complement rather than duplicate each other", and that the authorities should work effectively together to ensure best use of expertise (IR para.189).

16 There was extensive discussion also of the appropriateness of the 1 per cent rule. The record of the Council's submissions included a lengthy attack on the use of the rule (paras 839–872), leading to the submission that the Secretary of State, "cannot soundly conclude that Reg 61(5) of the Habitats Regs is satisfied and that permission must be refused on this basis alone." SITA's submissions on this issue are also lengthy. They asserted that their reliance on the 1 per cent rule had been known to the Council since 2008 and had not been questioned (paras 183–184), and that it had been referred to since 2001 in Joint Guidance issued by the Environment Agency and Natural England, and had never before been the subject of legal challenge; the guidance made clear that it applied "irrespective of background levels" (paras 193–194).

17 As to the exchanges after the inquiry, I have already noted that consultation on the terms of the draft Environmental Permit was continued after the close of the planning inquiry itself. The Permit itself was issued on December 6, 2010. In January comments on the permit were submitted to the inspector by groups within the Forum, again challenging the use of the 1 per cent rule, as one aspect of more specific submissions on the environmental issues. Although the inspector's report was submitted at the beginning of March, it would not have been seen by the parties until it was published along with the Secretary of State's decision on May 19.

**The inspector's conclusions**

18 The report was as the judge said "very lengthy and detailed". It is an impressively comprehensive treatment of a wide range of issues covered at the inquiry, of which the effect on the SACs was but one. The relevant conclusions on these issues come at paras 1970–1980. The passage starts with a reference to a submission by the Council that on appeal the Secretary of State became the competent authority. The inspector responded by noting that under reg.65(2), there may be more than one competent authority. He continued:

> "The question arises as to who should be the competent authority when considering a particular impact, in this case the Secretary of State in determining a planning appeal or the Environment Agency when considering an application for a permit. It is recognised that there might be bases which give rise to a number of impacts. Where there are impacts which would be more appropriately assessed by the Secretary of State then he would be the competent authority leaving other impacts to be assessed by a different competent authority" (para.1970).

19 He noted that in the present case, following cross-examination of the Council's witnesses, it had been accepted that there were no remaining concerns on issues such as water quality, hydrology or dust, or traffic emissions. This "narrowing of the issues" was significant in his view, because those matters related to, "impacts that may emanate from outside the boundary of the CERC plant and are thus matters for planning control" (paras 1971–1972) He continued:

> "1973 The concern of the Council and others is focused on air quality, that is the substances that would be emitted by the stack from the combustion process. Air quality in this regard is wholly a matter for the Environment Agency through the environmental permitting system. Permit controls the materials to be accepted for incineration, the incineration process and the nature and extent of processes to deal with emissions to air from the incineration process. These controls involve setting limits for the substances that are to be emitted to air and establishing a monitoring regime. As the Council of Nature Conservation witness accepted, it is the Environment Agency which has the expertise to deal with air quality issues.
> 1974 The control of emissions to air in this case is not a matter for the planning system. The emissions arise from a process which is wholly within the control of the Environment Agency through the environmental permitting system. In addition, I am doubtful whether the council in its role as the planning authority has the degree of expertise that the Environment Agency possesses in assessing air quality impacts.
> 1975 Accordingly I am satisfied that, in respect of assessing the impact of the CERC proposal on the SACs in the vicinity of the site, the EA through the environmental permitting system is the competent authority. PPS10 and PPS23 stress the importance of the planning system not duplicating the controls exercised by others. In this case, the environmental permitting regime is the appropriate vehicle for making a proper assessment of the air quality impact on the SACs."

20 He referred to the issue of the draft permit in August for consultation. He noted the lack of any comment on it from the Council at the inquiry, and on the other hand the further work undertaken in respect of comments received from Natural England, which was included in the final permit. He concluded:

> "1978 In the permit the EA says that it is possible to conclude that there would be no likely significant effect alone and/or in combination within the context of prevailing environmental effects on any interest feature of the protected sites. The additional assessments undertaken by the EA in response to the comments made by Natural England have not changed the EA's conclusions as to the impact on protected species or areas.
> 1979 The EA's decision to issue the permit was taken after consultation with Natural England, the statutory body charged with the designation and protection of sites of nature conservation interest in England. It is inconceivable that the EA, as the competent body, would have issued a permit if it could not conclude that significant effects were unlikely, in which case it would be required to undertake an appropriate assessment.
> 1980 Given the conclusion reached by the competent authority in the permit as to the likelihood of the development having no significant effect upon protected habitats or species, it is concluded that the proposal would not give rise to harm to acknowledged nature conservation interests."

21 The Secretary of State's decision-letter referred to this passage and adopted its reasoning:

> "The Secretary of State agrees with the Inspector's analysis at IR 1960–80, with regard to the effect of the proposal upon the nature conservation interests. He is satisfied that, in respect of assessing the impact of the appeal proposal on the Special Areas of Conservation in the vicinity of the site, the Environment Agency is the competent authority (IR1975). Given the conclusions reached by the competent authority in the permit as to the likelihood of the development having no significant effect upon the protected habitats or species, the Secretary of State agrees with the Inspector's conclusion that the proposal would not give rise to harm to acknowledged nature conservation interests (IR1980)." (para.19)

**The judgment below**

22 Having set out the factual background and the relevant provisions, the judge summarised the Forum's case (see [19]–[20]):

> "It is the claimant's case that the planning inspectorate, on behalf of the Secretary of State, indicated that the inspector would consider as part of his remit whether an appropriate assessment was needed and, if so, would give his views on what that assessment should require. This, it is said, remained the position throughout the inquiry so that those who now come under the aegis of the claimant had a legitimate expectation that that would be done. It was not. Rather, it will be seen that the inspector simply accepted the views of the EA which indicated that it would grant a permit because it considered that there could not be any adverse effects so that an appropriate assessment was not required. That view had been challenged and evidence presented to

> contradict it. But the inspector, relying on Regulation 65 (2), decided that the EA should be regarded as the competent authority which should, more appropriately, assess any implications of the project. Thus he did not make any findings on the evidence presented to challenge the EA's view."

23 The Forum had not thought it necessary to challenge the legality of the Environment Agency's approach, because they understood that the Secretary of State would act as competent authority, and as such undertake the role of considering relevant impacts. It was only when the inspector's report was published that they became aware that he was "disavowing his role as competent authority" and had not evaluated the criticisms made of the Agency's approach.

24 Having reviewed the pre-inquiry exchanges and the relevant parts of the inspector's report, the judge concluded, in broad agreement with Mr Wolfe's submissions:

> "43 …The inspector did not at any time suggest that the parties might not need to deal with the weight to be attached to the Environment Agency's views since he might decide that the Environment Agency was the appropriate competent authority within Regulation 65 (2).
> 44 Thus, whilst I think the claimant goes too far in suggesting that the inspector had repeatedly and throughout the inquiry process stated that the Secretary of State would take on the role of competent authority for the purposes of the Habitats Regulations, he never suggested that the Secretary of State was not or might not be the material competent authority. Nor did he indicate that he might not consider and decide upon the contentions that the Environment Agency's view that no adverse effects were possible was wrong.
> …
> 47. That the objectors were led to believe that the inspector would deal with the issue whether an appropriate assessment was required there can, in my view, be no doubt. That was on the basis that the Secretary of State was the competent authority and he it was who was the appropriate competent authority to deal with the issue. The objectors were never disabused of that belief by anything said by the inspector in the course of the inquiry process.
> 48. Whether the claim is correctly focused on the expectation that the Secretary of State was the relevant competent authority may be open to question. But it seems to me that the real point is that the expectation was that the inspector would consider and reach a view on the need for an appropriate assessment. In that, the Secretary of State would clearly be the relevant competent authority since the Environment Agency, the only other competent authority, had reached a decision which was said to be flawed. It was thus inevitable that if the inspector was to deal with the issue it had to be on the basis that the Secretary of State would be the relevant competent authority.
> 49. The Environment Agency's decision was under challenge, and since the expectation was that the inspector would deal with it — he had heard the evidence that was put before him to challenge the Environment Agency's view — the claimant did not see any need to seek judicial review to challenge it. Since the inspector was able to deal with both fact and law, judicial review was, in any event, a less effective remedy and the additional costs and possible delays involved in such a claim were undesirable and, it was believed by the claimant, unnecessary.

> 50. Thus I have no doubt that the expectation which I have identified was created. Furthermore, if there was a failure to comply with this expectation, the claimant has been unfairly treated since there has been no decision reached on its challenge to the Environment Agency's conclusion that no appropriate assessment is needed."

25 He went on to consider how the inspector had arrived at his conclusion, in the paragraphs set out above (1970–1980). He criticised the inspector's statement (para.1974) that "the control of emissions to air in this case is not a matter for the planning system", saying:

> "57. There can be no doubt that the effect of the emissions on the SACs is a matter for the planning system … Indeed, in the context of PPS/10, aragraph 26, there is a policy L6 in a material plan which states that development harmful to an SAC should not be permitted. Regulation 68 (1), as I have already indicated, makes clear that the assessment provisions apply in relation to the grant of planning permission on an application under Part III of the 1990 Act. Thus the inspector was, in my view, wrong to state that air quality was, in relation to substances emitted from the chimney, wholly a matter for the EA. Since the contention was that the emissions were bound to have an effect so that an appropriate assessment was required, it was a matter for the planning process. Thus the conclusion of the inspector in paragraph 1975 that he was, as he put it, accordingly satisfied that the Environment Agency through the environmental permitting system was the competent authority is wrong …
>
> 59. Whilst, of course, it was inconceivable that the EA would have issued a permit if it did not conclude as it did, that wholly misses the point being made by the objectors, namely that the Environment Agency got it wrong. There was evidence put before the inspector that the EA had got it wrong. But he did not, as a result of his approach, deal with or reach any decision on the evidence which had been produced to challenge the EA's view. No doubt, the EA issued the permit because it considered that no appropriate assessment was needed but there was material before the inspector which raised the question whether that was correct. The inspector found it unnecessary to form a view on this because he thought it was not a matter for the planning process.
>
> 60. In my judgment, he was wrong in that view."

26 He rejected the contention that reg.65(2) had been put in issue at the inquiry by SITA; that was in the context of a "factual attack", with a view to persuading the inspector that the conclusion reached by the Agency was correct (para.70):

> "71. Thus I do not accept the submission that the claimant should have challenged the Environment Agency's decision by judicial review and its failure to do so was its own fault, so that no prejudice resulted from the inspector's decision whether or not he was in any way wrong. It seems to me, as I have indicated, that the objectors were entitled to expect that the inspector would deal with the issue. There is nothing in the final submissions to which I have referred which ought to have put them on real inquiry that they might find the inspector not dealing with the issue. In context, the submissions were

based on the contention that there was sufficient material before him to enable him and entitle him, indeed, not only entitle him but require him to accept the view of the Environment Agency as correct."

27 Finally, he rejected the submission by SITA that any legitimate expectation should be overridden by public interest considerations. He referred to the discussion of this issue by Laws L.J. in *Nadarajah v Secretary of State* [2005] EWCA Civ 1363, where he explained it as a question of "proportionality":

> "…whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case … " (see [69]).

28 He noted the inspector's comments on the potential cost of rejection to the public in financial terms (in excess of £200 million) and in terms of loss of the ability to dispose of waste in a sustainable manner. However, these considerations did not justify refusal of relief:

> "… the Habitats Directive and the Regulations are the law and must be obeyed … it not suggested before me that the case put forward by the objectors can be disregarded as having no weight. There is an arguable issue. That being so, it would be a breach of the Habitats Regulations to fail properly to consider whether an appropriate assessment was needed … " (see [79]).

He suggested that a sensible way ahead would be for the Secretary of State to carry out an appropriate assessment as speedily as possible based on the evidence already produced.

**The arguments in this court**

29 Mr Wolfe interprets the judge's conclusions as based on two grounds: breach of legitimate expectation, and misdirection in law as to what was a planning matter. He accepts that the second ground went beyond his own submissions to the judge. Although he supports both grounds, he puts the main weight on the first argument, which is expressed in his skeleton:

> "CWF argued that it had a legitimate expectation that the Inspector (and thus then the Secretary of State) would deal with the issue of whether an appropriate assessment was required, including thus (when SITA argued that reliance should be placed on the Environment Agency's conclusion) grappling with the correctness of the Environment Agency's approach.
> However, the Secretary of State simply concluded (without grappling with the challenge to the Environment Agency's conclusion) that, pursuant to regulation 65(2), it was not necessary for him to further consider the matter."

The challenge with which the Secretary of State had failed to "grapple" was the challenge to the Agency's use of the 1 per cent rule (again quoting his skeleton):

> "[The Forum] and others (most particularly Cornwall Council as planning authority) challenged… the legality of the application (in the circumstances) of the '1% rule'. As Collins J said [79] 'it is not suggested before me that the

> case put forward by the objectors [on the "1% rule"] can be disregarded as having no weight.' That is an arguable issue. Nothing has changed in that regard."

30 The appellants submit that the judge was wrong on both grounds. First, there was no representation in language "clear, unambiguous and devoid of relevant qualification" such as would be necessary to found a legitimate expectation (*R. (on the application of Bancoult) v Foreign Secretary (No.2)* [2009] 1 A.C. 453 at [60] per Lord Hoffmann). In any event the representations relied on did not address the issue of allocation of responsibility under reg.65(2). Secondly, there was no misdirection. The inspector was not saying that the emissions were irrelevant to the planning decision, but was simply following the well-established principle, approved by this court in *Gateshead MBC v Secretary of State* (1971) 71 P. & C.R. 350 (citing the then current policy guidance, which is reflected in similar guidance today) that:

> "It is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies… Nor should planning authorities substitute their own judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over those matters."

The Secretary of State followed the same approach.

31 SITA submit further that, even if any representation gave rise to a legitimate expectation as suggested, a departure is justified in the present case, having regard to the public importance of the project and the serious costs of delay.

32 It is significant that neither in his skeleton nor in his oral submissions did Mr Wolfe condescend to detailed presentation of the grounds for challenging the 1 per cent rule. Although it is said to be a challenge to the "legality" of the rule he does not in these proceedings ask the court to rule on that legal question. He rests his case on the alleged unfairness resulting from the Secretary of State's failure to consider the legality of the 1 per cent rule, and the assertion that the point is arguable. In other words, the challenge is essentially procedural not substantive.

**Discussion**

33 Although the Forum's case had been founded on legitimate expectation, the judgment looked at the matter more broadly, drawing together what seem to me five distinct but interconnected points:

i) The Forum had a legitimate expectation, derived from the pre-inquiry representations and the course of events at the inquiry, that the Inspector and the Secretary of State would themselves address the issue of significance, and if necessary appropriate assessment, under regulation 61. This they failed to do.

ii) Because of that legitimate expectation, the Secretary of State could not rely on reg.65(2) to justify leaving the decision on those matters to the Environment Agency.

iii) Further, the inspector misdirected himself that emissions from the stack were not a planning matter. This led him wrongly to think that it was

unnecessary for him or the Secretary of State to make their own assessment of the effect of the emissions.

iv) In view of the criticisms made by the Forum and others of the Agency's use of the 1 per cent rule, it was necessary for the Inspector and the Secretary of State to address that issue, which they (unlike the court) could do as a matter of both law and fact.

v) Because they reasonably expected the Secretary of State to deal with that issue, the Forum were unfairly deprived of the opportunity to challenge the Environmental Permit within the time allowed for judicial review.

34 I can dispose of the third point shortly. I agree with the appellants that this stems from a misunderstanding of the inspector's language. It would be most surprising if an experienced inspector had made such an elementary legal error. As I read the passage in question, the inspector was making a point, not about emissions in general, but about the position in this case, reflecting the fact that (as explained in his preceding paragraph) by the end of the inquiry the only remaining issue for the SAC related to emissions from the stack. He observed correctly that the *control* of such emissions *in this case* was a matter for the Environment Agency. Although the overall planning judgement was one for the Secretary of State, he was entitled to be guided on this issue by the agreed position of the two specialist agencies. That was entirely consistent with the familiar approach approved in cases such as *Gateshead*. Mr Wolfe was right not to put this point at the forefront of his case.

35 The first two points together encompass Mr Wolfe's main submission. On the first step in the argument, I agree with the judge. The clear expectation of all at the beginning of the inquiry was that the inspector, and on his advice the Secretary of State, would deal with the issue whether an appropriate assessment was required (under reg.61), as part of the process of arriving at a planning decision on the merits of the proposal as a whole.

36 However, that is only the beginning. There are in my view three reasons why the legitimate expectation, based on the representations made before or during the inquiry, cannot lead to the conclusion which Mr Wolfe urges upon us. In the first place, as a technical matter, the relevant "competent authority" was the Secretary of State, not the Planning Inspectorate or the Inspector. They had no authority to commit the Secretary of State to an election under reg.65(2), or to the form of his decision. Their task was limited to that of holding the inquiry and providing a report to the Secretary of State. It was of course important that there should be consistency between the approach adopted at the inquiry and the basis of his ultimate decision. But that was a question of procedural regularity, not legitimate expectation.

37 Secondly, and more importantly, the representations reflect the circumstances as they were at the time they were made. At that stage the question of appropriate assessment was thought to depend on a range of factors not confined to emissions from the stack. It is understandable that it was assumed by all that the decision-maker under the Directive would be the Secretary of State. The issue of an election under reg.65(2) was not addressed because it did not arise. In my view, nothing said then can be treated as a binding commitment as to the position under the regulation if circumstances changed, as they did, so that the only relevant issues were ones within the competence of the Environment Agency.

38 Thirdly, in the context of the planning appeal the debate about responsibility under the Directive is in itself of no practical significance. Whether or not the

Secretary of State remained the decision-maker for the purposes of the Habitats Directive, he could not avoid responsibility for the planning decision, one aspect of which, as he recognised, was whether there would be "harm to acknowledged nature conservation interests". On the facts of this case the two issues were inextricably linked. By the same token, in so far as the possibility of harm to those interests arose from stack emissions, he was entitled—in either capacity—to be guided by the expertise of the relevant specialist agencies, the Environment Agency and Natural England. It would be only if their guidance was shown to be flawed in some material way that his own decision, relying on that guidance, would become open to challenge for the same reason.

39 Thus, as the judge implicitly recognised (his [48]), the legitimate expectation argument on its own took the claimants nowhere. Points (iv) and (v) were essential. On the arguments presented at the inquiry, it had to be said, the Secretary of State could not simply rely on the Agency's guidance without further investigation. An arguable issue had been raised that the guidance was based on material error of law or principle. By ignoring it, the Secretary of State had deprived the claimants of their right to a reasoned decision on a significant issue in the case, and at the same time had unfairly deprived of them of the chance to raise it by way of judicial review of the permit itself.

40 It is at this stage of the argument that I respectfully part company with Collins J. The Secretary of State did decide the issue, by implicitly accepting the reasoning of the Agency, which included reliance on the rule. Any defect in their use of the 1 per cent rule affected the Secretary of State's decision as much as that of the Agency. If there was an issue as to the legality of that approach, the time to raise it was in these proceedings. It is not enough simply to assert that the point is arguable. The judge referred to possible issues of both law and fact. However, Mr Wolfe's case as I understand it rests on an assertion of legal, rather than factual, error in the Agency's approach. Even if there were an independent factual challenge, it would not be a reason for delaying resolution of the legal issue by the court. If (which I doubt) the Forum could not have obtained an extension of time for judicial review of the permit itself, there was nothing to stop them including the same issues as part of their challenge to the legality of the planning decision. In short, the Forum has not been unfairly deprived of anything.

41 In summary, if one cuts through the legal and procedural arguments, the only substantive criticism of the Secretary of State's decision is in relation to his reliance, through the Agency, on the 1 per cent rule as a test of "significance" under the Directive. The evidence before the inquiry was that the rule had been used in published guidance by the Agency, with the agreement of Natural England, for a number of years without legal challenge. The County Council, which initially challenged the use of the rule, does not maintain that challenge. Instead they point to the severe economic and practical consequences of any further delay in confirming the permission. The Forum has chosen not to challenge its legality either by way of judicial review of the Permit, or as part of the present proceedings. We are asked instead to send the issue back to the Secretary of State so that he may address it, purely on the basis that it has not been shown to be unarguable, and without any persuasive reason to think that ultimate decision will be any different. In my view, the Forum has failed to show any valid grounds to justify that course.

**Conclusion**

42 For these reasons I would allow the appeal and confirm the validity of the Secretary of State's decision.

**MOORE-BICK L.J.:**

43 I agree.

**ARDEN L.J.:**

44 I also agree.

Neutral Citation Number: [2013] EWHC 4161 (Admin)

Case No: CO/5020/2013

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 20th December 2013

**Before** :

**MRS JUSTICE PATTERSON**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **THE QUEEN ON THE APPLICATION OF AN TAISCE (THE NATIONAL TRUST FOR IRELAND)** | **Claimant** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE** | **Defendant** |
| **NNB GENERATION COMPANY LIMITED, THE MINISTER FOR ENVIRONMENT, COMMUNITY AND LOCAL GOVERNMENT, IRELAND THE ATTORNEY GENERAL, IRELAND** | **Interested Parties** |

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

**David Wolfe QC and John Kenny B.L** (instructed by **Leigh Day**) for the **Claimant**
**Jonathan Swift QC, Rupert Warren QC and Jonathan Moffett** (instructed by **Treasury Solicitor**) for the **Defendant**
**Nathalie Lieven QC and Hereward Phillpot** (instructed by **Herbert Smith Freehills**) for the **Interested Party**

Judgment
As Approved by the Court

**Mrs Justice Patterson :**

1. This is an application by An Taisce, the National Trust for Ireland, to seek permission to apply for judicial review of a decision on the part of the Secretary of State for Energy and Climate Change (the defendant) to grant a development consent order on the 19th March 2013 for a new nuclear power station at Hinkley Point C (HPC). The case comes before the court as a "rolled up" hearing with the agreement of all parties.

2. An Taisce, the National Trust for Ireland, was founded as a charity in 1948. It is one of Ireland's oldest and largest NGOs. The trust is a prescribed consultee for a number of different Irish government policy formulation and consent processes, including those relating to planning applications, that require an Environmental Impact Assessment (EIA). The Trust's objectives include the protection of Ireland's built and natural environment. It sees compliance with international, EU and national legislation as fundamental to that objective.

3. The Trust's claim is that the defendant failed to comply with Regulation 24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 and/or Article 7 of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment in considering whether HPC was likely to have significant effects on the environment in the Republic of Ireland, another member state. The Trust contends that transboundary consultation should have been undertaken with the Irish people.

4. In particular, the claimant alleges that,

   i) the defendant misdirected himself as to the meaning of Regulation 24 and Article 7 in considering only impacts arising from the ordinary regulated operation of the nuclear power station and not "unlikely", but nevertheless possible, impacts from other scenarios;

   ii) the defendant failed to comply with Regulation 24 and Article 7 by omitting to take into account the possible impacts arising from unplanned or accidental effects of the development; and/or

   iii) because the meaning of Article 7 is unclear the court should make a reference to the CJEU.

   The first interested party (NNB) is wholly owned by NNB Holding Company which in turn is a wholly owned subsidiary of EDF Energy Holdings Limited, one of the largest power generation companies in the UK.

Factual background

5. On the 31st October 2011 NNB made an application to the Infrastructure Planning Commission (IPC) for a Development Consent Order (DCO) for a new nuclear power station at HPC. The proposed site is immediately to the west of the existing Hinkley Point power stations in Somerset.

6. The consent procedure for a new nuclear power station is understandably complex and involves various consents and permissions. The following paragraphs provide an outline of the background and processes.

7. In January 2008 the government published a White Paper entitled 'Meeting the Energy Challenge'. Under that, companies would be able to build new nuclear power stations which were to be subject to the same regulation of safety, security and environmental matters as existing nuclear installations. The government proposed to take steps to facilitate the development of such stations by using powers in the then planning bill (now the Planning Act 2008) to ensure that nationally significant infrastructure projects (NSIP), of which nuclear power stations were an example, were provided through the use of National Policy Statements (NPS) which set the national need and identified possible sites. Once a planning application was made, that was followed by an examination of the site-specific proposal. That was initially undertaken by the IPC.

8. The White Paper provided that a strategic siting assessment and strategic environmental assessment would have to be undertaken. In addition, there would be a generic design process that would set out the basis upon which the Office of Nuclear Regulation (ONR) and the Environment Agency (EA) would review new build nuclear reactor designs. To meet the requirements of EU and UK law new nuclear practises were to be required to demonstrate that their benefits outweighed any health detriment.

9. In November 2009 the government published its draft energy policy statements. There was an overarching draft NPS for energy proposals (EN-1) and a series of topic-specific policy papers. The draft NPS for nuclear generation (EN-6) contained a list of ten sites in England and Wales, including HPC, which the government considered to be potentially suitable for new nuclear power stations by 2025. The sites had been identified through a strategic siting assessment process. The draft NPS had been subject to an appraisal of sustainability to examine the likely social, economic and environmental effects of designating nuclear power stations and incorporated an assessment in accordance with the requirement of the EU Directive on strategic environmental assessment.

10. Between November 2009 and February 2010 public consultation on the draft NPS took place. Representations were received from the Irish government. The draft recognised the possibility of transboundary effects in the event of a significant unintended release of radioactive emissions but judged that the risk of such an accident was very small because of the strict regulatory regime in the UK. The claimant took no part in the consultation process.

11. In October 2010, after considering the consultation responses a revised draft, EN-6, was published, as was a revised appraisal of sustainability. The number of prospective sites was reduced to 8 (but still included HPC). Consultation on the draft ran until January 2011. The revised appraisal of sustainability noted that the Euratom Treaty would require the UK to submit to the EC information to enable the Commission to determine whether the implementation of a project was liable to result in radioactive contamination of water, soil or air space of another member state. Permission to make radioactive

discharges and disposals would not be given in the UK unless a favourable opinion was received from the European Commission.

12. The draft continued,

> "7.2.73 there is a risk of accidental release of radioactive emissions associated with new nuclear power stations which are built in line with the revised nuclear NPS. However, the risk of such an accident is judged to be very small because of the strict regulatory regime in the UK. The nuclear regulatory bodies will need to be satisfied that the radiological and other risk to the public associated with accidental releases of radioactive substances are as low as reasonably practicable and within relevant radiological risk limit. As part of the site licensing process, a potential operator will be required to demonstrate that the nuclear facility is designed and can be operated such that several layers of protection and defence are provided against significant faults or failures, that accident management and emergency preparedness strategies are in place and that all reasonably practicable steps have been taken to minimise the radiological consequences of an accident."

13. On the 18th July 2011 the House of Commons debated and approved the six NPS for energy, including NPS EN-6. On the 19th July 2011 the Secretary of State designated the NPS under the Planning Act 2008.

14. NPS EN-6 explains the relationship between the regulatory justification process and the planning regime. It sets out the role of the regulators in the IPC's consideration of applications for new nuclear power stations and the interaction that is required between the IPC and the other relevant regulators. Those regulators are the EA and ONR (which has taken over the role of the Department for Transport).

15. The document emphasises the separate nature of the licensing and permitting of nuclear power stations by the nuclear regulators which nuclear power stations have to undergo. In paragraph 2.73 it states,

> "When considering a development consent application the IPC should act on the basis that;
>
> - the relevant licensing and permitting regime will be properly applied and enforced, and
>
> - it should not duplicate consideration of matters that are within the remit of the nuclear regulators;
>
> - It should not delay a decision as to whether to grant consent until completion of the licensing and permitting process."

16. Matters which the IPC should not duplicate are the Generic Design Assessment (GDA), site licensing and environmental permitting processes. The nuclear regulators are to assess also external hazards to a proposed nuclear power station including the reasonably foreseeable effects of climate change.

17. Annex B to the NPS considers the sites listed as potentially suitable for new nuclear power stations. Section C5 considers HPC.

18. In October 2010 the Secretary of State made the Justification Decision (Generation of Electricity by the EPR Nuclear Reactor) Regulations 2010, SI 2010/2044. That means that the class or type of practice for the generation of electricity from nuclear energy using oxide fuel of low enrichment in fissile content in a light water cooled, light water moderated thermal reactor currently known as the EPR designed by AREVA NP was justified. The reasons given for he making of the Regulations continued, at paragraph 1.59,

> "In summary, the Secretary of State is conscious of the extent of damage and health detriment that a release of radioactive material from an EPR would have. However, he has confidence in the regulatory regimes for safety and security of civil nuclear installations and materials in the UK. The regulatory bodies are all independent, experienced and held in high regard around the world. He is also conscious that the EPR included inherent safety and security features, based on years of international experience of nuclear power stations and which will be subject to approval by the UK regulators. He therefore considers that the likelihood of an accident or other incident occurring at an EPR giving rise to a release of radioactive material is very small."

19. ONR was formed on the 1st April 2011 as an agency of the Health and Safety Executive (HSE). It comprises the HSE's former Nuclear Directorate, including the office of Civil Nuclear Security and the UK Safeguards Office together with the Radioactive Materials Team from the Department of Transport. It is an independent statutory corporation.

20. Before any new nuclear power station can be constructed, commissioned or operated in the UK the operator requires various regulatory licences, permits and other consents. The most significant are a nuclear site licence (NSL) issued under the Nuclear Installations Act 1965 regulated by ONR and environmental permits issued under the Environmental Permitting Regulations regulated by the EA (in England). The licences and permits are granted if the agencies are satisfied that radiation doses comply with the regulatory principles of as low as reasonably practicable (ALARP) and that the best available techniques (BAT) have been used.

21. ONR and the EA have developed a process of GDA for new reactor designs. Under that system ONR assess the safety and security of a generic design for a type and make of reactor in advance of it being considered on a specific site. ONR uses its safety assessment principles and technical assessment guides to guide its regulatory decision

making. The safety assessment principles are benchmarked against the international atomic agency standards.

22. The GDA is an iterative process. EDF made a submission to ONR and the EA in July 2007. It consisted of four steps - August to September 2007 initial discussion; September 2007 to March 2008 - overview of fundamental acceptability of the proposed reactor design; June 2008 to November 2008- safety design system and security review; December 2009 to 2011- examination of evidence given by the safety analysis which included a severe accident analysis. A summary of the design assessment was published on the 14th December 2011. At that time 31 matters remained outstanding. They were resolved during the following year so that on the 13th December 2012 ONR confirmed no matters were outstanding and issued a design acceptance confirmation. The EA issued also a statement of design acceptability. Their issue confirmed that the regulators were satisfied that the evidence demonstrated that the risk to workers and the public had been reduced to ALARP.

23. The power to licence and regulate nuclear sites rests with the HSE whose functions are carried out by ONR on its behalf. No site is to be used for the purposes of installing or operating a nuclear reactor unless a licence has been granted by ONR and is in force. Licensing Nuclear Installations is a document which provides an overview of the processes that ONR follows. There are three main aspects which have to be satisfied before the grant of a site licence;

    i) a site specific safety case (to show that the nuclear facility would have a robust defence against a range of local external hazards);

    ii) the suitability of the location for an adequate emergency plan;

    iii) that the proposal complies with government siting policy.

24. NNB applied for a nuclear site licence to install and operate a nuclear installation at Hinkley Point on the 29th July 2011. On the 31st October 2012 ONR issued a project assessment report which indicated its satisfaction subject to NNB carrying out substantial further analysis in several technical areas before ONR could give permission for nuclear safety related construction. That was done and a site licence granted which came into force on 3rd December 2012. It is subject to detailed licence conditions including one that provides that NNB will not commence construction, installation or operation without the consent of ONR.

25. Once a nuclear site licence is granted the licensee has to comply with all the conditions which are attached to it. In particular, those relating to nuclear safety are subject to expert assessment by ONR, known as the “permissioning” regime.

26. On the 8th April 2013 NNB published its pre construction safety report for its proposed development at HPC for assessment by ONR and the EA. That report will inform ONR’s decision on consents and permissions required for the next stage at HPC. Work is ongoing and a further report will be issued before regulatory consent is considered. If

consent is issued for the construction stage a schedule for submission of further safety documents will be agreed for the period of installation, commissioning and operation.

27. Throughout each stage of the process up to and including decommissioning ONR have continued inspection and regulatory oversight of the plant, the safety case and compliance with conditions.

28. The EA regulates several aspects of the operation and construction of nuclear power stations in England. In March 2013 NNB applied for and obtained a consultation process permit for the disposal and discharge of radioactive waste for the normal operation of the proposed nuclear station, operation of the combustion plant and discharge of trade effluent arising from the operation of the station. The EA considered the limits and conditions in those permits suitable to properly protect people and the environment.

The Euratom Treaty

29. The Treaty establishing the European Atomic Energy Community came into force on January 1 1958 and is known as the Euratom Treaty. Article 37 of the Euratom Treaty states that each member state shall provide the European Commission with such general data relating to any plan for the disposal of radioactive waste in whatever form as will make it possible to determine whether the implementation of such a plan is liable to result in radioactive contamination of the water, soil or airspace of another member state. The Commission has to deliver an opinion within six months, after consulting with an independent group of experts.

30. In August 2011, the UK government submitted general data under Article 37 in respect of the operation of a new nuclear power station at Hinkley Point. It contained information about how discharges would be monitored including an evaluation of the consequences of discharge to the state closest to HPC, the Republic of Ireland. It included also details about unplanned releases of radioactive effluents and reviewed the various kinds of accidents which could potentially result in unplanned releases of radioactive substances. It set out also the plant safety principles, including a range of design measures, to keep risks as low as reasonably practicable.

31. On the 3rd February 2012 the European Commission published its opinion relating to the plan for the disposal of radioactive waste arising from the two EPR reactors on the Hinkley Point C nuclear power station. It said that the assessment was carried out under the provisions of the Euratom Treaty and was without prejudice to any additional assessments to be carried out under the Treaty on the Functioning of the European Union and obligations stemming from it and from secondary legislation. It continued,

> "1. The distance from the site to the nearest member state is 185 kilometres for France and 250 kilometres for the Republic of Ireland.
>
> 2. Under normal operating conditions, the discharges of liquid and gaseous radioactive effluents are not likely to cause an exposure of

> population in another Member State that is significant from the point of view of health.
>
> 3. Solid low-level radioactive waste is temporarily stored on site for transfer to disposal facilities authorised by the United Kingdom regulatory authorities. Spent fuel elements and intermediate level solid waste are temporarily stored on site, awaiting the future availability of a geological repository. Reprocessing of spent fuel is not envisaged.
>
> 4. In the event of unplanned releases of radioactive effluents which may follow an accident of the type and magnitude considered in the General Data, the doses likely to be received by the population in another member state would not be significant from the point of view of health."

32. A further submission was made by the UK government in January 2012 in response to a request for more information about the interim storage of spent fuel and intermediate level waste on the site.

33. On the 30th May 2012, the European Commission published its opinion, stating that,

> "In conclusion, the Commission is of the opinion that both in normal operation and in the event of an accident of the type and magnitude considered in the General Data, the implementation of the plan for the disposal of radioactive waste in whatever form from the interim storage facilities for intermediate level waste and spent fuel at Hinkley Point C nuclear power station site, located in Somerset, United Kingdom, is not liable to result in radioactive contamination of the water, soil or airspace of another member state that would be significant from the point of view of health."

The Espoo Convention

34. The United Nations Economic Commission for Europe (UNECE) Convention on Environmental Impact Assessment in a Transboundary Context was adopted in 1991 in Espoo and came into force on 10 September 1997. It is, therefore, known as the Espoo Convention. It has been implemented by the EIA Directive (Council Directive 85/337/EC as amended) and transposed into domestic law through Regulation 24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. That means that decisions taken by the Secretary of State on NSIPs under the Planning Act 2008 will be subject to the procedural requirements of Regulation 24. Where the Secretary of State is of the view that the development is likely to have significant effects on the environment of another EEA state he must take certain steps.

Assessment of Transboundary effects

35. In June 2011 the IPC published Advice Note 12: Development with Significant Transboundary Impacts consultation paper. That Note indicates that there are four aspects to the consideration of transboundary impacts:

- the obligations under Regulation 24 and the Espoo Convention and EU Directive 85/337/EEC as amended (the EIA Directive);
- requests from other EEA states likely to be significantly affected;
- the role of UK Government departments to ensure that other EEA states are appropriately consulted; and
- the role of developers in helping to ensure the relevant information is available at the appropriate time.

36. The document includes the suggestion that, unless there is compelling evidence to the contrary, the IPC may consider that nuclear power stations are likely to have significant transboundary effects.

37. On the 6th October 2011 NNB submitted a draft transboundary-screening matrix. That noted that airborne or water borne spread of impact was possible from the proposed reactor but assessed the probability of any accident or incident leading to offsite radiological or other impact as very low because of the effective regulatory framework in the United Kingdom. Transboundary impacts were, therefore, not considered likely.

38. On the 20th October 2011 the IPC prepared its own pre-application screening matrix. That recorded that through the design measures built into the development, the delivery of mitigation measures, effective control by other regulatory bodies, conditions and monitoring, impacts on another EEA state will not be significant. The probability of radiological impact was considered to be low on the basis of the regulatory regimes in place. It concluded that transboundary impacts from accidents during operation or decommissioning will be so low as to be exempt from statutory control. Accordingly, the IPC concluded that the proposed development was not likely to have significant effects on the environment in another EEA state. As a result nothing further was needed under Regulation 24 of the 2004 Regulations at that time.

Application for DCO

39. On the 31st October 2011 NNB made a formal application to the IPC for the DCO which is challenged in these proceedings. The application included a comprehensive 11 volume environmental statement which included analysis of air quality, radiological impacts and their mitigation and, in appendix 7E, an assessment of transboundary impacts. That concluded that the likely impacts determined did not extend beyond the County of Somerset and the Severn Estuary. The nearest Espoo Convention states outside the UK were the Republic of Ireland and France, well beyond the areas where impacts were likely. It was noted that the extent of any possible adverse effects on nature conservation sites of European and national importance did not extend beyond the Severn Estuary and,

therefore, there was no possibility that any adverse effects would have a trans-boundary effect on another EEA area.

Screening decision by the Planning Inspectorate

40. On the 11th April 2012 a screening decision was issued by the Planning Inspectorate (PINS) that considered:

    i) the environmental statements;

    ii) distances to other EEA states;

    iii) submissions to the EC under Article 37 of the Euratom Treaty;

    iv) the Secretary of State's decision on regulatory justification for the EPR;

    v) statements in EN-6 and its appraisal of sustainability to the effect that significant transboundary effects arising from new nuclear power stations are not considered likely; as due to the robustness of the regulatory regime there is a very low probability of unintended release of radiation.

41. It concluded that significant transboundary environmental effects were not likely. The totality of the evidence about the reactor together with information about the regulatory framework within the UK was felt by PINS to amount to "compelling evidence" that there would be no likely significant effects on the environment as set out in Advice Note 12.

Communications with the Irish Government

42. On the 13th November 2009 the Government sent copies of the NPS consultation to all other EU member states including Ireland. They were informed that there was a possibility of transboundary effects in the event of a significant unintended release of radiation emissions. However, due to the robustness of the UK regulatory regime there was a very low probability of an unintended release of radiation.

43. In February 2010 the Irish government responded and reserved its position. In June 2010 detailed information was provided to the Irish government from the appraisal of sustainability. The Irish government raised various queries to which the Secretary of State responded but noted that the Irish request was more appropriate at the site-specific proposal stage.

44. On the 28th July 2010 the defendant sent a further letter. It set out the government position that the only significant transboundary effects were likely to come through an unintended release of radioactive emissions. The regulators viewed that as a very low probability based on both expert judgment and the GDA.

45. On the 28th October 2010 the UK government published for re-consultation a further draft of the NPS EN-6 and produced a revised appraisal of sustainability which again

concluded that the construction and operation of new nuclear power stations in line with the NPS were not likely to result in significant transboundary effects. On the same day the government sent a copy of the revised NPS to all EU member states including Ireland.

46. On the 24th January 2011 the Irish government responded saying that their questions were better answered at a site-specific stage. They did not ask for formal transboundary consultation. They made it clear that their concerns were best pursued through ongoing dialogue with the UK government.

47. In September 2011 the UK government informed the Irish government that NNB considered that there would be no significant transboundary effects from the proposed reactor and that a transboundary consultation was not needed. The Irish government was advised to register an interest in HPC when the DCO application was registered with the IPC. At no point has the Irish government requested transboundary consultation. It also did not take part in the examination process.

48. Instead, the Irish government asked the Radiological Protection Institute of Ireland (RPII) to carry out an assessment of the potential radiological impacts on Ireland from the proposed programme of nuclear plants including HPC. Five of the proposed locations are on the Irish Sea coast. The principal findings were summarised as being,

- " Given the prevailing wind direction in Ireland, radioactive contamination in the air, either from routine operation of the proposed nuclear power plants or accidental release, will most often be transported away from Ireland.

- The routine operations of the proposed nuclear power plant will have no measurable radiological impact on Ireland or the Irish marine environment.

- The severe accident scenarios assessed ranged in their estimated frequency of occurrence from 1 in 50,000 to 1 in 33 million per year. The assessment used a weather pattern that maximised the transfer of radioactivity to Ireland. For the severe accident scenarios assessed, food controls or agricultural protective measures would generally be required in Ireland to reduce exposure of the population so as to mitigate potential long-term health effects. In the accident scenario with an estimated 1 in 33 million chance of occurring, short-term measures such as staying indoors would also be advised as a precautionary measure. In general, the accidents with higher potential impact on Ireland are the ones least likely to occur.

- Regardless of the radiological impact, any accident at the proposed nuclear power plants leading to an increase in radioactivity levels in Ireland would have a socio-economic impact on Ireland.

- A major accidental release of radioactivity to the Irish Sea would not require any food controls or protective actions in Ireland.

- There is a continuing need for the maintenance of emergency plans in Ireland to deal with the consequences of a nuclear accident abroad."

Communications with the Austrian Government

49. The Austrian government was informed of the consultation on the NPS EN-6 and appraisal of sustainability. It responded in generic terms during those consultation periods.

50. On the 18th September 2012 the Austrian government wrote to the Department for Communities and Local Government requesting information "to allow for an examination as to whether or not the project was likely to have significant adverse effects on Austria's environment." That request was forwarded to the Planning Inspectorate. It replied on the 8th October 2012 explaining why it had not undertaken transboundary consultation and that, as the examination of the application had closed, the Austrian government should raise any concerns under the Espoo Convention with the Secretary of State. On the 19th October 2012 the Austrian government wrote to the Secretary of State indicating that it wished to participate in the process of considering the application according to the Espoo convention and the EIA Directive.

51. On the 16th November 2012 the Secretary of State provided the Austrian Government with a copy of the application documents and invited them to comment. Information was provided about the extensive public participation that had taken place on the project with just over 1,200 representations made to the Examining Authority which had held thirteen hearings.

52. In January 2013 the Austrian Government wrote to the Secretary of State to inform him that it had decided to initiate a public participation procedure in accordance with Article 7 paragraph 3 of the EIA Directive and Article 4 of the Espoo Convention. On the 17th January 2013 the Secretary of State replied requesting comments from the Austrian consultation by the 5th March 2013 as he had a statutory duty to announce his decision on the application no later than the 19th March 2013.

53. On the 5th March 2013 the Austrian Government wrote to the Secretary of State enclosing comments received from the provinces and the public. It also submitted a technical report assessing the likelihood and effects of a major accident at HPC. The technical report asserted that severe accidents with high releases of caesium-137 cannot be excluded, and there would be a need for official intervention in Austria after such an accident. However, the report recognised that the calculated probability of such an accident is below 1e-7/a (which means that such an accident would not be expected to occur more frequently than once in every 10 million years of reactor operation).

The Grant of Development Consent

54. The examination by the Panel of the application for development consent at HPC began on the 21st March 2012 and was completed on the 21st September. It included a series of accompanied site inspections by the panel, receipt of written evidence in response to panel questions and a series of issue specific hearings and open floor hearings held in the locality. The Planning Inspectorate prepared a report on the application on the 19th

December 2012 for submission to the Secretary of State which recommended that the order be made.

55. On the 19th March 2013 the Secretary of State announced his decision under Section 114 of the Planning Act 2008 to grant development consent for the proposals in the application.

56. In his Decision Letter the Secretary of State referred to the opinion of the European Commission under the provisions of the Euratom Treaty the conclusions of which are set out above and which were quoted in the Decision Letter at paragraph 6.6.1(ii).

57. The Secretary of State also referred to the position with regard to Austria and the Espoo Convention. Having set out that Austria had been sent a set of the application documents and invited to comment it recorded that Austria had responded on the 5th March 2013 with representations comprising an expert report and a number of submissions from groups and individuals opposed to the project. The Decision Letter continued,

> "6.6.2 (ii) The expert report focuses on nuclear safety issues and as such has been reviewed by the Office of Nuclear Regulation (ONR). It draws heavily on documents published by the ONR during the Generic Design Assessment of the EPR. Although broadly technically sound, it tends to over emphasise the significance of those areas where ONR has in any event determined that more work needs to be done during any subsequent construction and commissioning of a power station based on the EPR (i.e. such as at Hinkley Point) as part of its own regulatory processes.
>
> 6.6.2 (iii) The Austrian expert contends that in assessing the likely environmental effects of the HPC project, I should take into account the effects of very low probability, extreme (or severe) accidents. Effectively the report says that unless it can be demonstrated that a severe accident (including significant radiological release) cannot occur, then no matter how unlikely it is, I must consider its consequences as part of the development consent process, having regard, in particular, to the possible deleterious effects on Austria. However in my view such accidents are so unlikely to occur that it would not be reasonable to "scope in" such an issue for environmental impact assessment purposes."

58. The Secretary of State continued that his decision to make the order was only one of a number of decisions that needed to be made by government or the regulators before the HPC project could go ahead, and it was only concerned with one aspect of approval for the project (albeit an important one), namely, whether it should be given development consent under the Act. It is essentially a decision about the use of land.

59. The Secretary of State reiterated that the nuclear safety aspects of the project were regulated by the ONR and the EA, that a nuclear site licence had been granted (26 November 2012) and the GDA process concluded (13 December 2012). Paragraph 6.7.3 and 6.7.4 state,

> "Also relevant from the nuclear safety point of view is Secretary of State's Regulatory Justification decision of 2010. I note that NPS EN-6, paragraphs 3.12.9 and 3.12.11 state that I should have regard to this when considering potential effects on human health and well being and act on the basis that the risk of adverse effects resulting from exposure to radiation for workers, the public and the environment would be adequately mitigated because of the need to satisfy the requirements of the UK's strict legislative regulatory regime as well as the ONR's implementation of the governments policy on demographics. I am satisfied that in the light of the justification decision and the work done by ONR and EA as nuclear safety regulators in connection with the HPC project, there is no need to consider these issues further in a context of the application.
>
> It may also be noted, for the sake of completeness, that the EA has issued various non nuclear safety authorisations for which it is responsible in respect of the HPC project, most recently the Environmental Permit issued on 13 March 2013."

The Claimant's Involvement

60. On the 18th April 2013 the claimant wrote to the Secretary of State asking that the development consent be set aside and the decision making process be revisited. The claimant expressed concerns about the environmental impact assessment and decisions taken regarding transboundary consultation so that there was no consultation with Ireland or the public. The claimant asked the Secretary of State to confirm,

i) Whether Ireland had been formally consulted under Directive 85/337 as amended, under the Espoo Convention, or under the Aarhus convention;

ii) If so, evidence of the consultation and any response; and

iii) If not, the basis on which the UK determined that such consultation was not required.

61. The Secretary of State replied on the 26th April 2013. He confirmed that the Irish government had not been formally consulted in relation to those matters set out in question one of the claimant's letter. He explained his decision and provided links to the transboundary screening report completed by PINS which had concluded that in the absence of a likelihood of significant effect on the environment of another EEA state

there was no need to carry out transboundary consultation. The Secretary of State referred to information supplied by the developer and the conclusions by the European Commission under the Euratom Treaty. He emphasised also to the claimant that the safety and design features of the reactor were beyond the remit of the Planning Act process. Further, the Secretary of State noted that although the Screening Report had concluded that the development was not likely to have a significant effect on the environment of another EEA state it remained open to governments, organisations or members of the public in such states to take part in the examination process for the application for development consent. The Austrian government had asked to be consulted and the Secretary of State took those representations into account when making his decision. There was no representation from the Irish government.

62. The Secretary of State confirmed that the government did not intend to revisit the decision making process on the DCO. Nevertheless, there remained opportunities for organisations and individuals to participate on the potential effects of the HPC development in relation to site-specific design issues such as nuclear safety related construction. The claimants were informed that if they wished to participate in that process they could subscribe to ONR's free email service.

The Legal Framework

63. The Planning Act 2008 established a new system for the grant of consent for NSIP. It was designed to rationalise the different development consent processes and to create, as far as possible, a unified single consent regime with a harmonised set of requirements and procedures. Under part 2 of the Act an NPS can be designated which sets out national policy in relation to one or more specified descriptions of development. That is to be accompanied by an appraisal of sustainability. The document has to have been through public consultation and approved by resolution of the House of Commons.

64. By virtue of Section 15 nuclear power stations are a category of NSIP.

65. An application for a DCO was made to the IPC but, as set out, since their abolition, as a result of changes made under the Localism Act from the 1st April 2012 the decision is now made by the Secretary of State. The application is processed through the Major Infrastructure Planning Unit (now the Major Applications and Plans Directorate) within the PINS. There is a defined pre application procedure to be followed. Once an application is received, an Examining Panel is appointed with the function of examining the application and making a report to the Secretary of State setting out its findings and conclusions on the application together with a recommendation on the decision to be made. Once there is a start day for the examination the entire procedure is to be completed within six months. There are further provisions as to procedures to be followed which are not material to the current case.

66. Section 104(3) of the Planning Act 2008 provides that, in cases where an NPS has effect in relation to the development for which the DCO is applied for:

> "(3) The Secretary of State must decide the application in accordance with any relevant policy statement, except to the extent that one or more of subsections (4) to (8) apply."

67. Subsections (4) to (8) apply only where the Secretary of State is satisfied that,

> "(4) deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations;"
>
> (5) deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment;
>
> (6) deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment;
>
> (7) the adverse impact of the proposed development would outweigh its benefits;
>
> (8) any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met."

68. Under Section 114 the Secretary of State must either grant or refuse the application and, by virtue of Section 116, give reasons for his decision. A legal challenge is brought by way of judicial review within 6 weeks from the date of the publication of the order or the statement of reasons if that is later: Section 118.

69. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (the 2009 Regulations) came into force on the 1st October 2009. By virtue of Regulation 3 an order granting development consent must not be made by the Secretary of State unless he has first taken the environmental information into consideration. Under Regulation 4 development is EIA development if there has been the adoption by the Secretary of State of a screening opinion to that effect: regulation 4(2) (b).

70. Regulation 2 provides the following definitions,

> " 'Environmental information' means the environmental statement (or in the case of subsequent application, the updated environmental statement) including any further information, and other information any representations made by anybody required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development and of any associated development;

‘Environmental statement’ means a statement-

a) that includes such of the information referred to in part 1 of schedule 4 as is reasonably required to assess the environmental effects of the development and of any associated development and which the applicant can, having regard in particular to the current knowledge and methods of assessment, reasonably be required to compile; but

b) That includes at least the information referred to in part 2 of schedule 4.”

71. Regulation 24 is headed ‘Development with significant transboundary effects’. Because of its significance in this case I have set it out in full. It reads,

“(1) This regulation applies where—

(a) one of the events mentioned in regulation 4(2) occurs; or

(b) it otherwise comes to the attention of the Secretary of State that development proposed to be carried out in England, Wales or Scotland is the subject of an EIA application, and the Secretary of State is of the view that the development is likely to have significant effects on the environment in another EEA State; or

(c) another EEA State likely to be significantly affected by such development so requests.

(2) Where this regulation applies, the Secretary of State must—

(a) send to the EEA State as soon as possible and no later than their date of publication in The London Gazette referred to in sub-paragraph (b), the particulars required by paragraph (3) and, if it thinks fit, the information referred to in paragraph (4);

(b) publish the information in sub-paragraph (a) in a notice placed in—

(i) the London Gazette, in relation to all proposed development; and

(ii) the Edinburgh Gazette, in relation to development proposed to be carried out in Scotland,

indicating the address where additional information is available; and

(c) give the EEA State a reasonable time in which to indicate whether it wishes to participate in the procedure for which these Regulations provide.

(3) The particulars mentioned in paragraph (2)(a) are—

(a) a description of the development, together with any available information on its possible significant effect on the environment in another EEA State; and

(b) information on the nature of the decision which may be taken.

(4) Where an EEA State indicates, in accordance with paragraph (2)(c), that it wishes to participate in the procedure for which these Regulations provide, the Secretary of State must as soon as possible send to that EEA State the following information—

(a) a copy of the application concerned;

(b) a copy of any environmental statement in respect of the development to which that application relates; and

(c) relevant information regarding the procedure under these Regulations,

but only to the extent that such information has not been provided to the EEA State earlier in accordance with paragraph (2)(a).

(5) The Commission must also ensure that the EEA State concerned is given an opportunity, before development consent for the development is granted, to forward to the Secretary of State, within a reasonable time, the opinions of its public and of the authorities referred to in Article 6(1) of the Directive on the information supplied.

(6) The Commission must in accordance with Article 7(4) of the Directive—

(a) enter into consultations with the EEA State concerned regarding, inter alia, the potential significant effects of the development on the environment of that EEA State and the measures envisaged to reduce or eliminate such effects; and

(b) determine in agreement with the other EEA State a reasonable period of time for the duration of the consultation period.

(7) Where an EEA State has been consulted in accordance with paragraph (6), on the determination of the application concerned the Secretary of State must inform the EEA State of the decision and must forward to it a statement of—

(a)the content of the decision and any requirements attached to it;

(b) the main reasons and considerations on which the decision is based including relevant information about the participation of the public; and

(c) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development."

72. Development is EIA development if it is included within schedule 1 to the regulations, which nuclear power stations are by virtue of Regulation 2(b).

73. Schedule 4 sets out information for inclusion in environmental statements. Part 1, where relevant, reads,

"17. Description of the development, including in particular—

(a)a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;

(b)a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;

(c)an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed development.

19. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

20. A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and

long-term, permanent and temporary, positive and negative effects of the development, resulting from:

(a)the existence of the development;

(b)the use of natural resources;

(c)the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the applicant of the forecasting methods used to assess the effects on the environment.

21. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment."

74. The 2009 Regulations give effect in English law to Council Directive 85/337/EEC. The Directive has been amended to take account of the Espoo and Aarhus Conventions. The current Directive is 2011/92/EU which is a consolidating Directive.

75. The relevant recitals of the Directive are as follows,

"(2) Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes.

(7) Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question.

(8) Projects belonging to certain types have significant effects on the environment and those projects should, as a rule, be subject to a systematic assessment.

(15) It is desirable to lay down strengthened provisions concerning environmental impact assessment in a transboundary context to take account of developments at international level. The European

Community signed the Convention on Environmental Impact Assessment in a Transboundary Context on 25 February 1991, and ratified it on 24 June 1997.

(18) The European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) on 25 June 1998 and ratified it on 17 February 2005."

76. Article 2 has been described by the ECJ as containing the fundamental objectives of the Directive: see Case C-215/06 *Commission v Ireland* [2008] ECR 1-04911 at 49. It reads,

"Article 2

1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

3. Member States may provide for a single procedure in order to fulfil the requirements of this Directive and the requirements of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control.

4. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In that event, the Member States shall:

(a) consider whether another form of assessment would be appropriate;

(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the decision granting exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the

information made available, where applicable, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

The Commission shall report annually to the European Parliament and to the Council on the application of this paragraph."

77. Article 3 provides that subject to Article 2(4) projects listed in Annex 1 are to be made subject to an assessment in accordance with Articles 5 to 10. Nuclear power stations and other nuclear reactors including the dismantling and decommissioning of such power stations or reactors are listed in Annex 1. A footnote explains that nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

78. Article 7 now reads,

"Article 7

1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken.

The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given

> pursuant to Article 6(2) and made available pursuant to points (a) and (b) of Article 6(3).
>
> 3. The Member States concerned, each insofar as it is concerned, shall also:
>
> > (a) arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in Article 6(1) and the public concerned in the territory of the Member State likely to be significantly affected; and
> >
> > (b) ensure that the authorities referred to in Article 6(1) and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out."

79. Article 7.1 has been considered once by the CJEU and only in relation to a project which straddled the border between two countries. The issues raised are entirely different to those which are raised here.

80. I turn now to deal with the issues raised by this application.

The Submissions in Outline

81. The claimant describes the focus of the first complaint as,

> "The particular focus of the complaint is the way in which the Secretary of State says he dealt - in the screening decision - with the potentially very severe impacts nuclear accidents, which although agreed (thankfully) to be unlikely, could have were they to happen." (Claimant's skeleton [11])

82. The claimant contends that the approach of the Secretary of State in deciding that consultation under Article 7 with the people of Ireland was not required is flawed. That raises the following issues,

a) What is the correct approach to likelihood?

b) What is the correct approach to assessment?

83. On likelihood, Mr Wolfe QC submits that transboundary consultation is necessary if a significant transboundary impact may occur (i.e. is possible) or if such impacts cannot be excluded on a proper basis, in effect using a worst case assessment. Accordingly, the defendant asked himself the wrong question when it came to likelihood by "scoping out" events that could have significant transboundary impact.

84. The defendant and NNB submit that such an interpretation is inconsistent with Article 7 of the Directive or of any material provisions in either the Aarhus or the Espoo Convention.

85. On the correct approach to assessment the claimant submits that even if the defendant and NNB are right on the approach to likelihood then that decision cannot rely on incomplete information and assumed success of future regulatory controls.

86. The defendant and NNB submit that planning decision makers are entitled to rely on the proper operation of other regulatory regimes and that, in the context of nuclear safety, with the highly technical and highly regulated regime consisting of a combination of expert bodies it would be nonsensical for the defendant to have to scrutinise, appraise and judge the past work of those regulators and also not to be able to rely on their future work. Further, the defendant submits that the regulation by ONR penetrates the entire design so that it is inseparable from the scheme which is being advanced. As such, it is an integral part of the proposal and an actual characteristic of the development itself. The problem suggested by the claimant, therefore, does not arise.

87. In any event, provided the right test is applied by the decision maker the proper approach to a challenge to development consent is not a merits review but on *Wednesbury* principles.

**Ground One: The Meaning of Article 7 of the EIA Directive and Regulation 24 of the 2009 Regulations**

Likelihood: The Claimant's Case

88. The claimant carried out an extensive referencing exercise to set the background to their submissions on "likely".

89. The Treaty on the Functioning of the European Union in Article 191 sets out that the union policy on the environment shall aim at a high level of protection and be based on the precautionary principle and on principles that preventive action should be taken, that environmental damage should as a priority be rectified at the source. The approach to environmental policy was, therefore, one to be based on precautionary preventive principles. Further, international agreements concluded by the union were binding on the institutions of the union and on its member states: Article 216.

90. Domestic law was to be interpreted in the light of the wording and purpose of a Directive: see Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] and Case C-62/00 *Marks & Spencers Plc v Commissioners of Customs and Excise*.

91. The member state must ensure compliance with international agreements entered into by the community which form an integral part of the EU legal system. The meaning of an agreement is EU law which the CJEU must ensure is interpreted uniformly: see Case 104/81 *Hauptzollamt Mainz v Ca Kuferberg and CIE* [1982] ECR 3641. Further, preference should be given to the meaning which accords with an international treaty

which prevails over EU secondary legislation: see Case C-61/94 *Commission v Germany* [1996] ECR I-3989. The general rule was that an EU Directive should be interpreted in a manner that is consistent with the international agreements concluded by the EU: Case C-341/95 *Bettati v Safety High Tech* and *R (Edwards and Another) v Environment Agency and Others No 2* [2011] 1 WLR 79 at paragraph 25.

92. The Planning Inspectorate Advice Note 12: Development with Significant Transboundary Impacts consultation recognised that the Espoo Convention had been implemented by the EIA Directive and transposed into UK law specifically under Regulation 24. It recognised in relation to screening that,

> "In reaching a view the precautionary approach will be applied and following the court's reasoning in the *Waddenzee* case such that "likely to have significant effects" will be taken as meaning there is a probability or risk that the development will have an effect, and not that a development will definitely have an effect.
>
> To determine the likelihood of significant effects the Secretary of State will require certain information. This will enable screening of the proposed development as to the likelihood of such significant effects. A screening matrix will be used to assist the determination of the environmental significance of activities.
>
> … As a rule of thumb (taking the precautionary approach) unless there is compelling evidence to suggest otherwise, it is likely that the Planning Inspectorate may consider the following NSIPs as likely to have significant transboundary impacts:
>
> - nuclear power stations."

93. Guidance on the Application of Environmental Impact Assessment Procedure for Large Scale Transboundary Projects published by the EU required notification by the party of origin of projects listed in appendix 1 and likely to cause a significant adverse transboundary impact. The document recites the Espoo Convention's primary aim to "prevent, reduce and control significant adverse transboundary environmental impact from proposed activities" but continues that the party of origin is obliged to notify affected parties even if there is only a low likelihood of such an impact. That means that notification is always necessary unless significant transboundary impact can be excluded with certainty.

94. In the Espoo Convention itself Article 1 defines impact as meaning,

> "Any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction amongst these factors; it also includes

effects on cultural heritage or socio-economic conditions resulting from alteration to those factors."

95. Article 2 sets out general provisions and provides,

> "2.1 The parties shall either individually or jointly, take all appropriate effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.
>
> 2.2 Each party shall take the necessary legal, administrative or other measures to implement the provisions of this convention, including, with respect to proposed activities listed in appendix 1 that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of environmental impact assessment documentation described in appendix 2."

96. Article 3 deals with notification. It provides that for a proposed activity listed in appendix 1 that is likely to cause a significant adverse transboundary effect the party of origin shall notify any party which it considers may be an affected party as early as possible and no later than when informing its own public about the proposed activity. The notification is to contain information on the proposed activity including any available information on its possible transboundary impact. If the parties cannot agree then the question of whether there is likely to be a significant adverse transboundary impact may be submitted to an inquiry commission to advise on that likelihood.

97. Article 11 provides for a meeting of the parties to keep under continuous review the implementation of the convention. If there are disputes between two or more parties about the interpretation or application of the convention then, if not settled by negotiation or some other method of dispute settlement, they can be referred to the International Court of Justice or arbitration by virtue of Article 15. Article 20 provides that the authentic texts of the Convention are English, French and Russian.

98. The Vienna Convention on the Law of Treaties provides in Article 31 that any subsequent agreement between the parties regarding the interpretation of the treaty or any subsequent practice which establishes the agreement of the parties about the interpretation of the treaty shall be taken into account.

99. Meetings of the parties under the Espoo Convention have taken place. At the fourth meeting of the parties in 2008 it was recorded that the Implementation Committee were of the view that "even a low likelihood of such an impact should trigger the obligation to notify affected parties in accordance with Article 3… this means that notification is necessary unless a significant adverse transboundary impact can be excluded."

100. The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters under Article 6 headed Public Participation in Decisions on Specific Activities reads in Article 6.1(b),

> "Each Party
>
> Shall, in accordance with its national law, also apply the provisions of this Article to decisions on proposed activities not listed in annex 1 which may have a significant effect on the environment…"

Annex 1 includes nuclear power stations and other nuclear reactors.

101. The claimant then referred to the EIA Directive which I have set out above.

102. The case of *Kraaijeveld BV and others v Gedeputeerde Staten Van Zuid-Holland* Case C-72-95 [1996] ECR I-4355 was relied upon as providing a parallel to the current position as in that case the Dutch court relied on the Dutch text and argued that the Dutch version of the Directive was the only authentic language version. The court held that different language versions were to be looked at and the divergence to be resolved by reference to the purpose and general scheme of the Directive.

103. In *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others* Case C-437/97 [1999] ECR I-5613 the court held that the criteria and/or thresholds mentioned in Article 42 of the Directive were designed to facilitate examination of the "actual characteristics" of any given project. Although dealing with legislative exemption, no project was to be excluded other than on the basis of a comprehensive assessment. A future study to be carried out for the purposes of environmental impact assessment could not be relied upon. The project needed to be precisely assessed on the date of any proposed exemption.

104. That approach was confirmed in relation to the consent procedure in the case of *R(on the application of Delena Wells) v Secretary of State for Transport the Local Government and the Regions* Case C-201/02 [2004] ECR I-723 at [52]. The approach for comprehensive assessment was confirmed further in the case of *Commission v Italy* Case C-87/02 [2004] ECR I-4911at [44]. Paragraph 49 of the judgement made it clear that the screening decision should be accompanied by all information that makes it possible for the court to check that it is based on adequate screening.

105. The case of *Waddenzee* Case C-127/02 [2004] ECR I-7405 referred to in Advice Note 12 (supra) whilst dealing with the issue of the Habitats Directive and the requirement for an appropriate assessment was highly relevant. The Advocate General concluded that an appropriate assessment is always necessary where reasonable doubt exists as to the absence of significant adverse effects [74]. The judgement of the court was that the triggering of the environmental protection mechanism was as a result of a mere probability or risk that such an effect attaches to the plan or project. Accordingly, a negative opinion can only be advanced if a risk has been excluded on the basis of objective information.

106. In the *Commission v Ireland* [2008] ECR I-4911 the court said,

> "Nothing precludes Ireland's choice to entrust the attainment of that Directive's aims (Direction 85/337) to two different authorities, namely the planning authorities on the one hand and the agency on the other, that is subject to those authorities respective powers and the rules governing their implementation and ensuring that an environmental impact assessment is carried out fully and in good time, that is to say before the giving of consent, within the meaning of that Directive."

107. The claimant submits that supports its submissions that the vice in the ONR process is because it is ongoing. The judgment continues that the agency responsible for licensing a project with regard to pollution aspects may make its decision without an environmental impact assessment which creates a gap.

108. The case of *Solvay and Others v Région Wallonne* Case C-182/10 confirmed the approach of *WWF v Bozen* (supra) in cases which involve the Aarhus Convention. At the time of the decision authorising implementation of the project there must be no reasonable scientific doubt as to the absence of adverse effects on the integrity of the site in question.

109. *Peter Sweetman, Ireland v An Bord Pleanála* Case C-258/11 concerned the Habitats Directive. The Advocate General's opinion was that the threshold for assessment at Article 6(3) is very low. The court pointed out that the assessment carried out under Article 6(3) of the Habitats Directive cannot have lacuna and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the works proposed on the protected site concerned… It was for the national court to establish whether the assessment of the implications for the site met those requirements.

110. On domestic jurisprudence the claimant submits that the decision maker must take reasonable steps to acquaint himself with the right information relying on *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014. That is relevant here, as the defendant has not evaluated transboundary impact of accidents and other unplanned events.

111. The claimant then proceeds to review domestic jurisprudence relating to the EIA Directive and/or the similarly worded Habitats Directive. The cases establish, it is submitted, the following propositions;

- The fact that had the EIA Directive been followed it would not have affected the decision is no basis for not quashing the decision. A directly enforceable right of the citizen is not just a right to fully inform the decision on the substantive issue but a requirement that the decision was reached on the appropriate basis which required the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded in its views may be, is given an opportunity to

express its opinion on environmental issues: *Berkeley v Secretary of State for Environment* [2001] 2 AC 603.

- It is not appropriate for a person making a screening opinion to start from the premise that although there may be significant impacts they can be reduced to insignificance as a result of the implementation of conditions of various kinds: *R(on the application on Lebus) v South Cambridgeshire District Council* [2003] ENV LR 17 [46].

- In deciding whether an EIA was necessary in a screening direction the Secretary of State was not obliged to ignore the remedial measures submitted as part of the planning proposal: *Gillespie v First Secretary of State* [2003] 3 PLR 20.

- Whether a proposed development is likely to have significant effects on the environment involves an exercise of judgment or opinion. It is not a question of hard fact which there can only be one possible correct answer in any given case. The role of the court should be limited to one of review on *Wednesbury* grounds: *R (on the application of Jones) v Mansfield District Council* [2004] 2 P&CR 233.

- Since *Waddenzee*, applying the precautionary principle, significant harm to an SPA is likely for the purposes of Article 6 of the Habitats Directive if risk of it occurring cannot be excluded on the basis of objective information: *R (on the application of Hart DC) v Secretary of State for Communities and Local Government* [2008] 2 P&CR 16.

- "Likely to have significant effects on the environment" is a phrase that has to be construed as a whole… as well as any inevitable environmental consequences that will flow from a development, the phrase requires consideration of future environmental hazards or risks. That, in turn, requires consideration of both the chance of an effect occurring and also the consequences if it were to occur: *R (on the application of Miller) v North Yorkshire County Council* [2009] EWHC 2172.

- "Likely" connotes real risk and not probability: *R (Morge) v Hampshire County Council* [2010] PTSR .Something more than a bare possibility is probably required, though serious possibility would suffice: *R (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157.

- The decision on a screening opinion is a matter of judgment: *R (on the application of Loader) v Secretary of State for Communities and Local Government and Others* [2012] 3 CMLR 29, *R (on the application of Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114 although the claimant makes a point that the decision does depend on information available;

- A screening opinion that the impacts "should be… controllable" was contrary to the underlying purpose of the regulation: *R( on the application of Birch) v Barnsley NBC* [2011] Env LR 15.

Discussion and conclusions

The meaning of "likely"

112. It is common ground that in the ordinary course of its operation there is no prospect of HPC being "likely to have significant effects on the environment" of another EEA state. The claimant's case is premised on the basis of a severe accident occurring. Because the effect of such an event will be significant the claimant submits that a broad interpretation should be given to the word "likely" in Article 7 of the Directive and in Regulation 24.

113. The defendant submits that the odd consequence of the claimant's position is that it would mean that "likely" equals "cannot be excluded" or, in other words, means unlikely. Further, in considering whether the prospect of unplanned releases can be excluded one would need to exclude the role of the statutory regulators. As a matter of law they are there to exclude accidents. The claimant submits that is the consequence of applying the Directive and European jurisprudence.

114. In my judgement the claimant's approach is not consistent with the scheme or language of the Directive or the 2009 Regulations. Regulation 24 applies when the Secretary of State is of the view that the development is "likely to have significant effects" on the environment of another EEA state. That wording is materially the same as Article 7 of the Directive. That raises the question as to whether there is any linguistic divergence that requires one to look at the different language versions at all. I deal with that argument below. What is clear is that Article 7, in the material part, is identical in its wording to Article 2 in considering projects "likely to have significant effects" on the environment.

115. Starting with Directive 2011/92/EU the word "likely" appears in recital 7, Article 1, Article 2 and Article 5 as well as Article 7. In addition, it appears in Annex 4 which sets out the information required as part of an EIA. There the wording is,

> "3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including in particular population, fauna, flora, soil, water, air, climatic factors, material assets including the architectural and archaeological heritage, landscape and the interrelationship between the above factors.
>
> 4. A description of the likely significant effects of the proposed project on the environment resulting from;
>
> a) the existence of the project;
>
> b) the use of natural resources;
>
> c) the emission of pollutants, the creation of nuisances and the elimination of waste."

116. Using the claimant's interpretation would mean that, in this case, Irish citizens would get the right to be consulted but would then receive a document or documents describing "likely significant effects" that would be unlikely to affect them. That is because the claimant's case is that any effect that cannot be ruled out must be regarded as "likely". In my judgement, such an approach is highly artificial and runs contrary to the plain language used in both the Directive and the 2009 Regulations. In each case when it is used the word acts as a trigger for environmental assessment.

117. As *Commission v Ireland* makes clear [49],

> "Member States must implement Directive 85/337, as amended, in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that before development consent is given projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location should be made subject to a requirement for development consent and an assessment with regard to their effect."

118. The fundamental objective described must reflect the scope and purpose of the Directive which is to ensure that prior to any development consent being granted in cases where the application is likely to have a significant effect on the environment the application is properly assessed. The provisions are designed and have been amended (post Espoo and Aarhus) to provide the opportunity for the public to be engaged and participate in environmental decision-making.

119. The claimant contends that what is "likely" is easily identifiable and is to be taken from the approach to Article 6 of the Habitats Directive as exemplified in the case of *Waddenzee*. That means that if a risk of significant effect exists that cannot be excluded that is sufficient to trigger the requirements under Article 7.

120. It has to be recalled that the purpose of the screening direction under the Habitats Directive is to invoke a substantive process and not a procedural one as in the EIA Directive. Further, Article 6 is highly targeted in looking to protect special areas of conservation (SAC). Article 6(2) injuncts member states to take appropriate steps to avoid the deterioration of habitats as well as disturbance of species for which the areas have been designated. Article 6(3) permits development to proceed, but only after an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the site concerned. That is why a "no risk" approach is adopted.

121. That leads to a difficulty in a simple reading over of the judgments in the Habitats Directive cases of *Waddenzee*, *Solvay* and *Sweetman* to those under the EIA Directive. They are all cases concerned to make decisions on the basis of the most complete, precise and definitive findings and conclusions capable of removing all scientific doubt as to the effect of the proposed works on the protected site concerned. That is a different approach to that which is required under the EIA Directive which is looking at the likely significant

effects on the environment. One imposes a site-specific test whilst the other is a broader approach.

122. Further, the claimant's argument is akin to that which was made in *Evans*, namely, that a positive screening decision is required unless it can properly be said that there is no reasonable doubt about the potential for significant environmental effects. In that case it was argued that because of differing views on the part of the various interest groups there had to be reasonable doubt about environmental impact. That was rejected on the basis that the reference to reasonable doubt was to that on the part of the primary decision maker. Beatson LJ found that there was no support in the *Waddenzee* case for the view that where somebody else had taken a different view to the primary decision maker that it was not possible to demonstrate there is no reasonable doubt: [27].

123. The phrase "likely significant effects on the environment" has been considered by the Court of Appeal on various occasions. In Article 2 the Court of Appeal has held that "likely" is (i) more than a bare possibility: *Bateman* [17], (ii) a real risk: *Morge* [80], and (iii) that a real risk embodies the precautionary approach: *Evans* [21]. The word "likely" was considered in a different environmental context (the Habitats Directive) by Sullivan J (as he then was) in *Hart*. He said there [78],

> "To an English lawyer, a need to establish a likelihood imposes a more onerous burden than a need to establish a risk. The concept of a 'standard of proof' is of little if any assistance in environmental cases, but the nearest analogy would be the difference between the balance of probability more likely than not and the real risk standards of proof."

124. What is clear is that whilst the cases have not considered Article 7, given the similarity in wording between Articles 2 and 7, there is no basis for interpreting Article 7 in a different way to that in which Article 2 has been understood. The starting point should be to interpret the Directive as a whole to give it consistent effect and enable it to work as a whole. Applying that approach gives the Directive a sensible and comprehensible meaning.

125. To interpret Article 7 in a discrete way would be to have a scheme under the EIA Directive which worked inconsistently. The claimant's contention would mean, if "likely" was to be construed consistently throughout the Directive in accordance with Mr Wolfe's submission, a change in the well established EIA process. That is because the claimant's approach would not be limited to development with transboundary effects such as accidents. Its interpretation of 'likely' would have to apply to other aspects of the environment such as fauna, flora, landscape, air and all the other factors. There are, therefore, significant ramifications if the claimant's contention is correct. As Beatson LJ said in the case of *Bateman* at [19],

> "The main difficulty I have with this part of Mr Drabble's argument is that, if his submissions are both correct, an EIA would be required in virtually all cases in which a development might

> possibly have some effect on the environment, which does not seem to me to be what the directive intended."

126. For exactly that reason I have the same reservations about this part of the claimant's argument. The claimant's interpretation would bring about an approach to the EIA Directive which is not what was intended. As Pill LJ said in *Loader* at [46] ,

> "The proposed test does not accord with the overall purpose and tenor of the procedure initiated by the Directive. A formal and substantial procedure is contemplated, potentially involving considerable time and resources. It is contemplated for a limited range of schedule 2 projects, those which are likely to have significant effects on the environment. To require it to be followed in all cases where the effect would influence the development consent decision would devalue the entire concept."

Linguistic Divergence

127. The claimant contends that there is a linguistic divergence between the various versions and, therefore, relies on other language versions of Article 7(1) of the EIA Directive to assist its interpretation. In that context the claimant relies upon the case of *Kraaijeveldt* (supra). In my judgment, that does not assist the claimant. That deals with the situation where there is divergence and one must go to the purpose and general scheme of the Directive giving it a wide scope and a broad purpose.

128. Here, however, there is no significant doubt on the terms used in the different language translations. Just because the language used in other language versions is capable of being translated into English in words which are marginally different from those used by parliament does not mean that the English language version of Article 7 is any way defective. Each language version of a Directive is considered to be authentic and authoritative. That applies as much to the English language version as to any other language version of it. The question is whether, when legislating, parliament used words most naturally appropriate to convey the meaning that it intended? In my judgement it did. Further, if "likely" is understood consistently with the jurisprudence of the Court of Appeal as connoting the idea of "real risk" or "serious possibility", there is no divergence in language between the various versions. There is no need, therefore, to go to the different language versions of the Directive.

The role of the Aarhus and Espoo Conventions

129. The claimant argues that the wording of the Aarhus Convention and the Espoo Convention support its submissions. I do not agree. As set out, the consolidating Directive takes into account both Conventions.

130. The Aarhus provision referred to by the claimant, namely Article 6(4) is a general provision about the conduct and timing of public consultation. It says nothing about circumstances in which an obligation to consult arises and does not deal with when cross boundary considerations are material. It does not help on what the correct meaning of

'likely' in the Directive is. Even when Article 7 of the EIA Directive applies the member state of origin is required to provide information to the other state and take account of representations made by it. The obligation to consult the public, if it arises, is upon the second or receiving member state. The conduct and timing of that consultation exercise is unaffected.

131. Article 3 of the Espoo Convention contains language which is materially the same as the language in the EIA Directive. It talks about notifying any proposed activity to another state party when, "… a proposed activity… is likely to cause a significant and adverse transboundary impact…" There is, therefore, no material difference between Article 3 of the Espoo convention, Article 7 of the EIA Directive and Regulation 24 of EIA Regulations.

Meetings under the Espoo Convention

132. The claimant relies upon a decision of the Espoo Convention Implementation Committee to provide a meaning under that Convention which can then be read across into the EIA Directive. Article 3(7) of the Convention permits, but does not require, parties to the Convention to submit disputes on the application of the provisions of the convention to an inquiry commission. However, the Convention does not provide either that the decisions of the inquiry commission are binding or that such decisions represent an authoritative interpretation on the meaning of the convention. Annex (IV) of the decision (III/4) contains paragraph 28 which reads.

> "It may advisable to notify neighbouring Parties also of activities that appear to have a low likelihood of significant transboundary impacts. It is better to inform potentially affected Parties and let them decide on their participation instead of taking the risk of ending up in an embarrassing situation in which other Parties demand information on activities that have already progressed past the EIA phase."

133. That decision is footnoted in the guidance on the application of environmental impact assessment procedures for large-scale transboundary projects.

134. It is referred to also in decision (IV/2) in annex 1 dealing with the Implementation Committee's findings and recommendations further to the submission by Romania regarding Ukraine's compliance with its obligations under the Convention with respect to the Danube Black Sea deep water navigation canal. Paragraph 54 reads,

> "Article 3, paragraph 1 of the Convention stipulates that parties shall notify any party of a proposed activity listed in appendix 1 that is likely to cause a significant adverse transboundary impact. The committee is of the opinion that, whilst the Convention's primary aim, as stipulated in Article 2, paragraph 1, is to "prevent reduce and control significant adverse transboundary environmental impact from proposed activity", even a low

> likelihood of such impact should trigger the obligation to notify effective parties in accordance with Article 3. This would be in accordance with the guidance on the practicable applications of the Espoo Convention, paragraph 28, as endorsed by decision III/iv… this means that notification is necessary unless a significant adverse transboundary impact can be excluded."

135. In my judgment the meeting was not purporting to determine the legal position. What the meeting is doing is setting out a pragmatic approach for parties to the Convention to follow. The committee has no status to give a legal ruling.

136. Article 11 of the Espoo Convention deals with Meetings of the Parties. Paragraph 2 sets out that the parties shall keep under continuous review the implementation of the Convention and then prescribes what can be done. It reads, in part,

> "(e) Consider and, where necessary, adopt proposals for amendments to this convention."

137. Although the meeting can propose amendments the Conventions there is nothing which gives the meeting the power to make a definitive ruling on what the Convention means.

138. The Implementation Committee was established at the second meeting of the parties in 2001. Its structure and functions are set out in annex ii to the third meeting of the parties in 2004. It reads,

> "Objective and functions of the Committee
>
> 4. The objective of the Committee shall be to assist Parties to comply fully with their obligations under the Convention, and to this end it shall:
>
> (a) Consider any submission made in accordance with paragraph 5 below or any other possible non-compliance by a Party with its obligations that the Committee decides to consider in accordance with paragraph 6, with a view to securing a constructive solution;
>
> (b) Review periodically, in accordance with guidelines or criteria formulated by the Meeting of the Parties, compliance by the Parties with their obligations under the Convention on the basis of the information provided in their reports;
>
> (c) Prepare the reports referred to in paragraph 11 with a view to providing any appropriate assistance to the Party or Parties concerned, for example by clarifying and assisting in the resolution of questions; providing advice and recommendations relating to procedural, technical or administrative matters; and

> providing advice on the compilation and communication of information; and
>
> (d) Prepare, at the request of the Meeting of the Parties, and based on relevant experience acquired in the performance of its functions under subparagraphs (a), (b) and (c) above, a report on compliance with or implementation of specified obligations in the provisions of the Convention."

139. It is clear from that that there is nothing to suggest that the committee has a normative function.

140. Article 31 of the Vienna Convention sets out general rules of interpretation. Paragraph one is to the effect that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and their context in the light of its object and purpose. Paragraph 2(a) reads,

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty…"

141. As Article 11 of the Espoo Convention contains nothing to indicate that a meeting of the parties is able to give an authoritative meaning to the wording of the Convention there can be no normative force to the decision of the meeting.

142. The claimant's case is thus dependant upon the meaning and effect of paragraph 54 of the Implementation Committee's findings and recommendations further to a submission by Romania regarding Ukraine. The position is directly analogous to that which was raised in the case of *Solvay* when the question was whether Articles 2(2) and 9(4) of the Aarhus convention had to be interpreted in accordance with the guidance in the Aarhus Convention implementation guide. The aim of the guide was to provide an analysis of the Aarhus Convention which introduced the reader to the convention and to what it can mean in practice. Whilst the guide could be regarded as an explanatory document, being capable of being taken into consideration as appropriate amongst other relevant material for the purpose of interpreting the Convention, the observations in the guide were held to have no binding force and did not have the normative effect of the provisions of the Aarhus convention. That is exactly what the position would be here if reliance were placed upon the meetings held under the Espoo Convention.

<u>Other matters</u>

143. As to the published guidance on the application of the environmental impact assessment procedure for large-scale transboundary projects by the European Commission that is only guidance. As the disclaimer at the front of the document sets out the definitive interpretation of Union law is the sole prerogative of the European Court.

144. The same point can be made about the reliance placed on Advice Note 12 published by the IPC. It is only guidance. If it is saying that *Waddenzee* has to be followed then it is in error. If, on the other hand, it is saying that the effect of the development is to be gauged by when there is more than a bare possibility of an effect then that is entirely consistent with the cases of *Bateman*, *Morge*, and *Evans.*

Conclusion

145. It follows that for all of the reasons set out above the claimant's submission as to the meaning of Article 7 in the Directive and regulation 24 in the Regulations is rejected.

**Ground Two: Did the Defendant fail to comply with Regulation 24/Article 7? What approach should the court take to its consideration?**

146. The claimant submits that although the environmental statement included appendix 7E headed 'Assessment of transboundary impacts' the contents of it were inadequate to discharge the burden that had to be satisfied. It was incomplete and imprecise as an assessment.

147. The screening opinion conducted by PINS dated 11th April 2012 under Regulation 24 of the 2009 Regulations suffered from similar significant deficiencies. In considering appendix 7E to the ES the screening opinion concluded,

> "Potential transboundary effects are identified as air quality, marine water quality, marine ecology and radiological impacts. Air quality impacts are assessed in Volume 2 Chapter 12 of the ES: marine water quality and ecology are assessed in Chapters 18 and 19 and radiological effects are assessed at chapter 21. Potential impacts identified are assessed as not extending beyond the county of Somerset and the Severn Estuary. Any residual effects on human beings and sensitive ecological species/habitats would also be minimised and/or controlled through the imposition of appropriate licensing and monitoring conditions by the regulatory agencies. On the basis that licensing and monitoring conditions are effective, impacts will not be significant."

In terms of magnitude the opinion concluded,

> "The magnitude of effects are controlled through the design measures built into the development, the delivery of mitigation measures, effective control by the relevant regulatory bodies, conditions and monitoring, no significant impacts on other EEA states are anticipated."

148. On probability it concluded,

> "The probability of a radiological impact is considered to be low on the basis of the regulatory regimes in place. There could be

> direct impacts related to the discharge of water during normal operational conditions. However the discharge of water is expected to be controlled by appropriate licensing conditions and regular monitoring, and hence the probability of any adverse impacts is likely to be low. The Developer has indicated that information is included in the Government's submission to the European Commission under Article 37 of the Euratom treaty to show that transboundary impacts from accidents during operation or decommissioning will be solo as to be exempt from regulatory control."

149. As a result the claimant submits that the screening opinion was entirely premised on future regulatory control. As such, it was not based on the actual characteristics of the project, it was not based on a comprehensive assessment of its potential transboundary impacts, the impact could not be assessed precisely in a definitive manner based on information available at that time, PINS could not exclude doubt as to the absence of significant effects and their conclusion was not based on its independent judgment. Those were matters which the court had to consider.

150. The reference to the Article 37 submission was misleading as all there was was an awareness of its existence but nothing further by way of information that could allow it to be checked. In any event PINS expressed no view on the potential transboundary impact if an accident or unplanned release was to happen. As a result they did not apply the Article 7 test as they should.

151. The Development Consent issued on the 19th March 2013 noted the Euratom Opinion but the Secretary of State did not form a judgment upon it as he was obliged to do. The decision relied upon an assumption that the future regulatory processes would deal with the risks involved. It contained a mis- direction as to likelihood as evidenced in paragraph 6.6.2(iii) in scoping out accidents and did not involve the Secretary of State making a decision on the screening question under Article 7.

152. On the UK regulatory regime it is evident, as ONR themselves acknowledge in the project assessment report of the 31st October 2012, that there is no relationship in law between the DCO and licensing. Their scope is to deal with the organisation, the site, the safety report and the licence condition compliance arrangements. Their report recognised,

> "that not all resources, arrangements and safety reports to support construction and operation will be in place at the point of licensing and that NNB Gen Co will continue to develop its arrangements as the corporate and site-based organisations evolve towards those required for full operation. The key consideration for ONR is that, at the point of licensing, the licence is in control of all activities that have the potential to effect nuclear safety, and has adequate arrangements in place to provide confidence that this will continue to be the case."

153. On the safety report it was evident that post licensing, substantial further analysis work will be necessary in several technical areas to justify permissioning of nuclear safety related construction. The severe accident analysis assessment which contributed to the assessment report noted that NNB Gen Co's severe accident lead engineer is actively engaged with the proposed design changes arising from lessons learnt from the Fukushima incident.

154. In the HPC fault studies and severe accident analysis topic report for licensing it was evident that work was still ongoing as it is also in the report on external hazards assessment dated the 14th December 2012. That report considered only external hazards from the point of view of their definition of severity, frequency and other characteristics that define their effect on nuclear safety. They were considered in terms of the way they are analysed to develop a basis for plant design. More detailed assessment would need to be undertaken. The site-specific preconstruction safety report was recorded as developing.

155. The claimant submits that all demonstrates that whilst ONR is doing its job the regulatory regime is still very open with lots of design changes including consideration of fault, accident and safety matters to a degree which leaves it too uncertain for the requirements of Article 7.

156. On the Euratom opinion the general data was compiled by NNB Gen Co and seen by the relevant UK regulators before being provided by the UK government to the Commission. The letter from the Treasury Solicitor, dated 18th October 2013, makes it clear that the Secretary of State did not go behind the findings of the Commission under Article 37, by considering information underlying the Article 37 general data and it was not necessary for him to do so. That means, submits the claimant, that the assumptions which underpinned the submission and opinion are by no means complete and certainly not a worst case. They were, in any event, given in early 2012 considerably before the December 2012 ONR decisions which have the flaws set out above. In any event the principles which underlie the EIA assessment are not those which underlie the Euratom provisions.

157. Finally, the claimant submits that impact includes effects on socio-economic conditions resulting from alterations to environmental factors. The case of *Leth v Republik Osterreich and Another* [2013] 3 CMLR 2 makes it clear that the EIA process is concerned with direct economic consequences of effects on the environment. It does not have to be a significant effect. Where there is damage which is of direct economic consequence of the environmental effects of a public or private project that is covered by the object of protection pursued by Direction 85/337: paragraph 36. In that regard the claimant relies upon the report of RPII which concludes that in the event of the most severe accident scenario of 1 in 33 million chances in any given year there would be significant socio-economic implications and costs, possibly lasting for months or years following such an accident.

158. Accordingly the development consent was granted without the compliance with the requirements of Article 7 and cannot stand.

The standard of review

159. The approach of the court was considered in the case of *R (Jones) v Mansfield District Council*. Dyson LJ (with whom Laws and Carnwath LJJ) agreed, said at paragraph 17,

> "Whether a proposed development is likely to have significant effects on the environment involves an exercise of judgment or opinion. It is not a question of hard fact to which there can only be one possible correct answer in any given case. The use of the word "opinion" in regulation 2(2) is, therefore, entirely apt. In my view, that is in itself a sufficient reason for concluding that the role of the court should be limited to one of review on *Wednesbury* grounds."

160. It follows that the approach of the court should be one of *Wednesbury* review.

161. Considering the approach to future events and their consequences in the case of *Miller* Hickinbottom J at paragraph 31, said,

> "In the context of the EIA Directive and Regulations, "likely to have significant effects on the environment" is a phrase that has to be construed as a whole: and I respectfully agree with Dyson LJ in Jones that, rather than a hard-edged question of fact, it involves a question of planning judgment and opinion such that, in any set of circumstances, there is a range of valid answers. For a development to be likely to have significant environmental effects, it is certainly not necessary for it to be more likely than not that the development will have particular environmental consequences. For example, if a development has the potential for an environmental catastrophe, before the relevant provisions are brought into play it does not have to be more probable than not that such an event will occur in the future. As well as any inevitable environmental consequences that will flow from a development, the phrase requires consideration of future environmental hazards or risks. That in turn requires consideration of both the chance of an effect occurring, and also the consequences if it were to occur."

162. I agree with the approach of Hickinbottom J but note that he did not have to consider, in looking at future environmental hazards or risks, the role of the relevant regulator and its relationship with the development consent decision maker.

The basis of the Secretary of State Decision

163. Dealing with the documents which have considered the likelihood of accidents the first in time was the White Paper on nuclear power published in January 2008. Within that, the government made it clear that it continued to believe that "new nuclear power stations would pose very small risks to safety, security, health and proliferation. We also believe that the UK has an effective regulatory framework that ensures that these risks are minimised and sensibly managed by industry." It recognised also that regulatory

assessment required all foreseeable threats, including aircraft crash to be considered: paragraph 2.96.

164. In the appraisal of sustainability the draft NPS EN6 it said,

> "The construction of new nuclear power stations, in line with the revised draft NPS, is not likely to have any significant transboundary effects. The appraisal of sustainability of identified the possibility of transboundary effects in the event of a significant unintended release of radioactive emissions e.g. as a result of an accident. The appraisal of sustainability has been informed by the views that both the environment agency and the nuclear installations inspectorate, who advise that due to the robustness of the regulatory regime, there is a very low probability of unintended release of radiation. This is based on expert judgment and experience supported in the case of the new nuclear power reactor designs by the regulators' findings so far from Generic Design Assessments."

165. In the reasons for the making of the Justification Decision (Generation of Electricity by an EPR Nuclear Reactor) Regulations 2010 the Secretary of State said, at paragraph 6.209,

> "Extensive safety precautions are taken in order to protect those that work in nuclear power stations and members of the public from the health detriments arising from these by-products. The EPR has been designed to prevent the unplanned release of radioactivity during normal operations and in the event of an accident, both through a system of protective barriers and through a system of defences to protect these barriers from failure. In addition to these inherent safety features, any EPR that is built in the UK will be subject to the regulatory regime in place. This is internationally recognised as being mature transparent with highly trained and experienced inspectors."

166. In appendix 7E of the environmental statement the screening matrix it says,

> "Our assessment is that transboundary impact from accidents during operation or decommissioning will be so low that according to UN IAEA guidelines the time and effort to exercise control by a regulatory process may not be warranted, i.e. they are effectively so low as to be exempt from regulatory control. This information is included in the Government's submission to the European Commission under Article 37 of the Euratom Treaty."

167. NPS EN-6 published in July 2011 set out at paragraph 1.7.4 that,

> "Significant transboundary effects arising from the construction of new nuclear power stations are not considered likely. Due to the robustness of the regulatory regime there is a very low probability of an unintended release of radiation, and routine radioactive discharges will be within legally authorised limits."

168. The severe accident analysis for the GDA process considered that,

> "A severe accident is considered highly unlikely… accident situations with core melt… are practically eliminated… low pressure core melt sequences necessitate protective measures for the public which are very limited in both area and time…. The safety approach for EPR reactors is deterministic, complimented by probabilistic analyses, based on the concept of defence in depth. Within this framework, a number of design provisions… are made to preserve the integrity of the containment in severe accidents and hence reduce the accident consequences."

169. The EU Commission decision under Article 37 of the Euratom Treaty was reached after receipt not only of the general data but written and oral contribution from experts.

170. The same conclusion was reached in the PINS screening exercise in April 2012.

171. In November 2012 the preconstruction safety case for EPR considered whether, as part of the GDA process, the design was fit for purpose. It considered protection from earthquakes, aircraft crash, external explosion, external flooding, extreme climatic conditions and lighting and electromagnetic interference.

172. The supplementary report which addressed the outstanding 31 GDA issues was accepted by ONR in their letter of the 13th December 2012 with the issue of final design acceptance confirmation. That meant that ONR was fully content with both the security and safety aspects of the generic design.

173. On the same day the EA issues a statement of design acceptability. That included work prior to its issue to take into account issues arising from Fukushima. They issued a notice on the day that that GDA process had demonstrated the acceptability of the EPR design for environmental permitting.

174. The examining panel for the DCO did not duplicate consideration of matters that were within the remit of bodies responsible for the nuclear regulation. The report of the Austrian expert indicated that "severe accidents… could not be excluded although their calculated probability was below one in every 10 million years of reactor activity."

175. The RPII report of May 2013 concluded as set out above but that was on the basis of an earthquake of an assumed magnitude which the authors of the report considered to be unlikely. Further, their report was not on the basis of the EPR design but on the basis of a PWR design used in an American study published in 2012. That study was the main source of information on accident scenarios and release source terms used in the

assessment carried out by RPII. In the RPII report there was no assessment of the safety features or regulatory regime in the UK.

176. Whilst all of the above are policy or design related documents they do demonstrate a remarkable consistency of opinion and come from a variety of expert sources. They clearly provide, taken into account as they were, a sound and reasoned rational basis for the Secretary of State to come to his decision. They show also that the Secretary of State did take into account the prospect of a severe accident. He regarded it though as no more than a bare possibility.

The Relevance of the Regulatory Regime.

177. The claimant submits that the decision maker cannot have regard to the future role of the regulatory regime. The defendant submits that it would be odd if that was indeed the case. There is nothing in the Directive or Article 7 to require regulatory standards to be disregarded. Further, regulation by ONR penetrates the entire design so that it is inseparable from the scheme being advanced. As a result ONR is an integral part of the proposal and a key characteristic of the development itself.

178. The existence of another regulatory regime with powers which overlap with the regime of control under the Town and Country Planning Act is not new. The case of *Gateshead MBC v Secretary of State for the Environment* [1995] Env LR 37 dealt with an application to construct and operate an incinerator for the disposal of clinical waste. Under the Town and Country Planning Act 1990 planning permission was required for the construction and use of the incinerator. Incineration was a prescribed process under section 2 of the Environmental Protection Act 1990 and authorisation was required to carry out the process of incineration. The enforcing authority responsible for granting that authorisation was HM Inspectorate of Pollution (HMIP). An appeal against a decision of Gateshead Metropolitan Borough Council to refuse planning permission was heard at inquiry after which the inspector recommended refusal but the Secretary of State granted planning permission. The council appealed to the High Court. In dismissing that appeal the Deputy High Court Judge said,

> "Just as the environmental impact of such emissions is a material planning consideration, so also is the existence of a stringent regime under the EPA of preventing or mitigating that impact for rendering any emissions harmless. It is too simplistic to say, "The Secretary of State cannot leave the question of pollution to the HMIP."

179. Glidewell LJ in the Court of Appeal agreed. He went on to say,

> "The decision which was to be made on the appeal to the Secretary of State lay in the area in which the regimes of control under the Planning Act and the Environmental Pollution Act overlapped. If it had become clear at the inquiry that some of the discharges were bound to be unacceptable so that a refusal by HMIP to grant an

> authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission. But that was not the situation… Once the information about air quality at both of those locations was obtained, it was a matter for informed judgment, i) what, if any, increases in polluting discharges of varying elements into the air were acceptable, and ii) whether the best available techniques etc would ensure those discharges were kept within acceptable limits. Those issues are clearly within the competence and jurisdiction of HMIP. If in the end the Inspectorate conclude that the best available techniques etc would not achieve the results required by section 7(2) and 7(4) it may well be that the proper course would be for them to refuse an authorisation… The Secretary of State was, therefore, justified in concluding that the areas of concern which led to the Inspector and the assessor recommending refusal were matters which could properly be decided by EPA, and that their powers were adequate to deal with those concerns."

180. The position in *Gateshead* is analogous to the situation here. First, there is no doubt that the existence of a stringent regime for authorisation and planning control is a clear material consideration. Second, where, as here, at the time of the development consent determination the matters to be left over for determination by another regulatory body were clearly within the competence and jurisdiction of that body, as they are here within the remit of ONR it is, in principle, acceptable for the Secretary of State not only to be cognisant of their existence but to leave those matters over for determination by that body.

181. At the time of the Secretary of State's consideration of whether to grant development consent there was no evidence to suggest that the risk of an accident was more than a bare and remote possibility. In the instant case the regulatory regime is in existence precisely to oversee the safety of nuclear sites. There is nothing in the Directive and Article 7, in particular, to require the regulatory regime to be disregarded. NPS EN-6 refers to reliance being placed in the DCO process on the licensing and permitting regulatory regime for nuclear power stations, to avoid unnecessary duplication and delay and to ensure that planning and regulatory processes are focused in the most appropriate areas. It would be contrary to the accepted principle in *Gateshead* not to have regard to that regime, and in my judgement it would also be entirely contrary to common sense.

182. The claimant has relied upon a large number of cases as set out above. The defendant and interested party submit that the claimant has either misread or misapplied them.

183. The case of *Lebus* (supra) concerned whether there was a screening opinion for EIA development. But the case also concerned a further error of law which was that the question was not asked whether the development described in the application would have significant environmental effects but rather whether the development as described and subject to certain mitigation measures would have certain environmental effects. It was held not to be appropriate for a person charged with making a screening opinion to start

from the premise that although there may be significant impacts they could be reduced in significance as a result of implementation of conditions of various kinds. What was required was a clear articulation in the application of the characteristics of the development proposed and mitigation to offset any harm.

184. The case of *Gillespie* established that the Secretary of State was not obliged to ignore remedial measures submitted as part of the planning proposal when making his screening decision. Pill LJ said ( at paragraph 36),

> "In making his decision, the Secretary of State is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision."

185. The submission that when considering a screening decision the proposed development was the proposal shorn of remedial measures incorporated into it was rejected on the basis that it would be to ignore the "actual characteristics" of some projects. The problem there was that the disputed condition 6 required future site investigations to be undertaken to establish the nature, extent and degree of contamination present on site. Until that was done a scheme for remediation could not be proposed. That was held to be too open and too uncertain. That is very different from the instant case where extensive design work, licensing work and site investigation has been carried out, the overall design and site licence have been approved and the final solutions are in the process of being worked up.

186. The case of *Blewett* concerned an application for judicial review of a planning permission for the third phase of a large landfill site. The application was accompanied by an environmental statement in accordance with the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. The argument was that the environmental statement was defective as it did not include an assessment of the potential impact on the use of the proposed landfill on groundwater. The planning authority had left those matters to be assessed after planning permission and had granted the permission assuming that complex mitigation measures would be successful. The measures described refer to the appropriateness of the lining system and site design being assessed as part of the integrated pollution prevention and control permit application. It was held that,

> "Reading the environmental statement and the addendum report as whole, it is plain that a particular cell design, which is not in the least unusual, and a lining system were being proposed. The details of that system could be adjusted as part of the IPPC authorisation process… The defendant had placed constraints upon the planning permission within which future details had to be worked out."

187. The role of the EA, as the authority that would be in charge of the IPPC process was considered. They had initially been concerned that existing contamination had not been adequately addressed. There was an addendum report to address that concern. After

receipt of that they acknowledged that the issue had been discussed but said that no final remediation strategy had been proposed. Sullivan J continued [66],

> "If the Environment Agency had had any concern in the light of the geological and hydrogeological information provided in the addendum report as to the remediation proposals contained therein, then it would have said so. Against this background the defendant was fully entitled to leave the detail of the remediation strategy to be dealt with under condition 29. "

188. The role of the authorising body was thus clearly taken into account and, given their lack of objection, the decision maker had been fully entitled to leave the detail of the measures to deal with ground water pollution to be assessed after planning permission had been granted. As a matter of law, therefore, the role of another regulatory body is clearly a material consideration in the determination of development consent.

189. In European jurisprudence the claimant places significant reliance upon *WWF and Others v Bozen* (supra). The submission is that that judgement requires a comprehensive assessment that was just not possible in the circumstances as they were before the Secretary of State. The case concerned the restructuring of Bolzano airport, which had been used as a private airfield since 1925, into an airport which would be used for commercial flights. To enable that to be done various works had to be carried out including the extension of the runway from 1,040 to 1,400 metres. It was argued that the project was outside the reach of the EIA Directive because it did not involve the construction of a new airport but was the alteration of an existing airfield. Amongst the matters at issue was whether the member states had discretion to exclude such a project. It was held that whatever method was adopted by a member state to determine whether a specific project needed to be assessed the method must not undermine the objective of the Directive unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effect. Further, whilst Article 4(2) of the Directive conferred a measure of discretion the criteria and thresholds mentioned in Article 4(2) were designed to facilitate examination of the actual characteristics of any given project in order to determine whether it was going to be the subject of a requirement to carry out an assessment. The question, therefore, was whether, in the circumstances of this case, the Secretary of State had sufficient information to enable him to carry out a comprehensive assessment.

190. By the time of the screening decision on the 11th April 2012 the Justification Decision for EPR had been made and the project assessment report had been issued by ONR dealing with progress on the site licence on the 31st October 2011. Those were clearly material matters in coming to that decision.

191. By the time of the decision granting development consent on the 19th March 2013 the site licence had been issued on the 3rd December 2012 as had the GDA on the 13th December 2012. Those were clearly an integral part of the proposal before the Secretary of State. Put another way they were part of the "actual characteristics" of the project. To ignore

any part of what had gone before would be a failure to carry out the "comprehensive assessment" required under the Directive.

192. That leaves the issue of future regulation and what relevance that has, if any, to the Secretary of State in making his decision. There is a critical distinction between a decision on a screening decision where the decision maker has insufficient information to come to a lawful determination and the situation here where the Secretary of State is on record as expressing his view that he had adequate information to enable him to determine the application. That information enabled him to conclude that accidents were very unlikely and that the issue of safety was appropriately left to the relevant regulators. That is entirely consistent with the approach of the courts in *Gateshead, Blewett and R (Morge) v Hampshire County Council* [2011] UKSC2 at [29] and [30].

193. In my judgment there is no reason that precludes the Secretary of State from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control. Because of its existence, he was satisfied, on a reasonable basis, that he had sufficient information to enable him to come to a final decision on the development consent application. In short, the Secretary of State had sufficient information at the time of making his decision to amount to a comprehensive assessment for the purposes of the Directive. The fact that there were some matters still to be determined by other regulatory bodies does not affect that finding. Those matters outstanding were within the expertise and jurisdiction of the relevant regulatory bodies which the defendant was entitled to rely upon.

The Relevance of the Euratom Opinion

194. In taking his decision to grant development consent the Secretary of State made it clear that he had considered all the environmental information in line with his duties under regulation 3(2) of the 2009 regulations. Attached to his decision letter was a brief summary of his consideration of the likely significant effects as reported in the ES together with the key findings contained in the panel's report in respect of those effects. Where there was a difference between the two he preferred the analysis of the panel. He saw no need for the ES to be further supplemented.

195. The decision letter referred also to matters that had arisen after the close of examination on the 19th September 2012. One part of that was dealing with Austria and the Espoo Convention. Another part was dealing with communication that had been received from the Minister of Environment in Northern Ireland on the 21st October 2012. The Minister was particularly concerned about the environmental impact the HPC project would have on protected habitats in Northern Ireland. He was informed that his concern should be addressed to the Secretary of State as the examination of the application had closed. The Minister did not follow up his concerns. The decision letter continued,

> "6.6.1 (ii) However, as noted above (section iv), I undertook a Habitats Regulations Assessment in respect of the Application. I concluded that there would be no adverse effect on any European site as a result of the HPC project. That assessment was further

> borne out by the facts that the distance between the site of the HPC and the range of its likely impacts are such that granting consent would have no impact on a European site in Northern Ireland (over 300 miles distant) or in the Republic of Ireland (over 155 miles distant). In addition the European Commission carried out an assessment of HPC under the provisions of the Euratom Treaty, which concluded:
>
> "the Commission is of the opinion that, both in normal operation and in the event of an accident of the type and magnitude considered in the General Data, the implementation of a plan for the disposal of the radioactive waste in whatever form from the two EPR reactors on the Hinkley Point C nuclear power station, located in Somerset, United Kingdom is not liable to result in a radioactive contamination of the water, soil or airspace of another member state that would be significant from the point of view of health."

196. The defendant submits that that reference did not mean the Secretary of State was not taking the opinion into account. Indeed, the reverse, the Secretary of State was. He was entitled to take the opinion at face value. The position has to be looked at with a degree of reality. I agree. The Commission is a body which had received significant levels of information, had held oral hearings, received expert advice and then published its considered view. It was stating a conclusion which, despite the somewhat different remit of the Commission in considering the issue, was directly relevant to the issue of transboundary impacts.

197. The claimant contends, firstly, that the Secretary of State was simply noting the Commission opinion which was not the same as taking it into account. Secondly, the Secretary of State had to view the general data submitted to the Commission prior to decision being issued so that he was able to work out the situation for himself and come to his own conclusion.

198. I reject both of those submissions. I have dealt already with the first of those. As to the second, although the claimant relies on *Tameside* (supra) that is not authority for the Secretary of State having to do the work himself to enable him to come to his own independent conclusion. As Lord Diplock said about the Secretary of State's decision in that case,

> "it is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider… or put more compendiously, the

> question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

199. The answer in the instant case is that the Secretary of State did ask himself the right question and, as the review set out above shows, took reasonable steps to enable himself to answer it correctly.

200. Although the claimant relies upon *Commission v Italy* (supra) to show that there is no latitude on the part of the Secretary of State that case is dealing with an entirely different set of circumstances where no reasons at all were expressed as to whether screening of the project was carried out. The government there was relying upon an opinion by the Civil Engineering Department which was not an opinion on the environmental effects of the project but an authorisation solely for hydraulic purposes to cross the Tordera River and carry out certain works. There is nothing in the case which is authority for the proposition that a court should be placed in the role of a primary evaluator.

201. The claimant has served witness statements from Professor John Sweeney, Dr Paul Dorfman and Mr Large in November 2013 all purporting to put into issue the basis upon which the European Commission reached its opinion. The claimant does not have permission to rely upon such expert evidence. But, as the Secretary of State has not claimed to have taken into account the data submitted to the European Commission directly, such evidence is not in any event relevant.

Socio Economic Impacts

202. The claimant submits that there has been an omission to consider socio economic impacts which have to be taken into account under the EIA Directive. That takes into account effects on socio economic conditions resulting from environmental factors.

203. The reality is that it is the same event that will give rise to significant environmental harm that will give rise to any consequential harm, in this case to material assets or socio economic impacts. It follows that whether there is a breach in relation to that depends again upon whether the occurrence is likely. For reasons set out above, I am of the clear view, it is not.

Reference to the CJEU

204. The claimant contends that there is sufficient uncertainty about the meaning of the trigger test in Article 7 as to warrant making a reference to the CJEU.

205. The parties are agreed on the authorities. The starting point is *R v International Stock Exchange Ex Parte Else* [1993] QB 534 at page 545,

> "If the national court has any real doubt it should ordinarily refer."

206. In *Trinity Mirror plc v Commissioners of Customs and Excise* [2001] EWCA Civ 65 at paragraph 52 Chadwick LJ said,

> "Where the national court is not a court of last resort, a reference will be most appropriate where the question is one of general importance and where the ruling is likely to promote a uniform application of the law throughout the united union. A reference will be least appropriate where there is an established body of case law which could relevantly be transposed to the facts of the instant case, of where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case. Beyond those two extremes is a wide spectrum of possibilities"

207. In my judgment there is no need for a reference. There is no real doubt about the interpretation of Article 7. I have found that the case law on Article 2 is directly transferable to Article 7 for reasons set out above. There is no substance to the Espoo point arising from paragraph 54 of the Implementation Committee's decision again for reasons set out above. In these circumstances I can see no reason for making a reference.

Conclusion

208. I have not dealt expressly with each and every authority relied upon by the claimant. I have dealt with those relevant to the main issues above. I have taken the others into account. They do not affect my decision on either ground or overall.

209. As this is a rolled up hearing I have heard full argument. Having heard that I would not have granted permission to bring judicial review proceedings in this case. The claimant's case is dismissed.

210. I invite submissions from the parties as to the final order and costs.

Neutral Citation Number: [2014] EWCA Civ 1111

Case No: C1/2013/3763

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)**
**MRS JUSTICE PATTERSON**
**CO/5020/2013**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 1st August 2014

**Before:**

**LORD JUSTICE LONGMORE**
**LORD JUSTICE SULLIVAN**
and
**LADY JUSTICE GLOSTER**

- - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **The Queen on the Application of An Taisce (The National Trust for Ireland)** | **Claimant** |
| **- and -** | |
| **The Secretary of State for Energy and Climate Change** | **Defendant** |
| **- and –** | |
| **NNB Generation Company Limited** | **Interested Party** |

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

**David Wolfe QC, John Kenny and Blinne Ni Ghralaigh** (instructed by **Leigh Day Solicitors**) for the **Appellants Jonathan Swift QC, Rupert Warren QC and Jonathan Moffett** (instructed by the **Treasury Solicitor**) for the **Respondent**
**Nathalie Lieven QC and Hereward Phillpot (**instructed by **Herbert Smith Freehills LLP)** for the **Interested Party**

Hearing dates: 15th & 16th July 2014

Judgment
As Approved by the Court

**Lord Justice Sullivan:**

## Introduction

1. In this claim for judicial review the Claimant challenges the decision dated 19th March 2013 of the Defendant to make an Order ("the Order") granting development consent for the construction of a European pressurised reactor ("EPR") nuclear power station at Hinkley Point in Somerset ("HPC").

## Background

2. The background to the claim is explained in considerable detail in the judgment of Patterson J [2013] EWHC 4161 (Admin) dismissing the Claimant's application for permission to apply for judicial review following a "rolled up" hearing. On the 27th March 2014 I granted the Claimant permission to apply for judicial review and ordered that the application should be retained in the Court of Appeal.

3. The judge set out the factual background in paragraphs 5-62 of her judgment. There was no challenge to this aspect of her judgment, and I gratefully adopt, and will not repeat, all of the detail that is contained in those paragraphs.

4. There is no dispute as to the legal framework, which the judge set out in paragraphs 63-79 of her judgment. Article 7 of Directive 2011/92/EU ("the EIA Directive") is of central importance in this claim, and for convenience I set out the material paragraphs:

> "1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:
>
> (a) a description of the project, together with any available information on its possible transboundary impact;
>
> (b) information on the nature of the decision which may be taken.
>
> The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.
>
> 2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in

> Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to points (a) and (b) of Article 6(3).
>
> 3. The Member States concerned, each insofar as it is concerned, shall also:
>
> (a) Arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in Article 6(1) and the public concerned in the territory of the Member State likely to be significantly affected; and
>
> (b) ensure that the authorities referred to in Article 6(1) and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out."

5. It is common ground that the construction of HPC is a project which falls within Annex I to the EIA Directive. An environmental impact assessment was required and was carried out, and the necessary public consultation was undertaken within the United Kingdom, in accordance with Articles 4-6 of the Directive.

6. The Defendant did not carry out transboundary consultation in accordance with Article 7 because he did not consider that the HPC project was "likely to have significant effects on the environment in another Member State." A transboundary screening assessment carried out by the Planning Inspectorate ("PINS") on the Defendant's behalf, having referred to Appendix 7E to Volume 1 of the Interested Party's Environmental Statement, which contained an assessment of potential transboundary effects, said:

> "On the basis that licensing and monitoring conditions are effective, impacts will not be significant."

The screening assessment also said, when dealing the "Probability":

> "The probability of a radiological impact is considered to be low on the basis of the regulatory regimes in place.
>
> There could be direct impacts related to the discharge of water during normal operational conditions. However, the discharge of water is expected to be controlled by appropriate licensing conditions and regular monitoring, and hence the probability of any adverse impacts is likely to be low.

> The Developer has indicated that information is included in the Government's submission to the European Commission under Article 37 of the Euratom Treaty to show that transboundary impacts from accidents during operation or decommissioning will be so low as to be exempt from regulatory control."

7. The Austrian Government wrote to the Department of Energy and Climate Change indicating that it wished to participate in the process of considering the application for the Order. It was sent a copy of the application, and its response included an expert report. The decision letter dated 19th March 2013 summarised the expert report, and the Defendant's response thereto, in paragraphs 6.6.2(ii) and (iii):

> "6.6.2(ii) The expert report focuses on nuclear safety issues and as such has been reviewed by the Office of Nuclear Regulation ("ONR"). It draws heavily on documents published by the ONR during the Generic Design Assessment of the EPR. Although broadly technically sound, it tends to overemphasise the significance of those areas where ONR has in any event determined that more work needs to be done during any subsequent construction and commissioning of a power station based on the EPR (i.e. such as at Hinkley Point) as part of its own regulatory processes.
>
> 6.6.2(iii) The Austrian expert contends that in assessing the likely environmental effects of HPC project, I should take into account the effects of very low probability, extreme (or severe) accidents. Effectively the report says that unless it can be demonstrated that a severe accident (involving significant radiological release) cannot occur, then no matter how unlikely it is, I must consider its consequences as part of the development consent process, having regard, in particular, to the possible deleterious effects on Austria. However, in my view such accidents are so unlikely to occur that it would not be reasonable to "scope in" such an issue for environmental impact assessment purposes."

8. The Claimant contends that there was a failure to comply with Article 7 of the Directive. The Defendant failed to consult the public in the Republic of Ireland in accordance with Article 7 because:

   (1) He misdirected himself as to the meaning of "likely" within Article 7 by "scoping out" severe nuclear accidents on the basis that they were very unlikely (Ground 1 "likelihood"); and

   (2) Even if he was correct as to the meaning of "likely", the Defendant erred in relying on the existence of the UK nuclear regulatory regime to fill gaps in current knowledge when reaching his conclusion as to the likelihood of nuclear accidents (Ground 2 "regulatory regime").

9. Before considering these two grounds, it is necessary to understand the reference in the decision letter to "very low probability" severe accidents. The Austrian Expert

Report had said that severe accidents with high releases of caesium-37 cannot be excluded, and there would be a need for official intervention in Austria after such an accident, but the report recognised that the calculated probability of such an accident is below 1E-7/a, which means that such an accident would not be expected to occur more frequently than once in every 10 million years of reactor operation: see paragraph 53 of Patterson J's judgment.

**Discussion**

**Ground 1 Likelihood**

10. The words "likely to have significant effects on the environment" occur in a number of places in the EIA Directive: in recitals (7) and (9), in Articles 1(1), 2(1) and 7(1), and in a slightly different formulation – "likely significant effects of the proposed project on the environment" – in Annex IV. In similar vein, an Environmental Statement must include "the data required to identify and assess the main effects which the project is likely to have on the environment": see Article 5(3).

11. Two points should be made at the outset of any consideration of what is meant by "likely" in Article 7(1). It is now common ground that:

    (1) The words "likely to have significant effects on the environment" must have the same meaning throughout the EIA Directive (not least because the environmental information to be supplied to the authorities and the public in the other Member State under Article 7 is the information that must be provided under Article 6 to the public in the Member State in which the project is located); and

    (2) Whatever that meaning might be, in the context of the EIA Directive the word "likely" does not mean, as an English lawyer might suppose, more probable than not.

12. The CJEU has not ruled on the meaning of "likely to have significant effects on the environment" in the EIA Directive. The Domestic authorities were considered by Patterson J in paragraphs 123-126 of her judgment. None of those authorities is binding on this Court. In *R (Morge) v Hampshire County Council* [2010] EWCA Civ 608 [2010] PTSR 1882, Ward LJ recorded the parties' agreement that "likely" connotes real risk and not probability (paragraph 80). In *R (Bateman) v South Cambridgshire District Council* [2011] EWCA Civ 157 Moore-Bick LJ expressed the view in paragraph 17 that "something more than a bare possibility is probably required, though any serious possibility would suffice", but he did not find it necessary to reach a final decision on the question (paragraph 19).

13. The Claimant's submission that a project is "likely to have significant effects on the environment" if such effects "cannot be excluded on the basis of objective evidence" is founded on the decision of the Grand Chamber of the CJEU in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Bogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij ("Waddenzee").* *Waddenzee* was concerned with the Habitats Directive, Article 6 of which materially provides:

> "1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex 1 and the species in Annex II present on the sites.
>
> 2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect theron, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public." (emphasis added)

14. In paragraphs 42-44 of its judgment the Grand Chamber said:

> "42. As regards Article 2(1) of Directive 85/337 [now Article 2(1) of the EIA Directive], the text of which, essentially similar to Article 6(3) of the Habitats Directive, provides that "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment … are made subject to an assessment with regard to their effects', the Court has held that these are projects which are likely to have significant effects on the environment (see to that effect Case C-117/02 *Commission v Portugal* [2004] ECR I-5517, paragraph 85).
>
> 43. It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.
>
> 44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in

> accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 United Kingdom v Commission [1998] ECR I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.
>
> 45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects." (emphasis added)

15. On behalf of the Claimant, Mr. Wolfe QC, understandably, placed much emphasis upon the Grand Chamber's interpretation of the "essentially similar" text of Article 6(3) of the Habitats Directive; and the fact that the Grand Chamber had drawn an analogy with the judgment in the *United Kingdom* case in which the Court was considering the meaning of likelihood in a very different context: the United Kingdom's response to the BSE crisis, and a Directive which required notification of

> "any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health."

This demonstrated, he submitted, that the Grand Chamber's approach to the likelihood of significant harm in any context where environmental concerns, including the protection of human health, were in issue was based on first principles, and was not confined to the specific characteristics of the Habitats Directive.

16. While the text of Article 2(1) of the EIA Directive and Article 6(3) of the Habitats Directive is essentially similar, and both Directives are concerned with environmental protection, there is in my view a clear distinction between the two Directives. The scope of the EIA Directive is wide ranging, it ensures that any project which is likely to have significant effects on the environment is subject to a process of environmental impact assessment. The EIA Directive does not prescribe what decision must be

taken by the competent authority – to permit or to refuse – if the environmental impact assessment concludes that the proposal is likely to have significant effects on the environment. The Habitats Directive is more focussed, it protects particular areas of Community importance, which have been defined as "special areas of conservation", and which must be maintained at, or restored to, "favourable conservation status": see Articles 2 and 3. In order to achieve this aim Article 6(3) provides that, subject only to "imperative reasons of overriding public interest" (see Article 6(4)), where there has been an "appropriate assessment":

> "the competent authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned." (emphasis added)

17. Thus, where there has been an "appropriate assessment" Article 6(3) imposes a very strict test for approval. The Grand Chamber said that competent authorities may approve a plan or project:

> "55…… only after having made sure that it will not adversely affect the integrity of the site.
>
> 56 It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.
>
> 57 So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.
>
> 58 In this respect it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle (see case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211. paragraph 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.
>
> 59 Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, by analogy, Case C-236/01 *Monsanto Agricoltura Italia and Others*

[2003] ECR I-8105, paragraphs 106 and 113)." (emphasis added)

18. In order to achieve this very high level of protection for special areas of conservation an equally stringent approach is required at the screening stage when the competent authority is deciding whether an "appropriate assessment" is required: see paragraph 70 of the Opinion of Advocate General Kokott [2004] ECR 1-7405. It is for this reason that in a case falling within the Habitats Directive an "appropriate assessment" must be carried out unless the risk of significant effects on the site concerned can be "excluded on the basis of objective information." Reading the *Waddenzee* judgment as a whole, it is clear that significant effects can be excluded on the basis of objective evidence if "no reasonable scientific doubt remains as to the absence of such effects."

19. Standing back from a detailed analysis of the text of the two Directives, there is no obvious reason why such a strict approach should apply to the screening stage in the EIA Directive, which merely seeks to ensure that any likely significant effects on the environment are identified and properly taken into account in the decision making process. Even if significant environmental effects are identified, and are not merely likely, but are certain to occur, the EIA Directive does not require that approval for an EIA project within either Annex I or II of the EIA Directive must be refused in the absence of some overriding public interest. The Grand Chamber referred to the precautionary principle in *Waddenzee* (see paragraph 44), but it was applying that principle in the context of the Habitats Directive, where the objective is the protection of the integrity of particular sites designated for their conservation importance. In the wider context of environmental protection a "real risk" test embodies the precautionary principle: see *Evans v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114, per Beatson LJ at paragraph 21.

20. I have already mentioned the fact that, by contrast with the Habitats Directive, the EIA Directive has a broad scope: it applies to all "projects which are likely to have significant effects on the environment" (Article 1); and the Environmental Statements prepared for all such projects must include information about all of the likely significant effects (Article 5), and must be subject to public consultation (Article 6). While the claimant stresses the need for any likely environmental effect to be "significant", it seems to me that adopting the Claimant's approach to the meaning of likelihood – that a significant environmental effect is "likely" if it cannot be excluded on the basis of objective evidence – would inevitably have the effect of both (a) materially increasing the number of projects within Annex II which would have to be the subject of an EIA; and (b) increasing the number of "likely" significant effects that would have to be included in all Environmental Statements, and consulted upon.

21. Many Environmental Statements for major projects which are now prepared on a "real risk" basis are already very lengthy. If, in addition to being required for more Annex II projects, Environmental Statements had to deal with every possible significant environmental effect, however unlikely, unless it could be excluded on the basis of objective evidence, there is a real danger that both the public when consulted and decision takers would "lose the wood for the trees", thereby causing the EIA process to become less effective as an aid to good environmental decision making: see *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, [2012] 3 CMLR 29, per Pill LJ at paragraph 46; and *Bateman* per Moore-Bick LJ at paragraph 19.

22. In addition to these wider policy considerations, it is necessary to consider the text of the EIA Directive as a whole. I accept the submission of Mr. Swift QC on behalf of the Defendant that the Claimant's approach to likelihood is inconsistent with the selection criteria that are set out in Annex III, which must be taken into account when a decision is being taken as to whether an Annex II project shall be made subject to an environmental impact assessment, ie. whether it is likely to have significant effects on the environment. The selection criteria include "Characteristics of the Potential Impact". The potential significant effects of projects must be considered in relation to the criteria set out in points 1 and 2 [the characteristics and the location of projects] and having regard in particular to:

> "(a) the extent of the impact (geographical area and size of the affected population);"
>
> (b) the transfrontier nature of the impact:
>
> (c) the magnitude and complexity of the impact;
>
> (d) the probability of the impact;
>
> (e) the duration, frequency and reversibility of the impact". (emphasis added)

Mr Swift submits, rightly in my view, that the need to have regard to "the probability of the impact" would be redundant if the test of likelihood was whether the risk of any impact, however improbable, could be excluded on the basis of objective evidence.

23. For these reasons, I consider that the differences between the scope, purpose and text of the two environmental Directives are such that it is unduly simplistic to say that, because one part of the text in both Directives is "essentially similar", the meaning of that part of the text in the context of Article 6(3) of the Habitats Directive as determined by the Grand Chamber in *Waddenzee* can simply be carried over into the EIA Directive. The "real risk" test adopted in the domestic authorities (above) incorporates the protective principle in the context of the EIA Directive.

24. Mr Wolfe submitted that even if we were minded to conclude that the Defendant had not erred in his approach to likelihood for the purposes of Article 7, a reference to the CJEU was required because this Court could not be convinced that applying the "real risk" test in the context of the EIA Directive would be correct as a matter of EU law: see *CILFIT (Srl) v Ministry of Health* [1982] ECR 1-3415 at paragraphs 16-20. In support of that submission he relied, in addition to the Grand Chamber's judgment in *Waddenzee* (above), upon five considerations, as follows:

(a) the German text of Article 7(1);

(b) the Russian text of the Convention on Environmental Impact Assessment in a Transboundary context, ("the Espoo Convention");

(c) the interpretation of the Espoo Convention by that Convention's Implementation Committee;

(d) the Aarhus Convention; and

(e) Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive").

25. While both (a) and (b) support the proposition that "likely" in Article 7(1) has a broader meaning than "more likely than not", they do not support the Claimant's proposition that "likely" in Article 7(1) means "cannot be excluded no matter how unlikely." In *Waddenzee* [2004] ECR 1-7405 Advocate General Kokott explained in paragraph 69 of her opinion:

> "As regards the degree of probability of significant adverse effect, the wording of various language versions is not unequivocal. The German version appears to be the broadest since it uses the subjunctive "könntė (could). This indicates that the relevant criterion is the mere possibility of an adverse effect. On the other hand, the English version uses what is probably the narrowest term, namely "likely", which would suggest a strong possibility. The other language versions appear to lie somewhere between these two poles. Therefore, according to the wording it is not necessary that an adverse effect will certainly occur but that the necessary degree of probability remains unclear."

26. There is no dispute that Article 7 of the EIA Directive gives effect to the Espoo Convention: see recital (15) to the EIA Directive. The English language version of the Convention uses the word "likely". The Claimant obtained a translation of the Russian version of the Espoo Convention (of which there are three authentic texts, English, French and Russian). The translator states that the word "may" in the expression "may cause a significant adverse transboundary impact", "fails to convey the meaning of likelihood and expresses a mere possibility which can be either high or low." In a further statement, the translator explains that the Russian word for "may" "includes something which cannot be excluded or ruled out." It seems that the Russian word for "may" conveys a flexible concept of possibility which ranges from a high possibility at one end of the spectrum to a possibility which cannot be excluded. As with the German text of the EIA Directive, the Russian text would not constrain the CJEU to adopt the lowest level of possibility inherent in the Russian version of the Espoo Convention. I will deal with the view expressed by the Implementation Committee after I have considered whether any assistance can be obtained from the Aarhus Convention and the SEA Directive.

27. There is no dispute that the EIA Directive must be construed so as to give effect to the Aarhus Convention. Recital (20) to the EIA Directive records the fact that:

> "Article 6 of the Aarhus Convention provides for public consultation in decisions on the specific activities listed in Annex I thereto and on activities not so listed which <u>may</u> have a significant effect on the environment." (emphasis added)

In broad terms, Annex I to Aarhus lists the kinds of projects that are listed in Annex I to the EIA Directive, while Annex II projects in the EIA Directive may fall within the second part of Article 6(1) of Aarhus. While the word "may" indicates a lower

threshold than "likely" (used in the sense of more likely than not), it does not indicate that the test for public consultation across the board – for all activities which may have a significant effect on the environment – is so low as to include any activity where a significant effect on the environment, however unlikely, cannot be excluded.

28. Article 3(2) of the SEA Directive requires an environmental assessment for all plans and programmes (a) which are prepared for certain purposes and which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive; and (b) "which in view of the likely effect on sites [special areas of conservation] have been determined to require an [appropriate] assessment pursuant to Article 6 or 7 of [the Habitats Directive]." In the latter case, the CJEU has held that an environmental assessment is required if a significant effect on the site cannot be excluded: see Case C-177/11 *Syllogos Ellinon Poleodomon kai Khorotakton v Y pourgos Perivallontos, Khorotaxias & Dimosion Ergon and Others.* This decision of the CJEU merely applies the *Waddenzee* approach to plans or programmes which are likely to have a significant effect on sites of Community importance, which have been designated as special areas of conservation by the Member States: see paragraphs 19-23 of the judgment. It does not address the issue in the present case: whether the *Waddenzee* approach to likelihood should be carried over into the EIA Directive.

29. For these reasons, I am not persuaded that any of these considerations assists the Claimant's case. Against this background, I turn to the views expressed by the Implementation Committee ("the Committee"). The judge dealt with this issue in paragraphs 132-142 of her judgment. In summary, the Claimant had relied upon the endorsement by the Parties to the Espoo Convention at their Fourth Meeting of the findings of the Committee in Annex I that Ukraine had not complied with the Convention in, what for convenience I will call the "Danube Black Sea" case. In paragraph 54 in Part III of the Committee's report "Consideration and Evaluation", preceding its "Findings" in Part IV, the Committee said:

> "Article 3, paragraph 1. of the Convention stipulates that Parties shall notify any Party of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact. The Committee is of the opinion that, while the Convention's primary aim, as stipulated in Article 2, paragraph 1, is to "prevent, reduce and control significant adverse transboundary environmental impact from proposed activities", even a low likelihood of such an impact should trigger the obligation to notify affected Parties in accordance with Article 3. This would be in accordance with the *Guidance on the Practical Application of the Espoo Convention*, paragraph 28, as endorsed by decision III/4 (ECE/MP.EIA/6 annex IV). <u>This means that notification is always necessary, unless significant adverse transboundary impact can be excluded with certainty. This interpretation is based on the precautionary and prevention principles</u>." (emphasis added)"

30. The judge concluded that the Meeting of the Parties was not purporting to determine the legal position under the Convention, but was setting out a pragmatic approach for the parties to follow, and also said that the Committee had no status to give a legal ruling: see paragraph 135 of the judgment. At the Fourth Meeting, the Parties also

asked the Committee "To promote and support compliance with the Convention including to provide assistance in this respect, as necessary." In response to that request the Committee published its Opinions, as expressed in the reports of its sessions, from 2001 to 2010. Those Opinions included its views expressed in paragraph 54 of Annex 1 to decision IV/2 (above).

31. In 2013 the European Commission published "Guidance on the Application of the Environmental Impact Assessment Procedure for large-scale Transboundary Projects." Under the heading "Need for notification" the Commission's guidance says:

> "The Espoo Convention requires that the Party of origin notifies affected Parties about projects listed in Appendix 1 and likely to cause a significant adverse transboundary impact (Article 3(2)). The notification triggers the transboundary EIA procedure. The Espoo Convention's primary aim is to '*prevent reduce and control significant adverse transboundary environmental impact from proposed activities*' (Article 2(1), but in fact the Party of origin is obliged to notify affected Parties (in accordance with Article 3 of the Espoo Convention) even if there is only a low likelihood of such impact. This means that notification is always necessary, unless significant adverse transboundary impact can be excluded with certainty.[17] This interpretation is based on the precautionary and prevention principles." (emphasis added)

Footnote 17 cross-refers to paragraph 54 of decision IV/2 (above).

32. As I explained when granting permission to appeal, [2014] EWCA Civ 666, the Chair of the Committee wrote a letter dated 14th March 2004 to the United Kingdom Government. The Committee had requested a copy of Patterson J's judgment, and had considered the matter between 25th and 27th February 2014 at its 30th session held in Geneva. The Committee's letter dated 14th March 2014 expressly endorsed the view that it had expressed in the Danube Black Sea case, as to the circumstances in which transboundary consultation was required by the Convention:

> "This means that notification is necessary unless a significant adverse transboundary impact can be excluded (decision IV/2, annex I paragraph 54)"

The letter continued:

> "On the above grounds, the Committee found that there was a profound suspicion on non-compliance and decided to begin a Committee initiative further to paragraph 6 of the Committee's structure and functions. In line with paragraph 9 of the Committee's structure and functions, the Committee decided that the United Kingdom should be invited to the Committee's thirty-second session (9-11 December 2014) to participate in the discussion an to present information and opinions on the matter under consideration."

33. Having read the Committee's letter, I was satisfied that there was a compelling reason for granting permission to appeal. There was a need for this Court to decide whether it was possible to give a definitive ruling as to the approach to likelihood in the EIA Directive, or whether there should be a reference of that question to the CJEU. I have explained in paragraphs 16-23 (above) why I consider that the Defendant was not required to apply the *Waddenzee* approach to the likelihood of significant transboundary environmental effects under Article 7 of the EIA Directive. This is not a court of final appeal. If we had to apply *CILFIT* I could not say that I was convinced that the other Member States and the CJEU would necessarily conclude that the "real risk" approach is the correct approach to the likelihood of significant effects on the environment for the purposes of the EIA Directive. Does this mean that a reference to the CJEU is necessary for the purpose of deciding this claim?

34. Mr. Swift acknowledged that the threshold for the likelihood of significant effects on the environment for the purposes of the EIA Directive is a very important issue, with EU-wide implications. However, both he and Miss Lieven QC on behalf of the Interested Party submitted that a reference to the CJEU was not necessary for the purpose of determining this claim for judicial review, because no matter how low the threshold for a likely significant effect on the environment might be set by the CJEU, the Defendant's decision dated 19th March 2013 would still be lawful.

35. I accept that submission. There is an artificiality in the Claimant's claim. The Defendant was not writing an academic dissertation on the concept of likelihood in the EIA Directive, he was deciding whether to grant development consent for a particular project: the construction of an EPR nuclear power station, HPC. In its submissions, the Claimant posited a stark contrast between the "real risk" and the "cannot be excluded on the basis of objective information", approaches, to the issue of likelihood in the EIA Directive. The distinction between these two approaches to likelihood is clear as a matter of abstract legal analysis, but the Defendant, unsurprisingly in the context of a proposal for the construction of a nuclear power station, did not purport to apply a "real risk" approach. The disagreement between the approach adopted by the Defendant and the approach advocated in the Austrian expert report was not a disagreement as to whether the "real risk" approach or the "cannot be excluded on the basis of objective evidence" approach should be applied to the risk of a serious nuclear accident. It was a disagreement as to the point at which the significant environmental effects of a severe nuclear accident could properly be "excluded on the basis of objective evidence." Was that point reached only when it had been demonstrated that the probability of such a severe accident was zero; or was the Defendant entitled to conclude that that point had been reached in this case because the probability of a severe accident was very remote indeed – in circumstances where the Austrian expert report had calculated the probability of such an accident to be as low as 1 in 10 million years of reactor operation?

36. The true nature of the dispute in this case – whether the exclusion of a significant environmental effect from the EIA process is permissible only if it has been demonstrated that there is no risk whatsoever of it occurring, or if exclusion is permissible where it has been demonstrated that the risk is extremely remote – emerges most clearly from the response of the Department of Energy and Climate to the letter dated 14th March 2014 from the Espoo Implementation Committee (paragraph 32 above). In its letter dated 19th June 2014 the Department maintained

that the present case was very different from the Danube Black Sea case in which there was no doubt that the Convention was engaged:

> "On any analysis, the risk of an accident occurring from the proposed new nuclear development at Hinkley Point C is extremely low. Given the very remote nature of the risk, it is difficult to quantify, and the estimates produced will depend to some extent on the accident scenarios considered. However, the literature on this issue is summarised in the European Commission's 2005 Report 'Externe – The Externalities of Energy, Methodology 2005 Update', which points to a probability of major accidents (core meltdown plus containment failure) in the UK of $4x10^{-9}$. This suggests that the potential for a major accident in the UK – the meltdown of the reactor's core along with failure of the containment structure – is one in 2.4 billion per reactor year; by comparison, it is thought that the risks of a meteorite over a kilometre hitting the earth, which could have significant global environmental impacts, could be one in 0.5 million per year. The Austrian Government also commissioned its own expert analysis of the risks of an accident from a new nuclear development at Hinkley Point C, which expressed the risk of an accident as being not expected to occur more frequently than once in every 10 million years of reactor operation. On no natural understanding of the term could such a remote risk be considered be constitute a 'likely significant effect'."

37. The Claimant's challenge to the Defendant's decision in this case does not simply depend upon the proposition that the Grand Chamber's approach in *Waddenzee* to the meaning of "likely to have a significant effect" in the Habitats Directive should be carried over into the EIA Directive, it also depends upon a very literal meaning being given to the Grand Chamber's words "cannot be excluded on the basis of objective information" in its judgment in *Waddenzee.* If a remote risk can properly be excluded, the Claimant does not challenge the Defendant's assessment that the remoteness of the risk in this case was such that it could be excluded. In order to succeed in this claim the Claimant has to establish that any risk, no matter how remote, cannot be excluded unless it has been demonstrated that there is no possibility of its occurring. It is, in effect a "zero risk" approach to the likelihood of significant environmental effects.

38. It would be surprising if the Grand Chamber had intended to impose such a high and inflexible threshold for "appropriate assessment", even in the context of the Habitats Directive. However purposive the interpretation of the Habitats Directive, its text cannot be ignored. The word "likely", and the concept of likelihood, implies at least some degree of flexibility. There comes a point when the probability (to use the word in Annex III to the EIA Directive) of a significant effect is so remote that it ceases to be "likely", however broad the concept of likelihood. In *Waddenzee* the Grand Chamber said that, following an appropriate assessment, a project could be authorised only if the competent authority "have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as

to the absence of such effects…." (see paragraph 17 above). Thus, certainty was equated with the absence of reasonable scientific doubt.

39. Even if the *Waddenzee* approach to likelihood is carried over into the EIA Directive, it must be open to a competent authority to conclude that the risk of a significant adverse effect on the environment is so remote (eg if it is more remote than the risk of a meteorite of over a kilometre hitting the earth) that there is "no reasonable scientific doubt" as to the absence of that adverse effect for the purpose of the EIA Directive. The competent authority does not have to be satisfied that there is no risk, however remote, that a severe nuclear accident will occur in order to be satisfied that there is "no reasonable scientific doubt" that such an accident will not occur. This approach is consistent with the guidance that is contained in the Planning Inspectorate's *Advice note 12: Development with significant transboundary impacts consultation.*

40. I do not accept Mr. Wolfe's submission that the Defendant failed to follow this advice from the Planning Inspectorate. When dealing with "Screening", and with those cases in which it is necessary for the Secretary of State to determine whether or not a proposed development is likely to have significant effects on the environment in another EEA State, the Advice note say this:

> "In reaching a view, the precautionary approach will be applied and following the court's reasoning in the Waddenzee case such that 'likely to have significant effects' will be taken as meaning that there is a probability or risk that the development will have an effect, and not that a development will definitely have an effect…"

Mr. Wolfe emphasised the reference to the CJEU's reasoning in *Waddenzee*; but the Advice note continues:

> "As a rule of thumb (taking the precautionary approach), unless there is compelling evidence to suggest otherwise, it is likely that the Planning Inspectorate may consider the following [Nationally Significant Infrastructure Projects] as likely to have significant transboundary impacts:
>
> - nuclear power stations; and
>
> - off-shore generating stations in a Renewable Energy Zone."

I accept Mr. Swift's submission that evidence that the risk of a severe nuclear accident is not merely unlikely, but extremely remote, is capable of being "compelling evidence" that a proposed nuclear power station is not likely to have significant transboundary effects, since it is common ground that such effects would be likely to occur only if there was such an accident.

41. The contrast between the evidential basis for the low level of risk in the present case and the extent of the scientific uncertainty in the *United Kingdom* case to which the CJEU referred by way of analogy in its judgment in *Waddenzee* (see paragraph 14 above) is instructive. In the *United Kingdom* case the Spongiform Encephalopathy Advisory Committee ("SEAC") had said that "it was not in a position to confirm

whether or not there was a causal link between BSE and the recently discovered variant of Creutzfeldt-Jacob disease, a question which required further scientific research" (paragraph 14). A similar position had been adopted by the Scientific Veterinary Committee of the European Union: while it was not possible on the available data to prove that BSE was transmissible to humans, in view of the possibility of such transmission, which the committee had always considered, it had recommended certain precautionary measures and that research on the question of transmissibility of BSE to humans be continued (paragraph 13). The recitals to the Directive that was challenged by the United Kingdom reflected the extent of the scientific uncertainty:

> "Whereas under current circumstances, a definitive stance on the transmissibility of BSE to humans is not possible; whereas a risk of transmission cannot be excluded; whereas the resulting uncertainty has created serious concern among consumers; ... "

42. In the present case, it is common ground that the probability of a severe nuclear accident is very low indeed. There may be an issue as to just how low that probability is (see the correspondence with the Implementation Committee, paragraph 36 above) but there is no doubt that the Defendant was entitled to describe it in his decision as a "very low probability". The issue, therefore, is whether the risk of a significant effect on the environment can properly be excluded on the basis of a very low probability, or only upon the basis of a zero probability. In this case we are concerned with a proposal for a nuclear power station, and the environmental consequences of a severe nuclear accident. In that context, for obvious reasons, "very low probability" means very low probability indeed, far below the levels of probability (or "risk") that might be regarded as acceptable in the context of other developments. Although Annex I to the EIA Directive includes other inherently dangerous projects, eg chemical installations for the production of explosives, where only the remotest of risks will be acceptable, the Directive covers a very wide range of projects in Annexes I and II. In the context of very many, if not most, of the projects listed in the Directive, it is difficult to see how it could seriously be contended that a significant effect on the environment which would not be expected to occur more frequently than once in every 10 million years could not properly be excluded from environmental impact assessment on the basis of objective information.

43. Annex III requires the Member States to consider both the magnitude and complexity of an environmental impact and the probability of such an impact when deciding whether an Annex II project is likely to have significant effect on the environment (see paragraph 22 above). As a matter of common sense, the greater the potential impact, the lower will be the level of probability at which the competent authority will decide that it should be subjected to the environmental impact assessment process: see Miller v North Yorkshire County Council, [2009] EWHC 2172 (Admin) per Hickinbottom J at paragraphs 31 and 32. This leaves an area of judgment for the competent authority – balancing the severity of any potential environmental harm against the probability of it occurring. It recognises the fact that some significant effects on the environment, eg a significant radiological impact, are much more significant than others. Given the wide range of projects covered by the EIA Directive and the express requirement to consider the probability of any impact, I am satisfied that, even if it is appropriate to apply the "cannot be excluded on the basis of

objective evidence" approach to the likelihood of significant effects on the environment in the EIA Directive, there is no realistic prospect of the Claimant's "zero risk" approach being adopted by the CJEU. I would add that our attention was not drawn to any decision of a Court in which the Claimant's approach to exclusion has been adopted. However purposive the interpretation of the EIA Directive, a "zero risk" approach to likelihood would be an interpretative step too far and would frustrate, rather than further the purpose of the Directive.

44. In reaching that conclusion, I have not ignored the views expressed by the Committee in its letter dated 14th March 2014. They provide the only possible support for a "zero risk" approach to the point at which a serious environmental impact may be excluded from the EIA process. While I respect the Committee's view, it is not the function of the Committee to give an authoritative legal interpretation of the Convention. The correspondence with the Committee makes it clear that there is a dispute as to the proper interpretation of the Convention. Article 15 makes provision for the settlement of such disputes. If the dispute cannot be resolved by negotiation between the Parties it may be either submitted to the International Court of Justice, or referred to arbitration in accordance with the procedure set out in Appendix VII to the Convention.

45. The Committee does have an important role in promoting best practice under the Convention, and it is noteworthy that its conclusion in paragraph 54 of Annex I to decision IV/2 - that even a low likelihood of a significant adverse transboundary environmental impact would trigger the obligation to notify affected parties in accordance with Article 3 of the Convention [Article 7 of the EIA Directive] - is expressly based upon its "*Guidance on the Practical Application of the Espoo Convention*", as endorsed by decision III/4. Thus, it would appear that the views expressed by the Committee are based upon a combination of its advice as to what would be best practice, and its view as to what is the legal position, under the Convention. I intend no criticism of the Committee when I say that, insofar as its decision in paragraph 54 of Annex I to decision IV/2 moves from advice as to what would be best practice to a statement of what the legal position is, it is not based upon any legal analysis (that is not surprising, the Committee is not a legally qualified body). Even if a "low likelihood" of a significant transboundary effect not merely should (as a matter of good practice), but does (as a matter of law) trigger the obligation to notify any affected party, the Committee will still have to consider the issue raised in this case: whether a "likelihood" may be so very low that it can be excluded for the purpose of transboundary consultation, or whether exclusion is permissible only when all risk has been eliminated. Of critical importance for present purposes, the Committee understandably focuses simply upon the terms of the Espoo Convention, and does not consider the need for the words "likely to have significant effects on the environment" to have a consistent meaning throughout the EIA Directive. For these reasons, the views expressed by the Committee in its letter dated 14th March 2014 do not persuade me that it is necessary for this Court to make a reference to the CJEU in order to determine this claim.

Ground 2

46. The judge dealt with this issue in paragraphs 177-193 of her judgment. She concluded in paragraph 193:

> "In my judgment there is no reason that precludes the Secretary of State from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control. Because of its existence, he was satisfied, on a reasonable basis, that he had sufficient information to enable him to come to a final decision on the development consent application. In short, the Secretary of State had sufficient information at the time of making his decision to amount to a comprehensive assessment for the purposes of the Directive. The fact that there were some matters still to be determined by other regulatory bodies does not affect that finding. Those matters outstanding were within the expertise and jurisdiction of the relevant regulatory bodies which the defendant was entitled to rely upon."

I agree with the judge. Had this ground of challenge stood alone I would not have granted the Claimant permission to apply for judicial review.

47. There is no dispute that the Defendant was in principle entitled to have regard to the UK nuclear regulatory regime when reaching a conclusion as to the likelihood of nuclear accidents: see *Gateshead Metropolitan Council v Secretary of State for the Environment* [1995] Env LR 37.

48. Many major developments, particularly the kind of projects that are listed in Annex I to the EIA Directive, are not designed to the last detail at the environmental impact assessment stage. There will, almost inevitably in any major project, be gaps and uncertainties as to the detail, and the competent authority will have to form a judgement as to whether those gaps and uncertainties mean that there is a likelihood of significant environmental effects, or whether there is no such likelihood because it can be confident that the remaining details will be addressed in the relevant regulatory regime. In paragraph 38 of his judgment in *R (Jones) v Mansfield District Council* [2004] 2 P & CR 14, Dyson LJ (as he then was) adopted paragraphs 51 and 52 of the judgment of Richards J (as he then was) which included the following passage:

> "It is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available to it and having regard to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant environmental effects. Everything depends on the circumstances of the individual case."

49. This is precisely what happened on the facts of the present case. The elaborate regulatory regime for nuclear power stations is described in the Witness Statements filed on behalf of the Defendant and the Interested Party. For present purposes, it is sufficient to note that by the time the Defendant made his decision dated 19th March 2013 the Office for Nuclear Regulation ("ONR") had issued a nuclear site licence, and both the ONR and the Environment Agency had completed the Generic Design Assessment (GDA) process, including a severe accident analysis, for the EPR, the type of reactor to be used at HPC. All of the GDA issues had been addressed, and the ONR had issued a Design Acceptance Confirmation ("DAC"). The ONR had said

that it was confident that the design was "capable of being built and operated in the UK, on a site bounded by the generic site envelope, in a way that is safe and secure". Site specific matters not covered by the GDA process would still need to be considered, but the ONR was confident that they could, and would, be addressed under the site licence conditions. As the ONR explained:

> "Whilst the GDA process, leading to the issue of a DAC, is not part of the licensing assessment, the successful completion of GDA does provide confidence that ONR will be able to give permission for the construction, commissioning and operation of a nuclear power station based on that generic design."

50. In view of this factual background, it might be thought that this case was the paradigm of a case in which a planning decision-taker could reasonably conclude that there was no likelihood of significant environmental effects because any remaining gaps in the details of the project would be addressed by the relevant regulatory regime. Undaunted, Mr. Wolfe submitted that there was a distinction between reliance upon a pollution regulator applying controls "which it has *already* identified in the light of assessments which it has *already* undertaken on the basis of a scheme which has *already* been designed", which he said was permissible, and reliance upon "*current*" gaps in knowledge "being filled by the fact of the *existence* of the pollution regulator [who] will make *future* assessments… on elements of the project still subject to design changes….", which was not.

51. There is no basis for this distinction, which is both unrealistic and unsupported by any authority. The distinction is unrealistic because elements of many major development projects, particularly the kind of projects within Annex I to the EIA Directive, will still be subject to design changes, and applying Mr. Wolfe's approach those projects will not have "already been designed" at the time when an environmental impact has to be carried out. The detailed design of many Annex I projects, in particular nuclear power stations, is an immensely complex, lengthy and expensive process. To require the elimination of the prospect of all design changes before the environmental assessment of major projects could proceed would be self-defeating. The promoters of such projects would be unlikely to incur the, in some cases, very considerable expense, not to mention delay, in resolving all the outstanding design issues, without the assurance of a planning permission. If the environmental impact assessment process is not to be an obstacle to major developments, the planning authority (in this case the Defendant) must be able to grant planning permission so as to give the necessary assurance if it is satisfied that the outstanding design issues – which may include detailed design changes – can and will be addressed by the regulatory process.

52. In support of his submission Mr. Wolfe relied on the decision of the CJEU in Case C-435/97 *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others* [1999] ECR 1-5613. *Bozen* was concerned with whether there was a power under Article 4(2) of the EIA Directive to exclude from the environmental impact assessment process, from the outset and in their entirety, certain classes of projects falling within Annex II (paragraph 35). Unsurprisingly, the CJEU decided that it was not permissible to exempt whole classes of projects in advance from the obligation to carry out a screening exercise. The criteria and/or the thresholds mentioned in Article 4(2) must "facilitate examination of the actual characteristics of any given project" (paragraph 37 emphasis added). No project should be exempt from environmental

assessment "unless the specific project excluded could, on the basis of a comprehensive assessment be regarded as not being likely to have [significant effects on the environment]." (paragraph 45 emphasis added)

53. *Bozen* was not concerned with the level of detail that is required about a project if, as in the present case, an environmental assessment is carried out. The CJEU was not asked to, and did not address the issue raised by Ground 2 in the present case: at what point may the competent planning authority conclude that it has sufficient information about the "actual characteristics" of a project, and/or that the environmental assessment is sufficiently "comprehensive", to enable it to decide that a significant environmental effect is not likely because any outstanding details will be satisfactorily addressed by the relevant pollution regulator.

54. I have considered Ground 2 upon the basis that, as submitted by the Claimant, it has a life of its own even if Ground 1 is rejected. In the abstract, the Claimant's submission is correct – the circumstances in which a planning authority may rely upon a pollution regulator is a separate issue – but on the facts of this case Ground 2 has no substance if Ground 1 is rejected. The Claimant does not contend that the Defendant's decision that severe nuclear accidents were very unlikely to occur was unreasonable. There has been no suggestion by any Member State, or any recognised scientific body, that such accidents are anything other than very unlikely. If Ground 1 is rejected, and it is concluded that the Claimant's "zero risk" approach is not well founded, there is nothing to suggest that the Defendant's assessment of the degree of unlikelihood of the risk of such accidents was erroneous. The views expressed by the ONR, the European Commission, the Austrian expert report and the Radiological Protection Institute of Ireland, were all to the same effect: that the risk of a severe nuclear accident is very low indeed. If the Defendant was not required to adopt a "zero risk" approach there is no basis for a submission that he should not have concluded that the risk was so unlikely that the environmental effects of such an accident should not be "scoped in" (ie should be excluded) for environmental impact assessment purposes.

**Conclusion**

55. A reference to the CJEU is not necessary. I would dismiss this application.

**Lady Justice Gloster**:

56. I agree.

**Lord Justice Longmore**:

57. I also agree.

Neutral Citation Number: [2014] EWHC 4108 (Admin)

Case No: CO/2725/14

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**PLANNING COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 5th December 2014

**Before** :

**MR JUSTICE GILBART**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **THE QUEEN**<br>**(on the application of)**<br>**FRACK FREE BALCOMBE RESIDENTS ASSOCIATION** | **Claimant** |
| **- and -** | |
| **WEST SUSSEX COUNTY COUNCIL** | **Defendant** |

(Transcript of the Handed Down Judgment of
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Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

***David Wolfe QC*** (instructed by **Leigh Day, Solicitors of London**) for the **Claimant**
***James Maurici QC*** (instructed by **Rebecca Moutrey, Solicitor, West Sussex County Council**) for the **Defendant**

Hearing dates: 7th-8th November 2014
Judgment
As Approved by the Court

**MR JUSTICE GILBART:**

1. I shall deal with this matter as follows

   a) Background facts

   b) The Claimant's and Defendant's cases in outline

   c) Determination of applications under section 70 *Town and Country Planning Act 1990*

   d) Relationship of planning control regime with other statutory regimes, and effect on the determination of planning applications

   e) Grounds 1-3 : submissions of Claimant and Defendant and Discussion

   f) Ground 4: submissions of Claimant and Defendant and Discussion

   g) Ground 6: submissions of Claimant and Defendant and Discussion

   h) Ground 7: submissions of Claimant and Defendant and Discussion

   i) Conclusions

   (Ground 5 was withdrawn after the Defendant WSCC served its Grounds for Resisting the Claim.)

2. This claim for judicial review seeks to quash the planning permission of 2nd May 2014 granted by West Sussex County Council ("WSCC"), as minerals planning authority, to Cuadrilla Balcombe Limited ("CBL") for

   > "temporary permission for exploration and appraisal comprising the flow testing and monitoring of the existing hydrocarbon lateral borehole along with site security fencing, the provision of an enclosed testing flare, and site restoration"

   at the Lower Stumble Hydrocarbon Exploration Site, London Road, Balcombe, West Sussex. The Claimant Frack Free Balcombe Residents Association ("FFBRA") was opposed to the application being granted. Permission was granted by Lang J to bring the claim. No reasons were given for the grant of permission, nor observations made.

3. I regret that this judgment is of some length. The Claimant's case involved examining aspects of the hearing before the WSCC planning committee and of the documents relating to it. It would not do justice to the Claimant's case were I not to refer to them, nor to the Defendant's case were I not to set out the effect of its arguments on the law.

## A *Background facts*

4. The proposed development requires a number of statutory authorisations in addition to the grant of minerals planning permission

a) from the Environment Agency ("EA") in relation to drilling and testing. It addresses the protection of water resources (including groundwaters), treatment of mining waste, emissions to air, the treatment of naturally occurring radioactive substances, and the chemical content of fluids used in operations. A permit had already been granted.

b) from the Department of Energy and Climate Change ("DECC") pursuant to section 3 of the *Petroleum Act 1998* and which issues petroleum licences and consents for drilling, flaring and venting, including the assessment and monitoring the risk of seismic activity (see *Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations 2014*);

c) from the Health and Safety Executive ("HSE") which, pursuant to the *Borehole Sites and Operations Regulations 1995* (SI 1995/2038) addresses the safety aspects of all phases of extraction, including the design and construction of well casings within a borehole. By Regulation 7 "The health and safety document"

> (1) No borehole operation shall be commenced at a borehole site unless the operator has ensured that a document (in these Regulations referred to as "the health and safety document") has been prepared, which—
>
> > (a) demonstrates that the risks to which persons at the borehole site are exposed whilst they are at work have been assessed in accordance with regulation 3 of the Management Regulations;
> >
> > (b) demonstrates that adequate measures, including measures concerning the design, use and maintenance of the borehole site and of its plant, will be taken to safeguard the health and safety of the persons at work at the borehole site; and
> >
> > (c) includes a statement of how the measures referred to in sub-paragraph (b) will be co-ordinated."

The HSE has its usual enforcement powers under sections 22-3 of the *Health and Safety at Work Act 1974.*

5. The application for the planning permission at issue in these proceedings was made by CBL on 3rd December 2013 and followed the drilling of a vertical and lateral well at the site during the summer of 2013. This drilling was done pursuant to an earlier planning permission granted in 2010 to

> "upgrade existing stoned platform and drill and exploratory borehole for gas and oil exploration"

This earlier permission was time limited to a period of 3 years from the date of commencement of site construction. Site implementation works were carried out in September 2010, but no further operations took place until drilling commenced

in July 2013. The operations on site had all necessary permits from the relevant regulatory authorities.

6. On 14th January 2014 a screening opinion determined that the proposal did not have the potential for significant effects on the environment within the meaning of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2011*, so that no Environmental Impact Assessment was required. There has been no challenge to that decision.

7. As is I think well known, the operations under the previous permission had excited considerable opposition from those who disapprove of the use of hydraulic fracturing ("fracking") to extract shale gas. That had led to a great deal of protest taking place near the application site. On 14th November 2013, WSCC obtained an order in the High Court from His Honour Judge Seymour QC sitting as a Judge of the High Court against named Defendants as representatives of those currently protesting on the B 2036 London Road, other named Defendants and persons unknown, whereby

   a) WSCC was granted possession of land

   b) named Defendants and unknown Defendants served with the Order were restrained from camping or residing on the land, or obstructing or interfering with its use by the Council, save for lawful passage and repassage and save for peaceful assembly and freedom of association for the purposes of freedom of expression within Articles 10 and 11 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("ECHR") within a defined area set aside for protest opposite the site entrance, which was not to be used at night, and upon which they could not reside, camp, remain overnight or erect any tent, caravan, shed or shelter;

   c) the named Defendants and those subsequently served were to remove all personal property from the land, including any tent, caravan, shed or shelter or camping paraphernalia, and were also to remove any obstruction from the land.

8. In November 2013, WSCC had published a sheet of answers to "Frequently Asked Questions" ("FAQs") about onshore hydrocarbons including Hydrocarbon Extraction, and Hydraulic Fracturing ("Fracking"). I shall refer to its contents in due course (reference to it formed a part of the Claimants' case), but its purpose was plainly (and commendably, given the degree of public concern or interest on the topic) to assist the residents of areas where proposals were made to have a more informed grasp of the issues and of how planning control related to other statutory regulatory regimes. It was however published before the date of the application for planning permission, but it does refer to the CBL proposals (see its section H).

9. An issue arose in the hearing about the content of the application so far as the assessment of emissions to air was concerned. I shall deal with that question, and the issue of the application for, and grant of, the EA permit, when I deal with Grounds 1 to 3.

10. After the application was submitted, statutory consultation replies were received from, among others, the local planning authority (Mid Sussex District Council) Balcombe Parish Council, the EA, the HSE, WSCC Drainage, WSCC Highways, Southern Water, Sussex Police and the three neighbouring parish councils of Ardingly, Ansty and Staplefield , and Worth.

11. I shall deal in due course with the comments received from the EA and the HSE.

12. Representations were also received from Public Health England ("PHE"), and objections from Sussex Wildlife and from CPRE Sussex Countryside Trust. 889 objections were received from others, with 9 representations in support. The objection of the claimant FFBRA was noted, as was the fact that it had 300 members. The issues raised by objectors were summarised in the officer's report.

13. The FFBRA objection consisted of a 67 page document, with appendices, which was well prepared and argued. In particular, the section on emissions to air had plainly been drawn up with the assistance of someone with some knowledge of emissions modelling and monitoring.

14. I have noted the quality of the FFBRA objection. So too must I note the quality of the officer's report to committee by Ms Jane Moseley, a Principal Planner on behalf of the Strategic Planning Manager. It is itself 37 pages long, and contains an executive summary, a very full description of the proposals and of the consultations received, and a thorough consideration of the issues raised. While some criticisms are made of it by Mr Wolfe for FFBRA, it is in my judgment well written, informative and clear. I shall in due course consider some aspects of that report to which Mr Wolfe and Mr Maurici drew my attention.

15. At the meeting of the Planning Committee, which determined the application on 29th April 2014, many people attended. So did two representatives of the EA. Minutes were taken, and I have also been shown a transcript of what took place. The meeting took from 10.30 to 2.45 pm. It proceeded as follows:

    a) the officer Ms Moseley introduced her report. She also produced details of some amended proposed conditions. Her presentation included photographs of the site, an account of the representations received and a list of the issues. She also informed the Committee that at a very late stage (that morning) the solicitors for FFBRA had delivered a letter requesting deferral of the meeting. That request was rejected. It is not suggested before me that the planning committee had acted unlawfully in doing so;

    b) Mr Kevin Bottomley spoke against the proposal for Balcombe Parish Council;

    c) Miss Sue Taylor, Vice Chair of FFBRA spoke against the proposal;

    d) Mrs Louisa Delpy, a local resident, spoke against the proposal;

    e) Mr Charles Metcalfe, a local resident, spoke against the proposal;

    f) Mr Rodney Jago, a local resident, spoke in support of the proposal;

g) Mr Nigel Gould, of Ove Arup, planning consultants, spoke on behalf of CBL in support of the proposal;

h) County Councillor William Acraman spoke against the proposal;

i) The Chairwoman asked Ms Moseley to comment on what had been said thus far;

j) WSCC Committee members were then asked to make their contributions. After the first County Councillor had spoken , the Chairwoman asked the WSCC legal adviser and Mr Wick of the EA to provide information;

k) County Councillor Mullins then asked questions, and then raised a question to which I shall devote more attention when I come to deal with ground 7 raised by the claimants. She referred to the disruption caused, and what she described as the consequent distress to the local community by the protest that went on. Then she referred to the

> "……cost to West Sussex. Whatever we decide here will have an ongoing effect on what happens in the future…..I would like to ask how much it actually did cost West Sussex County Council to actually have this…action happening in this area. We have no guarantee that this is not going to happen again and can the council actually afford millions and millions of pounds to enable companies to extract….."

She was then stopped by the Chairwoman, who asked for the view of the legal advisers to the WSCC. The Committee was advised that the matter could only be decided on planning grounds and that such costs and expenses were not relevant to the determination of the application. County Councillor Mullins then accepted that the issue should not affect how the Committee determined the application.

l) Other members raised issues relating to noise re noise and traffic. Reference was made to issues of noise monitoring and the routing of HGVs.

m) The committee then discussed what planning conditions should be attached to the permission. I shall refer to those conditions shortly.

16. During the course of the discussions which took place at the committee meeting there were a number of occasions upon Miss Moseley gave advice relating to the way in which the committee should deal with matters which could also be dealt with by the other statutory bodies. When I come to deal with Ground 1 of the Claimant's case I shall refer to that in more detail. I shall also refer to other advice given by Miss Moseley and by the legal officer to the council. I do so because Mr Wolfe places some reliance on what he says were pieces of improper advice given to the committee.

17. The application was granted subject to 20 conditions, dealing inter alia with

a) Timescale: all operations approved were to be completed within 6 months (condition 2).

b) Scope of development: the proposed development was not to take place other than in accordance with plans and documents set out in the condition, together with supporting information, including Version 2 of the Planning Statement submitted by CBL, as varied by the conditions. High pressure hydraulic fracturing was not to take place as part of the development (Condition 2).

c) Pollution Prevention Statement: development was not to begin until such a statement had been submitted to, and approved by, WSCC setting out details of the construction of the engineered site to prevent pollution. It was to include details of an impermeable membrane, and detailed pollution prevention assessments and mitigation methods to prevent pollution of the water environment. It was to be implemented in full and maintained throughout the development (Condition 6).

d) Surface water: development was not to begin until a scheme dealing with surface water drainage had been submitted (and in doing so to follow an approved Drainage Strategy Report) and approved by WSCC. Details of what it must contain were set out (Condition 7).

e) Traffic management: development was not to begin until a traffic management plan had been submitted to and approved by WSCC. It was to include details of the number, type and frequency of vehicles used in the development, their access and routing (including consideration of routing to the south), security hoarding (if relevant), the provision of works required to mitigate the impact of development on the highway, details of public engagement, traffic management such as timing restrictions and signage, and measures to avoid HGVs travelling past Balcombe CE Primary School for periods before and after the beginning and end of the school day (Condition 10).

f) Noise: noise limits were set for the noise from the development, to be measured at a property. There was to be continuous monitoring of noise levels at that location, with weekly submissions to WSCC (or on request) and provision for mitigation (Conditions 12-13). Development was not to begin until a Noise management Plan had been submitted and approved (Condition 14).

g) Development was not to begin until a scheme had been submitted to WSCC and approved for the establishment of a liaison group to include representatives from CBL, WSCC and local residents (Condition 20).

18. An “Informative” advised the applicant CBL to contact the Highway Authority to enter into an agreement under s 59 *Highways Act 1980* to recover any costs caused by the passage of construction traffic.

**B** ***The Claimant’s and Defendant’s cases in outline***

19. The Claimant, represented by Mr Wolfe QC argues that

a) the Planning Committee was wrongly advised that it should leave matters such as pollution control, air emissions and well integrity to the EA, HSE and other statutory bodies;

b) the Committee was misled with regard to the views of PHE on air emissions monitoring, and of HSE on well integrity;

c) the Committee was wrongly advised to treat as immaterial evidence of past breaches of planning condition by CBL;

d) the Committee was wrongly advised that the number of objections received (as opposed to their content) was immaterial;

e) the Committee was wrongly advised that the issue of the costs generated by protests at the activities of CBL was immaterial.

20. The Defendant, represented by Mr Maurici QC, argues that:

a) the approach to matters dealt with under other statutory regimes was quite consistent with national policy and with well established legal authority;

b) the Committee treated the issue of the effects on the environment as material. It was quite entitled to assume that they would be addressed by the relevant statutory agencies ;

c) the Committee was not misled about the views of PHE, nor about the issue of well integrity and the conduct of HSE;

d) the Committee was properly advised about relevance of past breaches. In any event, they were addressed by the conditions which could be attached to the permission, or had already been addressed;

e) the Committee was not wrongly advised on the topic of objections. The Committee was aware of them, and of the numbers. The Committee was entitled to treat the numbers as being immaterial as opposed to the weight to be attached to their contents;

f) the Committee should not have had regard to the costs of dealing with protests.

**C** ***Determination of planning applications under s 70 Town and Country Planning Act 1990 (TCPA 1990)***

21. A Planning Authority when determining a planning application

a) must have regard to

a) the statutory development plan

b) any local finance considerations, so far as material to the application, and

c) any other material considerations.

b) Must determine the proposal in accordance with the development plan unless material considerations indicate otherwise.

(see s 70(1) *TCPA 1990* as amended by the *Localism Act 2011* s 143 and section 38(6) *Planning and Compulsory Purchase Act 2004*)

22. National Planning Policy is par excellence a material consideration. I refer to the lucid exposition of this topic by Lindblom J *in Cala Homes (South) Ltd v Secretary of State for Communities & Local Government* [2011] EWHC 97 (Admin), [2011] JPL 887 at paragraph 50

> "50 The power of a minister to issue a statement articulating or confirming a policy commitment on the part of the government does not derive from statute. As was noted by Cooke J. in *Stringer* (at p.1295), section 1 of the Town and Country Planning Act 1943 imposed on the minister a general duty to secure consistency and continuity in the framing and execution of a national policy for the use and development of land. Although that duty was repealed by the Secretary of State in the Environment Order 1970, Mr Mould submitted, and I accept, that it still accurately describes the political responsibility of the Secretary of State for planning policy. The courts have traditionally upheld the materiality of such policy as a planning consideration. In his speech in *Tesco Stores Limited* (at p. 777F) Lord Hoffmann acknowledged that the range of policy the Secretary of State may promulgate is broad. The example cited by Lord Hoffmann was "a policy that planning permissions should be granted only for good reason". In *ex parte Kirkman* Carnwath J. said (at pp. 566 and 567):
>
> > "… A distinction must be drawn between (1) formal policy statements which are made expressly, or are by necessary implication, material to the resolution of the relevant questions, (2) other informal or draft policies which may contain relevant guidance, but have no special statutory or quasi-statutory status.
> >
> > Even though the planning Acts impose no specific requirement on local planning authorities to take account of Government policy guidance, it is well established that it should be treated, so far as relevant, as a material consideration (see *Gransden v. Secretary of State, ex parte Richmond L.B.C.* [1996] 1 W.L.R. 1460, 1472). Given the Secretary of State's general regulatory and appellate jurisdiction under the Acts, his policies, and those of the Government of which he forms part, they can no doubt be regarded as "obviously material" within the *Findlay* tests. The same can be said of his policies in respect of the Environment Protection legislation …"
>
> In *Re Findlay* [1985] A.C. 318, to which Carnwath J. referred there, Lord Scarman approved (at p. 333) as a "correct statement of principle" the following observations made by Cooke J. in *Creed N.Z. Inc. v. Governor-General* [1981] 1 N.Z.L.R. 172 (at p. 183):
>
> > "… What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by

the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken unto account, or even that it is one which many people, including the Court itself, would have taken into account if they had to make a decision."

and

"… There will be some matters so obviously material to a decision on a particular project that anything short of direct consideration by the ministers … would not be in accordance with the intention of the Act."

23. No one has suggested to me in this matter that statements of national planning policy are anything other than material.

24. I shall turn to the definition of "local finance consideration" below.

**D** ***Relationship of planning control regime with other statutory regimes, and effect on the determination of planning applications***

25. Planning control is but one of the statutory regimes which can affect the carrying out of a development, or its use. At paragraph 4 above I have set out the various statutory regimes in play here. They do not all operate in the same way. Thus, while a planning permission cannot be revoked or modified by the minerals or local planning authority (as the case may be) without giving rise to a liability to compensation (see *s 97-100 TCPA 1990*) (and such revocations or modifications are therefore extremely rare) a permit from the EA can be modified by the EA to reflect changes in circumstance or knowledge without a right to compensation – see Regulation 20 of the *Environmental Permitting (England and Wales) Regulations 2010***.** (A planning permission may only be changed without there being an entitlement to compensation where the owner proposes the change, and then only so far as its conditions are concerned - see s *96A TCPA 1990* as amended).

26. Plainly, while the effect of an activity on the environment is a material consideration, so too is the existence of a statutory code or codes which address(es) the effect(s) being considered. Thus, the generation of airborne emissions or the potential for contamination of groundwaters are matters falling squarely within the purview of the EA permit regime: similarly, well integrity falls within the purview of DECC and of the HSE, and so on. Some fall within the remit of more than one statutory body.

27. It is therefore sensible that where one has a statutory code to address some technical issue, one should not use another statutory regime as an alternative way of addressing the issue in question.

28. It has been the stated policy of the First Secretary of State and his predecessor Secretaries of State for many years that while the effects of emissions to air or water generated by an installation are a material planning consideration, yet the planning system should recognise that the judgments on the acceptability of those emissions in pollution control terms are to be made by the pollution control authorities/regulators, whose judgments should then be accepted by the planning

system. That has been extended to the interrelationship between planning control and other statutory codes.

29. In paragraph 122 , within Chapter 11 of the National Planning Policy Framework, it is stated that

> …….. local planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities.

30. In the policy specific to Minerals Planning, which is of application here, under the heading "Assessing environmental impacts from minerals extraction" this appears at paragraph 12;

> "What is the relationship between planning and other regulatory regimes?
> The planning and other regulatory regimes are separate but complementary. The planning system controls the development and use of land in the public interest and, as stated in paragraphs 120 and 122 of the National Planning Policy Framework, this includes ensuring that new development is appropriate for its location – taking account of the effects (including cumulative effects) of pollution on health, the natural environment or general amenity, and the potential sensitivity of the area or proposed development to adverse effects from pollution."

31. Paragraphs 13 and 14 continue

> 13 What are the environmental issues of minerals working that should be addressed by mineral planning authorities?
>
> The principal issues that mineral planning authorities should address, bearing in mind that not all issues will be relevant at every site to the same degree, include:
>
> - noise associated with the operation
> - dust;
> - air quality;
> - lighting;
> - visual impact on the local and wider landscape;
> - landscape character;
> - archaeological and heritage features ……..
> - traffic;
> - risk of contamination to land;
> - soil resources;
> - geological structure;
> - impact on best and most versatile agricultural land;
> - blast vibration;
> - flood risk;

- land stability/subsidence;
- internationally, nationally or locally designated wildlife sites, protected habitats and species, and ecological networks;
- impacts on nationally protected landscapes (National Parks, the Broads and Areas of Outstanding Natural Beauty);
- nationally protected geological and geo-morphological sites and features;
- site restoration and aftercare;
- surface and, in some cases, ground water issues;
- water abstraction.

14 What issues are for other regulatory regimes to address?

Since minerals extraction is an on-going use of land, the majority of the development activities related to the mineral operation will be for the mineral planning authority to address. However, separate licensing, permits or permissions relating to minerals extraction may be required. These include:

- permits relating to surface water, groundwater and mining waste, which the Environment Agency is responsible for issuing;
- European Protected Species Licences, issued by Natural England (where appropriate), and;
- ……..

Hydrocarbon extraction will involve other regulations."

32. That approach is not new. It existed (for example) in earlier planning policy guidance, PPG 23 **"***Planning and Pollution Control*" which was published in the light of the leading authority of *Gateshead MBC v Sec of State for Environment* [1994] Env LR 37, 1 PLR 85, which endorsed this approach as the sensible one to adopt. That case concerned a proposed incinerator, which would be the subject of what was then Her Majesty's Inspectorate of Pollution, the predecessor in this field of the EA. I refer to the judgment of Glidewell LJ (sitting with Hobhouse and Hoffman LJJ), who gave the lead judgment dismissing an appeal from Mr Jeremy Sullivan QC (as he then was, sitting as a deputy judge) where the local planning authority challenged the grant of planning permission on appeal, on the grounds that (inter alia) the Secretary of State had been wrong to conclude that the powers of the then regulator (Her Majesty's Inspectorate of Pollution) were sufficient to deal with concerns over releases. Glidewell LJ referred to passages from *This Common Inheritance; Britain's Environmental Strategy*, which was then draft Government policy;

> "……..Mr David Mole QC, for Gateshead, has referred us to two paragraphs in particular. These are:
>
> > 125. It is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies (including local authorities in their non-planning functions). Planning controls are not an

> appropriate means of regulating the detailed characteristics of industrial processes. Nor should planning authorities substitute their won judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over these matters.
>
> 126……The dividing line between planning and pollution control is therefore not always clear-cut……

Neither……..are statements of law. Nevertheless, it seems to me they are sound statements of common sense. Mr Mole submits, and I agree, that the extent to which discharges from a proposed plant will necessarily or probably pollute the atmosphere……is a material consideration to be taken into account when deciding to grant planning permission. The deputy judge accepted that submission also. But the deputy judge said at page 17 of his judgment, and in this respect I also agree with him

> "Just as the environmental impact of such emissions is a material consideration, so also is the existence of a stringent regime under the EPA" (Environmental Protection Act 1990) "for preventing or mitigating that impact (or) rendering any emissions harmless. It is too simplistic to say "the Secretary of State cannot leave the question of pollution to the EPA.""

33. Glidewell LJ also said at [1994] Env LR 49

> "The central issue is whether the Secretary of State is correct in saying that the controls under the *Environmental Protection Act are* adequate to deal with the concerns of the Inspector and assessor. The decision which was to be made on the appeal to the Secretary of State lay in the area in which the regimes of control under the Planning Act and the Environmental Pollution Act overlapped. If it had become clear at the inquiry that some of the discharges were bound to be unacceptable so that a refusal by HMIP to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission.
>
> But that was not the situation…….Once the information about air quality at both of those locations was obtained, it was a matter for informed judgment, i) what, if any, increases in polluting discharges of varying elements into the air were acceptable, and ii) whether the best available techniques etc would ensure those discharges were kept within acceptable limits.
>
> Those issues are clearly within the competence and jurisdiction of HMIP. If in the end the Inspectorate conclude that the best available techniques etc would not achieve the results required by section 7(2) and 7(4) it may well be that the proper course would be for them to refuse an authorization. …….they" (HMIP) "should not consider that the grant of planning permission inhibits them from refusing authorisation if they decide in their discretion that this is not the proper course.
>
> The Secretary of State was, therefore, justified in concluding that the areas of concern which led to the Inspector and the assessor recommending refusal were matters which could properly be decided by HMIP, and that their powers were adequate to deal with those concerns."

34. It can thus be seen that the Court of Appeal endorsed what was then the approach in national policy, and remains so, as "sound common sense." The *Gateshead* approach has been followed ever since. In *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379 [2012] Env LR 34 a challenge was made to a grant on appeal of planning permission for an "energy from waste" plant. The Inspector and Secretary of State had relied upon an EA permit as showing that there was no need for an appropriate assessment of the permission – the main issue being emissions into the air. Carnwath LJ accepted that approach, stating at paragraph 30, 34 and 38:

> "30. … there was no misdirection. The inspector was not saying that the emissions were irrelevant to the planning decision, but was simply following the well-established principle, approved by this court in *Gateshead MBC v Secretary of State* (1971) 71 P. & C.R. 350 (citing the then current policy guidance, which is reflected in similar guidance today) that:
>
> > "It is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies… Nor should planning authorities substitute their own judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over those matters."
>
> …
>
> 34. … He observed correctly that the control of such emissions in this case was a matter for the Environment Agency. Although the overall planning judgment was one for the Secretary of State, he was entitled to be guided on this issue by the agreed position of the two specialist agencies. That was entirely consistent with the familiar approach approved in cases such as *Gateshead*. Mr Wolfe was right not to put this point at the forefront of his case.
>
> 38. By the same token, in so far as the possibility of harm to those interests arose from stack emissions, he was entitled – in either capacity – to be guided by the expertise of the relevant specialist agencies, the Environment Agency and Natural England. It would be only if their guidance was shown to be flawed in some material way that his own decision, relying on that guidance, would become open to challenge for the same reason."

35. In *R (An Taisce (The National Trust for Ireland) v The Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin) Patterson J was considering an application by An Taisce to seek permission to apply for judicial review of a decision on the part of the Secretary of State for Energy and Climate Change (the defendant) to grant a development consent order on the 19th March 2013 for a new nuclear power station at Hinkley Point C. One of the points taken by the Claimant was that it was wrong for the Secretary of State to have relied on

the future exercise of regulatory controls. Patterson J (who is of course very experienced indeed in this area of the law), said this:

177. "The claimant submits that the decision maker cannot have regard to the future role of the regulatory regime. The defendant submits that it would be odd if that was indeed the case. There is nothing in the Directive or Article 7 to require regulatory standards to be disregarded. Further, regulation by ONR" (Office of Nuclear Regulation) "penetrates the entire design so that it is inseparable from the scheme being advanced. As a result ONR is an integral part of the proposal and a key characteristic of the development itself.

178. The existence of another regulatory regime with powers which overlap with the regime of control under the Town and Country Planning Act is not new. The case of *Gateshead MBC v Secretary of State for the Environment* [1995] Env LR 37 dealt with an application to construct and operate an incinerator for the disposal of clinical waste. …….

36. Patterson J then referred to the passage from Glidewell LJ in *Gateshead* [1995] Env LR 49 set out above, and went on

180. "The position in *Gateshead* is analogous to the situation here. First, there is no doubt that the existence of a stringent regime for authorisation and planning control is a clear material consideration. Second, where, as here, at the time of the development consent determination the matters to be left over for determination by another regulatory body were clearly within the competence and jurisdiction of that body, as they are here within the remit of ONR it is, in principle, acceptable for the Secretary of State not only to be cognisant of their existence but to leave those matters over for determination by that body.

181. At the time of the Secretary of State's consideration of whether to grant development consent there was no evidence to suggest that the risk of an accident was more than a bare and remote possibility. In the instant case the regulatory regime is in existence precisely to oversee the safety of nuclear sites. There is nothing in the Directive and Article 7, in particular, to require the regulatory regime to be disregarded. NPS EN-6 refers to reliance being placed in the DCO process on the licensing and permitting regulatory regime for nuclear power stations, to avoid unnecessary duplication and delay and to ensure that planning and regulatory processes are focused in the most appropriate areas. *It would be contrary to the accepted principle in Gateshead not to have regard to that regime, and in my judgment it would also be entirely contrary to common sense"*. (My italics)

182. "The claimant has relied upon a large number of cases as set out above. The defendant and interested party submit that the claimant has either misread or misapplied them.

183. The case of *Lebus"* (*R (on the application on Lebus) v South Cambridgeshire District Council* [2003] ENV LR 17) "concerned whether there was a screening opinion for EIA development. But the case also

concerned a further error of law which was that the question was not asked whether the development described in the application would have significant environmental effects but rather whether the development as described and subject to certain mitigation measures would have certain environmental effects. It was held not to be appropriate for a person charged with making a screening opinion to start from the premise that although there may be significant impacts they could be reduced in significance as a result of implementation of conditions of various kinds. What was required was a clear articulation in the application of the characteristics of the development proposed and mitigation to offset any harm.

184. The case of *Gillespie*" (*Gillespie v First Secretary of State* [2003] 3 PLR 20) "established that the Secretary of State was not obliged to ignore remedial measures submitted as part of the planning proposal when making his screening decision. Pill LJ said ( at paragraph 36),

"In making his decision, the Secretary of State is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision."

185. The submission that when considering a screening decision the proposed development was the proposal shorn of remedial measures incorporated into it was rejected on the basis that it would be to ignore the "actual characteristics" of some projects. The problem there was that the disputed condition 6 required future site investigations to be undertaken to establish the nature, extent and degree of contamination present on site. Until that was done a scheme for remediation could not be proposed. That was held to be too open and too uncertain. That is very different from the instant case where extensive design work, licensing work and site investigation has been carried out, the overall design and site licence have been approved and the final solutions are in the process of being worked up.

186. The case of *Blewett" (R (Blewett) v Derbyshire CC* [2003] EWHC 2775 (Admin)) "concerned an application for judicial review of a planning permission for the third phase of a large landfill site. The application was accompanied by an environmental statement in accordance with the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. The argument was that the environmental statement was defective as it did not include an assessment of the potential impact on the use of the proposed landfill on groundwater. The planning authority had left those matters to be assessed after planning permission and had granted the permission assuming that complex mitigation measures would be successful. The measures described refer to the appropriateness of the lining system and site design being assessed as part of the integrated pollution prevention and control permit application. It was held that,

"Reading the environmental statement and the addendum report as whole, it is plain that a particular cell design, which is not in the least unusual, and a lining system were being proposed. The details of that system could be adjusted as part of the IPPC authorisation process… The defendant had placed constraints

upon the planning permission within which future details had to be worked out."

187. The role of the EA, as the authority that would be in charge of the IPPC process was considered. They had initially been concerned that existing contamination had not been adequately addressed. There was an addendum report to address that concern. After receipt of that they acknowledged that the issue had been discussed but said that no final remediation strategy had been proposed. Sullivan J continued [66],

"If the Environment Agency had had any concern in the light of the geological and hydrogeological information provided in the addendum report as to the remediation proposals contained therein, then it would have said so. Against this background the defendant was fully entitled to leave the detail of the remediation strategy to be dealt with under condition 29. "

188. The role of the authorising body was thus clearly taken into account and, given their lack of objection, the decision maker had been fully entitled to leave the detail of the measures to deal with ground water pollution to be assessed after planning permission had been granted. As a matter of law, therefore, the role of another regulatory body is clearly a material consideration in the determination of development consent. ……..

193. In my judgment there is no reason that precludes the Secretary of State from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control. Because of its existence, he was satisfied, on a reasonable basis, that he had sufficient information to enable him to come to a final decision on the development consent application. *In short, the Secretary of State had sufficient information at the time of making his decision to amount to a comprehensive assessment for the purposes of the Directive. The fact that there were some matters still to be determined by other regulatory bodies does not affect that finding. Those matters outstanding were within the expertise and jurisdiction of the relevant regulatory bodies which the defendant was entitled to rely upon.*" (My italics)

37. There was an unsuccessful appeal by the Claimant against that decision on this (and another) ground to the Court of Appeal – see [2014] EWCA Civ 1111. Sullivan LJ, with whom Longmore and Gloster LJJ agreed, said

45. " Ground 2

46. The judge dealt with this issue in paragraphs 177-193 of her judgment. She concluded in paragraph 193.....":

Sullivan LJ then cited it, and went on;

"I agree with the judge. Had this ground of challenge stood alone I would not have granted the Claimant permission to apply for judicial review.

47. There is no dispute that the Defendant was in principle entitled to have regard to the UK nuclear regulatory regime when reaching a conclusion as to the likelihood of nuclear accidents: see *Gateshead Metropolitan Council v Secretary of State for the Environment* [1995] Env LR 37.

48. Many major developments, particularly the kind of projects that are listed in Annex I to the EIA Directive, are not designed to the last detail at the environmental impact assessment stage. There will, almost inevitably in any major project, be gaps and uncertainties as to the detail, and the competent authority will have to form a judgment as to whether those gaps and uncertainties mean that there is a likelihood of significant environmental effects, or whether there is no such likelihood because it can be confident that the remaining details will be addressed in the relevant regulatory regime. In paragraph 38 of his judgment in *R (Jones) v Mansfield District Council* [2004] 2 P & CR 14, Dyson LJ (as he then was) adopted paragraphs 51 and 52 of the judgment of Richards J (as he then was) which included the following passage:

> "It is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available to it and having regard to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant environmental effects. Everything depends on the circumstances of the individual case."

49. This is precisely what happened on the facts of the present case. The elaborate regulatory regime for nuclear power stations is described in the Witness Statements filed on behalf of the Defendant and the Interested Party. For present purposes, it is sufficient to note that by the time the Defendant made his decision dated 19th March 2013 the Office for Nuclear Regulation ("ONR") had issued a nuclear site licence, and both the ONR and the Environment Agency had completed the Generic Design Assessment (GDA) process, including a severe accident analysis, for the EPR, the type of reactor to be used at HPC. All of the GDA issues had been addressed, and the ONR had issued a Design Acceptance Confirmation ("DAC"). The ONR had said that it was confident that the design was "capable of being built and operated in the UK, on a site bounded by the generic site envelope, in a way that is safe and secure". Site specific matters not covered by the GDA process would still need to be considered, but the ONR was confident that they could, and would, be addressed under the site licence conditions. As the ONR explained:

> "Whilst the GDA process, leading to the issue of a DAC, is not part of the licensing assessment, the successful completion of GDA does provide confidence that ONR will be able to give

permission for the construction, commissioning and operation of a nuclear power station based on that generic design."

50. In view of this factual background, it might be thought that this case was the paradigm of a case in which a planning decision-taker could reasonably conclude that there was no likelihood of significant environmental effects because any remaining gaps in the details of the project would be addressed by the relevant regulatory regime. Undaunted, Mr. Wolfe submitted that there was a distinction between reliance upon a pollution regulator applying controls "which it has *already* identified in the light of assessments which it has *already* undertaken on the basis of a scheme which has *already* been designed", which he said was permissible, and reliance upon "*current*" gaps in knowledge "being filled by the fact of the *existence* of the pollution regulator [who] will make *future* assessments… on elements of the project still subject to design changes….", which was not.

51. *There is no basis for this distinction, which is both unrealistic and unsupported by any authority.* (My italics) The distinction is unrealistic because elements of many major development projects, particularly the kind of projects within Annex I to the EIA Directive, will still be subject to design changes, and applying Mr. Wolfe's approach those projects will not have "already been designed" at the time when an environmental impact has to be carried out. The detailed design of many Annex I projects, in particular nuclear power stations, is an immensely complex, lengthy and expensive process. To require the elimination of the prospect of all design changes before the environmental assessment of major projects could proceed would be self-defeating. The promoters of such projects would be unlikely to incur the, in some cases, very considerable expense, not to mention delay, in resolving all the outstanding design issues, without the assurance of a planning permission. If the environmental impact assessment process is not to be an obstacle to major developments, the planning authority (in this case the Defendant) must be able to grant planning permission so as to give the necessary assurance if it is satisfied that the outstanding design issues – which may include detailed design changes – can and will be addressed by the regulatory process. …….”

38. It is right to emphasise that *R (Jones) v Mansfield District Council* is not to be taken as implying that, in the event that some issue has arisen about environmental effects, the local planning authority *cannot* decide that the matter may be left to the other statutory body to decide. That principle was reiterated in the important Supreme Court authority of *Morge v Hampshire County Council* [2011] UKSC 2, which considered the relationship of planning control and the Habitats Directive 92/43/EEC of the European Union. The scheme in question was a busway between Fareham and Gosport. The proposed new rapid busway was to run along the path of an old railway line, last used in 1991. Although most of the scheme lay

within a built-up area, there are a number of designated nature conservation sites nearby and, once the railway line had ceased to be used, the surrounding area became thickly overgrown with vegetation and an ecological corridor for various flora and fauna. Although, therefore, the scheme was widely supported, it also attracted a substantial number of objectors one of whom Mrs Morge, the appellant in that case, who lived close by.

39. Natural England, which had originally objected, then withdrew its objections. The Planning Committee was advised that mitigation and compensation measures could be provided to deal with any impacts. But an issue was also raised about the prospect of disturbance as the result of the development, where Natural England would be the enforcing authority, and about the local planning authority relying on Natural England to deal with it. Lord Brown of Eaton-under-Heywood JSC, with whom on this issue Lord Walker of Gestinghope, Baroness Hale of Richmond and Lord Mance JJSC all agreed, with Lord Kerr of Tonaghamore JSC dissenting, said this at paragraphs 28-32 when considering what it was the Planning Authority had to consider:

> 26. …….Regulation 39 of the 1994 Regulations (as amended) provides that: "(1) a person commits an offence if he . . . (b) deliberately disturbs wild animals of any such species [i.e. a European protected species]". It is Natural England, we are told, who bear the primary responsibility for policing this provision.
>
> 27. It used to be the position that the implementation of a planning permission was a defence to a regulation 39 offence. That, however, is no longer so and to my mind this is an important consideration when it comes to determining the nature and extent of the regulation 3(4) duty on a planning authority deliberating whether or not to grant a particular planning permission.
>
> 28. Ward LJ dealt with this question in paragraph 61 of his judgment as follows:
>
> > "61. The Planning Committee must grant or refuse planning permission in such a way that will 'establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range . . .' If in this case the committee is satisfied that the development will not offend article 12(1)(b) or (d) it may grant permission. If satisfied that it will breach any part of article 12(1) it must then consider whether the appropriate authority, here Natural England, will permit a derogation and grant a licence under regulation 44. Natural England can only grant that licence if it concludes that (i) despite the breach of regulation 39 (and therefore of article 12) there is no satisfactory alternative; (ii) the development will not be detrimental to the maintenance of the population of bats at favourable conservation status and (iii) the development should be permitted for imperative reasons of overriding public importance. If the planning committee conclude that Natural England will not grant a licence it must refuse planning permission. If on the other hand it is likely that it will grant the licence then the planning committee may grant conditional planning permission. If it is

uncertain whether or not a licence will be granted, then it must refuse planning permission."

29. In my judgment this goes too far and puts too great a responsibility on the Planning Committee whose only obligation under regulation 3(4) is, I repeat, to "have regard to the requirements of the Habitats Directive so far as [those requirements] may be affected by" their decision whether or not to grant a planning permission. Obviously, in the days when the implementation of such a permission provided a defence to the regulation 39 offence of acting contrary to article 12(1), the Planning Committee, before granting a permission, would have needed to be satisfied either that the development in question would not offend article 12(1) or that a derogation from that article would be permitted and a licence granted. Now, however, I cannot see why a planning permission (and, indeed, a full planning permission save only as to conditions necessary to secure any required mitigating measures) should not ordinarily be granted save only in cases where the Planning Committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. After all, even if development permission is given, the criminal sanction against any offending (and unlicensed) activity remains available and it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England's own duty.

30. *Where, as here, Natural England express themselves satisfied that a proposed development will be compliant with article 12, the planning authority are to my mind entitled to presume that that is so"* (My italics). "The Planning Committee here plainly had regard to the requirements of the Directive: they knew from the Officers' Decision Report and Addendum Report (see para 8 above and the first paragraph of the Addendum Report as set out in para 72 of Lord Kerr's judgment) not only that Natural England had withdrawn their objection to the scheme but also that necessary measures had been planned to compensate for the loss of foraging. For my part I am less troubled than Ward LJ appears to have been (see his para 73 set out at para 16 above) about the UBS's conclusions that "no *significant* impacts to bats are anticipated" – and, indeed, about the Decision Report's reference to "measures to ensure there is no significant adverse impact to [protected bats]". It is certainly not to be supposed that Natural England misunderstood the proper ambit of article 12(1)(b) nor does it seem to me that the planning committee were materially misled or left insufficiently informed about this matter. *Having regard to the considerations outlined in para 29 above, I cannot agree with Lord Kerr's view, implicit in paras 75 and 76 of his judgment, that regulation 3(4) required the committee members to consider and decide for themselves whether the development would or would not occasion such disturbance to bats as in fact and in law to constitute a violation of article 12(1)(b) of the Directive."* (My italics)

40. Baroness Hale said this at paragraph 45

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

41. Against that background, I turn now to the Grounds argued before me.

***D Grounds 1-3 : submissions of Claimant and Defendant and Discussion***

42. I shall start with the general advice given to the Committee by its planning officer. I have referred already to the fact that in November 2013 a document entitled "Onshore Hydrocarbons ( Oil and Gas) - frequently asked questions" was produced. It stated in its introduction :

> "This information paper provides some answers to questions that have been asked in recent months with regard to hydro carbon extraction fracking and related matters. The county council's intention is that the answers provide useful information; *they are not intended to be a source of definitive advice.*" (my italics).

43. It went on at C3:

> "C3: Before a company can explore (to see whether gas reserves are available) they must obtain a Petroleum Exploration Development License (PEDL) from the Department of energy and Climate change (DECC). This enables them to "search and bore for and get" the Crown's resources (i.e. oil and gas). They must then go to the Minerals Planning authority (MPA) for planning permission and exploration appraisal.
> As well as planning permission, the operator must also gain a "well consent" for the exploration from the DECC before commencing works. DECC also consults with the Environment Agency (EA) and the Health and Safety Executive (HSE) at this stage.

If a company intended to "frack" it is at this stage that DECC would impose the new controls introduced in December 2012. These controls require the geological assessment identifying faults, provision of a "frack plan" (which would show a fracking process gradually building in intensity, with close monitoring to access signs of problems) and measure seismic activity before, during and after fracking.
The EA may also require an environmental permit at the exploration phase, and are likely to require abstraction licence.
If the company then wish to go into production (i.e. actually extracting gas) they must gain a new planning permission for the MPA, a Field Development Consent from DECC and an environmental permit form the EA, with processes similar to the above.

44. At E1 onwards it stated

"What is the County Council's Role?
The County Council is the mineral planning authority (MPA – other than for the area of the south Downs National Park) and is responsible for determining planning applications for onshore hydrocarbon extraction. The County Council has to work within the planning system which governs the development and use of land in the public interest. It may not address any emissions, control processes, or health and safety issues that are matters to be addressed under other regulatory regimes.

E2: What Issues are dealt with by other Organisations and Regulatory Regimes?
There are a number of matters that lie outside the planning system and which are not the responsibility of the County Council as the minerals planning authority (MPA). They include:

- Seismic risks (Department for Energy and climate change - DECC)
- Well design, construction, and integrity (Health and Safety Executive);
- Mining waste (Environment Agency – EA);
- The chemical content of fracking fluid (EA);
- Flaring or venting of gas(DECC/EA but the MPA considers the noise and visual impacts);
- The impact on water resources (EA); and
- The disposal of water following fracking (EA).

E3: What is the Role of the Department of Energy and Climate Change (DECC)?
DECC issues Petroleum Licences, gives consent to drill under the licence once other permissions and approvals are in place and have responsibility for accessing risk of and monitoring seismic activity, as well as granting consent to flaring or venting.
E4: What is the role of the Minerals Planning Authority (MPA)?
An MPA, such as the County Council, grants planning permission for the location of any wells and wellpads, and imposes conditions to ensure that the impact on the use of the land is acceptable.

E5: What is the role of the Environment Agency (EA)?
The EA, through the environmental planning regime, protects the resources (including ground water aquifers), ensures appropriate treatment and disposal of

mining waste, emissions to air, and suitable treatment and management of naturally occurring radioactive materials.

E6 What is the role of the Health and Safety Executive (HSE)?
The HSE regulates the safety aspects of all phases of extraction, in particular responsibility for ensuring the appropriate design and construction of a well casing for any borehole."

45. At G5 onwards it stated, inter alia;

"G5: What Issues can I address when commenting on a Planning Application?
The County Council can take certain issues into account. These issues include:

- Whether the proposal is an acceptable use of the site;
- The visual impact of a new building or structure (location, size and appearance) on the local area and on the wider landscape (including designated landscapes);
- The impact on neighbours and surrounding area resulting from overshadowing, overlooking, loss of privacy, and disturbance caused by noise and lighting;
- The impact on the local environment including dist and air quality;
- Whether new roadways, accesses and parkways are adequate and the impact on highway capacity and road safety:
- The impact of the rights of way network;
- The impact on the historic environment including archaeological and heritage sites or features;
- The impact on the ecology and biodiversity including designated wildlife sites, and protected habitats and species;
- The risk of contamination of land and impact on soil resources;
- The risk of flooding;
- Land stability and subsistence;
- Site restoration and aftercare; and
- Consistency with national and local planning policies.

The County Council **cannot** take into account some issues including:

- The demand for, or alternatives to, onshore oil and gas resources;
- emission, control processes, or health and safety issues that are matters to be addressed under other regulatory regimes;
- loss of views;
- boundary and other disputes between neighbours, for example, private rights of way or covenants; or
- loss of property value.

G7: What can the County Council take into Account in determining a Planning Application?
Planning application must be determined in accordance with the statutory "development plan" (i.e. adopted local plans) unless "material considerations" indicate otherwise; the latter include draft plans, Government guidance, and the views of consultees, landowners, and the public.

The government has stated that a mineral planning authority should not consider the national demand for onshore hydrocarbon resources but only when the use of land, and the impacts of the proposed development (including on health, the natural environment, and amenity), are acceptable or can be made acceptable (e.g. by attaching conditions to a permission to minimise or mitigate potential adverse impacts).

G8: What weight is given to the views of the public and others?
The responses submitted by statutory consultees and by objectors and supporters are "material considerations" and they are fully considered before a decision is made. However, it should be noted that the number of objections or supporting representations is not important; consideration is only given to the validity of the objection or representation in planning terms regardless of whether one in 100 people hold that view.

G9: Why can't the County Council consider "non-planning" issues?
As the minerals planning authority, the County council is required to assume that non-planning regimes will operate effectively. Accordingly, in determining planning applications for onshore hydrocarbons, it may not address any emissions, control processes, or health and safety issues that are matters to be addressed by other organisations under different regulatory regimes."

46. The planning officer put forward the report which I have already referred. As I have indicated above it is a very full clear and informative document. It started with an executive summary, which contained these passages among others :-

*"Impact on Amenity and Public Health*
The development has the potential to adversely affect residential amenity and health primarily through increased noise and emission to air. In terms of noise, there is potential for the flare and plant on site to result in noise disturbance, but it is concluded that this can be adequately controlled by conditions requiring monitoring, and remediation of levels are exceeded. The development has the potential to have impacts on air quality through the flare, and an increase in vehicles travelling to and from the site. However, emissions from the flare are controlled by the Environmental Permit which applies to the operations. The potential impact upon the amenity and air quality as a result of increased vehicle numbers is not considered to be significant, as numbers are relatively low, on B- and A- roads, and for a temporary period"

*Impacts on the Water Environment*
The potential impact of the development on the water environment is a material consideration, but PPG: Minerals, paragraph 12 notes that mineral planning authorities must assume that non-planning regimes operate effectively. This means that assuming that the well is constructed and operated appropriately, that surface equipment operates satisfactorily, and that waste and NORMs are appropriately managed, in accordance with the requirements of the Health and Safety Executive, Department of Energy and Climate Change, and Environment Agency.

The Environment Agency and Health and Safety Executive have not raised concerns in relation to this proposal. The risk to surface water would be minimised by carrying out activities on an impermeable membrane with a sealed drainage system. Conditions would be added to the permission requiring the submission of a scheme to protect the water environment, as well as surface and foul water drainage schemes. With regards to groundwater, it must be assumed that the well is constructed and operated to the appropriate standards. Mapping and standards ensure that there is no risk of the present well intersecting with the well drilled in the 1980's. It is proposed to use dilute hydrochloric acid to clean the well, which is a standard procedure with many boreholes, including those for drinking water. The hydrochloric acid would react with material in the borehole to become non hazardous salty water. It is therefore concluded that the development does not pose a risk to the water environment, wither at the surface of groundwater.

*Overall Conclusion*

The six month flow testing and monitoring operation proposed at the Lower Stumble Wood site has the potential to result in impacts on the highway, people and the environment, issues which have been raised in the large number of objections to the application. Balcombe Parish Council and Ardingly Parish Council have objected to the application, but no other statutory consultees have objected, subject to the imposition of conditions. It is concluded that the number of vehicles required to carry out the development is not significant enough to raise concerns regarding highway capacity or safety. Emissions from the development would be controlled through the planning regime as well as through the Environment Permitting and health and safety regimes and the Health and Safety Executive which would ensure that water quality would not be compromised and that emissions to air would be acceptable. The rig and flare on the site would be visible at times on the site during the development, but the impact would be short-lived so would not compromise the landscape qualities of the High Weald Area of Outstanding Natural Beauty.

47. After the Executive Summary, the report then continued, having described the proposal which was the subject of the application. It referred at paragraph 4.24 to Environmental Permits stating that the implemented and proposed testing programmes are and would be subject to Environmental Permits granted by the EA.

48. At paragraph 5.8 it recorded the fact that the EIA screening opinion of 14th January 2014 concluded that the proposal would not have the potential for significant effects on the environment within the meaning of the EIA regulations whereby an EIA was not considered necessary. It also referred to the fact that that had been reconsidered in the light of the new planning guidance of 6 March 2014 and the same conclusion had been reached.

49. In section 6 the report considered the statutory development plan which consisted of the West Sussex Minerals Local plan and the Mid Sussex Plan. It also referred to the National Planning Policy Framework ("NPPF") It set out the relevant parts of the planning policy guidance on minerals at considerable length.

50. It then recited the objections to the development and other representations received and then passed to a section 9, headed "Consideration of Key Issues"

> " 9.1 The key issues in relation to this application are considered to be whether:
>
> - There is a need for the development
> - The development is acceptable in terms of highway capacity and road safety
> - The development is acceptable in terms of amenity and public health;
> - The development is acceptable in terms of impact on water environment;
> - The development is acceptable in terms of impact on landscape; and
> - The development is acceptable in terms of impacts on ecology."

51. The report addressed the first issue of the "Need for the Development". Having considered national policy in the NPPF, specific national guidance on minerals, and the Development Plan it stated this at paragraph 9.6

> "Taking this into account the present proposal is considered to accord with the approach set in national guidance by investing in energy infrastructure to establish whether indigenous oil and gas reserves are available and worth exploiting in Balcombe".

52. It also concluded that policy 27 of the West Sussex Minerals local plan created a presumption in favour of allowing temporary hydrocarbon exploration subject to environmental matters.

53. The officer also addressed the question of alternative sites and she concluded as follows at paragraph 9.12 and 9.13:-

> 9.12 Taking the above into account it is concluded that there is a need for continued exploration and appraisal at the site to establish whether there are hydrocarbon resources which can be utilised. It is also concluded that that site represents the best option within the search area, namely the PEDL boundary.
> 9.13 The NPPF gives "great weight" to the benefits of mineral extraction, including to the economy and highlights that minerals can only be worked where they are found. PPG: Minerals notes that oil and gas will continue to form part of the national energy supply, and gives a clear steer from Government that there is a continuing need for indigenous oil and gas. The West Sussex Minerals Local Plan (2003) notes that planning permission for oil and gas exploration will normally be granted subject to environmental considerations and the development being the "best option" in the area of search. The present proposal would make use of an existing well on a site with established infrastructure to establish whether oil and gas resources are exploitable so is considered to represent the "best option". It is therefore concluded that the is an identified need for local oil and gas production and

that there is an identified need for development on this particular site to establish whether the hydrocarbons identified in drilling in 2013 are exploitable."

54. Having considered traffic issues the report then at paragraph 9.26 went on to consider the impact on amenity and public health.

> "9.26 A key concern raised in objections is the potential impact of the development on public health and the amenity of local people.
> 9.27 The nearest dwelling to the site is a Kemps Farm, some 340 metres north and the nearest residential street, Oldlands Avenue, is some 780 metres north.
> 9.29 The key potential impacts on amenity and public health resulting from the proposed development are likely to be increased noise and reduced air quality."

55. Having considered noise (about which no issue is taken in these proceedings) it then went on to consider the topic of air quality.

> "9.40 Concern has been raised in third party objections over the potential impact of the flare in particular on air quality and human health.
> 9.41 The flare would be on site for seven days to dispose of natural gas which is a by-product of oil exploration which is not always viable to use.
> 9.42. PPG: minerals (paragraph 112) is clear that the flaring or venting of gas is subject to DECC controls and regulated by the Environment Agency with Minerals Planning Authorities needing to consider only "*how issues of noise and visual impact will be addressed.*" It is clear therefore that the potential impact of the flaring of gas on air quality is not a matter for the County Council.
> 9.43 However, in leaving this issue to other regimes, PPG: Minerals also makes it clear that the Minerals Planning Authority must be satisfied that the issues can or will be addressed by taking advice from the relevant regulatory body (paragraph 112). The Environment Agency has commented on this application and has raised no objection. In addition, the environment Agency has granted an Environmental Permit which addresses the flaring of waste gas resulting from the proposed operations, and considers it can be done without risk to people or the environment.
> 9.44 A number of representations have picked up on issues raised in a response from Public Health England which has questioned the air quality information provided and suggested that wider emissions monitoring would be required. However, it is important to note that their response was similar to that made to consultation regarding Environmental Permit influencing an influencing the monitoring scheme in place as a result. In direct response to the issues raised, the Environment Agency has confirmed that it is satisfied with the baseline and ongoing air quality monitoring results provided to them.
> 9.45 The development also has the potential to result in impacts on air quality through increase traffic on the road to and from the site. However, the level of vehicles associated are not considered to be significant enough to reduce air quality, particularly given the short term nature of the project and the small increase over existing HGV numbers already on the local highway network.

9.46 Taking the above into account, it is concluded that the potential impact of the development on air quality is satisfactory, particularly given the controls in place through the Environmental Permitting regime.
9.47 The development has the potential to adversely affect residential, amenity and health primarily through increased noise and emission to air. In terms of noise, there is a potential for the flare and plant on site to result in noise disturbance, but it is concluded that this can be adequately controlled by conditions requiring monitoring, and remediation if levels are exceeded. The development has the potential to result in impacts on air quality through the flare, and increase in vehicles travelling to and from the site. However, emissions from the flare are controlled by the Environmental Permit which applies to the operations. The potential impact of increased vehicle numbers is not considered to be significant as numbers are relatively low on B and A roads, and for a temporary period."

56. It then went on to consider the impact on the water environment:

"9.48 One of the key issues raised in objections to the proposal is the potential impact on the water environment. PPG: minerals notes that "surface, and in some cases ground water issues", should be addressed by Minerals Planning authorities as well as flood risk and water (paragraph 13). The impact on the water environment is, therefore, a material planning consideration.
9.49 The site is not within a groundwater source protection zone, with the nearest of these some 2.3 Km north-west of the site, without an abstraction licence to pump water (though $20m^3$ can be abstracted without such a licence). The Environment Agency has confirmed that there are no licensed ground water abstractions within 3km of the site.
9.50 There are small streams as close as 15m from the site access road.
9.51 In terms of geology of the site, it lies on Wadhurst Clay some 47 metres thick, classified as "unproductive strata" (formally "non-aquifers"). It is identified as being generally unable to provide usable water supplies and unlikely to have surface water and wetland dependant upon them. The clay also acts as a natural barrier to the migration of either groundwater of gases between permeable strata.
9.52 Below the clay are the Ashdown Beds of some 212 metres thickness, a "Secondary Aquifer" formed of fine-brained silty sandstone and mudstone. The Environment Agency notes that this contains naturally high levels of methane but that due to geology and well construction this does not pose a risk to ground water. Below the Ashdown Beds is another layer of Kimmeridge clay below which are the Hydrocarbon-bearing micrite beds into which the lateral well extends.
9.53 In considering the potential impact on the water environment, it is important to note that the County Council must assume that other, non-planning regimes operate effectively (PPG: Minerals paragraph 112). In relation to water, this means assuming that the construction, design and operation of the borehole have been undertaken appropriately, in accordance with Health and Safety Executive (HSE) requirements. It also means assuming that the Environment Agency will ensure that surface equipment operates satisfactorily, and that mining waste NORMs are appropriately managed.

9.54. Nonetheless, as already noted paragraph 112 of PPG:Minerals notes that before granting permission the county council will need to be satisfied that the issues dealt with under other regimes can be adequately addressed "by taking advice from the relevant regulatory body". The County Council has consulted with the Environment Agency and HSE, neither of which has objected.

9.55 The main risks to surface water are due to run off from the surface of the site. For any development, it is important to ensure that fluids, particularly where they are potentially polluting, are managed within the site. This development, impacts on water quality would be migrated by ensuring potentially-polluting activities are undertaken on an impermeable surface with sealed drainage system. A condition would be added, as requested by the Environment Agency, requiring the submission and approval of a Construction Method Statement detailing: how the impermeable membrane is constructed; remediation of the existing membrane; inspection and maintenances; and pollution prevention assessments and mitigation methods. Fuel tanks and chemicals stored outside of the impermeable area would have their own bunded containers, as is common practice in industry and agriculture.

9.56 It is considered these mechanisms, which satisfy the Environment Agency, would ensure that surface water is protected.

9.57 Details of surface and foul water drainage are required by conditions at the request of WSCC Drainage Officers, which would ensure that the site does not increase the risk of flooding off-site, and that foul waste is managed appropriately.

9.58 The main risk to groundwater are through failure of the well casing, leaking of chemicals and hydrocarbons, and through migration of liquid from the borehole. All of these matters are address through regulation by the Environment Agency and HSE. The Environment Agency has considered the sites location in terms of a range of issues including geology and hydrogeology, and protected sites and species. The HSE has considered the potential interaction with nearby wells, as well as geological strata and the fluid within them. Neither consultee has raised concerns about the proposal.

9.59. Concern has been raised that the works presently proposed would interact with the borehole drilled in the 1980s (Balcombe-1) which is 10 metres from the present borehole. HSE has confirmed that Balcombe-1 has not been inspected since it was abandoned, but there is no regulatory requirement for them to do so as it was abandoned in accordance with approved procedures to minimise the risk to the environment. The drilling of boreholes in close proximity to other boreholes is common practice and is not considered to pose particular risks. As an example, there are seven wells drilled from a pad at singleton oil field near Chichester with no resultant problems emerging.

9.60 The vertical (and horizontal, where relevant) position of existing wells is mapped prior to new wells being drilled so there is no risk of collision.

9.61 Specific concerns have been raised regarding the use of hydrochloric acid. This is a standard procedure in the cleaning of boreholes for not just oil and gas development but also more generally for many drinking water boreholes. The acid would be diluted to a maximum of 10%, with almost 2,000 litres being used with 18,000 litres of water.

9.62 The Environment Agency has considered the use of dilute hydrochloric acid in responding to the present application, as well as in granting its Environmental Permits and has raised no concerned. The decision document relating to the Environmental Permit for this operation notes that "the dilute hydrochloric acid reacts with the residual drilling mud's debris and surrounding rocks to become salty water (calcium carbonate, calcium chloride and water)." (Decision Document for Draft Permit number EPR/AB3307XD, Page 7). This salty water (spent hydrochloric acid) is considered non hazardous with the Environment Agency concluding that it "does not create a risk to groundwater as it cannot migrate to where there is groundwater as there is no pathway to where groundwater can be found." (ibid, page 18).

9.63 It has been suggested that a bond or financial guarantee should be sought to cover remediation in the event that contamination occurs. However, for minerals project, typically quarries and similar financial guarantees are only justified in "exceptional cases" involving very long term projects, novel approaches, or reliable evidence of the likelihood of financial or technical failure (PPG; Minerals, paragraph 48). For oil and gas projects, the operator is explicitly liable for any damage or pollution caused by their operations, with DECC checking that operators have appropriate insurance against these liabilities in granting a PEDL Licence.

9.64. Finally, Southern Water has set out a number of measures to protect and monitor groundwater resources including an Environmental and Hydrogeological Risk Assessment, baseline sampling and ongoing groundwater monitoring, consultation with relevant environmental/nature agencies and agreeing waster management, drainage and well design with the appropriate agencies. All of these requirements have been addressed through the Environmental Permit which relates to the site, and through the HSE requirements. It is not therefore considered necessary to require any of these measures in relation to the present application.

9.65 Taking the above into account it is considered that subject to the imposition of appropriate conditions the development does not pose a risk to the water environment.

9.66 The potential impact of the development on the water environment is a material consideration, but PPG: Minerals paragraph 12 notes that Mineral Planning Authorities must assume that non-planning regimes operate effectively. This means assuming that the well is constructed and operated appropriately, that surface equipment operates satisfactorily, and that waste and NORMs are appropriately managed in accordance with other regulatory regimes. The Environment Agency and Health and Safety Executive have not raised concerns in relation to the proposal. The risk to surface water would be minimised by carrying out activities on an impermeable membrane with a sealed drainage system. With regards to groundwater, it must be assumed that the well is constructed and operated to the appropriate standards. Mapping and surveys ensure that there is no risk of the present well intersecting with the well drilled in the 1980s. it is proposed to use dilute hydrochloric acid to clean the well, which is a standard procedure with many boreholes, including those for drinking water. The hydrochloric acid would react with material in the borehole to become non-hazardous salty water. It is therefore concluded that the development does not pose a risk to the water environment, either at the surface or groundwater.

57. Having considered landscape and ecology issues as well it went on to say at paragraph 10.1:

> "Overall Conclusions and Recommendations
> 10.1 The six month flow testing and monitoring operation proposed at the Lower Stumble Wood site has the potential to result in impacts on the highway, people and the environment, issues which have been raised in the large number of objections to the application. Balcombe Parish Council and Ardingly Parish council have objected to the application, but no other statutory consultees have objected, subject to the imposition of conditions.
> 10.2. It is concluded that the number of vehicles required to carry out the development is not significant enough to raise concerns regarding highway capacity or safety. Emissions from the development would be controlled through the planning regime as well as through the environmental permitting and health and safety regimes to ensure that water quality would not be compromised and that emissions to air would be acceptable. The rig and flare on the site would be visible at times during the development, but the impact would be short-lived so would not compromise the landscape qualities of the High Weald Area of Outstanding Natural Beauty.
> 10.3. It is therefore ***recommended*** that planning permission is granted, subject to conditions and informatives set out at appendix 1." (emphasis as per the report)

58. At paragraph 11 the report stated that there were no *Crime and Disorder Act* implications. It then considered the *Equality Act* implications and *Human Rights Act* implications.

59. The court has also been provided with a copy of minutes that were kept. Paragraph 13 of the minutes reads as follows (all italics are as per the original);

> "13. The following points of clarification were provided to the committee arising from the speakers' addresses:
>
> - The requirement for an EIA was considered during the initial screening opinion and again during the writing of the report. There was not felt to be justification within the EIA regulations or in government guidance for an EIA. Environmental issues and impacts of relevance to the application were considered in studies submitted with the application which informed the officer recommendation.
> - There was a reliance on the technical ability of EA and HSE and it must be assumed that such agencies were discharging their duties effectively. The NPPF sets out the responsibilities of the County Council and government agencies. The consideration of the impact of the flare on air quality and the requirements of the well-casing were the responsibility of agencies with the necessary technical expertise.
> - During the production of the report the issues raised in representations were considered but the number of representations was not a material consideration.

- There was sufficient information in the application to enable a decision by the committee. Conditions requiring the submission of further information were not grounds to defer consideration of the application.
- Condition 14 required the continuous monitoring of noise and the application would employ a traffic lights system to indentify the incidence and severity of adverse noise impacts. It was acknowledged that there had been problems with noise under the previous permission and to address such problems noise specialists had been engaged by the County Council to monitor levels from the site.
- To respond to concerns regarding the solvency of applicants it was confirmed that planning permission was linked to the land rather than the applicant and officers must assume that there will be compliance with the imposed conditions.
- The Balcombe-1 well was considered by the HSE in relation to the well drilled in 2013. It was not in the interests of the applicant that any interrelation existed between Balcombe-1 and the new well.

14. The Committee considered those points below:
    - Whether the applicant could have been required to undertake an EIA. *The requirement for an EIA was considered during assessment of the application. The applicant could appeal any request to undertake an EIA if they considered it was not justified.*
    - The advantage of deferring the application and requesting further information. The additional information that could be gained and its value was queried. *The County Council considered the information was adequate to make a decision. The EA was satisfied with the proposal and had issued Environmental Permits.*
    - Clarification of the time frame for the application was requested. *The exploration was for 6 months which would have to be undertaken 3 years from the date of approval.*
    - The location of Balcombe-1 in relation to the bore hole in the present application.
    - It was felt that the traffic route South of the site to the A23 was over-complicated and unnecessary. The committee asked what consideration had been undertaken of the alternative lorry route to the South of Balcombe. *The route to the north of the site was the most direct and short way to reach the strategic network – the A23. There was no evidence that the roads to the South of Balcombe were not suitable for HGVs and an alternative route for the site could be established.*
    - Limited public consultation between the local community and the applicant following the protests in 2013. *The applicant was encouraged but not required to engage with the local community but the committee could agree a condition for the establishment of a liaison group.*
    - It was felt that condition 10 regulating the movement of HGVs should specify precise timings that lorries were prohibited from passing the Church of England Primary School in Balcombe.
    - The monitoring of noise levels from the site should be undertaken on a continuous basis; conditions 12 and 13 needed to be amended to incorporate mention of continuous monitoring. A comparison was requested of the noise of passing trains and noise emanating from the

site. *Train noises had been recorded at 78dB at the site and the noise from the site was limited in the conditions, operations at the site during the day are predicted to produce maximum noise levels of 37dB and 31dB during the night.*

- The financial status of the applicant and whether a bond could be sought to require the restoration of the site. *The financial status of the applicant was not a material planning consideration. The use of a bond was not supported by planning guidance. A number of enforcement mechanisms were available to the local planning authority including powers of entry to ensure the site was safe.*
- The objections heard by the committee were based on arguments against planning policy. The committee was required to determine the application with regard to planning policy and other material planning considerations. It was felt that the application accorded with these considerations.
- The application was for temporary permission of 6 months and there were no significant concerns with the site. Significant grounds for approval existed and it was not feasible to present a compelling case for refusal based on planning considerations.
- The impact of the flare and plume on the local Area of Outstanding Natural Beauty was queried and what monitoring and recording measures would be in place. *It was confirmed that the flare would only be required for a week before the well was enclosed and that there would be no visible plume.*
- The mechanism for the monitoring and recording of light impacts was raised. *Lighting was limited in the conditions to a spill of 1 lux from the site to protect the local bat population.*

60. The court has also been provided with a transcript of what happened at the committee meeting. Mr Maurici on behalf of the Defendant took no objection to it being put before the court. As I have indicated above one of the points being taken by the objectors to the proposal was that there was insufficient material before the committee so far as the technical aspects of the development were concerned. There is a reference in the transcript to submissions made by County Councillor Acraman to the committee. During the course of his submission he said this:-

> "My recommendation actually is that the application be deferred until more satisfactory answers are forthcoming from all departments involved. I don't think that we are in a position to give the go ahead today will be a hostage to fortune and it will leave you far too many things to be done as it were behind closed doors in the future. There is not enough research being done and the conditions are not adequately or completely expressed".

61. The chairwoman turned to the planning officer Miss Moseley for advice and she said this:-

> "..the lack of an EIA does not mean that environmental issues and environmental impact have not been considered and dealt with as appropriate. In terms of being reliant on the Environment Agency and the Health and Safety Executive we have to be and we have to assume that they are doing their job just as they assume that we are doing ours, the National Planning Policy Framework and the planning guidance makes it clear what our role is and what is the role of other regulators,… Paragraphs 110 and 112 of the minerals planning guidance makes it clear that issues such as the flare we as a minerals planning authority can consider the noise from the landscape impact …it is not for us to consider …the air quality impact of the flare and in terms of the casing around the well and things like that that is all for the Health and Safety Executive to consider and I am satisfied that they are doing their job."

62. Two representatives of the EA were present at the meeting. It is recorded at the meeting that one of them said this:-

> "At the Environment Agency we have obviously issued Environmental Permits which authorise the activity which was subject to this planning permission. As part of that process we carried out our own assessment of environmental risk and the necessary controls which need to be put into place. For our benefit there is nothing to be gained by an additional delay. I don't believe there is any additional information that we need to obtain."

63. I accept that so far as one can ascertain from the minutes and from the transcript the Councillors appeared to accept the advice that they were given by the planning officer. I shall deal with the specifics relating to the advice of the EA and the HSE shortly when I have set out the basis of the case for the claimant and for the defendant.

64. Mr Wolfe contends that WSCC had been wrong to assume that the EA and HSE would exercise effective control so as to deal with concerns over emissions to air, groundwater contamination and well integrity. It is argued that there was some reason to think that the HSE and EA had not exercised, or would not exercise adequate control, and that therefore WSCC had to form its own judgment on that issue, and could not do as national policy advised and assume that the other statutory regimes would deal with matters properly.

65. Mr Wolfe put his case as follows:

a) the advice given to members by the planning officer was to the effect that they must assume that the control of such matter should be left to the EA and HSE;

b) that advice, which the Committee followed, was in conflict with national planning guidance, and was thus unlawful, and was wrong in law anyway;

c) in the case of emissions monitoring, the committee members were misled as to the representations of Public Health England (PHE) on emissions monitoring, and in particular because the Committee was wrongly assured that PHE's concerns on the monitoring of sulphur dioxide ("$SO^2$") had been or would be addressed by the EA (Ground 2);

d) in the case of the HSE, the committee members were misled on the degree to which the HSE had addressed the interaction between the proposed well and an earlier abandoned well nearby (Ground 3).

66. Mr Maurici contended that

a) WSCC had done as was advised by national planning guidance and consulted the relevant statutory bodies. None had any objection to the proposal;

b) the approach it adopted was endorsed by the courts in the *Gateshead* line of cases;

c) the officer's report:

a) correctly cited, considered and gave effect to paragraph 112 of the MPG;

b) considered the Claimant's objections in so far as these related to the HSE and EA's scrutiny of the proposed development;

c) set out the results of consultation with the EA and HSE in respect of the Claimant's concerns and had regard to the responses of both bodies;

d) concluded, having regard to the guidance contained in paragraph 112 of the MPG, that a number of issues raised in the planning application process were dealt with in the other regimes operated by the EA and the HSE and could be adequately addressed in those regimes;

e) was justified in treating the absence of comment by HSE as indicating that it had no objection, in an approach endorsed in *Elliott v The Secretary of State for Communities and Local Government* [2012] EWHC 1574 @52 per Keith J.

f) EA made no error so far as PHE's advice was concerned, and in any event the Committee was not misled;

g) HSE had yet to give any approval, but there was no reason to think that it could not do so. The Committee had not been misled.

67. So that those submissions may be put in context, I must refer to the facts surrounding the involvement of EA and HSE, who are statutory consultees (under the *Town and Country Planning (Development Management Procedure) (England) Order 2010*) and PHE, which is not, but had made a representation.

68. As originally argued by Mr Wolfe on behalf of the claimant his case was that PHE, when it made a representation about the planning application asked that there be monitoring of the flare for $SO^2$, by which he said PHE meant monitoring within the flare. He further contended that the representation made by PHE had been wrongly described to the committee in a way which I shall describe shortly. Because there appeared to me to be some room for doubt as to the nature and content of the documents that were considered by PHE and referred to in their letters, I asked at the conclusion of the hearing that the court be provided with a copy of the planning application, and in particular its Appendix dealing with air emissions (to which the PHE consultation of 2014 related), and also with the application for a permit made to the EA the previous year (to which the PHE representation to the EA related.)

69. The court was then supplied with those documents after hearing the oral argument. However, Mr Wolfe took it upon himself to supply the court with a further document.

70. Mr Wolfe now placed before the court a letter from PHE dated 12th November 2014 written in response to an email which he had sent to PHE asking for some clarification of what they had said earlier. That email was sent after argument had concluded, and has not been disclosed by Mr Wolfe. Unsurprisingly Mr Maurici on behalf of the defendant objects in the strongest terms to Mr Wolfe taking it upon himself to seek and obtain evidence which was not before the planning committee at the date of the hearing. I agree with Mr Maurici. This Court is concerned with what was before the Planning Committee when it considered the application, and whether the planning officer had misled the Committee on PHE's known position, not with evidence which Mr Wolfe has seen fit to obtain during or after the hearing in this Court. However I must also add that in my judgment it adds absolutely nothing to the debate.

71. Having dealt with that side issue I now return to the issue relating to the representations made by PHE of which the planning committee were aware.

72. Mr Wolfe referred me to paragraph 9.44 of the officers report where it stated

> "A number of representations were picked up of issues raised in response from PHE which has questioned the air quality provided and suggestions that wider emissions monitoring should be required. However, it is important to note that their response was similar to that made to a consultation regarding the environmental permit and influencing the monitoring scheme in place as a result. In direct response to the issues raised the Environment Agency has confirmed that it is satisfied with the base line and ongoing air quality monitoring results provided to them."

73. Mr Wolfe contends that that description of the PHE representation was misleading, and in particular that the response was not "similar," which at some times he treated as equivalent to "the same." He contends that PHE was asking for monitoring of sulphur dioxide within the flare which was more than they had asked for in their original submissions to the agency. Mr Maurici contends that it

was not a misleading description. It is therefore necessary to see what had actually happened. That is why it was necessary to obtain copies of the relevant appendix to the planning application, and the previous application for an EA permit.

74. As already noted EA had issued a permit on 24th July 2013. That had followed an application for a permit made on 12th June 2013. In that application, CBL had assessed the air emissions without addressing $SO^2$, but had only addressed carbon monoxide (CO) and oxides of nitrogen (NOx). On 10th July 2013, PHE responded to the consultation made of them by the EA. It stated

> "PHE are aware that some local residents have expressed concern with regards to possible impacts on the health and environment as a result of the process activities, specifically from the potential flaring of natural gas which may be encountered during well testing.
>
> The applicant has commissioned modelling to assess the potential impact the flaring on local air quality. There are no air quality management areas in the immediate vicinity on the site. The applicant states that the flare will comply with the best available techniques; will be enclosed with a chimney to minimise noise and light and will operate continuously fuelled by propane.
>
> The natural gas, which will be flared if detected, is primarily composed of methane and as such, combustion products principally carbon dioxide and water vapour. The modelling of the air quality emissions focused on nitrogen dioxide and carbon monoxide to access any potential impact on human health. The modelling indicated that the emissions of nitrogen dioxide and carbon monoxide were within the relevant short term air quality strategy objectives for human health during well testing.
>
> However it would be advisable to ensure that the flare used during flaring is operated in line with best available techniques to ensure that appropriate combustion temperature is maintained.
>
> The applicant has stated that air quality monitoring for the following compounds will be undertaken before during and after the operations: oxides of nitrogen (NOx): volatile organic compounds; BTEX (Benzene Toluene Ethylene and Xylene), hydrogen sulphide; CO; $SO^2$ and methane from the extracted gas waste stream. We recommend that any Environmental Permit issued for this site should contain additions to ensure that these potential emissions do not enact upon public health…. Based solely on the information contained within the application provided, PHE has no significant concerns in relation to the potential emission

> form the site adversely impacting on the health of the local population from this proposed activity, providing that the applicant takes all appropriate measures to prevent or control pollution, in accordance with the relevant sector technical guidance for industry best practice…"

75. The EA issued a permit, which addressed monitoring for $SO^2$ as well as for CO and NOx.

76. In the permit the EA stated (bundle page D18)

> "We have included monitoring conditions in the permit requiring the Capital Operator to monitor the temperature, nitrogen dioxide, sulphur dioxide, hydrogen sulphide, methane, Volatile Organic compounds and BTEX (Benzene Toluene Ethylene and Xylene) and to provide monthly reports of the monitoring results. These cover the most significant emissions that are expected to occur and will also demonstrate whether the flare is operating effectively."

77. The permit at schedule 3 deals with emissions and monitoring. It is divided into two parts. The first deals with point source emissions to air – i.e. monitoring at the location of the part of the plant which generates the emission. That monitoring would be of the gas flare for the temperature and carbon dioxide and would be carried out continuously. The second part dealt with air quality monitoring, including monitoring for $SO^2$. As the description cited above makes clear, that monitoring addresses the question of emissions of $SO^2$ and other substances from the flare. The monitoring of the gas flare was to be conducted monthly and that of air quality was to be conducted monthly as well.

78. In the planning application, CBL again addressed emissions of CO and NOx, and perhaps because FFBRA had raised the questions about $SO^2$ with PHE, PHE made a representation to the planning authority by letter of the 4 March 2014. It stated the following

> "The applicant has identified a number of air quality parameters i.e. nitrogen dioxide; sulphur dioxide; hydrogen sulphide; methane; VOCs and benzene, toluene, ethelbenzine and xylenes (BTEX) related to proposed operations at the site. The applicant states that a contractor has been employed to undertake air quality monitoring prior to, during and after the well testing operation. However, the application does not appear to enclose the air quality monitoring data stated to have been undertaken <u>prior to</u> well testing operations. The planning statement Section 4.14 states that a report of such monitoring will be issued to the

Environment Agency as part of the Mining Waste Directive permit condition.

Modelling has been undertaken on potential omissions of nitrogen oxides and carbon-monoxide from flaring which indicated that the emissions would not affect the achievement of the relevant short-term air quality objectives. The application does not appear to provide a clear justification for only selecting nitrogen oxides and carbon-monoxide as potential emissions from flaring. Sulphur dioxide emissions appear to have been discounted on the basis that no sulphur dioxide has is present in the extracted gas however it does not appear that the monitoring data to justify this has been included within the application. The Planning Authority may wish to seek the assessment of sulphur dioxide emissions from flaring activities."…"The application appears limited in its consideration of the potential for future release of VOCs into atmosphere either directly of as a result of incomplete combustion during flaring. The planning authority may wish to request the applicant considers the potential for impacts in fugitive VOC emissions and other combustion emissions and undertakes baseline air quality monitoring for VOCs. The results of such monitoring could then be compared to monitoring results during operations to provide an accurate assessment of air quality impacts due to the [proposed operations."….

Summary

"Based solely on the information contained in the application provided, PHE has no significant concerns regarding risk to health of the local population from potential emissions associated with the proposed activity, providing that the applicant all appropriate measures to prevent or control pollution, in accordance with relevant technical guidance or industry best practice."

PHE would like to suggest that:

wider emission monitoring may be required to better assess the impact on the environment from any development.

……"

79. Mr Wolfe also referred to the fact that the Committee was informed (see the transcript at C 151) that the EA permit required a range of chemicals to be monitored including those set out by PHE.

80. I have already set out what the officer said in the report. I have also already noted above that at the meeting, after the reference to PHE had been made by objectors, the EA stated itself satisfied with the information it had.

81. Mr Wolfe argued that the officer misled the committee on this issue. I regard that submission as being entirely without substance. PHE had asked for monitoring of $SO^{2}$ in 2013 when consulted by the EA, and that was included by EA in the permit. Contrary to the way the case was first argued by Mr Wolfe, PHE never asked at any stage for monitoring of sulphur dioxide *within* the flare. Indeed monitoring of its emission in the manner proposed by EA is a perfectly usual approach, and not one ever criticised by PHE. In 2014 PHE correctly pointed out that the planning application did not ask for monitoring of sulphur dioxide, and quite understandably PHE asked for it again. The description by the planning officer of what was asked for in the letter of 2014 as "similar" was therefore fair and beyond any criticism.

82. The fact is that at all times the EA have agreed with PHE that there should be air quality monitoring, which among other matters will address the emission of sulphur dioxide and other chemicals which will be produced by the flare. This argument by Mr Wolfe about the PHE consultation is in my judgment a claim which is completely without substance. It is a point which could not have been taken had the relevant documents been examined correctly before the case was pleaded.

83. In any event, even if the summary of what was said could have been improved upon by the officer, it did not go to any significant point. PHE has twice emphasised that it has no significant concerns about the proposal. Any question of the degree of monitoring is a matter to be taken up with the EA, which in the knowledge of the PHE representation, voiced no concern before the planning committee and has indeed already acted in the way in which PHE have sought.

84. It follows that I consider that there is no merit whatever in Ground 2 as taken by Mr Wolfe. Further, in so far as this matter supports his attack on the council in Ground 1 it demonstrates that much of the attack was misconceived.

85. I turn now to the questions that were raised concerning the Health and Safety Executive (HSE). In the officers report at paragraph 7.4 the officer described the consultation response of the HSE as "No comment."

86. In its objection document the claimant at paragraph 4.2.3 had referred to the HSE as having responsibility for regulating well design and construction and it pointed out that in the guidance on the regulation on well construction it stated that the HSE would "initially scrutinise the well design for safety and then monitors progress on the well to determine of the operator conducting operations as planned……HSE uses and inspection and assessment process consisting of the following main elements, all of which utilise HSE's experienced specialist wells inspectors:

> "Assessment of well notifications submitted to HSE. This assesses well design prior to construction, a key phase of work where the vast majority of issues are likely to have an

> impact on the well integrity will be identified and addressed by the well operator
>
> Monitoring of well operations during construction…This ensures the construction phase matches the design intent.
>
> Meetings with well operators prior to, and during, the operational phase to be undertaken (including joint meetings with the EA) these will include site inspections to access well integrity during the operational phase…."

87. Having recited Minerals Planning Guidance the representation went on

> "both the EA and HSE have confirmed that they have not inspected the well. The HSE has therefore failed to adhere to their own best practice and the new practice planning guidance on minerals. As such the integrity of the well is simply unknown and the risk to groundwater is unquantifiable. Part of paragraph 4.8 of the planning statement is misleading. It says
>
> " In summary the EA and HSE have assessed in detail the site, the proposal and any potential impact from surface and ground water and concluded that the methods are safe."
>
> The EA's assertions that the process is safe are based on certainty of well integrity – and they cannot be certain."

88. In the next paragraph it then referred to the danger of well failure and it referred to the fact that should there be failure of the well, there could be a migration of contaminated fluids into the Ashdown Beds and that could lead to contamination of local water courses including those feeding the Ardingly Reservoir and the River Ouse.

89. The officer addressed impacts on the water environment at paragraphs 9.48 ff of her report. She stated with regard to well integrity the following at paragraph 9.58

> "The main risks to groundwater are through failure of the well casing, leaking of chemicals and hydrocarbons, through migration of liquid through the borehole. All of these matters are addressed for regulation by the Environment Agency and HSE. The Environment Agency has considered the sites location and terms of a range of issues including geology and hydrogeology, and protected sites and species. The HSE has considered the potential interaction with nearby wells, as well as geological strata and t he fluid within them. Neither consultee has raised concerns about the proposal.
>
> 9.59. Concern had been raised that the works presently proposed would interact with the borehole drilled in the 1980s (Balcombe-1) which is ten metres from the present

> boreholes. HSE has confirmed that Balcombe-1 has not been inspected since it was abandoned but that there is no regulatory requirement for them to do so as it was abandoned in accordance with agreed procedures to minimise the risk to the environment. The drilling of boreholes in close proximity to other boreholes is common practice and is not considered to pose particular risk. As an example there are seven wells drilled from a pad at Singleton oil field near Chichester with no resultant problems emerging.
>
> 9.60. The vertical (and horizontal, where relevant) position of existing wells is mapped prior to new wells being drilled so there is no risk of collision."

90. The transcript of the meeting shows at page C173 of the bundle that this was said by the planning officer

> "In terms of the Balcombe-1 well that is an issue considered in detail by the Health and Safety Executive in relation to the well drilled last summer and by the applicant themselves because it is not in their interest to have any interrelations between the to wells"

91. Mr Wolfe referred me to an email exchange that took place between the HSE and the Planning Officer. The Planning Officer on 19 March 2014 sent an email to Mr Green of the HSE stating as follows

> "We have had a number of objections to the application noting a lack of confidence that HSE are doing their job at Balcombe which I was hoping you could help with.
>
> Can you please clarify whether it is the case that HSE has not checked the well casing for Balcombe-1 since it was sealed and abandoned in 1987. Would you usually check wells once they are sealed and abandoned – and is this the reason for any concern? Is there added concern given that Balcombe-2 has been drilled 10 metres from it?"

92. This appears then to have been inserted in the email at this point by the HSE officer as its comment

> "There is no legal or regulatory requirement for the Executive to inspect wells that have been abandoned. This well was abandoned in accordance with agreed procedures, guidelines and legal requirements in place at that time and was abandoned such that the risk of release of fluids in the well were as low as is reasonably practicable. There should be no added concern that the Balcombe-2 well is drilled 10 metres from Balcombe-1. It is common practice for development wells to be drilled from slots which are based

> at less then 10.0 metres. (an example was given) the verticality and direction of the new well was plotted against the known surveyed position of the vertical Balcombe -1 to ensure that there was no collision risk. The horizontal section was also surveyed to ensure there was no risk between the two wells."

93. That was the answer by Mr Green to the first part of the email. The officer attached a summary of the objection to the planning application by Miss Taylor of the claimants, and in it she referred to the fact that the other well had not been inspected and the contention that there was an unquantifiable risk of explosion if further work was carried out in close proximity to the first well. She was informed by Mr Green that there was no legal or regulatory requirement for the HSE to inspect wells that had been abandoned.

94. He went on

> "The HSE are not statutory consultees for planning applications. The application will not contain sufficient information to assess well integrity aspect. If a planning application is granted then a Well Operator will submit a Well Notification of the proposed workscope" (sic) "which will be inspected by the Well Operations Group of the HSE.
>
> The HSE will inspect the Well Notification submitted by the Well Operator. If the HSE are not satisfied that the risks are as low as is reasonably practicable then the appropriate enforcement action will be taken."

95. The case for Mr Wolfe under Ground 3 was that it was wrong to describe HSE as having addressed the question of the relationship of the two wells in detail. That charge is in my judgment incorrect. The HSE *had* assessed the question in detail, albeit by means of a desk study. Mr Wolfe's real complaint is that he says that the HSE should have inspected the wells and should have carried out its assessment of the wells at this stage in advance of applications being made to them for the working of the well. But in my judgment that misses the point. For the point about the comments that had been made by the Health and Safety Executive was that they had ample powers to deal with well integrity before the drilling of the well took place. They would do so as a result of the requirements of the Borehole Regulations to which I have already drawn attention at the beginning of this judgment. Mr Wolfe submitted to me in reply to Mr Maurici that it was immaterial that the HSE would act in the future and that what mattered was what they had done in the past. That argument is again misconceived. The prospect of future control by a statutory body is just as capable of being material as what has happened already. The committee had ample material before it that the HSE would be concerned in the overseeing of the drilling works and indeed that they would be an active regulatory body.

96. I note that a very similar point was taken by Mr Wolfe when acting on behalf of the claimants in the *An Taisce* case. It will be noted that at paragraphs 50-1 Sullivan LJ said this

> "In view of this factual background, it might be thought that this case was the paradigm of a case in which a planning decision-taker could reasonably conclude that there was no likelihood of significant environmental effects because any remaining gaps in the details of the project would be addressed by the relevant regulatory regime. Undaunted, Mr. Wolfe submitted that there was a distinction between reliance upon a pollution regulator applying controls "which it has *already* identified in the light of assessments which it has *already* undertaken on the basis of a scheme which has *already* been designed", which he said was permissible, and reliance upon "*current*" gaps in knowledge "being filled by the fact of the *existence* of the pollution regulator [who] will make *future* assessments… on elements of the project still subject to design changes….", which was not.
>
> 51 *There is no basis for this distinction which is both unrealistic and supported by any authority…"* (My italics)

97. A precisely similar submission was made to me by Mr Wolfe in reply when he stated under Ground 3:

> "What HSE was going to do in the <u>future</u> is not the issue here."

This argument conflicts also with the approach endorsed in *Morge v Hampshire CC* by Lord Brown at paragraph 29 about being able to rely on the future "policing" by Natural England.

98. I reject Mr Wolfe's submission that there was any misleading of the committee so far as the HSE was concerned. Further, it is entirely evident in my view that ample controls existed and that the officer and Committee took the view that they would be applied by the HSE to ensure well integrity.

99. Given the matters that I have set out above and the findings I have made, I regard Grounds 2 and 3 as unsustainable.

100. So far as Ground 1 is concerned, it essentially comes down to Mr Wolfe arguing that it is wrong for a planning authority to consider that it can assume that environmental controls would be properly applied. He contends that it should not make the assumption if it has material placed before it which raises issues which could persuade the Planning Committee that such controls would not exist or would not be properly applied. I have already determined that in my judgment that was simply was not the case here. But in any event, in my judgment there is ample authority to the effect that the Planning Authority may in the exercise of its discretion consider that matters of regulatory control could be left to the statutory

regulatory authorities to consider. There was ample material before it that all matters of concern could be and would be addressed, as set out in the officer's very careful report.

101. In my judgment what happened here was that the committee accepted its officer's advice that it had sufficient information to determine the application, and that it should and could assume that the matters could be dealt with by the EA and by the HSE. That is what she advised them, and that is what the Minutes record. She did so after setting out all the issues. That approach was entirely in keeping with long standing authority, and also with long standing policy advice. There is no question here of any gap being left in the environmental controls, and none was identified by Mr Wolfe. Each question raised by the objectors was dealt with in the officer's report with great thoroughness, and the Committee was quite entitled to accept her professional view that the matters in question could be left to the other regulatory bodies.

102. Indeed, the existence of the statutory regimes applied by the HSE, the EA and the DECC shows that there are other mechanisms for dealing with the very proper concerns which the Claimant's members have about the effects on the environment. The Claimant and its members' concerns are in truth not with the planning committee's approach of relying on the other statutory regimes, but rather with the statutory bodies whose assessments and application of standards they disagree with. That does not provide a ground of legal challenge to the decision of the planning committee.

103. Mr Wolfe has drawn the Court's attention to the use of the word "must" in the advice given by the officer. I do not regard that as altering the sense of the advice, which was that the Committee ought to assume that, and was in a position to do so. Given the terms of national policy advice, and its endorsement by the Courts, and the fact that there was ample material before the Committee on the topic, nothing turns in this case on the choice of verb.

104. Mr Wolfe's arguments on Ground 1 are in truth not a challenge to the lawfulness of the decision. They are an attempt to dress up as a challenge in law what is actually a merits argument that the WSCC Committee should have accepted that it should not regard the matters as being capable of being dealt with by HSE and EA.

### *F Ground 4: submissions of Claimant and Defendant and Discussion*

105. Mr Wolfe contended that there had been past breaches of the conditions attached to the earlier permission by CBL, and that they should have been, but were not, treated as material considerations by the planning officer, and therefore by the Committee. He contended that it was wrong for the officer to advise the Committee that (bundle C173)

> " ……..in planning terms the permission goes with the land rather than with the applicant and as with any application we have to assume that they would comply with the conditions attached to the permission if granted."

106. He argued also, by reference to *Great Portland Estates PLC v Westminster City Council* [1985] AC 661 @670E that this was an exceptional case where the personal aspect of CBL's breaches could be taken into account.

107. Mr Maurici argued that the Planning Committee had the evidence of past breaches placed before them, as is undoubtedly the case. One breach had related to noise levels. That had been remedied by the suspension of activities, and the erection of noise barriers. The other had related to the timing of lorry movements. That had occurred when the Police had required CBL to move lorries outside the times permitted, because of the activities of protesters.

108. Mr Maurici also pointed out that the planning permission as granted contained more stringent conditions on HGV movements and noise monitoring. Two of the conditions (12 and 13) proposed by the Planning Officer were strengthened by the Planning Committee in the permission itself. Traffic routing was also addressed (see condition 10), and the establishment of a liaison group was also proposed and approved (Condition 20).

109. I regard this ground argued by the Claimant as also quite without substance. No one doubts that the enforceability of a planning condition is a material matter, and evidence of past breaches must be relevant in that context. That evidence was put before the Committee. The transcript shows (page C 173) that the planning officer advised the Committee that she considered that it had enough information to assess the application. The Committee dealt with the issue carefully, and addressed the points of concern about noise and traffic routing, which had led to the breaches of the conditions under the earlier permission. The Minutes at paragraphs 16-33 show that the Committee gave very full consideration to the issues of noise monitoring and HGV movements, which were actually the subject matter of the conditions of the previous permission which had been breached.

110. It follows that the only remaining argument could be one that because CBL had breached the conditions, therefore there was an argument that there should not be a further permission on an application by CBL. The Claimants argue that because it was CBL which had breached the previous conditions, the officer was not entitled to advise the Committee, and it to consider, that in planning terms it should assume that the conditions would be complied with. As I pointed out to Mr Wolfe in argument, that was a very unwise way to take a quite different point. The occurrence of past breaches is of course relevant to the policy tests which apply to the imposition of a condition- such as necessity and enforceability (see NPPF paragraph 206) but as planning permission runs with the land, it is very hard to justify a refusal based on past breaches *unless* they go to the issue of enforceability. After all, the grant of a personal permission (i.e. one limited by condition to a particular applicant) is rare but permissible in policy when there are personal circumstances which are material considerations (see PPG: "Use of Planning Conditions" paragraph 15), but the grant of a personal refusal is simply unknown.

111. The Council carefully addressed how noise monitoring and traffic routing were to be achieved and enforced. It considered all the evidence put before it of past breaches. It follows in my judgment that it addressed all matters material to this issue.

**G** ***Ground 6: submissions of Claimant and Defendant and Discussion***

112. It is contended by Mr Wolfe that the officer was wrong to advise the Committee that

> " the issues raised in representations were considered but the number of representations was not a material consideration." (Minutes paragraph 13).

113. He relied on *R(Redcar and Cleveland BC) v Sec of State for Business etc and EDF (Northern Offshire Wind) Ltd* [2008] EWHC 1847 (Sullivan J) . He also argued that while the numbers of objections were put before the Committee, the results of an opinion poll conducted by the Parish Council were not. He also referred to *Newport BC v Secretary of State for Wales* [1998] 1 PLR 47.

114. Mr Maurici argued that the Committee were told about all the objections, including the opinion poll conducted by the Parish Council (the results are at paragraph 7.2 of the officer's report on page C97). He submitted that the proper approach was to look at the issues raised rather than the number of objections received.

115. I consider that Mr Wolfe's point is entirely without substance in the context of this case. The subject matter of all the objections was recited with care in the officer's report (including the opinion poll results). I note that *in R (Redcar and Cleveland BC)* a very similar point was taken. Sullivan J said this at paragraphs 33-35

> 34. "The list of material considerations which the claimant now contends that the defendant should have taken into account is as follows:
>
> (i) – (iv) ……
>
> (v) the weight of objections, including that of the adjacent planning authority, to which he should have given substantial weight;
>
> (vi) the lack of support;
>
> (vii)-(viii) ……..
>
> 35. ……..
>
> 36. Since the decision letter carefully considers all of the points that were made in the objections, it is difficult to see why it is said that the defendant failed to have regard to points (v) and (vi). The submission that the defendant should have given "substantial weight" to the objections, including the objection from the claimant, is misconceived in any event. It was for the defendant to decide what weight should be given to the objections……..."

116. Mr Wolfe's point appears to be that the Committee had been advised that the number of representations could not be material. But in the context of this current case the Committee was very well aware of the fact of the substantial opposition, and was directed to the scale of the opposition, including the number of objections , but also advised to look at the issues raised rather than the numbers raising them. I can see nothing wrong with that advice in the context of this case.

117. For completeness I should add that the *Newport BC* case adds nothing. It concerns the question whether an unfounded public perception of risk could ever amount to a reason for refusing planning permission. It was not suggested before me that such an issue arose here.

**H** ***Ground 7: submissions of Claimant and Defendant and Discussion.***

118. Here Mr Wolfe refers to a case not made by his client, but by County Councillor Mullins, which he now argues for the Claimant. He says that she raised the question of the costs incurred as the result of protesters attending the application the site and the village to protest against the activity permitted by the previous consent. I have already set out what she said in the account of the meeting, at paragraph 15 above.

119. Mr Wolfe says that the costs incurred as a result of the protests against the activities of CBL amounted to a "local finance consideration" within the meaning of s 70(1) (b) of the *Town and Country Planning Act 1970* as amended by the *Localism Act 2011*. He also argues that the prospect of crime and disorder occurring when CBL is carrying out the activities authorised by the permission amount to a crime and disorder implication for the purposes of s 17 of the *Crime and Disorder Act 1998*, and that the Committee was wrongly advised that there were no Crime and Disorder implications.

120. Mr Maurici contended that the cost of dealing with the protests do not fall within the definition of "local finance consideration." He says also that the Police had no objections to the development, and that the effect of the injunctive relief which was obtained makes any protest outside the excepted area unlawful. Then he submits that it is wrong in principle for a statutory authority to be influenced in deciding whether or not to permit lawful activities by the prospect of others seeking to protest against it and, in the course of such protests, acting unlawfully. He referred the Court to *R(Phoenix Aviation) v Coventry Airport and others* [1995] EWHC 1 (Admin) [1995] 3 All ER 37 [1995] .

121. A "local finance consideration" is defined in s 70(4) *TCPA 1990 (as amended)* as

> " (a) a grant or other financial assistance that has been, or will or could be provided to a relevant authority by a Minister of the Crown, or
> (b) sums that a relevant authority has received . or could or will receive in payment of Community Infrastructure levy"
> A "relevant authority" means—
> (a) a district council;
> (b) a county council in England;
> (c) –(l).....

122. There was no evidence at all that any relevant grant or financial assistance paid or to be paid to any relevant body would be in any way affected, nor could Mr Wolfe point to any.

123. Mr Wolfe was also very reluctant to identify any item of expenditure which would fall on WSCC as a result of the activities of those who were protesters against CBL's activities. It was common ground that the costs of policing came from a precept which did not fall on WSCC. When pressed, he referred to the costs of repairing damage to the highway, but offered nothing which justified that observation. He also referred to County Councillor Mullins referring to "millions and millions of pounds" as showing that a cost had fallen on WSCC. I note also that there was no objection from the Highways Authority nor from the Police and Crime Commissioner, nor from the Police. The other item referred to in argument (by the court, it should be said) was the unquantified cost of obtaining injunctive relief. I am prepared to accept that some costs will fall on the County Council if there is further protest, but I have no evidence at all of its degree. I am not prepared to accept that County Councillor Mullins' estimates of "millions and millions of pounds" (upon which estimate Mr Wolfe placed reliance as evidence that there would be a cost to WSCC), was anything other than an emphatic, vigorous and perhaps hyperbolic way of her expressing her point.

124. So far as the *Crime and Disorder Act 1998* is concerned, one must in my judgment distinguish the effects of a development in terms of it leading to crime and disorder, from the effects of the protests of those who disagree with the activity permitted. Thus, the effects of a new public house or night club in a residential area could be relevant, because of the activities of those leaving the club late at night the worse for wear. They are a direct result of the clientele making use of and enjoying the facilities provided. Other commonplace examples are that housing developments should be designed so as to deter burglars, or that motorway service area car parks should be lit and laid out so as to deter car thieves. But this is quite different; this has nothing to do with the design or use of the development applied for. It relates to policing the activities of those who consider that a protest must be made against an entirely lawful activity, permitted by an elected authority according to a statutory code enacted by Parliament. On any view the previous protests had exceeded what was lawful. That must be so, because the High Court had granted the application for injunctive relief referred to at paragraph 7 above.

125. It follows that what was really being argued here (albeit not by FFBRA before the Committee) was that the County Council should take into account the cost of dealing with the activities of those who disagree with their decision, and were and are prepared to misuse the right to protest to do so. In *Phoenix Aviation* the Divisional Court was dealing with an airport and two ports which had refused to accept livestock being transported for slaughter, because of the extensive protests against it. As Simon Brown LJ put it at the outset of his judgment, in a passage which shows a closely analogous situation to that existing here

> "The export of live animals for slaughter is lawful. But many think it immoral. They object in particular to the shipment of live calves for rearing in veal crates, a practice banned in this country since 1990. The result is that for some months past the trade has attracted widespread concern and a great deal

of highly publicised protest. Some of that protest is lawful; some alas is not. The precise point at which the right of public demonstration ends and the criminal offence of public nuisance begins may be difficult to detect. But not only is all violent conduct unlawful; so too is any activity which substantially inconveniences the public at large and disrupts the rights of others to go about their lawful business.

It is the actual and threatened unlawful activity of animal rights protesters which underlies these three judicial review challenges. Two are brought by those wishing to export live animals, respectively through Coventry Airport and Dover Harbour; they seek to compel the port authorities to accept their trade. The third, by contrast, is brought by Plymouth City Council against its own harbour authority in an attempt to ban the trade. It is the fear of unlawful disruption which has prompted Coventry and Dover to refuse the trade (Coventry's ban being subject to the court first lifting the injunction requiring it at present to accept the trade); and which prompts Plymouth City Council to seek a similar ban. All three authorities, let it be clear at once, expressly now disavow animal welfare considerations as any part of their motivation (although earlier it was otherwise with both Coventry and Plymouth City Councils).

The central questions raised by all three applications are these.

(1) Given that their trade is lawful, what if any rights are enjoyed by animal exporters to have it accepted by the public authorities administering the respective (air and sea) ports here under consideration? Or, putting it the other way round, what, if any, discretion have the authorities to refuse it?

This question falls to be decided by reference to the respective statutory regimes under which each of these authorities operates.

(2) Assuming the authorities have a discretion to refuse trade which it would be within their physical capacity to handle, can they properly refuse it so as to avoid the disruptive consequences of threatened illegality? When, if ever, can a public authority properly bar lawful activity in response to unlawful protest? How absolute is the principle that the rule of law must prevail?

(3) If it be lawful under national law for these authorities to refuse this trade so as to avoid the disruptive consequences of accepting it, does such refusal nevertheless contravene European Community law?

126. At page 58 ff he addressed the rule of law, and said

"English law is unsurprisingly replete with examples of ringing judicial dicta vindicating the rule of law. Amongst them are these:

'The law must be sensibly interpreted so as to give effect to the intentions of Parliament; and the police must see that it is enforced. The rule of law must prevail.' *(R v Metropolitan Police Comr, ex p Blackburn* [1968] 1 All ER 763 at 770, [1968] 2 QB 118 at 138 per Lord Denning MR.)

'Any suggestion that a section of the community strongly holding one set of views is justified in banding together to disrupt the lawful activities of a section that does not hold the same views so strongly or which holds different views cannot be tolerated and must unhesitatingly be rejected by the courts.' (*R v Caird* (1970) 54 Cr App Rep 499 at 506 per Sachs LJ.)

'There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself.' (*Bennett v Horseferry Road*

*Magistrates' Court* [1993] 3 All ER 138 at 155, [1994] 1 AC 42 at 67 per Lord Bridge.)

Those cases, however, were all decided in very different contexts to the present. So too was *Singh v Immigration Appeal Tribunal* [1986] 2 All ER 721 at 728, [1986] 1 WLR 910 at 919, where Lord Bridge said:

> 'Extraneous threats to instigate industrial action could only exert an improper pressure on the Secretary of State and if he allowed himself to be influenced by them, he would be taking into account wholly irrelevant considerations.'

Nor, despite the submissions of Lord Kingsland QC, have we found *Wheeler v Leicester City Council* [1985] 2 All ER 1106, [1985] AC 1054 a helpful case. It was there held that the Leicester Football Club 'could not be punished because the Club had done nothing wrong' (see [1985] 2 All ER 1106 at 1112, [1985] AC 1054 at 1079 per Lord Templeman). But Coventry City Council here, unlike Leicester City Council there, are not intent on punishing Phoenix. That is not their purpose and different considerations accordingly apply.

Coventry and Plymouth City Councils and Dover Harbour Board argue against any absolute principle that the rule of law must prevail. Unlawful disruptive activity cannot simply be ignored. Rather it will on occasion justify or even require the suspension of lawful pursuits. An obvious illustration is the closure of an airport following a bomb threat. The question therefore becomes: what are the permissible limits within which a public authority may properly respond to unlawful action?"

127. He then reviewed the authorities. He placed particular emphasis on R *v Chief Constable of the Devon and Cornwall Constabulary, ex p Central Electricity Generating Board* [1981] 3 All ER 826, [1982] QB 458. He said at page 61

> "The Court of Appeal there was concerned with the board's attempt to survey land in Cornwall with a view to constructing a nuclear power station, a survey which was being impeded by the non-violent activities of protesting demonstrators. The police had thought themselves powerless to act. The Court of Appeal disagreed. Lord Denning MR said ([1981] 3 All ER 826 at 832–833, [1982] QB 458 at 470–471):
>
> > '… I cannot share the view taken by the police. English law upholds to the full the right of people to demonstrate and to make their views known so long as all is done peaceably and in good order (see *Hubbard v Pitt* [1975] 3 All ER 1, [1976] QB 142). But the conduct of these demonstrators is not peaceful or in good order. By wilfully obstructing the operations of the board, they are deliberately breaking the law … I go further. I think that the conduct of these people, their criminal obstruction, is itself a breach of the peace. There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it. He is entitled by law peacefully to go on with his work on his lawful occasions … If I were wrong on this point, if there was here no breach of the peace or apprehension of it, it would give a licence to every obstructor and every passive resister in the land. He would be able to cock a snook at the law as these groups have done. Public works of the greatest national

> importance could be held up indefinitely. This cannot be. The rule of law must prevail.'

Lawton LJ asked ([1981] 3 All ER 826 at 834, [1982] QB 458 at 472–473):

'… can those who disapprove of the exercise by a statutory body of statutory powers frustrate their exercise on private property by adopting unlawful means, not involving violence, such as lying down in front of moving vehicles, chaining themselves to equipment and sitting down where work has to be done. Such means are sometimes referred to as passive resistance. The answer is an emphatic No. If it were otherwise, there would be no rule of law. Parliament decides who shall have statutory powers and under what conditions and for what purpose they shall be used. Those who do not like what Parliament has done can protest, but they must do so in a lawful manner. What cannot be tolerated, and certainly not by the police, are protests which are not made in a lawful manner.'

Templeman LJ agreed, adding ([1981] 3 All ER 826 at 840, [1982] QB 458 at 481):

> '… the powers of the police and the board are adequate to ensure that the law prevails. But it is for the police and the board to co-operate and to decide on and implement the most effective method of dealing with the obstructors.'

In the result the court refused the board's application for an order of mandamus requiring the chief constable to instruct his officers to remove the objectors. No one contemplated, however, that the protesters should have their way. On the contrary, the case stands as another trenchant endorsement of the imperative requirements of the rule of law.

In our judgment, that body of authority, taken as a whole, provides singularly little support for the contentions advanced by those now seeking to bar the livestock trade from their ports.

If we are right in holding in each case that the port authority enjoys no discretion in the matter, then plainly there presently exists no such emergency as could begin to justify non-compliance with their duty to accept this lawful trade; they would have no defence of necessity. We speak of 'enjoying' a discretion but it is right to record ABP's cogent view that in truth any discretion here would be unwelcome: they have no desire to make judgments between legal trades (or shippers) according to whatever popular protest these may attract. Still less do they relish being dragged into court to justify their judgment.

Even, however, if the port authorities are to be regarded as having a discretion to determine which legal trades to handle, then in our judgment they could not properly exercise it here in favour of this ban. One thread runs consistently throughout all the case law: the recognition that public authorities must beware of surrendering to the dictates of unlawful pressure groups. The implications of such surrender for the rule of law can hardly be exaggerated. Of course, on occasion, a variation or even short-term suspension of services may be justified. As suggested in certain of the authorities, that may be a lawful response. But it is one thing to respond to unlawful threats, quite another to submit to them—the difference, although perhaps difficult to define, will generally be easy to recognise. Tempting though it may sometimes be for public authorities to yield too readily to threats of

> disruption, they must expect the courts to review any such decision with particular rigour—this is not an area where they can be permitted a wide measure of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role."

128. In my judgment that very clear statement of principle is one which must apply in this case. While I have no doubt that County Councillor Mullins meant well, the reality of her objection was that she asked WSCC to refuse to permit that which it would otherwise have permitted, on a basis that its granting permission would excite opposition leading to protests designed and intended to disrupt a perfectly lawful activity. In my judgment, had it taken County Councillor Mullins' original argument into account, WSCC would have had regard to an immaterial consideration and would have acted unlawfully.

129. In any event, I note that after the intervention of the Chairwoman and the legal advice being taken, County Councillor Mullins actually accepted that it was not material.

130. I therefore reject this ground, which to my mind has not the slightest merit.

## *I Conclusions*

131. I have no doubt whatever that this proposal has caused considerable concern to the Claimant Association. I recognise also that some parts of the public are concerned about the process commonly known as "fracking" although I must observe also that this application did not seek permission for that activity.

132. My task has been to consider whether West Sussex County Council acted lawfully in the way in which it dealt with the planning application. It was for it, and not for this Court, to determine the merits. It did so after a very full discussion and a thorough exploration of all the issues raised. It was entitled to consider that it could leave matters within the purview of the EA, the HSE and other statutory bodies and their regimes for those bodies to address. It had ample material to justify such an approach.

133. This application was for a lawful activity, which (and this has never been challenged in these proceedings) was a development which national and development plan policy supported, and which would be the subject of statutory control as well as planning conditions. The approach adopted by WSCC towards the relationship of planning control with other regulatory codes and regimes followed national policy guidance as repeatedly endorsed by the courts.

134. In each respect argued by the Claimants as showing that those regulatory bodies were not able to deal with the proposals, the case for the Claimants has failed, both because the legal arguments neither addressed nor reflected long accepted principles, but also because the case that the Committee was misled was unsustainable on the facts.

135. The Claimant's other grounds were also unsustainable.

136. I feel considerable sympathy for the Claimant association and its members, who have mounted what is no doubt an expensive claim on what FFBRA and its members no doubt considered and were advised were respectable grounds in law.

137. This claim for judicial review is dismissed.

CO/1902/2002

Neutral Citation Number: [2003] EWHC 2775 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Friday, 7th November 2003

B E F O R E:

**MR JUSTICE SULLIVAN**

- - - - - - -

**THE QUEEN ON THE APPLICATION OF BLEWETT**

**(CLAIMANT)**

-v-

**DERBYSHIRE COUNTY COUNCIL**

**(DEFENDANT)**

- - - - - - -

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**MR D WOLFE (**MR M PURCHASE for judgment) (instructed by Public Interest Lawyers) appeared on behalf of the CLAIMANT
**MR A EVANS** (instructed by Derbyshire County Council) appeared on behalf of the DEFENDANT
**MR J BARRETT** appeared on behalf of Derbyshire Waste Limited as INTERESTED PARTY

- - - - - - -

J U D G M E N T
(As approved by the Court)

- - - - - - -

Friday, 7th November 2003

1. MR JUSTICE SULLIVAN: Introduction

2. In this application for judicial review the claimant seeks a quashing order in respect of a grant of planning permission dated 23rd December 2002 by the defendant to the interested party for "land reclamation by waste disposal with restoration to agricultural, woodland, grassland and nature conservation uses at Smith's void, Former Glapwell Colliery, Palterton Lane, Sutton Scarsdale".

Factual background

3. Glapwell Colliery closed in the mid-1970s leaving two spoil tips. Planning permission was granted for a reclamation scheme which involved tip washing, opencast mining of shallow seams under the spoil tips and the replacement of the opencast mine spoil and washed deep mine spoil into a landscaped profile. Smith's void was to be reprofiled as part of these operations but the contractor employed to carry out the coal recovery scheme went into receivership, leaving the scheme incomplete. Voids had been created within the reprofiled spoil tips as part of the reclamation works to facilitate landfills.

4. Glapwell 1 was the first of the voids to be filled. Over a five year period between 1983 and 1988 it accommodated some 750,000 cubic metres of waste. Planning permission was granted in 1984 for the filling of two further voids, Glapwell 2 and 3. Waste disposal in Glapwell 2 commenced in 1988, and finished in November 2002 after planning permission had been granted in 1995 for additional tipping. No tipping took place in Glapwell 3 (Smith's void) pursuant to the 1984 permission, but that planning permission remains valid until December 2003 (operations were limited to a period of 15 years from the start of tipping). The 1984 planning permission envisaged that Glapwell 3 would have a capacity of about 1 million cubic metres. The present proposal involves tipping around 850,000 cubic metres of domestic, industrial, commercial and inert waste over a period of four years, with the overall operational programme, including restoration to agriculture et cetera, taking six years.

5. The application site covers about nine hectares and is located within one kilometre of the villages of Glapwell, Palterton, Bramley Vale and Doe Lea. The claimant lives in Bramley Vale. In his witness statement he states that the nearest site boundary of Glapwell 3 is about 800 metres from his home, which is about 200 metres from the nearest site boundary of the existing tipped voids, Glapwell 1 and 2.

6. The claimant is registered disabled and suffers from chronic bronchitis and also from asthma and angina. He contends that these conditions have been exacerbated by dust and smells from the landfilling operations on Glapwell 1 and 2. He also complains of noise from the landfilling operations, that some of his pet pigeons have been killed by rats living in the landfills, and that he is plagued by the noise and droppings of the many seagulls who are attracted to the landfills. The claimant has actively opposed the grant of planning permission for Glapwell 3. He made representations to the defendant both personally and in his capacity as a member of the "Stop the Landfill Group".

7. The defendant County Council is both the waste planning authority, and thus responsible for granting planning permission for landfilling operations, and the waste disposal authority for its area. Derbyshire Waste Limited (the interested party) was set up by the County Council, pursuant to arrangements made under section 30 of the Environment Protection Act 1990, to dispose of Derbyshire's waste. The company remains 20 per cent owned by the County Council and disposes of the County's waste under a long term contract with the County Council.

8. The development proposed in the application for planning permission was a "Schedule 2" development as defined by the Town and Country Planning (Environmental Impact Assessment) (England and wales) Regulations 1999 ("the Regulations"). An environmental statement was required if the development was likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The application was accompanied by an environmental statement which was submitted to the County Council on 8th February 2001.

9. The defendant's Regulatory Planning and Control Committee first considered the application on 11th March 2002. The defendant's Director of Environmental Services advised members as to the merits of the application in a 55-page report ("the Report"). He recommended that planning permission should be granted, subject to no less than 53 conditions.

10. On the morning of the meeting the Secretary of State issued an Article 14 direction preventing the defendant from determining the application. Members resolved that had they been in a position to determine the application they would have granted planning permission, as recommended in the Report, subject to a minor amendment to one of the recommended conditions.

11. Application for permission to apply for judicial review of the Committee's resolution was lodged on 22nd April on a precautionary basis, since at that time it was unclear whether the three month period prescribed by CPR Part 54.5(1)(b) ran from the date of the resolution to grant planning permission or from the date of the permission itself. I adjourned consideration of the application pending the outcome of the Secretary of State's Article 14 direction. In the event, the Secretary of State decided not to call in the application, but the judicial review challenge had by then been overtaken by the decision of the House of Lords in R (Burkett) v Hammersmith & Fulham London Borough Council [2002] 1 WLR 1593. Although the challenge to the resolution to grant planning permission was premature in the light of that decision, the application for permission to apply for judicial review was adjourned to enable the claimant to challenge the grant of planning permission in due course, if so advised. On 4th November 2002 the Committee reconsidered the application for planning permission. In addition to the Report, members were provided with a Joint Report of the County Secretary and Director of Environmental Services. The Joint Report responded to the contentions which were being advanced in the judicial review proceedings. The officers recommended that planning permission should be granted. Members resolved to grant planning permission and permission was granted on 23rd December 2002.

12. Having considered the amended claim form, Collins J granted permission to apply for judicial review on 29th April 2003.

Submissions

13. On behalf of the claimant, Dr Wolfe submitted that the decision to grant planning permission was unlawful on three grounds:

(1) The environmental statement did not include an assessment of the potential impact of the use of Glapwell 3 for landfill on groundwater and on human health and instead unlawfully left those matters to be assessed after planning permission had been granted. So far as groundwater is concerned, the defendant had impermissibly approached the issue by assuming that contemplated "complex" mitigation measures would be successful ("Environmental Statement").

(2) The defendant failed to give effect to its obligations under Schedule 4 to the Waste Management Licensing Regulations 1994 ("the 1994 Regulations") by failing to keep the objectives of avoiding, or at least minimising, nuisance from noise and smell, in mind ("Relevant Objectives").

(3) The defendant failed to comply with its obligations under the Government's Waste Strategy 2000 to carry out an assessment in order to determine whether the proposed landfill was the Best Practicable Environmental Option (BPEO) for the waste stream(s) in question ("BPEO").

14. In his submissions before me Dr Wolfe placed ground (3) in the forefront of the claimant's case.

Analysis and conclusions

15. I find it convenient to begin with ground (2), I will then consider ground (1) and finally ground (3).

Ground (2) (Relevant Objectives)

16. Schedule 4 to the 1994 Regulations implements certain provisions of Council Directive 75/442/EEC ("the Waste Framework Directive"). Article 4 of the Directive provides:

> "Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment and in particular -
>
> ...
>
> without causing a nuisance through noise or odours..."

Paragraph 2(1) of Schedule 4 states that:

> "... the competent authority shall discharge their specified functions insofar as they relate to the recovery or disposal of waste with the relevant objectives."

The wording of paragraph 2(1) is, to say the least, inelegant. It appears that a word or words may have been omitted in the process of transposing the requirements of the Directive.

17. In any event, the defendant is a competent authority and when it granted planning permission it was discharging a specific function: see paragraphs 1 and 3 and Table 5 in Schedule 4.

18. Paragraph 4 in Schedule 4 sets out the relevant objectives in relation to the disposal or recovery of waste. They include:

> "ensuring that waste is ... disposed of without endangering human health and without using processes or methods which could harm the environment and in particular without ...
>
> (ii) causing nuisance through noise or odours."

19. The nature of the obligation imposed by paragraphs 2 and 4 of Schedule 4 was considered by the Court of Appeal in R (Thornby Farms Ltd) v Daventry District Council; R (Murray) v Derbyshire County Council [2002] QB 503 [2002] EWCA 31. Having reviewed the authorities, Pill LJ, with whom the other members of the court agreed, concluded in paragraph 53 of his judgment:

> "An objective in my judgment is something different from a material consideration. I agree with Richards J that it is an end at which to aim, a goal. The general use of the word appears to be a modern one. In the 1950 edition of the *Concise Oxford Dictionary* the meaning now adopted is given only a military use: 'towards which the advance of troops is directed'. A material consideration is a factor to be taken into account when making a decision, and the objective to be attained will be such a consideration, but it is more than that. An objective which is obligatory must always be kept in mind when making a decision even while the decision-maker has regard to other material considerations. Some decisions involve more progress towards achieving the objective than others. On occasions, the giving of weight to other considerations will mean that little or no progress is made. I accept that there could be decisions affecting waste disposal in which the weight given to other considerations may produce a result which involves so plain and flagrant a disregard for the objective that there is a breach of obligation. However, provided the objective is kept in mind, decisions in which the decisive consideration has not been the contribution they make to the achievement of the objective may still be lawful. I do not in any event favour an attempt to create an hierarchy of material considerations whereby the law would require decision-makers to give different weight

to different considerations."

20. Thus, the question is whether the Committee kept the objective, of avoiding causing nuisance through noise or odours, in mind when deciding to grant planning permission. It is common ground that, in the absence of any evidence to the contrary, members approached these issues on the basis set out in the Report and Joint Report.

21. The Report said this under "Noise":

> "Existing ambient noise levels have been measured at four sensitive noise locations around the proposed site boundary and a detailed analysis of the potential impacts has been submitted with the application. It shows the predicted noise impact to be within MPG 11 criterion at all properties. In the event of a grant of planning permission the Environmental Health Officer agrees that it would be appropriate to condition noise levels as above and to require ongoing monitoring."

22. Under the heading "Odour" the Report said this:

> "There are two principal sources of odour from landfill sites; freshly deposited waste and landfill gas (LFG). Like dust, the generation and dispersal of odours is dependent on the wind speed, temperature and precipitation. The applicant is proposing to adopt a number of good working practices that can substantially reduce the generation and disposal of odour. These are:
>
> • minimising the extent of the operating area;
>
> • the daily application of cover materials, such as inert soils;
>
> • progressive restoration;
>
> • any waste previously identified with an odour problem should be deposited directly in pre-prepared trenches excavated into dry waste and immediately covered.
>
> In the long-term, the applicant proposes that upon cessation of landfill operations, continued odour mitigation would be provided by the engineered containment liner and cap preventing the escape of odourous gases to the atmosphere and the active abstraction and burning/flaring of landfill gas.
>
> Some objectors have raised odour as an issue and I acknowledge that some individuals may be more sensitive to smells than others. To minimise future odour impact I recommend that a detailed scheme for the control of odour should be submitted for approval if planning permission is granted and that the following are incorporated as agreed by the Environmental Health Officer:

• implementation of a monitoring scheme;

• results of smell monitoring to be submitted to the Council together with details of any remedial action taken and any complaints received by the operator about smell.

I am satisfied that, subject to rigorous adherence to the above practices and conditions that could be imposed as part of a planning permission, long term nuisance impacts associated with odour should not arise."

23. The Joint Report responded to the contention in the application for permission to apply for judicial review that the defendant had failed to give effect to the relevant Waste Framework Objectives in these terms:

"This ground of the challenge relates to the objectives under the 'Waste Framework Directive' relating to human health and harm to the environment. The claimant refers to an obligation on the part of the County Council to have had in mind the objective of avoiding impacts such as noise and dust, as explained by the Court of Appeal in Thornby Farms v Daventry District Council; Murray v Derbyshire County Council [2002] EWCA Civ 31 by refusing permission rather than just reducing them to below a threshold.

Your reporting officers consider that the report of 11 March does demonstrate that the Council did keep the relevant objectives in mind."

24. The officers recommended conditions in relation to noise and odour control which were included in the planning permission, as follows:

"18) All plant and machinery shall be silenced at all times in accordance with the manufacturers' recommendations.

19) The noise levels arising from the developments, with the exception of temporary operations, shall not exceed 55dB(A)Leq (1hr) at any noise sensitive property.

20) Noise levels arising from temporary operations shall be minimised as far as is practicable, shall not exceed 70dB(A)Leq (1hr) measured at any noise sensitive property and shall not continue for more than eight weeks in any 12 month period. Any bund or mound constructed under this exemption shall be in accordance with a scheme that shall have received the prior approval of the Waste Planning Authority. The scheme shall provide for the minimum impact on the landscape and upon nearby residential property. The commencement of all temporary operations carried out in accordance with this condition shall be notified to the Waste Planning Authority before such works commence.

21) No development authorised by this permission shall take place until a scheme for noise monitoring at the site has been submitted to and

approved by the Waste Planning Authority. The noise levels from the site shall be monitored in accordance with the approved scheme."

25. "Olfactory assessment" was dealt with in condition 22:

> "22) A scheme for the monitoring of smells generated by the site shall be submitted to the Waste Planning Authority three months before the first deposit of waste. Monitoring and control of smells shall be undertaken in accordance with an approved scheme or as subsequently modified in writing by the Waste Planning Authority.
>
> The scheme shall include: ...
>
> (vi) what would trigger remedial action;
>
> (vii)details of remedial action that would be taken... "

26. In my judgment it is plain from these references that the Committee, when granting planning permission, did keep the relevant objectives in mind. The objective is not to avoid noise or odours altogether. Such an objective would be wholly unrealistic in the context of a waste disposal operation. The objective is to avoid "causing nuisance through noise or odours". Thus, an approach which seeks to reduce the impact of noise and smells so that they will not cause a nuisance is in accordance with the objectives. Dr Wolfe drew a distinction between an approach which merely sought to reduce noise below a threshold, and an approach which sought to minimise the impact of noise or smell. Provided the threshold is set with the objective of avoiding the creation of a noise or smell nuisance, I can see no objection to the former approach. That is the objective of the noise limits recommended in MPG 11, which was referred to in the Report. In effect, conditions 19 and 20 impose the noise limits recommended in MPG 11. Dr Wolfe points to the fact that MPG 11 explains that the recommended limits are not intended "to become the norm at which operations work. Operators are asked to take any reasonable steps they can to achieve quieter working wherever this is desirable and technically feasible having regard to the principle of BATNEEK [(Best Available Techniques Not Entailing Excessive Cost)]" (paragraph 31). He contrasts condition 20, which follows this advice - "noise levels from temporary operations shall be minimised as far as practicable" - with condition 19 which contains no such requirement, merely an upper limit of 55dB(A)Leq (1hr). The difference between the two conditions is readily explained by the fact that noise levels at the upper limit set by condition 20 would be perceived as very noisy indeed. The purpose of the high upper limit is to enable such operations as the construction of baffle mounds around the perimeter of a landfill site. Temporary inconvenience is the price residents will have to pay for long term benefits (paragraph 61 of MPG 11). It is reasonable to expect that an operator will try to minimise such high levels of noise as far as practicable.

27. As explained in paragraph 34 of MPG 11, the lower limit in condition 19 "is roughly equivalent to a noise made by a person talking normally, and is generally thought to be a tolerable noise level; above this level, continuous noise could well cause annoyance". Limiting the noise of operations to such a threshold is wholly in accordance with the

objective of not causing noise nuisance. Moreover, even if condition 19 was deficient in this respect, because it should have incorporated a requirement to minimise the noise levels arising from operations as far as practicable, the deficiency would not mean that members had not kept the objective in mind when deciding to grant planning permission. The fact that a decision taker has not imposed the most effective condition that might (with the benefit of hindsight) have been devised does not mean that he failed to keep the relevant objective in mind.

28. The original claim form in these proceedings, to which the Joint Report responded, criticised the Report's treatment of noise and odour issues, but did not suggest any amendment to the proposed conditions. Nor is any such criticism made in the replacement claim form challenging the grant of planning permission on 23rd December 2002.

29. So far as odour control is concerned, it is difficult to see what more could reasonably have been done by the defendant. It was submitted that the scheme required by condition 22 merely provided for monitoring, but that is clearly wrong. The scheme must cover not merely the monitoring but also the "control of smells", and "shall include ... what would trigger remedial action" and "details of remedial action that would be taken".

30. In his skeleton argument Dr Wolfe referred to a "proof of the pudding test". Applying such a test, the proof of the pudding under ground (2) is that the claimant has not cast any doubt on the conclusions in relation to noise and smell in the Report, and has not suggested any better conditions, save for the addition of a general requirement to reduce noise below the threshold set in condition 19. By no stretch of the imagination could such an omission indicate that there had been a failure to keep the relevant objectives in mind. Accordingly, I reject ground (2) of the challenge.

Ground (1) (Environmental statement)

31. As mentioned above, the application for planning permission was accompanied by an environmental statement. The environmental statement was a lengthy document comprising 15 chapters and 7 technical appendices. It is not suggested that the environmental statement failed to mention the potential impact of the proposed development on groundwater and human health, rather it is submitted that the manner in which these issues were dealt with was inadequate. In summary, the assessment of likely impact and the description of the necessary mitigation measures were left over for subsequent determination.

32. Where there is a document purporting to be an environmental statement, the starting point must be that it is for the local planning authority to decide whether the information contained in the document is sufficient to meet the definition of an environmental statement in Regulation 2 of the Regulations:

> "'environmental statement' means a statement -
>
> (a) that includes such of the information referred to in Part I of

> Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
>
> (b) that includes at least the information referred to in Part II of Schedule 4."

33. The local planning authority's decision is, of course, subject to review on normal Wednesbury principles: see R v Cornwall County Council ex parte Hardy [2001] JPL 786, per Harrison J at paragraph 65, applying R v Rochdale Metropolitan Borough Council ex parte Milne [2001] Env LR 416 at paragraph 106.

34. Information cable of meeting the requirements of Schedule 4 to the Regulations must be provided: see Hardy (ibid) and R v Rochdale Metropolitan Borough Council ex parte Tew [1999] 3 PLR 74 at 95G.

35. Part I of Schedule 4 requires the environmental statement to provide "a description of the likely significant effects on the environment ..." (paragraph 4) and "a description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment". Part II of Schedule 4 requires:

> "1. A description of the development comprising information on the site, design and size of the development.
>
> 2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
>
> 3. The data required to identify and assess the main effects which the development is likely to have on the environment.
>
> 4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.
>
> 5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part."

36. Dr Wolfe referred to the speech of Lord Hoffmann in Berkeley v Secretary of State for the Environment [2001] 2 AC 603 at pages 615 to 616, which, he submitted, "emphasised the absolute nature of the requirement to produce an environmental statement in the correct form and to comply with the procedural requirements". Lord Hoffmann's speech must be considered in its context. Berkeley was a case where there had been no environmental statement. Even in such a case the House of Lords was prepared to accept that "an EIA by any other name will do as well. But it must in substance be an EIA" (see page 617). If an application for planning permission has been accompanied by a document purporting to be an environmental statement, can it be said that that document falls outside the definition of environmental statement in

Regulation 2 (so that the local planning authority is unable to grant planning permission: see regulation 3(2)) because it has failed to describe a likely significant effect on the environment subsequently identified by the local planning authority, or a particular mitigation measure thought necessary by the local planning authority? The omission might have been due to an oversight on the part of those preparing the environmental statement, or to a deliberate decision because it was not considered by the author of the environmental statement that a particular environmental effect was likely, or, if likely, that it was likely to be significant, or because the author of the environmental statement was unfamiliar with the particular mitigation technique, or because he considered that mitigation was unnecessary.

37. In my judgment, the fact that the local planning authority's consideration of the application leads it to conclude that there has been such an omission does not mean that the document is not capable of being regarded by the local planning authority as an environmental statement for the purposes of the Regulations.

38. The Regulations envisage that the applicant for planning permission will produce the environmental statement. It follows that the document will contain the applicant's own assessment of the environmental impact of his proposal and the necessary mitigation measures. The Regulations recognise that the applicant's assessment of these issues may well be inaccurate, inadequate or incomplete. Hence the requirements in Regulation 13 to submit copies of the environmental statement to the Secretary of State and to any body which the local planning authority is required to consult. Members of the public will be informed by site notice and by local advertisement of the existence of the environmental statement and able to obtain or inspect a copy: see Regulation 17 of the Regulations and Article 8 of the Town and Country Planning (General Development Procedure) Order 1995.

39. This process of publicity and public consultation gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies. Under Regulation 3(2) the local planning authority must, before granting planning permission, consider not merely the environmental statement, but "the environmental information", which is defined by Regulation 2 as "the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development".

40. In the light of the environmental information the local planning authority may conclude that the environmental statement has failed to identify a particular environmental impact, or has wrongly dismissed it as unlikely, or not significant. Or the local planning authority may be persuaded that the mitigation measures proposed by the applicant are inadequate or insufficiently detailed. That does not mean that the document described as an environmental statement falls outwith the definition of an environmental statement within the Regulations so as to deprive the authority of jurisdiction to grant planning permission. The local planning authority may conclude that planning permission should be refused on the merits because the environmental statement has inadequately addressed the environmental implications of the proposed

development, but that is a different matter altogether. Once the requirements of Schedule 4 are read in the context of the Regulations as a whole, it is plain that a local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects.

41. Ground 1 in these proceedings is an example of the unduly legalistic approach to the requirements of Schedule 4 to the Regulations that has been adopted on behalf of claimants in a number of applications for judicial review seeking to prevent the implementation of development proposals. The Regulations should be interpreted as a whole and in a common-sense way. The requirement that "an EIA application" (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in R v North Yorkshire County Council ex parte Brown [2000] 1 AC 397, at page 404, the purpose is "to ensure that planning decisions which may affect the environment are made on the basis of full information". In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (Tew was an example of such a case), but they are likely to be few and far between.

42. It would be of no advantage to anyone concerned with the development process - applicants, objectors or local authorities - if environmental statements were drafted on a purely "defensive basis", mentioning every possible scrap of environmental information just in case someone might consider is significant at a later stage. Such documents would be a hindrance, not an aid to sound decision-making by the local planning authority, since they would obscure the principal issues with a welter of detail.

43. Against this background, I turn to the manner in which this environmental statement dealt with the impact of the proposed development on groundwater and human health. Chapter 13 referred to human health in two paragraphs as follows:

> "13.4.36. The potential health effects of landfill sites have been the subject of epidemiological studies, and the presentation of the findings of a recent study has caused some concern in respect of proposed new facilities. However, the evidence available does not support a causal link between the health effects studied and proximity to landfill sites.
>
> 13.4.37. The proposed landfill at Smiths Void would be operated to the highest environmental standards and the operation would be independently regulated by the Environment Agency. The management and regulation of the site would ensure that the potential risk to the site

employees, local communities and the wider environment were minimised."

44. It is submitted on behalf of the claimant that the environmental statement did not provide any assessment of the potential health impacts arising out of the proposal. On the contrary, it is plain from paragraph 13.4.36 that the authors of the environmental statement considered that there were not likely to be any significant effects on human health. It was therefore unnecessary for them to describe mitigation measures in any detail. Those who disagreed with this assessment had an opportunity to put their views to the local planning authority in the consultation process. The Report summarised the responses of consultees. They included the North Derbyshire Health Authority, which raised no objection:

> "A report subsequently amended to include congenital anomalies data has been produced on the impact of the proposal on the local population. It is held in the Environmental Services Department for Members' inspection and will be available at Committee. The covering response states:
>
> *"There are concerns in relation to the recent study from the Small Area Health Statistics Unit on health effects in people living adjacent to landfill sites. The results of this study, however, were not conclusive. Landfill sites could potentially be harmful if toxic substances are released into the environment and ingested/absorbed (in toxic doses) by the local population. It is essential therefore that all landfill sites are engineered to a high standard with appropriate control and monitoring of any emissions (landfill gas/leachate).*
>
> *If planning permission were granted, I would expect the applicants to undertake a health risk assessment as part of the Integrated Pollution and Prevention Control (IPPC) application process for a waste management licence. Any application would be scrutinised by our environmental toxicology advisors and us at this stage.*
>
> *I do not feel there is sufficient evidence to object to landfill sites on health grounds. However, I would need to be satisfied by the proposed control measures detailed in a waste management licence application."*
>
> The amended report indicates that *"from our routine data sets, there is no evidence that the local communities have suffered health effects from the existing landfill sites."*
>
> *The Lancet* has recently reported further findings from the Eurohazcon study relating to selected landfill sites in Europe.
>
> Whilst this study relates to hazardous sites only and is therefore of marginal relevance in this case, I refer to it given the medial interest shown and renewed public concern about landfill sites.
>
> The AHA has commended that the Study fails to demonstrate a

statistically significant association between those living near a hazardous landfill site and chromosomal abnormalities and that further work is needed.

I address the question of the perception of risk associated with certain hazardous waste types and a method of providing some comfort to the local community in the Planning Considerations section of this report."

45. The Director dealt with "Health, Perception of Risk and the Living Environment Considerations" as follows:

"I accept that in this case fear regarding adverse health effects as expressed by objectors should not be viewed as baseless, since the possibility of risk to health cannot entirely be dismissed. Accordingly, it is appropriate to afford some weight to this genuinely held view. The Area Health Authority's (AHA) amended report and correspondence evaluates recent studies, takes account of specialist advice and examines rates of congenital anomalies in the electoral Wards adjacent to Glapwell compared to the North Derbyshire average. The results over a four year period from 1997 to 2000 illustrate no significant difference. The AHA's conclusions would not, in my view, support a rejection of the application on health related grounds.

I am also mindful of the fact that the ongoing 'health' debate has not led to health issues being accorded significance within national planning policy guidance relating to waste management facilities including landfill.

Notwithstanding the above, the AHA has pointed out that anxiety relating to operations at landfill sites can lead to a variety of health concerns. I would agree with its conclusion that this could largely be avoided if the local population have confidence in the site operator to maintain a clean and safe site. The early establishment of a Liaison Committee for the duration of the operations as agreed by the applicant can also be an effective way of alleviating concerns.

Additionally, I have raised with the applicant the possibility of a condition specifically restricting the deposit of hazardous waste as a means of providing assurance to the public. While I believe that there is general recognition of the meaning and character of municipal domestic waste, there is less public understanding of the terms commercial and industrial waste. There is also widespread concern that this is likely to involve toxic substances as evidenced by the objection notices displayed locally.

I have suggested a condition to the application the wording of which makes reference to the Hazardous Waste directive 91/689/EEC. As described in Article 6(c) of the Directive, only non-hazardous commercial and industrial waste would be acceptable at the site with the exception of

stable, non-hazardous wastes that have for example been solidified or vitrified. I consider that a condition linking the range of waste coming to the site to the Landfill Directive's classification of waste would be appropriate and would be warranted on planning grounds as a means of calming public fear. The applicant has agreed that such a condition would be acceptable to them."

Condition 7 in the planning permission imposes a restriction on waste types as follows:

"In relation to commercial and industrial waste, the site shall be used for the landfill of only non-hazardous waste, except for stable, non-reactive hazardous wastes as described in article 6(c(iii) and Annexe II of the Landfill Directive 1999/31/EC."

46. This was an eminently reasonable response to fears expressed by objectors which, while they did not raise any likely significant effect, nevertheless raised a possibility of risk to human health which "cannot entirely be dismissed".

47. Turning to the effect of the proposed development upon groundwater, the assessment of operational impacts and mitigation in chapter 12 of the environmental statement has to be considered against the background of the description of the proposals given in chapter 4. Under "Engineering", paragraph 4.5 of the environmental statement said:

"4.5.1 On completion of the initial earthworks, the engineering of the landfill void would be carried out for Cell 1.

4.5.2 The formation below the lining system would be graded to falls of approximately 1 in 50, to ensure positive drainage. The proposed lining system, comprising a minimum of 1.0m of mineral liner, with a maximum permeability of 1 x 10-9 m/s, or equivalent, would then be installed. The installation would be the subject of a rigorous Construction Quality Assurance programme.

4.5.3 The clay would be excavated from the area of Cell 3, above the cell formation levels. During the landfilling of Cell 1, Cell 2 would be constructed, taking further clay from the area of Cell 3.

4.5.4 The construction of Cell 3 would comprise completion of the formation levels. The quantity of clay above the formation levels would be sufficient to construct the clay liner within the cell.

4.5.5 Each cell would be constructed independently, and would be separated from adjacent cells by internal bunds constructed to a similar standard to the basal lining.

4.5.6 The liner would be overlain by a comprehensive leachate collection system, comprising 300 mm of free draining material, within which would be situated a network of slotted pipes to collect leachate. The leachate would be directed via this system to leachate collection points

situated at the low point of each cell.

4.5.7 Upon completion of landfilling in each cell, the waste would be capped. The capping system would include a stabilisation layer, overlain by a mineral liner or equivalent geosynthetic material to minimise rainfall infiltration and leachate generation within the waste mass.

4.5.8 Typical details of the proposed engineering systems are indicated on Figure 11; Typical Construction Details."

48. Figure 11 contained diagrams of a typical basal liner, typical capping liner, typical leachate collection point, and typical internal bund.

49. Chapter 12 dealt with the effects of the proposed development under the heading of "Geology, Hydrogeology and Hydrology ".

50. Under "Introduction" paragraphs 12.1 and 12.2 said:

"12.1.1 The landfilling of biodegradable wastes has the potential to cause environmental impact on the local water environment. The source of this potential impact is leachate produced through the percolation of rainwater through the waste mass. Leachate has the potential to pollute any adjacent water bodies it is able to reach.

12.1.2 In order to assess the potential impact, an examination of the geological, hydrogeological and hydrological conditions at the site has been undertaken."

Against the background of that assessment, paragraph 12.3 described the Construction Impacts and Mitigation. They included:

"12.3.1 During the construction phase of the landfill, the principal potential impact would be the discharge of polluted surface water run-off to the local watercourses.

12.3.2 To mitigate the potential impact of polluted discharges, a system of perimeter cut-off ditches would be installed, to intercept polluted run-off and direct it to settlement facilities where suspended solids would be removed prior to discharge.

12.3.3 Such measures would be designed to ensure that surface water discharges complied with the requirements of a Consent to Discharge issued by the Environment Agency."

Paragraph 12.4 described the Operational Impacts and Mitigation as follows:

"12.4.1 The potential impacts associated with the operation of the landfill would include those identified during the construction phase, and in additional potential impacts from the uncontrolled discharge of leachate

from the site.

...

12.4.9 The uncontrolled discharge of landfill leachate has the potential to pollute any adjacent water it is able to reach. Given the position of the site in relation to surface watercourses, and the groundwater table, it is predicted that potential impacts would be low to medium.

12.4.10 To minimise the potential for such impacts, the following mitigation measures would be implemented:

• The installation of a full containment system, constructed within a rigorous Construction Quality Assurance regime, to prevent uncontrolled discharge of leachate.

• The provision of a comprehensive leachate collection system.

• Regular monitoring and removal of excess leachate

12.4.11 The design of the above measures would be finalised based upon the results of a quantitative Risk Assessment, in agreement with the Environment Agency.

12.4.12 With the implementation of the above measures, and good working practices, the operation of the site would be in accordance with Environment Agency policy, and the residual impact associated with the operation of the landfill would be low."

51. The Environment Agency was one of the consultees. It raised a number of matters in a letter dated 24th April 2001. The interested party sought to address the Environment Agency's concerns in an addendum report dated July 2001. This gave further information in relation to the geological and hydrogeological setting of the proposal. The proposed development was described in paragraph 2.3:

"The site will be operated as a containment site with a liner equivalent to or better than a clay composite liner as required by the IPPC Regulations and Landfill Directive. The appropriateness of the lining system and the site design will be assessed as part of the assessment of emissions to groundwater (Regulation 15 Risk Assessment) as part of the PPC Permit application.

...

Leachate management systems at the site will result in the leachate levels being maintained at 1 m above the base of the site. This is approximately 1 m below the water levels within the made ground and consequently the site will be hydraulically contained with respect to the shallow groundwater."

A conceptual design of the site was presented in a diagram.

52. Chapter 4 described the historical contamination of the site and paragraph 4.2 described the remediation options available:

> "The remediation options currently available which are considered suitable for the site include the interception of potentially contaminated groundwater adjacent to the development area and/or capping the area to reduce the infiltration and the production of contaminated groundwater."

Paragraph 4.3 dealt with the effect of the development on remedial design, and concluded that:

> "In summary by developing the site, the reduction in infiltration will improve the quality of the Stockley Brook by decreasing the impact from contaminated groundwater on the stream from that observed today and will not limit the application of future remediation operations."

53. The Addendum Report concluded in paragraph 5.0:

> "Based on the conclusion that the contamination is disseminated throughout the colliery spoil the potential remediation options which could be implemented include the interception of groundwater and/or capping of the site to reduce the infiltration. By developing Smith's void as a landfill site, the groundwater quality would be improved by:
>
> • Reducing the infiltration to the made ground and therefore the volume of contaminated groundwater;
>
> • Decreasing the residence times of the groundwater within the made ground therefore potentially decreasing the contaminant loading.
>
> In addition, the development would not impeded the interception of groundwater, should it be required at a later date.
>
> The risks posed by the landfill development to the perched groundwater (and consequently surface water streams) and the groundwater in the Coal Measures will be assessed as part of the PPC application for the assessment of emissions to groundwater."

54. The Environment Agency responded to the Addendum Report in a letter dated 3rd July 2001. That said, in part:

> "Generally speaking the report satisfies the majority of the matters raised.
>
> The issues pertaining to managing existing contamination have been discussed but no final remediation strategy has been proposed.
>
> The other outstanding matters that have not been addressed in this

submission will need to be resolved through the IPPC authorisation application process.

The Agency has no objections, in principle, to the proposed development but recommends that if planning permission is granted the following planning conditions are imposed:

CONDITION: No development approved by this permission shall be commenced until:

a) The application site has been subjected to a detailed desk study and site investigation, and remediation objectives have been determined through risk assessment, and approved in writing by the Local Planning Authority.

b) Detailed proposals for the removal, containment or otherwise rendering harmless any contamination (the 'Reclamation Method Statement') have been submitted to and approved in writing by the Local Planning Authority.

REASON: To protect the environment and ensure that the remediated site is reclaimed to an appropriate standard.

...

CONDITION: There shall be no discharge of foul or contaminated drainage from the site into either groundwater or surface waters, whether direct or via soakaways.

REASON: To prevent pollution of the water environment.

CONDITION: No soakaway shall be constructed in contaminated ground.

REASON: To prevent pollution of groundwater.

INFORMATION

The waste disposal operations shall be subject to an IPPC permit under the Pollution Prevention and Control Regulations 1999."

55. The Addendum Report and the Environment Agency's response were part of the environmental information considered in the Report. The claimant's solicitors had argued that the environmental statement was deficient in its treatment of the impact of the proposal on human health and hydrology. The Director commented in his report:

> "I have received an 'Addendum Report' from the applicant dealing with ground water issues in response to a request from the Environment Agency. The Agency's observations upon it are referred to below. Additional ecological information to that contained in the Environmental Statement has also been supplied and, subject to conditions that could be

required as part of a planning permission, the relevant statutory consultees are content with the development proposal. Further background noise assessment has also been submitted at the request of the District of Bolsover Environmental Health Officer. I am satisfied that, with the inclusion of the additional material referred to above, these issues have been thoroughly covered. My assessment of these issues is addressed with the Planning Considerations section of this report. The submission of additional information on these issues does not in any event detract from the adequacy of the Environmental Statement which I am satisfied meets relevant legal requirements.

The claimant's solicitors had complained:

> **"• The application does not deal adequately with ground water issues and this matter should be properly addressed as part of the planning process rather than being left to the Integrated Pollution Prevention Control Authorisation application.**
>
> Comment: The Environment Agency has confirmed that its Hydrology Section has examined the planning application and the Addendum Report requested by the Agency and has reiterated that it has no objections in principle to landfilling at this location. The Agency indicates that further detailed work will be required through the IPPC process to ensure that the requirements of the relevant legislation can be met. A ground water risk assessment will be required as part of this process, to address ground water protection issues in greater detail. Planning Policy Guidance (PPG) Note 23 gives advice to planning authorities on whether or not concerns about potential releases can be left for the pollution control authority or, in the case of wider impact of potential releases, may appropriately be considered unacceptable on planning grounds. PPG 23 also advises that planning authorities should work on the assumption that pollution control regimes will be properly applied and enforced. In this case I am satisfied that it would be appropriate for this issue to be addressed within any IPPC Authorisation application that would have to follow a grant of planning permission. Of course, planning permission would not pre-empt the Agency's proper consideration of an IPPC Authorisation application. If matters could not be resolved to the Agency's satisfaction then Authorisation would not be granted and the development could not proceed."

56. The claimant's concerns in relation to groundwater and human health were also addressed in the Joint Report. Under the heading "Groundwaters" the Joint Report said this:

> "Chapter 12 of the Environmental Statement provides information relation to Geology, Hydrogeology and Hydrology. It identifies groundwater levels including those from 'perched' groundwater within the colliery spoil deposits at the site. It identifies the potential for impacts on

local water resources. The proposed mitigation measures include a full containment system for the landfill cells.

Apart from the ES itself, the 'Addendum Report' that the applicant subsequently submitted to the Council gives further technical details in relation to, amongst other things, hydrogeology, groundwaters and mitigation measures. This report was not produced at the Council's request, but was submitted following discussions between the applicant and the Environment Agency. The report made it quite clear that the leachate management system that was proposed would be designed to maintain leachate levels within the site below the groundwater levels in the colliery spoil. The proposals included a free draining groundwater drain and the hydraulic containment of the landfill by means of an impermeable liner system

The Council is always particularly mindful of the responses made by the Environment Agency (EA), which is a statutory consultee, on such matters. The Agency, after careful consideration of the geological and hydrogeological details, raised no objections to the application in principle and recommended a number of conditions to be included if planning permission was granted. The EA letter in response to this application confirmed that other outstanding matters which it had discussed with the application would be resolved through its Pollution Prevention and Control (PPC) authorisation application process. These matters would include a 'groundwater risk assessment'. Your reporting officers understand this to be a reference to an assessment that would be carried out under the PPC process in order to ensure that the final detailed technical specifications for the liner system of the landfill cells would be adequate to fully contain the leachate as proposed in the planning application.

There is a specific allegation within this ground of the challenge that the ES did not provide any estimate of emissions to soil and water including, in particular, of leachate to groundwater, nor of the likely effect of the landfill on soil or groundwater of such emissions.

The ES did identify potential impacts of the proposed landfill on groundwaters. Measures are included in the proposals in order to ensure that any negative impacts are prevented from happening. Your officers have no reason to doubt that this will be achieved through the detailed PPC process referred to above. The ES's estimate of the emissions to groundwater and soils is that there would not be any because the landfill cells would be fully contained.

The ES also identified potential benefits in reducing the impact on groundwaters of the site compared to that which would be expected to continue into the future if the site were to be left in its existing undeveloped state. The proposals include the continued monitoring of

groundwater quality which is considered to be a sensible precautionary approach.

In our opinion the ES should not be regarded as deficient."

The Report continued:

"Regulation 19 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 requires a planning authority, if it considers that a submitted Environmental Statement should contain additional information in order to be an Environmental Statement, to so notify the applicant in writing ...

These circumstances did not apply in this case, the Council never has taken such a view on the ES and the submission of the Addendum Report was not in response to a notification by the Council. The Council nevertheless considered the contents of the Addendum Report once it was received, and duly forwarded it to consultees for their comments and it was placed on the planning register."

57. So far as conditions are concerned, the defendant accepted the Environment Agency's suggestions. Under "Water Resources and Pollution Prevention" condition 29 provided:

"No part of the development shall be commenced until:

(a) The application site has been subject to a detailed desk study and site investigation, and remediation objectives have been determined through risk assessment, and approved in writing by the Waste Planning Authority.

(b) Detailed proposals for the removal, containment or otherwise rendering harmless of any contamination (the 'Reclamation Method Statement') have been submitted to and approved in writing by the Waste Planning Authority."

Condition 32 provided:

"There shall be no discharge of foul or contaminated drainage from the site into either ground water or surface waters, whether direct or via soakaways."

58. It is against this background that the claimant submits that the assessment of the impact of the proposed development on groundwater was impermissibly left over to another decision maker (the Environment Agency) after the grant of planning permission, and that the environmental statement did not adequately describe the mitigation measures, because it left significant matters over for subsequent determination and proceeded on an assumption that remedial measures, whatever they might be, would work.

59. In advancing these submissions Dr Wolfe relied on two decisions of the Court of Appeal: Smith v Secretary of State for the Environment [2003] EWCA Civ 262 and Gillespie v Secretary of State for the Environment [2003] EWCA Civ 400. In Smith, Waller LJ distilled a number of principles from the authorities which he set out in paragraph 24 of his judgment. The first and second principles in paragraph 24 relate to the grant of outline planning permission. The planning permission in the present case, for engineering operations, is a detailed permission. The third and fourth principles are as follows:

> "Third, the planning authority or the Inspector will have failed to comply with article 4(2) if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given...
>
> Fourth, (and here it seems to me one reaches the most difficult area) it is certainly possible consistent with the above principles to leave the final details of for example a landscaping scheme to be clarified either in the context of a reserved matter where outline planning consent has been granted, or by virtue of a condition where full planning consent is being given as in the instant case."

Waller LJ continued in paragraph 33 of his judgment:

> "In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision-maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision-maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision-maker will act competently. Constraints must be placed on the Planning Permission within which future details can be worked out, and the decision-maker must form a view about the likely details and their impact on the environment."

60. In Gillespie there was no environmental statement and Richards J quashed a planning permission granted by the Secretary of State on the basis that he had erred in concluding that no environmental statement was required. Part of the site was a former gas works, which was extensively contaminated. The Secretary of State had relied upon the imposition of a condition (condition (VI)) which required a detailed site investigation to be carried out. That investigation would have proposed a remediation scheme. Pill LJ rejected a submission that the Secretary of State, in deciding whether an environmental statement was required, was obliged to shut his eyes to the remediation scheme. In paragraph 37 he said this:

> "The Secretary of State has to make a practical judgment as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature and complexity of such measures, will vary enormously but the Secretary of State is not as a matter of law required to ignore proposals for remedial measures included in the proposals before him when making his screening decision. In some cases the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of the proposed remedial measures, it would be likely to have such effects. His decision is not in my judgment pre-determined either by the complexity of the project or by whether remedial measures are controversial though, in making the decision, the complexity of the project and of the proposed remedial measures may be important factors for consideration."

He continued in paragraphs 40 and 41:

> "40. In my judgment the Secretary of State erred in the test he has expressed in paragraph 19 of his final decision letter. I read the second part of paragraph 19 as including an assumption that Condition VI provides a complete answer to the question whether significant effects on the environment are likely. That is too narrow an approach. In the circumstances, it was necessary to consider the stage which the site investigation had reached (Condition VI requires a further site investigation in detail to be undertaken), the nature and extent of the scheme for remediation, including its uncertainties, the effects on the environment during the remediation and the likely final result. The condition is properly drafted but itself demonstrates the contingencies and uncertainties involved in the development proposal, as does the evidence of Mr Simmons already quoted.
>
> 41. When making the screening decision, these contingencies must be considered and it cannot be assumed that at each stage a favourable and satisfactory result will be achieved. There will be cases in which the uncertainties are such that, on the material available, a decision that a project is unlikely to have significant effects on the environment could not properly be reached. I am not concluding that the present case is necessarily one of these but only that the test applied was not the correct one. The error was in the assumption that the investigations and works contemplated in Condition VI could be treated, at the time of the screening decision, as having had a successful outcome."

Laws LJ agreed, saying in paragraph 46:

> "Where the Secretary of State is contemplating an application for

> planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA."

Lady Justice Arden's judgment in paragraph 49 is to a similar effect.

61. The facts of the present case are very different. Here there was an environmental statement which did contain a description of the effect of the operation of the landfill upon groundwater: the potential impacts of uncontrolled discharge of landfill leachate were described as "low to medium". With the implementation of the mitigation measures described in the environmental statement the residual impact was described as "low".

62. The description was relatively brief, but it was open to the claimant and others to challenge it as inaccurate and/or inadequate in the consultation process. It is significant that having received the Addendum Report, the Environment Agency raised no objection. The environmental statement did describe the proposed mitigation measures. The claimant complains that the description was brief, and that the proposals are in effect purely standard, providing for no more in terms, for example of the permeability of the proposed lining system in the cell, than would be required by the Landfill (England and Wales) Regulations 2002 in any event.

63. That may well be so, but it was open to the claimant to argue that more stringent mitigation measures should be adopted. Although criticisms have been made in general terms of the adequacy of the mitigation measures proposed in the environmental statement, no alternative mitigation measure, let alone a more effective mitigation measure, was advanced on behalf of the claimant during the consultation process.

64. The measures were described in sufficient detail to enable informed criticism of them to be made. Dr Wolfe placed reliance on the words "The appropriateness of the lining system and the site design will be assessed ... as part of the PPC permit application" in support of his submission that the defendant had left over questions relating to the effectiveness of mitigation. That submission takes the words out of context. Reading the environmental statement and the Addendum Report as a whole, it is plain that a particular cell design, which is not in the least unusual, and a lining system were being proposed. The details of that system could be adjusted as part of the IPPC authorisation process. This case falls squarely within Waller LJ's fourth principle (above). The defendant had placed constraints upon the planning permission within which future details had to be worked out. Condition 6 provided:

> "Except as may otherwise be required by conditions of this permission, the development shall be implemented in accordance with the submitted

details and accompanying Environmental Statement dated 8 February 2001 as amended by letters dated 18 June 2001, 17 July 2001 and 29 August 2001 with enclosures and Addendum Report, provided that nothing otherwise required or prohibited by this condition shall prevent the making of any alterations to any detailed technical specifications and operations of waste management processes that the Environment Agency might require in accordance with the Landfill Regulations 2002."

65. The claim form did not criticise condition 29 (above). In his skeleton argument and submissions Dr Wolfe contended that the condition (which is concerned with the existing contamination on this former site) left over a significant environmental impact for future assessment and was, in this respect, similar to condition (VI) relied upon by the Secretary of State in the Gillespie case. It is clear from the letter dated 3rd July 2001 that the Environment Agency was initially concerned that existing contamination had not been adequately addressed in the environmental statement. The Addendum Report was the response to this concern. Having considered the Addendum Report the Environment Agency acknowledged that the issue had been discussed but said that "no final remediation strategy had been proposed" (my emphasis).

66. If the Environment Agency had had any concern in the light of the geological and hydrogeological information provided in the Addendum Report as to the remediation proposals contained therein, then it would have said so. Against this background the defendant was fully entitled to leave the detail of the remediation strategy to be dealt with under condition 29.

67. I therefore reject ground 1 of the challenge.

68. I have dealt with it in some detail because it does illustrate a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by Schedule 4 it was therefore not an environmental statement and the local planning authority had no power to grant planning permission. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, such an approach is in my judgment misconceived. It is important that decisions on EIA applications are made on the basis of "full information", but the Regulations are not based on the premise that the environmental statement will necessarily contain the full information. The process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the "environmental information" of which the environmental statement will be but a part.

Ground (3) (BPEO)

69. Under the heading "Planning Considerations" the Report explained that planning policies were developed at national, regional and local levels. Having reminded members of the obligations imposed by sections 70(2) and 54A of the Town and

Country Planning Act 1990 identifying the plans comprising the Statutory Development Plan, the report stated that "It is also necessary to have regard to Government Policy on waste issues, planning guidance at national and regional level and objectives and requirements obtained in relevant EC Directives. The Report mentions Council Directive 1999/31/EC on the landfill of waste (The Landfill Directive) and refers to Waste Strategy 2000:

> "**Waste Strategy 2000**, which is the current national waste strategy sets out the changes considered necessary to deliver more sustainable waste management. It sets a series of challenging targets to increase the value that is recovered from municipal waste and to reduce the amount of biodegradable municipal waste that is sent to landfill.
>
> Waste Strategy 2000 expects planning decisions on suitable sites for treatment and disposal to be based on a local assessment of the 'Best Practicable Environmental Option' (BPEO) for each waste stream. However, the courts have held that, whilst BPEO is material to land use planning, it is for local planning authorities to decide how much weight to attach to it. The BPEO process was defined in the 12th Report of the Royal Commission on Environmental Pollution as:
>
> *"The outcome of a systematic and consultative decision-making procedure which emphasises the protection of the environment across land, sea and water. The BPEO establishes for a given set of objectives, the option that provides the most benefits or the least damage to the environment as a whole, at acceptable cost, in the long term as well as the short term."*
>
> In determining the BPEO, decision-makers are expected to take account of three key considerations."

Those three considerations are the Waste Hierarchy, the Proximity Principle and Self-sufficiency.

70. Under "National Planning Policy Guidance" reference is made to PPG10:

> "The document advises that Waste Planning Authorities should consider the provision of waste management facilities within the context of the following ...
>
> the best practicable environmental option for each waste stream including consideration of the 'Waste Hierarchy' and 'Proximity Principle'."

71. Under the heading "Regional Policy" reference is made to RPG8, which advises that waste planning authorities should adopt the targets for waste recycling and reduction set out in Waste Strategy 2000. Under "Local Policy" the report states that the Derby and Derbyshire Joint Structure Plan:

> "... reflects national policies. In particular Chapter 10: Waste

Management Policies, acknowledges the strategic principles set out in Waste Strategy 2000 and confirms that its policies accord with the framework established in national, regional and local waste strategies.

The principle policies that are relevant to consideration of this application are as follows:

**Waste Management Policy 1: Waste Management Sites and Facilities** states:

*Provision will be made for sufficient sites and facilities to cater for the waste management needs of Derbyshire, having regard to the national, regional and local strategies for waste management. Particular account will be taken of:*

1) The need to pursue objectives which further the aim of achieving sustainable waste management, such as to find the Best Practicable Environmental Option for individual waste streams."

**Waste Management Policy 2: Waste as a Positive Resource** states that:

*Where waste disposal activities are justified, preference will be given to proposals that assist the reclamation of derelict or despoiled land or mineral sites, subject to the environmental acceptability*.

**Waste Management Policy 3: Environmental Criteria** states that:

*Waste management sites and facilities will be permitted only where their impact on the environment is acceptable, in particular where:*

1) in accordance with the proximity principle, they are well located to serve the main sources of waste, are well related to the transport network ..."

72. The Report also refers to a non-statutory policy document, Derbyshire Waste Management Strategy (DWMS). That in turn refers to BPEO and the Report states that:

> "The Strategy recognises that movement up the waste hierarchy will take time to achieve and, secondly, despite being at the bottom of the waste hierarchy, indicates that landfill will continue to be the best environmental option for some waste types. This is particularly likely to be so for municipal waste."

73. Having identified the relevant policies, the Director then set out his own Policy Assessment. He considered that the issues to be addressed included the relationship of the application to the policies in the Structure Plan, in PPG10 and in Waste Strategy 2000 for England and Wales.

74. The applicant for planning permission had claimed that there was a shortfall in final disposal capacity in Derbyshire for non-inert wastes of approximately 4.1 million cubic metres for the remainder of the plan period in the DWMS to 2011. Perhaps as a consequence, the environmental statement did not address BPEO in terms. Under the heading "Need for the Development", it was said in paragraph 3.2.1 that:

> "The need for the development is two-fold; to deliver the comprehensive reclamation of the current despoiled site and to facilitate the disposal of wastes arising in the area."

Having referred to the shortfall in the county as a whole, paragraphs 3.2.11 and 12 of the environmental statement said:

> "3.2.11 The proposed development of a landfill site at Smiths Void is intended to address at least part of this shortfall and to provide continuity of waste disposal capacity at the locality. The proposed waste void has a capacity of approximately 850,000 m3, which represents 4 to 5 years life at an input rate of approximately 200,000 tonnes per annum. The capacity generated would be available during the plan period.
>
> 3.2.12 The development of the landfill would also enable Derbyshire Waste Ltd to fulfil its obligations under the long term contract with Derbyshire County Council in the surrounding area, ensuring that MSW [Municipal Solid Waste] arising continues to be disposed of locally, thus complying with the 'proximity principle'."

Having examined the figures provided by the interested party and the Environment Agency, the Director did not accept that there was a shortfall of capacity:

> "Work that I am currently undertaking in connection with the production of a waste local plan, does not assume an increase in waste due to economic growth contrary to the DWMS. My calculations suggest that there may be a sufficiency of landfill within the county as a whole up to 2010 provided that there is no growth in waste and the Government's recovery targets are achieved. However, further work and refinement of figures is ongoing and as yet there is no published information. At that stage the methodology would be open to public scrutiny.
>
> ...
>
> ... given my preparatory local plan work and having regard to the degree of uncertainty on this issue, I can only conclude that the case in relation to need is, in my view, not proven although seems not to be in conflict with Waste Management Policy 1."

The only passage in the Report that deals directly with the question whether the proposed development would be the BPEO for the waste stream in question is in the following terms:

"Glapwell 2 has, until its recent closure, taken waste including a large proportion of municipal solid waste, from Chesterfield, North-East Derbyshire and the Bolsover area. The applicant indicates that municipal waste from this area is currently deposited at the Hall Lane, Steveley landfill site and at Sutton Landfill in Nottinghamshire. As an extension of an existing disposal facility, this site would make an effective, albeit small, contribution to the facilities available. Notwithstanding the Sub-Area supply position, I am satisfied that the proposal is not large enough that it would transform the local supply situation and, of itself, create substantial excess capacity. Whilst the application site is particularly accessible from the north-east of the County, the site also has good connections to the M1 Motorway and A38 trunk route to serve the wider needs of Derbyshire and I am mindful of the imminent shortage of landfill space in the south-east of the county. Thus, I consider that landfilling at this site would be in accordance with the key considerations - Proximity Principle and Regional Self-sufficiency and technically suitable for landfilling as proposed thereby providing a Best Practicable Environmental Option for the disposal of waste in accordance with criteria 1 of this policy."

75. The Director's planning conclusions were:

"The case for additional landfill space within the County for the period specified in the Derbyshire Waste Management Strategy to 2011 is not proven although I am satisfied that the proposal is not of a sufficient size that it would transform the local supply situation and, of itself, create substantial excess capacity. Further, preparatory waste local plan works suggests that a shortage of landfill space in the county as a whole will arise by 2010 and in the south-east of Derbyshire, a shortage is imminent. This site could help meet that shortage.

Notwithstanding the availability of alternative sites both currently, and which may become available in the north-east of the County within the Waste Management Plan period referred to this report, I consider that there are compelling reasons to accept the infilling/land raising/restoration of the site as submitted to restore the site satisfactorily and conserve and enhance its ecology thereby providing a significant benefit. I consider that there is no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed."

76. The minutes of the meeting of the Planning and Control Committee on 11th March 2002 state that:

"The Director of Environmental Services written report referred to there being no shortage of landfill space within the County as a whole to 2010, provided that reduced waste production and landfill targets were achieved. If waste arisings increased due to economic growth as forecast

by the applicant then a shortfall of landfill space would arise. There was some uncertainty on this issue but he was satisfied that the proposal was not large enough that it would transform the local supply situation and create substantial excess capacity. He was mindful that preparatory waste local plan work showed that a shortfall of landfill space was about to arise in the south east of the County and given its good accessibility, this site could assist in meeting the waste disposal needs of that area.

The officer also reported verbally that ongoing work in connection with the production of the waste local plan for Derby and Derbyshire now indicated that there was likely to be sufficient landfill space both in the North East Derbyshire Sub-Area and the plan area as a whole up to the end of the current Structure Plan period in 2011, but that an overall shortage was currently predicted to develop in the subsequent period up to 2015 (the year to which that plan would run).

In his report the Director of Environmental Services considered that there were compelling reasons to accept the infilling/landraising/restoration of the site as submitted, to restore the site satisfactorily and conserve and enhance its ecology thereby providing a significant benefit. He considered that there was no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed.

...

Members of the Committee commented on the proposal, and asked for clarification from officers on a number of issues raised, to which officers responded. Members, having considered the report and heard the comments made and explanations provided by officers, generally considered that there were not any substantial planning grounds for refusal of the application. It was felt that the site was in need of improvement but that it would be unlikely to regenerate in a satisfactory manner on its own. An officer explained that satisfactory restoration without use of waste was a technical possibility but was not feasible except at great expense and that no such alternative scheme was likely to be being promoted."

77. In the original claim form in the judicial review proceedings one of the grounds of challenge was that there was no proper BPEO assessment. The Joint Report responded as follows:

"**Lack of a Compliant Best Practicable Environmental Option (BPEO) Assessment**

The report to Committee of 11 March explained the concept of BPEO (ie the option that provides the most benefits or the least damage to the environment as a whole, at acceptable cost, in the long term as well as the

short term), and analysed it in the context of this proposal.

The challenge essentially alleges that the Council's treatment of BPEO, as referred to in the Government's published Waste Strategy 2000, was insufficient. In particular, the level of detail that should be taken into account in determining a planning application, including the lack of identification of the specific BPEO for particular waste streams.

The Courts have held that in appropriate cases BPEO is an objective to which planning authorities should have regard as a material consideration. It is for local planning authorities to decide how much weight to attach to it. In this case the waste hierarchy and the proximity principle were considered and reference was made to the relevant Planning Policy Guidance, Waste Strategy 2000, Regional Planning Guidance and the Derbyshire Waste Management Strategy. The ES made reference to the applicant's own waste management strategy and proposed recycling rates. In particular, the report identified the waste hierarchy, the proximity principle and self sufficiency as considerations. It addressed the issues of the targets for reducing, re-using and recovering value from waste and the requirements for landfill capacity for the residual wastes. In the context of Structure Plan policies it identified the use of waste as a positive resource to reclaim this site.

Although extensive reference has been made under this ground of challenge to Chapter 3 in Part 2 of Waste Strategy 2000 ('the decision making framework'), this Part of the Strategy appears to be concerned with waste management decisions by local authorities in general rather than with waste planning authority decision-making on particular planning applications.

Your reporting officers remain of the view that the relevant factors relating to the planning application in terms of BPEO were properly taken into account."

78. It would appear from the defendant's summary grounds of opposition to the claim and from Mr Evans' skeleton argument on its behalf that the words "the Courts have held" were a reference to the dicta of Carnwath J (as he then was) in R v Bolton Metropolitan Borough Council ex parte Kirkman [1998] JPL 787 at page 799, which were followed by Richards J in R v Leicestershire County Council ex parte Blackfordby & Boothorpe Action Group [2001] Env LR 2, see paragraphs 46 to 49, whose dicta were in turn followed by Maurice Kay J in R v Derbyshire County Council ex parte Murray [2001] Env LR 26, see paragraphs 13 to 15.

79. Since Murray went to appeal, it is curious that reference was not made in this context to the conclusions of Pill LJ in paragraph 53 of his judgment given on 22nd January 2002 (see above).

80. It is submitted on behalf of the claimant that the approach to be BPEO in the Report and the Joint Report - "BPEO is an objective to which local planning authorities should have regard as a material consideration. It is for local planning authorities to decide how much weight to attach to it" - does not accord with Pill LJ's conclusion that an objective is more than a factor to be taken into account, since it is an objective which is obligatory it must always be kept in mind when making a decision.

81. It is further submitted that the weight to be given to BPEO has increased since the government implemented the 1999 Landfill Directive by making the Landfill (England and Wales) Regulations 2002, which came into force on 15th June 2002. It should be noted that Thornby Farms was an incinerator, not a landfill, case and that the decision in Murray predated the implementation of the Directive, and did not consider Waste Strategy 2000 which had been published in May 2000. The pre-Landfill Directive position, which was that considered by the Court of Appeal in Murray, was as follows. The relevant objectives in paragraph 4 of Schedule 4 to the 1994 Regulations included: "(b) implementing so far as material any plan made under the plan making provisions." Paragraph 1, as amended, defines the plan making provisions as follows:

> "'plan making provisions' means paragraph 5 below, section 50 of the 1990 Act ... Part II of the Town and Country Planning Act 1990 ... and section 44A of the Environmental Protection Act 1990 ..."

Section 44A, which was inserted by the Environment Act 1995 makes provision for a national waste strategy:

> "(1) The Secretary of State shall as soon as possible prepare a statement ('the strategy') containing his policies in relation to the recovery and disposal of waste in England and Wales.
>
> (2) The strategy shall consist of or include -
>
> (a) a statement which relates to the whole of England and Wales; or.
>
> (b) two or more statements which between them relate to the whole of England and Wales.
>
> (3) The Secretary of State may from time to time modify the strategy.
>
> (4) Without prejudice to the generality of what may be included in the strategy, the strategy must include -
>
> (a) a statement of the Secretary of State's policies for attaining the objectives specified in Schedule 2A to this Act ..."

The objectives in paragraphs 1 and 2 of Schedule 2A are, in substance, the objectives in articles 4 and 5 of the Waste Framework Directive.

82. Waste Strategy 2000 for England and Wales is the national waste strategy prepared for the purposes of section 44A (see paragraph 5.1 of the document). Thus, the defendant

in the present case was obliged to keep in mind the objective of implementing, so far as material, the provisions of the strategy. BPEO is dealt with in the strategy as follows. Under the heading "Delivering Change" the second bullet point in the introduction to Chapter 4 states:

> "Decisions on waste management, including decisions on suitable sites and installations for treatment and disposal, should be based on a local assessment of the Best Practicable Environmental Option."

Under the heading "Making Good Decisions", paragraph 4.4 says:

> "The right way to treat particular waste streams cannot be determined simply. The objective is to choose the Best Practicable Environmental Option, (BPEO) in each case. BPEO varies from product to product, from area to area and from time to time. It requires waste managers to take decisions which minimise damage to the environment as a whole, at acceptable cost in both the long and short term. A more detailed description of how decision makers can identify the BPEO is at Chapter 3 section starting 3.3 in Part 2 of this strategy."

83. The three "key considerations", namely the waste hierarchy, the proximity principle, and self-sufficiency are set out in paragraph 4.5. Paragraph 4.13 is concerned with the obligations of waste planning authorities. It says:

> "Waste Planning Authorities are responsible for identifying suitable sites for waste treatment or disposal installations. The Government and the National Assembly look to Waste Planning Authorities to:
>
> • take full account of the policies described in this strategy, in particular:
>
> • the importance of establishing the BPEO ..."

Part 2 of the strategy complements Part 1 and should be read in conjunction with it (see paragraph 1.2).

84. Having referred to the fact that the strategy is a waste management plan for the purposes of the Framework Directive and section 44A of the 1990 Act, paragraph 1.8 says:

> "Furthermore, this waste strategy is an advisory document. The 1990 Town and Country Planning Act requires local planning authorities in England and Wales to have regard to national policies in drawing up their development plans, and therefore this document will be an important source of guidance. These development plans will then provide a framework for individual planning decisions ..."

85. Chapter 3 describes the decision-making framework in considerable detail. I do not propose to extend this already lengthy judgment by extensive citations from the chapter. Suffice it to say that paragraph 3.2 states in part:

> "When taking waste management decisions on suitable treatment options, sites and installations, local authorities must follow the framework set out below. This framework should act as a guide for other decision makers, including business waste managers."

The framework is set out under the heading "Determining the Best Practicable Environmental Option". Paragraph 3.4 states:

> "The process that should be used for considering the relative merits of various waste management options in a particular situation is the Best Practicable Environmental Option (BPEO). This was defined in the 12th Royal Commission on Environmental Pollution as ..."

The definition is then set out.

86. The proximity principle - which suggests that waste should generally be disposed of as near to its place of origin as possible - is then amplified. A step by step approach is suggested:

> "Identifying the most sustainable mix of waste management options, environmentally, economically and socially, can be a daunting task. However, the process can be simplified by breaking it down into smaller, more manageable tasks:
>
> Step 1: set the overall goals for making the waste management decision, subsidiary objectives and the criteria against which the performance of different options will be measured
>
> Step 2: identify all the viable options.
>
> Step 3: assess the performance of these options against the criteria.
>
> Step 4: value performance.
>
> Step 5: balance the different objectives or criteria against one another.
>
> Step 6: evaluate the rank the different options.
>
> Step 7: analyse how sensitive the results are to variations in the assumptions made or the data used."

87. Annex A deals with "Major Waste Facilities in England and Wales" and includes the following advice in paragraph A3:

> "Under the Town and Country Planning legislation, planning authorities must have regard to national and regional policies, including policies on waste management, in drawing up their waste development plans. **This waste strategy will be a material consideration for planning**

> **authorities in drawing up their development plans and for determining individual planning applications**."

88. It is submitted on behalf of the claimant that while the Report mentions BPEO on a number of occasions, and indeed sets out the Royal Commission on Environmental Pollutions definition, it does no more, in effect, than pay lip service to the principle when it comes to applying it to the particular circumstances of this application for planning permission. BPEO could not have been kept in mind by the Committee because there was nothing recommending a step-by-step analysis of the kind recommended in Waste Strategy 2000.

89. Having concluded that there was sufficient landfill space in the North-East Derbyshire Sub-Area and the plan area as a whole up to the end of the Structure Plan period in 2011, the Committee should have been invited to consider whether landfill at the application site was the best option to meet the objectives which this particular application was intending to meet.

90. The objectives were not identified in any systematic way, but once it was acknowledged that there was sufficient capacity in the county as a whole and in the north-east of the county, they clearly included the objective of meeting an imminent shortage of landfill space in the south-east of the county. Whether landfill was the best option for such a waste stream, having regard to the waste hierarchy, and if it was whether landfill in the north-east of the county would be in accordance with the proximity principle, were not examined. The defendant was obliged to adopt the, not a, BPEO. There is considerable force in these criticisms of the way in which the Report and the Joint Report dealt with BPEO.

91. I turn to consider the status of Waste Strategy 2000 post the Government's implementation of the Landfill Directive.

92. The background to the making of the Directive is set out in the recitals. Recital (18) explains:

> "Whereas, because of the particular features of the landfill method of waste disposal, it is necessary to introduce a specific permit procedure for all classes of landfill in accordance with the general licensing requirements already set down in Directive 75/442/EEC and the general requirements of Directive 96/61/EC ..."

Article 8 provides, so far as material:

> "Member states shall take measures in order that:
>
> (a) the competent authority does not issue a landfill permit unless it is satisfied that ...
>
> (b) the landfill project is in line with the relevant waste management plan or plans referred to in Article 7 of Directive 75/442/EEC."

Article 7 of the Waste Framework Directive required the competent authorities to draw up as soon as possible one or more waste management plans. Waste Strategy 2000 is that plan for England and Wales. Who is to ensure that a landfill permit is not issued unless it is "in line with" the Strategy? As mentioned above, the Landfill Directive was implemented by the Landfill (England and Wales) Regulations 2002, under which the Environment Agency is responsible for issuing landfill permits.

93. DEFRA has published a note explaining how the main requirements of the Landfill Directive have been transposed in the 2002 Regulations. Under the heading "Conditions of the permit" the note explains that the requirement in Article 8B of the Landfill Directive "has already been transposed in the PPC Regulations 2000 through the duty placed on the Environment Agency not to issue a permit to any waste management activity unless it has already obtained planning permission". Thus, it is clearly intended, at least by DEFRA, that local planning authorities will not grant planning permission for a landfill project unless they are satisfied that it is "in line" with Waste Strategy 2000.

94. On behalf of the defendant, Mr Evans, whose submissions were adopted by Mr Barrett on behalf of the interested party, submitted that the combined effect of the Landfill Directive and Waste Strategy 2000 did not alter the approach to BPEO that was required to be taken by the local planning authority. It had to keep BPEO in mind as an objective. Both Mr Evans and Mr Barrett submitted that the strategy was merely advisory, no more than a material consideration to which the defendant was required to have regard as members were advised in the Joint Report. It was for the local planning authority to decide what weight to give to the Strategy, both in general and insofar as it gave advice in relation to BPEO in particular.

95. So far as Article 8 of the Landfill Directive is concerned, Mr Evans submitted that the duties relating to issuing landfill permits were imposed by the 2002 Regulations upon the Environment Agency, not the local planning authority. Thus, the local planning authority was not under any duty to ensure that a planning permission was "in line" with the Strategy.

96. He fairly accepted that this approach had two consequences. Firstly, if the local planning authority was not under any obligation to ensure that a grant of planning permission was in line with the Strategy, it might well be too late to recover the position when the Environment Agency came to consider the issue of a permit under the 2002 Regulations. That might cause the United Kingdom to be in breach of the Landfill Directive. Secondly, whatever may be the respective roles of the local planning authority and the Environment Agency, the practical effect of the submissions of the defendant and the interested party is that no greater weight need be placed by the decision taker upon the relevant waste management plan that has been drawn up pursuant to Article 7 of the Waste Framework Directive as implemented by section 44A.

97. I am unable to accept Mr Evans' and Mr Barrett's submissions in this respect. In 1975 the Waste Framework Directive addressed all forms of waste management, including reduction, re-use, recycling, energy recovery and disposal (see Articles 3 and 4). Since

it required member states to prepare waste management plans it could reasonably be expected that, once those plans had been prepared, arrangements would be made for them to be given additional weight in the decision-making processes of member states.

98. The 1999 Landfill Directive is concerned with a particular method of waste disposal, landfill, which is at the bottom of the waste hierarchy (that is to say, all other things being equal, it is the least preferred option). The purposes of the Landfill Directive included encouraging the prevention, recycling and recovery of waste and obviating the wasteful use of land (Recital (3)), and ensuring that, in future, only safe and controlled landfill operations should be carried out (Recital (2)). In short, it sought to discourage the unnecessary use of landfill as a method of waste disposal.

99. To this end, Article 8 of the Landfill Directive is more prescriptive than the Framework Directive as implemented by paragraphs 2 and 4(1)(b) of the 1994 Regulations. In ordinary language an obligation to be satisfied that a proposed development is "in line with" a waste management plan, is more stringent than an obligation to keep the objective of implementing the plan, so far as material, in mind. The difference in wording between the two directives, requiring greater weight to be placed upon the waste management plan, is deliberate, having regard to the purposes of the later directive. The words "in line with" admit of some flexibility. They are perhaps less prescriptive than "in accordance with". Moreover, given the complexity of the subject matter and the many factors that may have to be taken into account when taking individual waste disposal decisions, the waste management plan itself may well allow for a further degree of flexibility. Mr Evans submitted that, in this respect, the Strategy was no different from earlier policy guidance, which also referred to BPEO such as that contained in PPG10. He referred to paragraph 1.8 in Part 2 (above) and to the advice in paragraph A3 in Annex A to the Strategy.

100. This is to take these paragraphs out of context. Both parts 1 and 2 of the Strategy must be read as a whole. It is true that it is an important source of guidance which must be taken into account by local planning authorities. But on its face it professes to be more than that: it "implements ... the requirement within the Waste Framework Directive ... as incorporated into law by section 44A of the Environmental Protection Act 1990" (see paragraphs 1.4 and 1.5).

101. Fairly read, as a whole, the policies relating to BPEO in Waste 2000 are, and are intended to be, more prescriptive than earlier policy guidance. To give but a few examples from the extracts cited above: "Decisions on waste management, including decisions on suitable sites ... for disposal should be based on a local assessment of the BPEO"; "The right way to treat particular waste streams cannot be determined simply. The objective is to choose the BPEO in each case"; "The Government ... look(s) to Waste Planning Authorities to take full account of the policies described in this Strategy, in particular ... the importance of establishing the BPEO"; "When taking waste management decisions on suitable ... sites ... local authorities must follow the framework set out below". As mentioned above, the framework describes how to determine the BPEO: "The process that should be used for considering the relative merits of the various waste management options in a particular situation is the BPEO".

102. On a fair reading, the Strategy does not simply maintain the status quo in policy terms, leaving local planning authorities free to give such weight as they choose to BPEO. One of the main objectives of the Strategy is to "deliver change" by placing greater emphasis on the need to choose the BPEO when making waste management decisions.

103. It is true that Chapter 3 in Part 2 of the Strategy applies to waste management decisions by local authorities generally, but contrary to the advice given to members in the Joint Report (above) it applies with no less force to waste planning authorities when they are taking decisions on planning applications for waste disposal. Under the 2002 Regulations the Environment Agency is concerned at the landfill permit stage with the detailed regulation of landfilling operations that will already have been granted planning permission. It is for waste planning authorities when deciding whether or not to grant planning permission for landfill proposals to ensure that they are "in line" with Parts 1 and 2 of the Strategy.

104. Mr Evans submitted that such an obligation might conflict with the waste planning authority's duty under section 54A: to determine an application for planning permission in accordance with the development plan unless material considerations indicate otherwise. Policies in the development plan might conflict with those in the Strategy. Since the Strategy will be a material consideration for local planning authorities when reviewing their development plans, the scope for conflict should reduce as policies in development plans "catch up" with those in the Strategy. Any conflicts in the short term should not present a practical difficulty because the policies in the Strategy will, at the very least, be material considerations for the purposes of section 54A which may indicate that an application for planning permission should be determined otherwise than in accordance with the (conflicting) policies in the development plan.

105. Mr Barrett conceded that the Government might well have wished local planning authorities to give greater weight to the policies in the Strategy including BPEO, but he submitted that its intention was that this should be achieved through the incorporation of those policies into statutory development plans, thus giving them the added force of section 54A. He relied upon paragraph A3 of Annex A to the Strategy, but his submission ignores the concluding words of the paragraph A3 which make it clear that the Strategy is to be taken into account in both plan making and development control.

106. For these reasons, I conclude that the defendant's approach to the status of the policies relating to BPEO in Waste Strategy 2000 was erroneous in principle because the Joint Report effectively relegated BPEO to a material consideration to be taken into account but to be given such weight as the defendant thought fit. Such an approach did not accord with Pill LJ's pre-Landfill Directive and Waste Strategy 2000 dicta in Murray. There was no recognition of the defendant's duty, post the publication of the Strategy and the implementation of the Landfill Directive, not to grant planning permission unless the proposed development was "in line with" the policies relating to BPEO in Waste Management 2000.

107. But the defendant's consideration of BPEO was seriously flawed, regardless of the weight that should have been attributed to the policies in the Strategy. Mr Evans and Mr Barrett pointed to the number of places in the Report where BPEO was mentioned.

I accept that there are frequent references to BPEO in the Report, but merely repeating the acronym, however frequently, and whether or not accompanied by the Royal Commission's definition, is not an adequate consideration of the issues raised by BPEO. If a material consideration is to be taken into account it must first be properly understood. What matters is not the letters BPEO, but the analysis of the issues raised by the concept: the application of the three key elements - the waste hierarchy, the proximity principle and self-sufficiency to the particular waste stream(s) which the development is intended to serve. So long as there was both a local (in the North-East Derbyshire Sub-Area) and county-wide shortage of capacity, it was relatively easy to see how the proximity principle might be met. It would appear that this must have been the assumption underlying the environmental statement, since it contained no discussion of BPEO whatsoever. However, once it had been concluded that there was capacity both locally and county-wide up to 2011, the question whether this particular application site would be the BPEO for meeting a shortage of landfill space in the south-east of the county had to be addressed in terms of the three key considerations, including the proximity principle. Beyond referring to the application site's good road connections, and stating that the Director was "mindful of the imminent shortage of landfill space" in the south-east of the county, the report did not address this issue at all. It may well be that this is why the Director did not feel able to conclude that the site was the BPEO in accordance with criterion 1 in Waste Management Policy 1 in the Structure Plan, merely that it was "a BPEO for the disposal of waste".

108. I accept that officers' reports should not be read in a legalistic or pedantic manner. If there had been a reasonable attempt to grapple with the issues raised by BPEO in the light of local spare landfill capacity and capacity county-wide for the structure plan period, the use of the indefinite rather than the definite article might well have been of little consequence, and reference to it dismissed as mere pedantry. Its use in this Report is, in my judgment, a reflection of the defendant's muddled approach to the BPEO issue. Unfortunately, the muddle was compounded, rather than clarified, by the advice given to members in the Joint Report as to the weight that they ought to give to BPEO. Given the importance attached to choosing the BPEO for a particular waste stream in Waste Strategy 2000, this was a significant flaw in the decision-making process.

109. The defendant's failure to deal adequately with BPEO, whether it is regarded as a breach of its obligation to ensure that the grant of planning permission was in line with Waste Strategy 2000, or whether it is viewed more simply as a failure to have regard to a material consideration, does not mean that the planning permission must be quashed. The court has a discretion and I have anxiously considered whether it would be right in all the circumstances to exercise that discretion, given the two-fold justification for the development in the environmental statement: to reclaim a despoiled site and to facilitate the disposal of wastes arising in the area. It is clear from the Report and from the Minutes of Meeting on 11th March 2002 that the Director placed considerable weight upon the first justification: "there was no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed". However, it was for members to determine the application. The minutes record that they "generally considered that there were not any substantial planning grounds for refusal of the application. It was felt that the site was in need of improvement but that it would be unlikely to regenerate in a satisfactory manner on its own."

110. Given the manner in which BPEO was addressed in the Report and Joint Report it is not surprising that members concluded that there were no substantial planning grounds for refusing planning permission. Since there had been no proper BPEO analysis it is not possible to say whether there would or would not have been a substantial planning objection on this ground, for example because of failure to comply with the proximity principle. Thus it is simply not possible to tell what members' attitudes might have been if there had been a proper analysis of the BPEO issue, including both the weight to be given to, and the content of, the policies relating to BPEO in Waste Strategy 2000. In particular, Waste Management Policy 2 in the Structure Plan gives preference to waste disposal proposals that assist in the reclamation of derelict or despoiled land, "where waste disposal activities are justified" (see above). In deciding whether waste disposal activities are justified a BPEO assessment is, for the reasons set out above, a most material consideration.

111. For these reasons, the application succeeds on ground (3) and the planning permission dated 23rd December 2002 must be quashed.

112. MR PURCHASE: My Lord, I would ask for our costs from the defendant in this matter. The claimant has been funded by the Legal Services Commission so I would ask for the order to be the usual order in that regard and for an assessment of our publicly funded costs as well.

113. MR JUSTICE SULLIVAN: Do you resist that, Mr Evans?

114. MR EVANS: I cannot resist the principle of it. I think the most I can say, and I do say, is that perhaps 50 per cent of the time of the court was taken up on the BPEO point. It was one ground of three but I fairly recognise that it took up at least half the time of the court. So I would invite the court to make an order for costs against us but limited to 50 per cent of the costs incurred by the claimant.

115. MR JUSTICE SULLIVAN: In effect, you say you should not have to pay for the time spent on considering the objectives and the IEI point?

116. MR EVANS: That is effectively it, my Lord.

117. MR JUSTICE SULLIVAN: The position is as I described in the judgment. There is no doubt that whilst BPEO was ground 3 in Dr Wolfe's skeleton, in his oral submissions before me he placed it in the forefront of those submissions, and certainly it probably took about half the time rather than just a third of the time, if that is a reasonable estimate. On that basis what do you want to say, Mr Purchase?

118. MR PURCHASE: My Lord, on that basis I would say that we would ask for our full costs, that being the principal issue before the court.

119. MR JUSTICE SULLIVAN: Yes. Thank you very much.

120. I am satisfied that the defendant ought to pay part of the claimant's costs. I say "part of the claimant's costs" because a significant part of the court's time was occupied with the two quite discrete issues on which the claim has failed. Although the BPEO issue was

third in order in the skeleton argument, it is true, as I indicated in the judgment, that Dr Wolfe placed it at the forefront of his oral submissions. Thus it would not be fair simply to apportion one third of the costs to each of the three grounds. I accept Mr Evans' submission that the proper apportionment, doing the best I can, would be to apportion 50 per cent of the costs to the BPEO point and I therefore order that the defendant pays the claimant 50 per cent of its costs, those costs to go for detailed assessment.

121. You have asked for the usual order. You can have it.

122. MR EVANS: My Lord, I would like to ask for permission to appeal on the BPEO ground, my Lord, simply on the basis that there would be a real prospect of success in relation to the issue of principle, although I have heard what your Lordship has said in relation to the factual position in any event, but, my Lord, I do ask for permission on that ground.

123. MR JUSTICE SULLIVAN: You say that it can fairly be said that it is an important issue for waste planning authorities generally?

124. MR EVANS: My Lord, yes.

125. MR JUSTICE SULLIVAN: Yes. Do you want to say anything about that, Mr Purchase? I very much suspect that if it had gone the other way there might have been a similar application from you pointing out how important this issue was, I do not know.

126. MR PURCHASE: Indeed.

127. MR JUSTICE SULLIVAN: I will not pry.

128. MR PURCHASE: All I will say is that I am not really in a position to resist that now. My clerk did speak to your Lordship's clerk yesterday about this point and your Lordship did seem minded to accept that perhaps written submissions on appeal would be appropriate given that Mr Wolfe has dealt with the case up until this time and I have had little time to be familiar with the issue.

129. MR JUSTICE SULLIVAN: Yes. I did give that indication but I was cautious to do so in such a way as to not give any indication as to who might succeed and who might fail.

130. MR PURCHASE: My Lord, yes.

131. MR JUSTICE SULLIVAN: Certainly had you been in the position of having to apply for permission to appeal then I would have adjourned the matter for further submissions for you to have the opportunity to consider the matter further. Since the boot is, as it were, on the other foot, I think it is right to deal with that matter today. I appreciate that you may feel that it is difficult to assist a great deal further, but do you have anything more you wish to say?

132. MR PURCHASE: My Lord, all I would say is that while we cannot deny that this is an important point of principle, we would say there is no reasonable prospect of success against your Lordship's reasoning on the facts.

133. MR JUSTICE SULLIVAN: Yes. Do you want to say anything, Mr Barrett, or are you just keeping your head down?

134. MR BARRETT: I would support the application made by Mr Evans for the very simple reason that it is a very important point of law that your Lordship has addressed in the course of the judgment in respect of whether BPEO, as a concept, is an elevated concept in the context of a planning application.

135. MR JUSTICE SULLIVAN: I am satisfied that it is appropriate to grant permission to appeal not necessarily upon the first ground of real prospect of success, because it does seem to me that the facts are problematical, to say the least, from the defendant's point of view, but on the second limb there are other exceptional reasons, that is to say the relevance of the BPEO principle for waste planning authorities, and indeed for those involved in the process of waste disposal both as objectors and as applicants for permission. So I do give permission on the second limb. It is obviously for counsel to consider, in the light of my judgment on the facts, the realistic prospects of success.

Neutral Citation Number: [2009] EWCA Civ 1061

Case No: C1/2009/0041/QBACF

**IN THE HIGH COURT OF JUSTICE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM QUEEN'S BENCH**
**DIVISION ADMINISTRATIVE COURT**
**The Hon Mr Justice Blair**
**C0/7831/2006**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 October 2009

**Before :**
**LORD JUSTICE MUMMERY**
**LORD JUSTICE LONGMORE**
and
**LORD JUSTICE SULLIVAN**

**Between :**

| | |
|---|---|
| **PETER CHARLES BOGGIS**<br>**EASTON BAVENTS CONSERVATION** | **Respondents/Claimants** |
| **- and -** | |
| **NATURAL ENGLAND** | **Appellant/Defendant** |
| **- and-** | |
| **WAVENEY DISTRICT COUNCIL** | Interested Party |

(Transcript of the Handed Down Judgment of
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**Gregory Jones and James Neill** (instructed by Parkinson Wright) for the **Defendant**
**Christopher Balogh (**instructed by Waveney District Council**) for the Interested Party**

Hearing dates : **6th/7th October 2009**

## Judgment
## As Approved by the Court

**Lord Justice Sullivan :**

Introduction

1. This is an appeal against the Order of Blair J. quashing the Appellant's confirmation of the Pakefield to Easton Bavents Site of Special Scientific Interest ("the SSSI") insofar as it related to the areas to the east, and to the west, of the Easton Bavents cliffs shown on a plan annexed to the Order. Blair J's Order left within the SSSI a thin strip of land comprising the Easton Bavents cliffs ("the cliffs") as they stood at the date of his judgment on 5th December 2008, and the remainder of the area included within the SSSI to the north of the cliffs.

2. Before Blair J. the Respondents challenged the lawfulness of the confirmation of the SSSI on two grounds, referred to as Ground A and Ground G in the judgment. Blair J. rejected Ground A, but granted the claim for judicial review on Ground G. The Appellant contends that Blair J. erred in granting the claim on Ground G. In a Respondent's Notice, the Respondents contend that Blair J. erred in rejecting Ground A.

Statutory Provisions

3. The SSSI was confirmed by the Appellant's predecessor, English Nature, on 28th June 2006 under section 28 of the *Wildlife and Countryside Act 1981* as amended (the 1981 Act), the relevant provisions of which were, as at the date of confirmation, as follows:

> "(1) Where [English Nature] are of the opinion that any area of land is of special interest by reason of any of its flora, fauna or geological or physiographical features, it shall be the duty of [English Nature] to notify that fact –
>
> (a) to every local planning authority in whose area the land is situated;
>
> (b) to every owner and occupier of any of that land; and
>
> (c) to the Secretary of State.
>
> (3) A notification under subsection (1) shall specify the time (not being less than three months from the date of giving the notification) within which, and the manner in which, representations or objections with respect to it may be made; and [English Nature] shall consider any representation or objection duly made.
>
> (4) A notification under subsection (1)(b) shall also specify –
>
> (a) The flora, fauna, or geological or physiographical features by reason of which the land is of special interest, and
>
> (b) Any operations appearing to [English Nature] to be likely to damage that flora or fauna or those features,

> And shall contain a statement of [English Nature's] views about the management of the land (including any views [English Nature] may have about the conservation and enhancement of that flora or fauna or those features).
>
> (5) Where a notification under subsection (1) has been given, [English Nature] may within the period of nine months beginning with the date on which the notification was served on the Secretary of State either –
>
> (a) give notice to the persons mentioned in subsection (1) withdrawing the notification; or
>
> (b) give notice to those persons confirming the notification (with or without modifications)."

Since the date of confirmation these statutory provisions have been amended and these functions which were exercised by English Nature, have been transferred to Natural England.

4. To the north of the cliffs, at Easton Marshes, there is within the SSSI the southern most part of the Benacre to Easton Bavents Special Protection Area ("the SPA") classified under Council Directive 79/409/EEC on the conservation of wild birds ("the Birds Directive"). The SPA is protected by Article 6 of Council Directive 92/43/EC ("the Habitats Directive"), as is the Benacre to Easton Bavents Lagoons Special Area of Conservation ("the SAC") which was adopted as a site of community importance under the latter Directive. So far as material, Article 6 of the Habitats Directive provides:

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

Background

5. The background to the confirmation of the SSS1 and the Respondents' claim for judicial review is set out in some detail in paragraphs 1-33 of the judgment of Blair J. [2008] EWHC 2954 (Admin) and a brief summary will suffice for the purposes of this appeal.

6. The SSSI is located along, and inland from, the Suffolk coast between Southwold and Lowestoft. The cliffs are at the southernmost end of the SSSI. Over the centuries the cliffs have been eroded by the sea, and that erosion continues. The First Respondent lives in Easton Bavents. The boundary of his property is now 80m from the cliff edge. His house "The Warren" is 92m from the cliff edge. When the SSSI was notified on 8th December 2005 these figures were 82m and 94m, respectively. Other properties are much closer to the cliff edge. We were told the boundary of the closest property, "Thursley" was approximately 2m from the cliff edge in 2005; by 2009 about 1m of the garden had been lost to the sea.

7. The First Respondent and other residents formed a group called Easton Bavents Conservation, the Second Respondent. Since 2003 the Second Respondent has constructed a "sacrificial sea defence" approximately one kilometre long, 8m high and 20m wide on the seaward side of the cliffs. The bank is called a "sacrificial sea defence" because it is constructed of "soft" materials such as soil, and it is intended that it shall erode at its seawards edge so as to maintain the coarse sediment inputs to the shoreline. The material lost by erosion was to be replenished each year as part of an ongoing programme. The initial construction, and the continuous replenishment, of such a large bank could not sensibly be described as the deposit of waste, as was suggested to Blair J. (para.5 Judgment). It was a continuing engineering operation, and a substantial one at that, which required both planning permission and a consent under section 16 of the Coast Protection Act 1949. Neither a planning permission nor a consent was obtained. Since 2005 there has been no replenishment of the bank and much of it has been eroded by the sea.

8. The cliffs were originally included in an SSSI in 1962 and the site was re-notified in 1989 under the new provisions of the 1981 Act. By December 2005 a large proportion of the original SSSI, including the cliffs, had been lost to the sea as a result of coastal erosion. Thus, the notification of the SSSI on 8th December 2005 was not, at least in the case of the cliffs, the result of the discovery of some new feature of special scientific interest; the boundary of the SSSI was adjusted to reflect the new position of the cliffs and English Nature's assessment of the pace of coastal erosion over the next 50 years. As a result, the new SSSI boundary included an area of up to 225m on the landward side of the cliff face as it stood in 2005. This area included the First Respondent's house and he, together with other affected residents, was notified in accordance with the provisions of section 28(1)(b) of the 1981 Act.

9. They objected to the notification of the SSSI because they feared that if confirmed it would prevent them from continuing to replenish the sacrificial sea defence. They particularly objected to one of the operations specified under subsection 28(4)(b) [OLDs] listed in Annex 3 to the notification, number 19 which required them to obtain consent under the 1981 Act for the:

> "Erection, maintenance, and repair of sea defences or coast protection works, including cliff or landslip drainage or stabilisation measures."

All of the objections to the notification of the SSSI were considered in a Report ("the Report") prepared by Officers for the Council of English Nature meeting on 28th June 2006. Having considered the Report the Council confirmed the designation. The Respondents' judicial review proceedings challenging that decision were commenced on 21st September 2006. Against this background, I will consider the two grounds of challenge.

Ground A

10. Blair J. rejected this ground of challenge. In my judgment, he was clearly right to do so since the Respondents' submissions, which were supported by the Interested Party, were founded firstly on a misconception as to what was the geological feature that was, in English Nature's opinion, of special interest; and secondly upon the proposition that "conservation" is synonymous with "preservation".

11. Mr Jones submitted that English Nature had approached both the notification and the confirmation of the SSSI on the basis that "the process of exposure" of the cliffs was a geological feature of special interest. He submitted that English Nature was wrong to do so because "the act of exposure was not a geological feature". Had English Nature approached the notification and confirmation of the SSSI on that basis it would have been in error, but when Mr Jones was asked to identify those passages in the Notification, the Supporting Information Supplementing the Notification Package, and the Report ("the documents") on which he relied in support of this submission, he was unable to identify any passage which might have suggested that English Nature thought that the act, or process, of exposure of the cliffs was a geological feature.

12. The documents understandably refer to the fact that exposure of the cliffs was taking place, and would continue to take place, as a result of "continuing coastal processes", not least because English Nature was concerned to take coastal erosion into account when drawing the boundary of the SSSI. However, the geological features of special interest were said to be: the "Pleistocene vertebrate palaeontology and Pleistocene/Quaternary of East Anglia at Easton Bavents", referred to for convenience during the hearing as "the fossils" and "the sediments" respectively. The Report said that the sediments were "of national importance for the stratigraphical and palaeo-environmental study of the Lower Pleistocene in Britain", and continued:

> "These geological features include exposures of the three major elements of the Norwich Crag Formation; the Crag itself (Chillesford Church Member), the Baventian Clay (Easton Bavents Member) and the Westleton Beds (Westleton Member)." (Report para. 1.3.1) (emphasis added)

13. Thus, English Nature was not saying that the act or process of exposure was a geological feature, it was saying that the geological features of special interest were not confined to the sediments behind the cliff face, but included the exposure. A geological exposure, as in the case of an exposed cliff or quarry face, is a geological feature. At the risk of stating the obvious, it is readily understandable that among the

reasons why such a geological feature might be of special interest would be the fact that it is exposed. As the Report explained:

> "As the cliff face has eroded geologists have been able to study the new sections in order to gather valuable scientific data, identify how the geological sequence is changing and use this environmental information to correlate the site more widely with other sites in the GCR and those outside of Great Britain. A three-dimensional picture of the landscape and associated depositional environments can then also be developed. Palaeo-environmental information derived from the site contributes to our understanding of how the environment responded to changes in climate."

14. Recognition that the geological features of special interest were not confined to the sediments, but included the exposure at the cliffs (not the act or process of the cliffs' exposure) disposes of the alternative submission advanced by Mr Jones: that if the act of exposure of the cliffs is not the geological feature of special interest, that feature must be the sediments and the fossils, and allowing nature to take its course will result in their destruction, not their conservation. In this respect, reliance was placed by both the Respondents and the Interested Party on the duty imposed by section 28G (2) of the 1981 Act on all public bodies, including English Nature, when the exercise of their functions is likely to affect the flora, fauna etc. in any SSSI:

> "to take reasonable steps, consistent with the proper exercise of [their] functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which [the SSSI] is of special scientific interest."

15. In his submissions on behalf of the Interested Party, Mr Balogh also referred to the definition of "nature conservation" in section 131(6) of the *Environmental Protection Act 1990* (the 1990 Act):

> "In this part "nature conservation" means the conservation of flora, fauna or geological or physiographical features."

In my view, the definition of "nature conservation" in section 131(6) of the 1990 Act does not, for the purposes of this appeal, add anything of substance to the duty under section 28G(2) of the 1981 Act to further the conservation and enhancement of the geological features by reason of which this SSSI was designated.

16. The submission that English Nature's approach, to allow natural processes (in this case coastal erosion) to proceed freely, would result in the destruction rather than the conservation of those geological features is based upon two misconceptions:

i) that the geological features in question are confined to the sediments and did not include the exposure; and

ii) that "conservation" in this context means preservation of the status quo.

17. The Report explained why allowing natural processes to take their course would conserve the exposure:

> "The key management principle for coastal geological sites is to maintain exposure of the geological interest by allowing natural processes to proceed freely. Inappropriate construction of coastal defences can conceal rock exposures and result in the effective loss of the geological interest. In addition, any development which prevents or slows natural erosion can have a damaging effect. Erosion is necessary to maintain fresh geological outcrops. Reducing the rate of erosion usually results in rock exposures becoming obscured by vegetation and rock debris…...
>
> Conserving the geological exposures and the geomorphological features is not about preventing erosion but allowing their continued evolution."

18. Even if it is assumed that "conservation" in section 28G(2) means "preservation", allowing nature to take its course will "preserve" the exposure, while hindering those processes would harm it because that which is obscured will cease to be exposed. It is therefore, unnecessary to consider in any detail the meaning of "conservation" in section 28G(2), but since the Interested party has sought guidance on this aspect of the appeal, I will deal with the issue. There is no definition of "conservation" in the 1981 Act, and the parties were not able to point to a definition in any other enactment. Mr Balogh referred to the Convention Concerning the Protection of the World Cultural and National Heritage adopted by the General Conference of UNESCO on 16th November 1972, and to dictionary definitions. The former is, understandably, expressed in such general terms as to be of no material assistance, and the latter are of no assistance because we are not concerned with the meaning of "conservation" in isolation or in the abstract, but with the meaning of "conservation" in a particular statutory context: nature conservation. Whatever may be the meaning of conservation in other contexts, one would have thought that allowing natural processes to take their course, and not preventing or impeding them by artificial means from doing so, would be a well recognised conservation technique in the field of nature conservation. "Conservation" is not necessarily the same as "preservation", although in some, perhaps many, circumstances preservation may be the best way to conserve. Whether that is so in any particular case will be a matter, not for the lawyers, but for the professional judgement of the person whose statutory duty it is to conserve.

Ground G

19. Blair J. concluded that insofar as the notification and confirmation of the SSSI applied to "the authorisation of the maintenance of the Easton Bavents' sea defence" (but in that respect only) it was a "plan" within the meaning of Article 6(3) of the Habitats Directive (para. 106 judgment). He did not accept the Respondents' submission that the notification and confirmation of the SSSI was in that respect a "project" within the meaning of Article 6(3). In my judgement, he was correct to reject that submission. In the leading authority on the effect of Article 6(3), *Landelijke Vereniging tot Behould van de Waddenzee and another v Staatssecretaris van Landbouw, Natuurbeheer en Visserij C – 127/02 ECR 2004 I-07405 ("Waddenzee")*, the ECJ,

having noted that the Habitats Directive does not define the terms plan or project, referred to the definition of "project" in Article 1(2) of Directive 85/337/EEC ("the EIA Directive"):

> " the execution of constructions works or of other installations or schemes,
>
> - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources."

and said that it was relevant to defining the concept of plan or project in the Habitats Directive.

20. By no stretch of the imagination could the notification or confirmation of an SSSI, whether or not it included the "erection, maintenance and repair of sea defences or coast protection works…." among the list of OLDs under subsection 28(4)(b), be described as an "intervention" in the natural surroundings and landscape…" The notification and confirmation (to simplify matters I will refer only to notification when dealing with this issue) of an SSSI is not an intervention at all, it is a means of ensuring that any such intervention takes proper account of the features that are of special interest in the SSSI. Moreover, even if notification could sensibly be described as an "intervention", paragraph 19 of the OLDS, which prohibits the erection etc., without consent of artificial sea defences, could not possibly be described as an intervention in the "natural" surroundings. Any "intervention" would be the prevention (without consent) of man's attempts to intervene in the natural surroundings.

21. When pressed on this point Mr Jones referred to paragraph 26 of the ECJ's judgment in *Waddenzee* in which it said that the Habitats Directive:

> "seeks to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment."

When asked what was the "activity" upon which he relied, he replied that it was the making of the OLDs, which was an "activity [by English Nature] that prevents an activity". A process which ensures that activities which are likely to damage the environment are not authorised without prior assessment of their impact on environmental features of special interest is not itself an "activity", much less is it an activity which might be capable of damaging the environment.

22. Is notification of an SSSI a "plan" for the purposes of Article 6.3? Blair J. held that normally it was not (para.101 judgment). He was right to do so. I will consider below whether the qualification "normally" was justified. This case is concerned with the notification of SSSIs, but when considering whether such a notification amounts to a plan for the purposes of Article 6.3 it is important to bear in mind that SSSIs are only one among many areas or features that may be designated because of their special environmental qualities. By way of example, the Secretary of State lists buildings that are of special architectural or historic interest, schedules ancient monuments that are of national importance, and designates areas of archaeological importance that appear to him to merit treatment as such. Local planning authorities

designate as Conservation Areas those parts of their area that are of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance. Natural England has power to designate Areas of Outstanding Natural Beauty (AONBs) and, subject to confirmation by the Secretary of State, National Parks.

23. The common thread running through all of these provisions is that they "flag up" the special interest of the feature, and impose, or enable the imposition, of more stringent controls than would otherwise be imposed by the "normal" planning process over any activities which might harm it, thereby ensuring that before any plan or project that is likely to have an adverse impact upon it is authorised, full account will have been taken of that which is of special interest. Mr Jones submitted, consistently with his submission that notification of an SSSI was a plan, that some, at least, of these other designations would also be plans for the purposes of Article 6.3. I do not accept that submission: such notifications are not themselves plans, they are a means of ensuring that land use and other plans take proper account of environmental features of special interest.

24. Mr Jones referred us to Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment "("the Strategic Environmental Assessment (or SEA) Directive"). The SEA Directive does not define "plan or programme". The Commission's Guidance as to the implementation of the SEA Directive advises member states to adopt a similar approach to that adopted by the ECJ in respect of the EIA Directive, and states that:

> "The kind of document which in some Member States is thought of as a **plan** is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas, or giving criteria which should be taken into account in designing new development. Waste management plans, water resources plans, etc, would also count as plans for the purposes of the Directive if they fall within the definition in Article 2(a) and meet the criteria in Article 3. (para 3.5)."

The Office of the Deputy Prime Minister ("ODPM") published "A Practical Guide to the Strategic Environmental Assessment Directive" in September 2005. The Guide is instructive for two reasons. First, it contains in Appendix 1 an "Indicative list of plans and programmes subject to the SEA Directive". A lengthy list of plans of various kinds is set out. The notification of SSSIs is not included in the list. The list is only indicative, not determinative, as to what amounts to a plan for the purposes of the SEA Directive, but the second reason why the Guide is instructive is the fact that the characteristics of the plans in the list are very different from those of the notification of an SSSI. The list does not include any of the designations of other environmental features of special interest referred to in paragraph 22 above. Thus, the designation of an AONB or a National Park is not, of itself, a plan; whereas Areas of Outstanding Natural Beauty Management Plans and National Park Management Plans are, in the ODPM's view, plans for the purposes of the SEA Directive.

25. The particular characteristics of Development Plans in the United Kingdom's Town and Country Planning regime were highlighted by the ECJ in *Commission v UK* C-6/04, 20th October 2005, ECR 2005 I-09017. In paragraphs 55 and 56 of its judgment the ECJ said:

> "55. As the Commission has rightly pointed out, section 54A of the Town and Country Planning Act 1990, which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned.
>
> 56. It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held well founded in this regard."

Section 54A of the 1990 Act has been replaced by section 38(6) of the Planning and Compensation Act 2004 which provides that:

> "If regard is to be had for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

26. The Development Plan does not define those activities for which planning permission must be obtained – that is the function of Part III of the 1990 Act and the General and Special Development Orders made under the Act – it describes the circumstances in which planning permission is likely to be permitted or refused for those activities which do require planning permission. Sites are allocated for housing and other forms of development, and there are policies to the effect that "permission will normally be granted/refused for…." Thus, Development Plans effectively create a powerful statutory presumption in favour of, or against, permitting certain types of development in particular locations.

27. The list of OLDs in a notification of an SSSI, setting out those operations which must not be carried out unless one of the conditions in section 28E(3) is fulfilled, or planning permission is granted (section 28P(4)(a)), is no more a "plan" than is the requirement to obtain Conservation Area Consent for certain operations in a Conservation Area. Mr Jones placed great emphasis on the totality of the notification "package" which, by virtue of subsection 28(4) included the:

> "Statement of [English Nature's] views about the management of the land (including any views [English Nature] may have about the conservation and enhancement of that flora or fauna or those features)."

28. However, the statement of English Nature's views was just that, a statement of its views with no further statutory significance. The statement made it clear that it did not constitute consent for any of the OLDs. For those OLDs requiring planning permission, including the erection etc. of sea defences, the views of English Nature could not in any event be determinative of the question whether the operation would be able to be lawfully carried out. While a grant of planning permission would obviate the need for a consent under section 28E(3)(a), the converse is not the case. The views of English Nature, whether expressed in the statement or otherwise, would be one, but only one, of the material considerations to be considered by the local planning authority, or on appeal the Secretary of State. The lack of any "bite" in a statement of views under sub-section 28(4) is confirmed by the other provisions in the 1981 Act relating to the management of the SSSIs: section 28J which enables English Nature to formulate "Management Schemes"; and section 28K which enables English Nature to serve "Management Notices" if owners or occupiers do not give effect to Management Schemes.

29. For all these reasons I consider that a notification "package" under section 28 of the 1981 Act is most certainly not a plan for the purposes of Article 6.3 of the Habitats Directive, and would delete the qualification "normally" in paragraph 101 of Blair J's judgment. In paragraph 104 of the judgment Blair J. set out a passage in the Report which, in his view, predetermined the question whether the operations in paragraph 19 of the OLDs (the erection etc. of sea defences) would be permitted. In my judgment, the Report did not purport to, and could not in any event, predetermine whether such operations would be permitted. The Report contained the Officers' professional advice to the Council Members of English Nature. It no more predetermined the issue of whether permission would be granted than any report of a Planning Officer to the council members of a Local Planning Authority. The passage cited is not in a part of the Report which purports to set out policies or proposals for future action, it is part of the Officers' response to the objections from Easton Bavents Ltd.

30. The passage cited by Blair J. is immediately followed by this paragraph dealing with "Development issues":

> "Any proposal for the construction of coastal defences should be subject to the Town and Country Planning legislation, in respect of which English Nature is a statutory consultee where development is proposed within an SSSI, and decisions are made by the Local Planning Authority. This provides a process whereby all material considerations, including the special interest of the site and the case for protecting property and homes can be fully considered."

This passage makes it clear beyond any doubt that, far from predetermining the question, the Officers of English Nature were advising the Council of English Nature that whether permission should be granted for the construction of sea defences would have to be determined by the Local Planning Authority through the planning process, wherein the site's special scientific interest would be one, but not the only, material consideration.

31. Since the notification of the SSSI did not amount to a "plan or project" for the purposes of Article 6.3 the issue of likelihood of significant effect on the SPA does

not arise, but out of deference to the parties' submissions on the point I will deal with it, albeit briefly. The ECJ's decision in *Waddenzee* makes it clear that "the significant effect" referred to in Article 6.3 is a significant effect on the site's conservation objectives. It is not suggested by the Respondents that there is likely to be a significant effect on the SAC. Nor did they, or anyone else, suggest prior to the confirmation of the SSSI that an appropriate assessment was required in respect of the SPA.

32. When the matter was raised, in the Grounds for Judicial Review, the Appellant instructed Dr Lee, an Engineering Geomorphologist , to advise as to the predicted physical effects of maintaining the Respondents' sacrificial sea defences. In the light of Dr Lee's conclusions as to these physical effects a Joint Report ("the Joint Report") was prepared by two of Natural England's employees: Mr Reach, a Senior Specialist in Marine Ecology and Mr Robinson, a member of the East Suffolk Land and Sea Management Team. The Joint Report considered the implications of the physical effects found by Dr Lee for the SPA's conservation objectives. In summary, the Joint Report concluded that there would be no significant effect.

33. The Respondents then produced a report from Professor Vincent, a Physical Oceanographer with particular interests in coastal and near shore processes. He was asked to advise whether it was possible that not maintaining the sacrificial sea defences and permitting the erosion of the cliffs could result in significant likely physical effects on the SPA. In his Report dated 17th October 2008, Professor Vincent said:

> "I do not comment on the implications for nature conservation interests of significant physical effects on Easton Broad, as this is not within my area of expertise."

In summary, Professor Vincent concluded that:

> "the risk of significant likely physical effects on the barrier beach in front of Easton Broad, part of the SPA and SAC, by 2050 cannot be discounted."

34. Dr Lee was asked to consider Professor Vincent's conclusions. He pointed out that Professor Vincent had not described what he meant by "significant physical effects on the barrier beach"; and said that:

> "The absence of justification of [Professor Vincent's] assumptions and their questionable validity casts significant doubt on the reliability of Professor Vincent's conclusions about the extent of beach build up north of the [sacrificial sea defences]."

Dr Lee said that his conclusions were not altered by anything in the Vincent Report. Having considered both the Vincent Report and Dr Lee's response Messrs Reach and Robinson confirmed that the views expressed in their Joint Report remained unchanged.

35. Mr Jones submitted that this was not sufficient to avoid a breach of Article 6.3. He contended that the mere fact that English Nature had not, when confirming the notification, considered the question whether there might be a significant effect on the SPA by reason of preventing the maintenance of the Respondents' sea defences was sufficient to amount to a breach of Article 6.3. I do not accept that submission. The ECJ's decision in *Waddenzee* makes it clear that the requirement for an appropriate assessment is conditional on there being:

> "a probability or a risk that the [plan or project] will have significant effects on the site concerned." (para. 43)

36. Notwithstanding the word "likely" in Article 6.3 the precondition before there can be a requirement to carry out an appropriate assessment is not that significant effects are probable, a risk is sufficient. The nature of that risk is explained in para. 44 of the ECJ's judgment:

> "44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 United Kingdom v Commission [1998] ECR I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora."

37. In my judgement, a breach of Article 6.3 is not established merely because, some time after the "plan or project" has been authorised, a third party alleges that there was a risk that it would have a significant effect on the site which should have been considered, and since that risk was not considered at all it cannot have been "excluded on the basis of objective information that the plan or project will have significant effects on the site concerned". Whether a breach of Article 6.3 is alleged in infraction proceedings before the ECJ by the European Commission (see *Commission of the European Communities v Italian Republic* Case C-179/06, para. 39), or in domestic proceedings before the courts in member states, a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be "excluded on the basis of objective information", must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered.

38. In the present case there was no such evidence prior to confirmation. It simply did not occur to anyone, including the Respondents, that there was a risk to the SPA which required an assessment under Article 6.3. Nor was there such evidence after confirmation. The question was not whether there might be physical effects on Easton Broad if the Respondents' sea defences to the south were not maintained, but whether such physical effects were "likely to undermine the conservation objectives" of the SPA" (see paras.47 and 48 of *Waddenzee*, which must be read together with the approach to likelihood in paras.43 and 44 of the judgment). Professor Vincent very properly disclaimed any expertise in nature conservation. It follows that, even if the notification/confirmation of the SSSI was a plan or project for the purposes of Article 6.3, there was no breach of that Article.

Discretion

39. Since the question of discretion does not arise, I would merely say that I doubt that it was appropriate for Blair J. to apply Lord Hoffmann's reasoning on that issue in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 to this case. *Berkeley* was concerned with the EIA Directive and the opportunity for public debate about the possible environmental impact of projects subject to that Directive prior to their authorisation is a vital part of the EIA process: see Lord Hoffmann's speech at page 615. By contrast, Article 6 of the Habitats Directive does not require the involvement of the public in the "appropriate assessment". It was for English Nature to decide whether an appropriate assessment was required. If it had decided that such an assessment was required, the opinion of the general public would have been obtained as part of the assessment process only if English Nature had considered that it was "appropriate" to do so: see Article 6.3. As Lord Hoffmann said in the later case of *R. (on the application of Edwards) v The Environment Agency* [2008] UKHL 22 at para.63, the speeches in *Berkeley* need to be read in context, and both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered.

40. I am not persuaded, therefore, that had there been a breach of the Habitats Directive it would have been inappropriate on the very unusual facts of this particular case, for the court to exercise its discretion not to quash the confirmation of the SSSI. In this context, I would draw particular attention to three matters:

(a) The lack of any evidence to contradict the conclusions in the Joint Report.

(b) The real purpose of these proceedings is not to secure the protection of the SPA, but to enable the continued replenishment of the Respondents' sacrificial sea defences.

(c) The construction of the sacrificial sea defences was not lawful, and their continued replenishment would be lawful only if carried out with both planning permission and a consent under section 16 of the Coast Protection Act 1949.

41. No application has been made for either a planning permission or a consent under section 16, and in my view the court should be slow to grant relief which is, in reality, intended to facilitate the retention of works that are unlawful. I am not unsympathetic to the plight of the First Respondent and the other residents who can see the cliff face remorselessly approaching the boundaries of their properties. But they are, with

respect, aiming at the wrong target in challenging the confirmation of the SSSI. Their only lawful course is to apply for planning permission and a section 16 consent for the sacrificial sea defence. On such an application the Interested Party, or on appeal, or if the application is called in, the Secretary of State, will be able to look at the problem in the round, giving due weight both to their rights under Article 8 of the ECHR, and to the special scientific interest of the SSSI, as two, among what are likely to be many other, material considerations.

Conclusion

42. I would allow the Appellant's appeal on Ground G, dismiss the Respondents' cross-appeal on Ground A, and set aside the Order of Blair J quashing the confirmation of part of the SSSI.

Lord Justice Longmore:

43. I agree.

Lord Justice Mummery:

44. I also agree.