**APPEAL REFERENCE: APP/D0121/W/20/3259234**

**IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 78 OF THE TOWN AND COUNTRY PLANNING ACT 1990**

**BRISTOL AIRPORT, NORTH SIDE ROAD, FELTON, WRINGTON BS48 3DP**

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[HOUSE OF LORDS]

*TESCO STORES LTD. . . . . APPELLANT

AND

SECRETARY OF STATE FOR THE ENVIRONMENT AND OTHERS . . . . . RESPONDENTS

1995 March 6, 7, 8, 9; May 11

Lord Keith of Kinkel, Lord Ackner, Lord Browne-Wilkinson, Lord Lloyd of Berwick and Lord Hoffmann

*Town Planning—Development—"Material considerations"—Planning obligation—Planning application to build food superstore outside town—Development likely to increase traffic slightly—Link road not essential for development—Developer's offer of full funding for road—Whether material consideration—Town and Country Planning Act 1990 (c. 8), ss. 70(2), 106 (as substituted by Planning and Compensation Act 1991 (c. 34), s. 12)*

At an inquiry into proposals to alter the Witney local plan by building a new link road to relieve traffic congestion and a food superstore in the town centre, various developers, including T. Ltd. and P. Ltd. proposed superstores on sites outside the town centre. The inspector approved the proposal for a link road and rejected that for a town centre superstore. He held that development on one of the sites away from the town centre would be beneficial but made no formal recommendation, although he expressed a preference for T. Ltd.'s proposal. He also recommended that the council should negotiate the funding of the link road with developers. T. Ltd. and P. Ltd. both applied for planning permission. P. Ltd.'s application was not determined by the local planning authority within the statutory period. P. Ltd. appealed to the Secretary of State for the Environment, who called in T. Ltd.'s application as well. At a subsequent public inquiry T. Ltd. offered to provide full funding of £6·6m. for the link road, and entered into an agreement with the county council containing a planning obligation to that effect under section 106 of the Town and Country Planning Act 1990, as substituted.[1] The inspector recommended that T. Ltd.'s application should be granted and P. Ltd.'s appeal dismissed, observing that planning obligations under section 106 could relate to land and roads other than those covered by the planning permission where there was a direct relationship between the two, but that full funding of a major road was not reasonably related in scale to the proposed because it would only marginally increase the traffic. The Secretary of State in his decision letter rejected the inspector's recommendations, allowed P. Ltd.'s appeal and dismissed T. Ltd.'s application, stating that the relationship between the funding of the link road and the proposed foodstore was tenuous and could not be treated as a reason for granting T. Ltd. planning permission. On T. Ltd.'s application to the High Court the deputy judge quashed the letter, holding that the Secretary of State had wrongly failed to treat T. Ltd.'s offer of funding as a material consideration within section 70(2) of the Act of 1990. The Court of Appeal allowed P. Ltd.'s appeal.

On appeal by T. Ltd.:—

*Held*, dismissing the appeal, that a planning obligation offered under section 106 of the Act of 1990 by a developer was a

[1] Town and Country Planning Act 1990, s. 70(2): see post, p. 764E–F.
S. 106, as substituted: see post, p. 765A–D.

material consideration to which regard should be had under section 70(2) of the Act if it was relevant to the development; that the weight to be given to such an obligation was a matter entirely within the discretion of the decision maker; and that, accordingly, T. Ltd.'s offer for funding the link road was sufficiently related to the proposed development to constitute a material consideration under section 70(2), and since the Secretary of State had given it full and proper consideration his decision could not be challenged (post, pp. 764F–H, 770A–B, F–771D, 779G–H, 780F–H, 783C–G, 784B–C).

*Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240, C.A.; *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578, H.L.(E.) and *Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.* (1993) 67 P. & C.R. 78, C.A. considered.

Decision of the Court of Appeal affirmed.

The following cases are referred to in their Lordships' opinions:

*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

*Bradford City Metropolitan Council v. Secretary of State for the Environment* (1986) 53 P. & C.R. 55, C.A.

*Good v. Epping Forest District Council* [1994] 1 W.L.R. 376; [1994] 2 All E.R. 156, C.A.

*Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240; [1964] 1 All E.R. 1, C.A.

*Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578; [1980] 2 W.L.R. 379; [1980] 1 All E.R. 731, H.L.(E.)

*Nollan v. California Coastal Commission* (1987) 483 U.S. 825

*Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625, C.A.

*Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.* [1993] J.P.L. 538; 67 P. & C.R. 78, C.A.

*Reg. v. South Northamptonshire District Council, Ex parte Crest Homes Plc.* (unreported), 13 October 1994; Court of Appeal (Civil Division) Transcript No. 1204 of 1994, C.A.

*Safeway Properties Ltd. v. Secretary of State for the Environment* [1991] J.P.L. 966, C.A.

The following additional cases were cited in argument:

*Barber v. Secretary of State for the Environment* [1991] 2 P.L.R. 20

*Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696; [1991] 2 W.L.R. 588; [1991] 1 All E.R. 720, H.L.(E.)

*Reg. v. Westminster City Council, Ex parte Monahan* [1990] 1 Q.B. 87; [1989] 3 W.L.R. 408; [1989] 2 All E.R. 74, C.A.

*Simplex G.E. (Holdings) Ltd. v. Secretary of State for the Environment* [1988] 3 P.L.R. 25, C.A.

*Wansdyke District Council v. Secretary of State for the Environment* [1992] J.P.L. 1168

APPEAL from the Court of Appeal.

This was an appeal by Tesco Stores Ltd. ("Tesco") by leave of the Appeal Committee of the House of Lords (Lord Goff of Chieveley, Lord Browne-Wilkinson and Lord Slynn of Hadley) granted on 4 October 1994 from a decision dated 25 May 1994 of the Court of Appeal (Sir Thomas Bingham M.R., Beldam and Steyn L.JJ.) allowing appeals from a decision dated 7 July 1993 of Mr. Nigel Macleod Q.C., sitting as a deputy High Court judge in the Queen's Bench Division, by the first respondent, the

A Secretary of State for the Environment and the third respondent, Tarmac Provincial Properties Ltd. ("Tarmac").

On 20 May 1993 Tesco gave a notice of motion under section 288 of the Town and Country Planning Act 1990 and amended on 24 June 1993, seeking an order that the decisions of the Secretary of State given by letter dated 16 April 1993 be quashed. By the letter the Secretary of State dismissed Tesco's appeal under section 78 of the Act of 1990 and refused B to grant planning permission for a food superstore on part of the Henry Box Playing Fields, Station Lane, Witney and allowed Tarmac's appeal and granted outline planning permission for a food retail store at Mount Mills, Wilton Way, Witney. Tesco maintained that in paragaphs 7 and 8 of the letter the Secretary of State discounted Tesco's offer of funding for the West End Link road and in doing so he failed to take into account a C relevant consideration. The deputy judge made the order sought. The Secretary of State and Tarmac appealed against that judgment.

The second respondent, West Oxfordshire District Council, took no part in the proceedings.

The facts are stated in the opinion of Lord Keith of Kinkel.

*Roy Vandermeer Q.C.* and *Christopher Katkowski* for Tesco.
D *Duncan Ouseley Q.C.* and *John Hobson* for the Secretary of State.
*Christopher Lockhart-Mummery Q.C.* and *Richard Drabble* for Tarmac.

Their Lordships took time for consideration.

11 May. LORD KEITH OF KINKEL. My Lords, at the end of the E judgments of the Court of Appeal in this case Sir Thomas Bingham M.R., said that it involved:

> "a question of unusual public importance bearing on the conditions which can be imposed, and the obligations which can be accepted, on the grant of planning permission and the point at which the imposition of conditions, and the acceptance of obligations, overlaps F into the buying and selling of planning permission, which are always agreed to be unacceptable."

Three companies applied to the local planning authority for planning permission to build a retail food superstore in the town of Witney in Oxfordshire, each on a different site. Tesco's site was described as the Henry Box site, and that of Tarmac (which was associated with G Sainsburys) as the Mount Mills Site. The third company's site does not figure in these proceedings and can be ignored. There had previously been a Local Plan inquiry into certain proposed alterations to the development plan. One of these related to a proposed new road to the west of the town of Witney. The town straddles the River Windrush. There is only one bridge over this river, and as a result there is severe traffic congestion in the centre of the town, which is a conservation area. The proposed new H road known as the West End Link ("W.E.L." for short) included a new river crossing, and the purpose of it was to relieve the traffic congestion. Another proposed alteration to the plan was to provide for a major retail food superstore in the town centre. The inspector who conducted the inquiry issued a report approving the W.E.L. and rejecting the proposal for a retail food superstore in the town centre. Tesco, Tarmac and other developers had taken part in the inquiry, opposing the town centre superstore and promoting the merits of their own sites for such a store,

these sites being a considerable distance from the town centre. The inspector did not make any formal recommendations about these sites, but he held that development of a retail food superstore on one only of these sites would be beneficial, and he expressed a preference for Tesco's Henry Box site. Further, he expressed the view that funding for the W.E.L. was unlikely to come from the highway authority and he recommended a policy statement including reference to the district council's intention to negotiate with developers funding for the W.E.L. or a major contribution to it, before a superstore went ahead.

Tarmac's application for planning permission was not determined by the local planning authority within the statutory period, and so became the subject of an appeal to the Secretary of State, who then called in Tesco's application for the Henry Box site.

In July 1992 an inquiry into Tarmac's appeal and Tesco's application and another appeal not now relevant was held by Mrs. S. E. Hesketh. At the inquiry Oxfordshire County Council contended that without the construction of the W.E.L. there was a fundamental constraint to the development of a superstore on any site because of the traffic congestion situation, and that full private funding at a cost of £6·6m. must be provided. West Oxfordshire District Council supported this contention, as did Tesco, which offered to provide the full funding for the W.E.L. itself.

The inspector recommended that Tesco's application should be granted and Tarmac's appeal dismissed. She first addressed the question whether there was a fundamental constraint to the development of a food superstore in the absence of funding for the W.E.L. and rejected that proposition. Having referred to the traffic problem in Witney, she said:

> "7.2 . . . It is clear that a new foodstore would result in additional traffic on the local road network, and Bridge Street in particular. However, whilst a store would generate more traffic at peak times, particularly the Friday evening and Saturday morning peaks, even the worst estimates indicate the increase in traffic at Bridge Street would be well below 10 per cent. over and above that which would be generated by B1 office development, for which planning permission exists. . . ."

The inspector went on to refer to the Department of the Environment Circular 16/91, dealing with planning obligations under section 106 of the Town and Country Planning Act 1990 (as substituted by section 12 of the Planning and Compensation Act 1991), and observed that such obligations could relate to land, roads etc. other than those covered by the planning permission provided there was a direct relationship between the two. She went on to say:

> "7.4 . . . In this case there is some relationship between the funding of the W.E.L. and a proposed store in that a store would slightly worsen traffic conditions in the town over and above the existing planning permission. The relationship is however tenuous. Any superstore site would be a considerable distance from the W.E.L. and Bridge Street and the development proposed would not generate a great deal more traffic than the other permitted uses of the sites. . . ."

Having further observed that the Circular stated that the extent of what is required should be fairly and reasonably related in scale to the proposed development, she said:

> "7.5 . . . In the case of Witney, the W.E.L. is necessary to ameliorate existing traffic conditions and to assist in bringing forward

A the development of Policy Areas 1–3. I take the view therefore that the full funding of the road is not fairly and reasonably related in scale to this proposed development. . . ."

The inspector took the view that it would be unreasonable to require a developer of a previously approved development site to fully fund a major road proposal because his development would marginally increase traffic B over and above that already permitted but concluded:

"7.6 However, no such requirement is being made by the council. The Proposed Modifications of the Local Plan Alterations provide an upper case policy relating to the provision of the W.E.L. and a lower case statement to the effect that it will be the council's intention to negotiate funding or a major contribution to funding the W.E.L. The C Local Plan inspector also stated that the superstore may contribute 'all or most' of this funding. If the council negotiations result in the offer of a full contribution to the cost of the W.E.L. from the developer of a site preferred by the council following a lengthy Local Plan inquiry, then it would be perverse to turn away the offer. The council therefore finds itself in the somewhat surprising but felicitous position of the first major developer since the Local Plan inquiry D responding to the council's offer to negotiate on W.E.L. funding by a full funding proposal. This seems to me to be a perfectly proper outcome of negotiations provided that the agreement entered into is sufficiently robust to achieve the benefits promised."

The inspector went on to consider the merits from the planning points of view of the competing sites, upon the basis, which she found proper, E that only one site should be approved. She found those merits to be finely balanced, but having regard to the informal preference for Tesco's Henry Box site expressed by the Local Plan inspector she came down in favour of that one.

Though the matter is not directly alluded to in the inspector's report, it is relevant to notice that on 28 July 1992, the third last day of the F inquiry, Tesco entered into an agreement with Oxfordshire County Council containing a planning obligation under section 106 of the Act of 1990. The obligation was to pay the council the sum of £6·6m. if planning permission for the development of the Henry Box site was granted.

On 16 April 1993 the Secretary of State issued a decision letter in which he rejected the inspector's recommendation. He allowed Tarmac's appeal regarding the Mount Mills site, and dismissed Tesco's application G for the Henry Box site. I will have occasion to consider the decision letter in some detail later, but his reasons in brief were (1) that he held Tesco's offer of funding not to be a good ground either for granting planning permission to Tesco or for dismissing Tarmac's appeal, (2) that the Local Plan inspector's informal preference for the Henry Box site should receive only limited weight, and (3) that on planning grounds the Mount Mills H site was to be preferred.

Tesco took proceedings against the Secretary of State, under section 288 of the Act of 1990, to quash the decision letter. The grounds of the application were (1) that the Secretary of State had wrongly discounted the preference of the Local Plan inspector for the Henry Box site and the local planning authority's acceptance of that, and (2) that the Secretary of State by discounting Tesco's offer of funding for the W.E.L. had failed to take account of a material consideration. Tarmac and West Oxfordshire

District Council, in addition to the Secretary of State, were called as respondents to the application, but the council took no part in the proceedings. The matter came before Mr. Nigel Macleod Q.C., sitting as a deputy High Court judge in the Queen's Bench Division, who on 7 July 1993 gave judgment in favour of Tesco quashing the decision letter. He rejected the first ground of application but accepted the second, holding that the Secretary of State had wrongly failed to treat Tesco's offer of funding as a material consideration. Tarmac appealed, and on 25 May 1994 the Court of Appeal (Sir Thomas Bingham M.R., Beldam and Steyn L.JJ.) allowed the appeal and reinstated the decision of the Secretary of State: see Court of Appeal (Civil Division) Transcript No. 736 of 1994. Sir Thomas Bingham M.R. and Beldam L.J. held that the Secretary of State had not failed to have regard to Tesco's offer of funding nor treated it as immaterial, but had simply declined to give it any or any significant weight, as he was entitled to do. Steyn L.J. went somewhat further. He held that the Secretary of State, in announcing and applying a policy to the effect that planning obligations should only be sought where they were necessary to the grant of planning permission, had acted lawfully, and was entitled to take the view that in the light of that policy Tesco's offer of funding was immaterial. All three Lords Justices rejected a respondent's notice by Tesco directed to Mr. Macleod's refusal of the first ground of application to him. Tesco now appeals to your Lordships' House. The only matter now at issue is concerned with Tesco's offer of funding for the W.E.L.

The thrust of Tesco's argument is that the offer of funding was a material consideration and that the Secretary of State failed to have regard to it. The argument relies on section 70 of the Act of 1990 which, so far as material, provides:

> "(1) Where an application is made to a local planning authority for planning permission—(*a*) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit, or (*b*) they may refuse planning permission. (2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

By virtue of sections 77(4) and 79(4), section 70 applies to the Secretary of State when he is determining an application or an appeal.

Sir Thomas Bingham M.R. in the course of his judgment in this case said that "material" in subsection (2) meant "relevant," and in my opinion he was correct in this. It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). In assessing whether or not the Secretary of State in the instant case wrongly treated Tesco's offer of funding for the W.E.L. as not being a material consideration in determining the competing applications for planning permission it is necessary to examine both the published policy of the Secretary of State in regard to planning obligations and the terms of his decision letter.

The substituted section 106 of the Act of 1990 made provisions with regard to planning obligations. The first three subsections of it are in these terms:

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as 'a planning obligation'), enforceable to the extent mentioned in subsection (3)—(*a*) restricting the development or use of the land in any specified way; (*b*) requiring specified operations or activities to be carried out in, on, under or over the land; (*c*) requiring the land to be used in any specified way; or (*d*) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically. (2) A planning obligation may—(*a*) be unconditional or subject to conditions; (*b*) impose any restriction or requirement mentioned in subsection (1)(*a*) to (*c*) either indefinitely or for such period or periods as may be specified; and (*c*) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period. (3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(*d*)—(*a*) against the person entering into the obligation; and (*b*) against any person deriving title from that person."

Just before the section came into force on 25 October 1991 the Secretary of State issued a Circular, 16/91, giving guidance on the proper use of planning obligations under it. Annex B to the Circular commenced by observing that, rightly used, planning obligation might facilitate and enhance development proposals, but that they should not be used to extract from developers payments in cash or in kind for purposes that were not directly related to the development proposed but were sought as "the price of planning permission." That no doubt reflected the dictum of Lloyd L.J. in *Bradford City Metropolitan Council v. Secretary of State for the Environment* (1986) 53 P. & C.R. 55, 64, to the effect that it has usually been regarded as axiomatic that planning consent cannot be bought or sold.

The Circular continued, under the heading "General Policy:"

> "B5. The following paragraphs set out the circumstances in which certain types of benefit can reasonably be sought in connection with a grant of planning permission. They are the circumstances to which the Secretary of State and his inspectors will have regard in determining applications or appeals. They may be briefly stated as those circumstances where the benefit sought is related to the development and necessary to the grant of permission. Local planning authorities should ensure that the presence or absence of extraneous inducements or benefits does not influence their decision on the planning application. Authorities should bear in mind that their decision may be challenged in the courts if it is suspected of having been improperly influenced.
>
> "B6. Planning applications should be considered on their merits and determined in accordance with the provisions of the development plan unless material considerations indicate otherwise. It may be reasonable, depending on the circumstances, either to impose

conditions on the grant of planning permission, or (where the planning objection to a development proposal cannot be overcome by means of a condition) to seek to enter into a planning obligation by agreement with the applicant which would be associated with any permission granted. If there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition is preferable because it enables a developer to appeal to the Secretary of State. The terms of conditions imposed on a planning permission should not be restated in a planning obligation, because that would entail nugatory duplication and frustrate a developer's right of appeal.

"B7. As with conditions (see DoE Circular 1/85, Welsh Office Circular 1/85), planning obligations should only be sought where they are necessary to the granting of permission, relevant to planning, and relevant to the development to be permitted. Unacceptable development should never be permitted because of unrelated benefits offered by the applicant, nor should an acceptable development be refused permission simply because the applicant is unable or unwilling to offer such unrelated benefits.

"B8. The test of the reasonableness of seeking a planning obligation from an applicant for planning permission depends on whether what is required: (1) is needed to enable the development to go ahead, for example the provision of adequate access or car parking; or (2) in the case of financial payment, will contribute to meeting the cost of providing such facilities in the near future; or (3) is otherwise so directly related to the proposed development and to the use of the land after its completion, that the development ought not to be permitted without it, e.g. the provision, whether by the applicant or by the authority at the applicant's expense, of car parking in or near the development, of reasonable amounts of open space related to the development, or of social, educational, recreational, sporting or other community provision the need for which arises from the development; or (4) is designed in the case of mixed development to secure an acceptable balance of uses; or to secure the implementation of local plan policies for a particular area, or type of development (e.g. the inclusion of an element of affordable housing in a larger residential development) or (5) is intended to offset the loss of or impact on any amenity or resource present on the site prior to development, for example in the interests of nature conservation. The Department welcomes the initiatives taken by some developers in creating nature reserves, planting trees, establishing wildlife ponds and providing other nature conservation benefits. This echoes the Government's view in 'This Common Inheritance' (Cmnd. 1200) that local authorities and developers should work together in the interest of preserving the natural environment. Planning obligations can therefore relate to land, roads or buildings other than those covered by the planning permission, provided that there is a direct relationship between the two. But they should not be sought where this connection does not exist or is too remote to be considered reasonable.

"B9. If what is required passes one of the tests set out in the preceding paragraph, a further test has to be applied. This is whether the extent of what is required is fairly and reasonably related in scale and kind to the proposed development. Thus a developer may reasonably be expected to pay for or contribute to the cost of

infrastructure which would not have been necessary but for his development, but his payments should be directly related in scale to the benefit which the proposed development will derive from the facilities to be provided. So, for example, a developer may reach agreement with an infrastructure undertaker to bring forward in time a project which is already programmed but is some years from implementation."

Paragraph B12, under the heading "Unilateral Obligations" stated:

"The use of unilateral undertakings is expected to be principally at appeal, where there are planning objections which only a planning obligation can resolve, but the parties cannot reach agreement. Where a developer offers an undertaking at appeal, it will be referred to the local planning authority to seek their views. Such an undertaking should be in accordance with the general policy in this guidance. It should be relevant to planning and should resolve the planning objections to the development proposal concerned. Otherwise, it would not be a material consideration and will not be taken into account. If the undertaking would resolve an identified planning objection to a development proposal but also contains unrelated benefits, it should only be taken into account to the extent that it resolves the objection. Developers should not promise to do what they cannot perform. Attention is drawn to the statutory requirement that a developer must have an interest in the land before he can enter into a planning obligation. At appeal the inspector may seek evidence of title if it has not been demonstrated that the developer has the requisite interest. Where a trunk road is involved the developer will also need the agreement of the relevant highway authorities and any necessary highway orders."

The Secretary of State's decision letter, in dealing with the matter of Tesco's offer to fund the W.E.L., had regard to the policy guidance in Circular 16/91. The relevant paragraphs are these:

"7. Turning, therefore to the first main issue, the W.E.L., the Secretary to State accepts that a new foodstore on any of the three sites would result in additional traffic on the local road network, but he observes that such an increase would be less than 10 per cent. in excess of that which would have been generated by the permitted B1 development on the Mount Mills and Henry Box sites. He agrees with the inspector that this slight worsening of traffic conditions produces some relationship between the funding of W.E.L. and a proposed store, but shares her view that the relationship is tenuous, given the distance of these sites from W.E.L. and the amount of traffic likely to be generated compared to the potential from uses already permitted. Looking at the offer of funding made by Tesco in relation to the tests of reasonableness set out in paragraph B8 of Annex B to Circular 16/91, the Secretary of State does not consider that W.E.L. is needed to enable any of the superstore proposals to go ahead, or is otherwise so directly related to any of the proposed developments and to the use of the land after completion that any of the developments ought not to be permitted without it. He appreciates that provision for the road is made in the Local Plan which is nearing adoption, and that it is the county council's intention to seek funding or a major contribution. However, having regard to paragraph B9 of

the Annex to the Circular, and bearing in mind also that no contributions towards highway improvements were sought when planning permission was granted in 1991 for B1 development on two of the sites, he agrees with the inspector that the full funding of W.E.L. is not fairly and reasonably related in scale to any of the proposed developments. As to whether it would be appropriate to seek a major contribution from developers before allowing any superstore proposal, he takes the view, given the anticipated traffic levels and the distance between the sites and the route of W.E.L., that it would be unreasonable to seek even a partial contribution from developers towards the cost of the work in connection with the proposals currently before him. He notes the inspector's conclusion that it would be 'perverse' to turn away an offer from a developer of a site preferred by the council after a lengthy Local Plan inquiry but, for the reasons given in paragraphs 5 and 6 above, he thinks that the expressed preference can carry only limited weight. Accordingly, in his view, since the offer of funding fails the tests of Annex B of Circular 16/91, it cannot be treated either as a reason for granting planning permission to Tesco or for dismissing either of the two section 78 appeals.

"8. If the Secretary of State is wrong in his conclusion that it would be unreasonable to seek even a partial contribution towards the funding of W.E.L., then it would be the case that he would be required to take into account Tesco's offer of funding, albeit not fully but only to the extent of such partial contribution as he considered was reasonable. For the same reasons that led him to his conclusion that not even the seeking of a partial contribution would be reasonable, he considers that the extent to which the funding should be taken into account (assuming, for the purposes of argument, that it has to be taken into account at all) will be of such a limited nature that, even upon taking the benefit into account, the balance of the arguments would not be tipped so as to change his decision."

The argument for Tesco draws attention to the reference in paragraphs B5 and B7 of the Circular 16/91 to the benefits of planning obligations being properly sought only where they are necessary to the grant of planning permission, and in paragraph B8 to the reasonableness of seeking a planning obligation being dependent on whether it is needed to enable the development to go ahead. Paragraph 7 of the decision letter states that the W.E.L. is not needed to enable any of the superstore proposals to go ahead. This demonstrates, so it is maintained, that the Secretary of State has applied a test of necessity which has wrongly resulted in his treating Tesco's offer of funding as immaterial. Reliance is placed on *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578. That case was concerned with the question as to the type of conditions which might lawfully be annexed to a grant of planning permission. Viscount Dilhorne said, at p. 599:

"It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them."

The other members of the House spoke to similar effect.

A The same test, so it is claimed, falls to be applied to a planning obligation for the purpose of deciding whether it amounts to a material consideration in connection with an application for planning permission. The parallel, however, cannot be exact. No doubt if a condition is completely unrelated to the development for which planning permission is sought it will not be lawful. But this case is not concerned with the lawfulness of Tesco's planning obligation, and there may be planning B obligations which have no connection with any particular proposed development. Further, in *Good v. Epping Forest District Council* [1994] 1 W.L.R. 376 the Court of Appeal held that an agreement under section 52 of the Town and Country Planning Act 1971, the predecessor of section 106 of the Act of 1990, might be valid notwithstanding that it did not satisfy the second of the *Newbury* tests. So I do not think that C reference to the *Newbury* case is particularly helpful for the purpose of deciding whether a particular planning obligation is a consideration material to the determination of a planning application with which the obligation is associated.

Tesco's argument founded on *Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.* (1993) 67 P. & C.R. 78 as being a decision of the Court of Appeal to the effect that offers of D section 106 agreements by applicants for planning permission which promised various benefits on and off site, involving the payment of considerable sums of money, did not vitiate planning consents granted by the local planning authority, notwithstanding that the offers were not necessary in the sense that they overcame what would otherwise be planning objections to the proposed development. A supermarket operator E was seeking to overturn planning consents granted to two rivals, and argued that the section 106 agreements were not material considerations unless they passed the necessity test. The Court of Appeal held that it was sufficient, on the basis of the *Newbury* case [1981] A.C. 578, that the obligations offered concerned planning matters and fairly and reasonably related to the proposed development. The only member of the court who referred to the Circular 16/91 was Hoffmann L.J. Having quoted, at p. 90, F from paragraph B7 the statement that planning obligations should only be sought where they were necessary to the granting of permission, he observed that this statement of policy embodied a general principle that planning control should restrict the rights of landowners only so far as might be necessary to prevent harm to community interests. He did not make any criticism of the policy but said:

G > "The fact that the principle of necessity is applied as policy by the Secretary of State does not make it an independent ground for judicial review of a planning decision. . . . to say that a condition or the requirement of a section 106 agreement would have been discharged on appeal by the Secretary of State, because its imposition did not accord with the policies I have quoted, is not at all the same thing as saying that the planning authority would have been acting beyond its H statutory powers."

The meaning, as I understand it, is that a local planning authority is not bound to apply a policy favoured by the Secretary of State in the sense that failure to do so will vitiate its decision. The effect of the decision, therefore, is simply that the local planning authority is not acting unlawfully if it fails to apply a necessity test in considering whether a planning obligation should be required or accepted. It does not decide the

converse, namely that the local planning authority would be acting unlawfully if it did, as a matter of policy apply a necessity test.

An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not de minimis, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision maker and in exercising that discretion he is entitled to have regard to his established policy. The policy set out in the Circular 16/91 is intended to bring about certainty and uniformity of approach, and is directed among other things to securing that planning permissions are not bought and sold. It is not suggested that there is anything unlawful about Circular 16/91 as such. It might be thought the Secretary of State has made a slip in paragraph B12 where it is stated of unilateral undertakings:

> "It should be relevant for planning and should resolve the planning objections to the development proposal concerned. Otherwise, it would not be a material consideration and will not be taken into account. . . ."

But the context is that of an appeal against refusal of planning permission, which involves that the local planning authority should have taken the view that there were planning objections to the proposed development. If these objections were bad there would be no need for any unilateral obligation. If they were good then something would require to be done to overcome them and a unilateral obligation which would not do so would indeed be irrelevant. As regards the references in paragraphs B5 and B7 to planning obligations being necessary to the grant of permission and in paragraph B8 to their being needed to enable the development to go ahead, I think they mean no more than that a planning obligation should not be given weight unless the exercise of planning judgment indicates that permission ought not to be granted without it, not that it is to be completely disregarded as immaterial.

When it comes to the Secretary of State's decision letter, I am clearly of opinion that on a fair reading of it he has not disregarded Tesco's offer of funding as being immaterial. On the contrary, he has given it careful consideration. Paragraph 7 examines the effect of a new foodstore on the traffic situation in Witney, concludes that there would be a slight worsening, and agrees with the inspector that this produces some relationship between the funding of the W.E.L. and the proposed foodstore but that the relationship is tenuous. He expresses the view that the W.E.L. is not so closely related to any of the proposed superstores that any of them ought not to be permitted without it. He goes on to say that full funding of the W.E.L. is not fairly and reasonably related in scale to any of the proposed developments, and further that having regard to the expected traffic and the distance between the sites and the route of the W.E.L. it would be unreasonable to seek even a partial contribution from developers towards the cost of it. All of this seems to me, far from being a dismissal of the offer of funding as immaterial, to be a careful weighing up of its significance for the purpose of arriving at a planning decision. In paragraph 8 the Secretary of State considers whether in the event of its being reasonable to seek a partial contribution to the funding of W.E.L. the amount of the benefit would be such as to tip the balance of the

A argument in favour of Tesco, and concludes that it would not. That is clearly a weighing exercise.

Upon the whole matter I am of opinion that the Secretary of State has not treated Tesco's offer of funding as immaterial, but has given it full and proper consideration, and that his decision is not open to challenge. I would, accordingly, dismiss the appeal.

B LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. For the reasons which he gives I, too, would dismiss the appeal.

LORD BROWNE-WILKINSON. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Keith C of Kinkel. For the reasons which he gives I, too, would dismiss the appeal.

LORD LLOYD OF BERWICK. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Keith of Kinkel. For the reasons which he gives I, too, would dismiss the appeal.

D LORD HOFFMANN. My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree that for the reasons which he gives, this appeal must be dismissed. But in view of what Sir Thomas Bingham M.R., in the passage quoted at the beginning of my noble and learned friend's speech, described as the unusual public importance of the questions involved in this appeal, E I add some observations of my own.

1. *External costs*

A development will often give rise to what are commonly called external costs, that is to say, consequences involving loss or expenditure by other persons or the community at large. Obvious examples are the F factory causing pollution, the office building causing parking problems, the fast food restaurant causing litter in the streets. Under the laissez-faire system which existed before the introduction of modern planning control by the Town and Country Planning Act 1947, the public had for the most part to bear such external costs as best it could. The law of torts (particularly nuisance and public nuisance) and the Public Health Acts could provide a remedy for only the most flagrant cases of unneighbourly G behaviour.

2. *Imposing conditions*

Section 14(1) of the Town and Country Planning Act 1947 gave planning authorities the power, when granting planning permission, to impose "such conditions as they think fit." This power has been repeated H in subsequent planning Acts and is now contained in section 70(1) of the Town and Country Planning Act 1990. This might have been thought to be a suitable instrument by which planning authorities could require that developers bear, or at any rate contribute to, their own external costs. But the courts, in the early days of planning control, construed the power to impose conditions very narrowly. It was not so much the general principles which the courts laid down as the way in which in practice the principles were applied. The classic statement of the general principle was by Lord

Denning in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

As a general statement, this formulation has never been challenged. In *Newbury District Council* v. *Secretary of State for the Environment* [1981] A.C. 578 it was paraphrased by Viscount Dilhorne as stating three conditions for the validity of a condition. It must (1) be for a planning purpose and not for any ulterior one; (2) fairly and reasonably relate to the permitted development; and (3) not be *Wednesbury* unreasonable: [1948] 1 K.B. 223.

3. *The Shoreham case*

The inability of planners to use conditions to require developers to bear external costs arose from the way in which these principles were applied to the facts of particular cases.

The landmark case was *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240. The plaintiffs wanted to build a ready mixed concrete plant and other facilities on land between the sea near Shoreham and the heavily congested main road to Brighton. The local planning authority granted permission subject to a condition that the plaintiffs construct an ancillary road on their own land parallel to the main road and allow access over that road to traffic from neighbouring land which was scheduled for development and over which it was proposed that a continuation of the ancillary road would be built. Willmer L.J. said that this was an admirable way to avoid further congestion and minimise the risk of accident. Nevertheless he and the other members of the Court of Appeal held the condition to be *Wednesbury* unreasonable. He said, at pp. 250–251:

> "if what the defendants desire to achieve is the construction of an ancillary road serving all the properties to be developed along the strip of land that is scheduled for development, for the use of all persons proceeding to or from such properties, they could and should have proceeded in a different way. What is suggested is that, in addition to the strip of land already earmarked for the proposed road widening, they could have designated a further strip 26 feet wide immediately to the southward, and could have imposed a condition that no building was to be erected on this additional strip which would in any way interfere with its use hereafter for the building of the proposed ancillary road. . . . Under the conditions now sought to be imposed, on the other hand, the plaintiff must construct the ancillary road as and when they may be required to do so over the whole of their frontage entirely at their own expense. . . . The defendants would thus obtain the benefit of having the road constructed for them at the plaintiffs' expense, on the plaintiffs' land, and without the necessity for paying any compensation in respect thereof. Bearing in mind that another and more regular course is open to the defendants, it seems to me that this result would be

A utterly unreasonable and such as Parliament cannot possibly have intended."

This judgment shows no recognition of the possibility that the need to widen the Brighton Road could in part be regarded as an external cost of the applicant's ready mixed concrete business, to which they could in fairness be required to contribute as a condition of the planning B permission. It is assumed that the "regular course," the natural order of things, is that such costs should be borne by taxation upon the public at large. The fact that the local authority has power, on payment of compensation, to take land for highway purposes from any person, whether or not he imposes external costs upon the community, is treated as a reason for denying that it can use planning powers to exact a contribution from those who do.

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4. *Planning agreements*

I have dwelt upon *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* because it exercised a decisive influence upon the development of British planning law and practice. The Ministry of Housing and Local Government issued a circular for the guidance of local planning authorities D (5/68) which was intended to reflect its ratio decidendi. It has since been replaced in similar terms by paragraph 63 of Circular 1/85:

> "No payment of money or other consideration can be required when granting a permission or any other kind of consent required by a statute except where there is specific statutory authority. Conditions requiring, for instance, the cession of land for road improvements or E for open space, or requiring the developer to contribute money towards the provision of public car parking facilities, should accordingly not be attached to planning permissions. Similarly, permission cannot be granted subject to a condition that the applicant enters into an agreement under section 52 of the Act [now section 106 of the Act of 1990] or other powers. However, conditions may in some cases reasonably be imposed to oblige developers to carry out F works, e.g. provision of an access road, which are directly designed to facilitate the development."

Faced with this restriction on their power to require contribution to external costs by the imposition of conditions, local planning authorities resorted to a different route by which they could achieve the same purpose. This was the agreement under section 52 of the Town and G Country Planning Act 1971, now replaced by section 106 of the Town and Country Planning Act 1990. In its original form it provided as follows:

> "(1) A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the H agreement; and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement."

5. *Planning gain*

During the property boom of the early seventies, local planning authorities increasingly used the power to enter into section 52 agreements

(or agreements under their general powers) to exact payments or cessions of land which could not be imposed by conditions. Under Circular 5/68 it could not be made a condition of the planning permission that the developer enter into such an agreement, but that presented no difficulty. The local planning authority simply refused to grant a planning permission until the developer had entered into the agreement. Then it granted permission unconditionally. Of course the developer could always appeal against a refusal to the Secretary of State, but the delay and expense which would be involved was a powerful incentive to negotiate an agreement which would meet the local planning authority's demands.

There developed a practice by which the grant of planning permissions was regularly accompanied by negotiations for what was called a "planning gain" to be provided by the developer to the local planning authority. The practice caused a good deal of public concern. Developers complained that they were being held to ransom. They said that some local authorities insisted that in return for planning permission, an applicant should make a payment for purposes which could in no way be described as external costs of the particular development. In the boom atmosphere of the time, in which a grant of planning permission could add substantially to the value of land, some authorities appeared to regard themselves as entitled to share in the profits of development, thereby imposing an informal land development tax without the authority of Parliament. Citizens, on the other hand, complained that permissions were being granted for inappropriate developments simply because the developers were willing to contribute to some pet scheme of the local planning authority. There was also a more general concern about distortion of the machinery of planning. The process envisaged by the planning acts was that decisions would be made openly in council or committee by adjudicating on the merits of the application and then either refusing permission or granting it with or without unilaterally imposed conditions. If the developer did not like the condition, he could appeal to the Secretary of State, who would also adjudicate upon the matter openly after public inquiry. But the shift from conditions to agreements meant that a crucial part of the planning process took place in secret, by negotiation between the developer and the council's planning officers. It began to look more like bargain and sale than democratic decision-making. Furthermore, the process excluded the appeal to the Secretary of State. The developer who had entered into a section 52 agreement could not appeal. Nor did anyone else have a right of appeal. The only possibility of challenge was if some sufficiently interested party applied for judicial review on the ground that the planning authority had taken improper matters into consideration when granting the permission. In this respect the decision in *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 had been self-defeating. By preventing local planning authorities from requiring financial contributions or cessions of land by appealable conditions, it had driven them to doing so by unappealable section 52 agreements.

6. *Circular 16/91*

It was in response to these concerns that the Department of the Environment issued its circular *Planning Gain* (22/83), now replaced by Circular 16/91, *Planning Obligations*. The purpose of these circulars was to give guidance to local planning authorities and state the policy which the Secretary of State would apply in dealing with appeals. The essence of

A the advice is contained in paragraph B5 of Circular 16/91. It says that any benefit sought in return for a grant of planning permission must be "related to the development and necessary to the grant of permission." The test thus has two limbs: relationship to the development and necessity for the grant of permission. The need for a relationship to the development flows from the requirements of what is now section 70(2) of the Town and Country Planning Act 1990, which says that in deciding whether to B grant or refuse planning permission (or to impose conditions)

> "the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

A benefit unrelated to the development would not be a "material consideration" and a refusal based upon the developer's unwillingness to C provide such a benefit would therefore be unlawful. Thus far, the Circular does no more than reflect the requirements of the statute. But the second limb, "necessary to the grant of permission," is a different matter. The foundation for this test is the policy which has been applied by successive governments since the inception of the modern planning system, namely that

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> "applications for development should be allowed, having regard to the development plan and all material considerations, unless the proposed development would cause demonstrable harm to interests of acknowledged importance." (*Planning Policy Guidance 1*: (PPGl, March 1992), *General Policy and Principles*, paragraph 5).

As a corollary of this principle of policy, the department had for many E years advised that conditions should not be imposed unless without them the development would be unacceptable in the sense that it would have to be refused as likely to cause "demonstrable harm to interests of acknowledged importance:" see Circular 1/85, paragraph 12. Circular 16/91 declares a similar policy in respect of benefits required to be provided by agreements under section 106 of the Town and Country Planning Act 1990. It says that an obligation to provide such a benefit F may be imposed if it is needed to enable the development to go ahead, or designed to secure an acceptable balance of uses or "so directly related to the proposed development that [it] ought not [be allowed to go ahead] without it:" paragraph B8. If there is the necessary relationship between the development and the benefit, i.e. if the benefit can be regarded as meeting or contributing to an external cost of the development, then

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> "the extent of what is required [must be] fairly and reasonably related in scale and kind to the proposed development." A developer may "reasonably be expected to pay for or contribute to the cost of infrastructure which would not have been necessary but for his development, but his payments should be directly related in scale to the benefit which the proposed development will derive from the facilities to be provided:" paragraph B9.

H In each case the language emphasises that an obligation should not be required if, even without it, or with a less onerous obligation, a refusal of planning permission would be contrary to the presumption in favour of development.

*7. Modern policy on external costs*

I shall defer for the moment an examination of the relationship between this second limb of the test in Circular 16/91 and the legal limits

of the powers of planning authorities. For the moment I would only draw attention to two aspects of the policy which it lays down. First, it comes down firmly against the practice of using demands for "planning gain" as a means of enabling local planning authorities to share in the profits of development. The more flagrant examples of demands for purposes unrelated to the development were in any event illegal as *Wednesbury* unreasonable or founded upon immaterial considerations. But the Circular also makes it clear that appeals will be allowed if local planning authorities make demands which are excessive in the sense of being in planning terms unnecessary or disproportionate. This policy is reinforced by a warning that applications for costs against local planning authorities making such excessive demands will be sympathetically considered. But secondly, the Circular sanctions the use of planning obligations to require developers to cede land, make payments or undertake other obligations which are bona fide for the purpose of meeting or contributing to the external costs of the development. In other words, it authorises the use of planning obligations in a way which the court in *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 would have regarded as *Wednesbury* unreasonable in a condition. A good example of its application is the recent case of *Reg. v. South Northamptonshire District Council, Ex parte Crest Homes Plc.* (unreported), 13 October 1994; Court of Appeal (Civil Division) Transcript No. 1204 of 1994. The district council, faced with an alteration to the structure plan which contemplated residential development which would double the population of the small town of Towcester, decided that applicants for planning permission to build the new houses would be required to enter into agreements to contribute to the necessary infrastructure, such as schools, community centres, a bypass road and so forth. The council calculated how much these works would cost and decided to allocate the burden among prospective developers in accordance with a formula based on the percentage of value added to the land by the grant of planning permission. The Court of Appeal held that this policy was both lawful and in accordance with Circular 16/91. Henry L.J. said:

> "Where residential development makes additional infrastructure necessary or desirable, there is nothing wrong in having a policy that requires major developers to contribute to the costs of infrastructure related to their development."

He went on to say that the formula was, in the circumstances of that case, a practical and legitimate way of relating the infrastructure costs to the various developments.

8. *Legislation in support of the new policy*

The government policy of encouraging such agreements has been buttressed by amendments to the planning and highways legislation to confer upon local planning authorities and highway authorities very wide powers to enter into agreements with developers. The new section 106 of the Town and Country Planning Act 1990 says in express terms that agreements under that section may require a developer to pay sums of money. The new section 278 of the Highways Act 1980, substituted by section 23 of the New Roads and Street Works Act 1991, confers a broad power upon a highway authority to enter into agreements by which some other person will pay for the construction or improvement of roads or streets. Parliament has therefore encouraged local planning authorities to enter into agreements by which developers will pay for infrastructure and

A other facilities which would otherwise have to be provided at the public expense. These policies reflect a shift in Government attitudes to the respective responsibilities of the public and private sectors. While rejecting the politics of using planning control to extract benefits for the community at large, the Government has accepted the view that market forces are distorted if commercial developments are not required to bear their own external costs.

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9. *Law and policy in the United Kingdom*

This brings me to the relationship between the policy and the law. I have already said that the first limb of the test in paragraph B5 of Circular 16/91 marches together with the requirements of the statute. But the second—the test of necessity (and proportionality)— does not. It is C well within the broad discretion entrusted to planning authorities by section 70 of the Town and Country Planning Act 1990. But it is not the only policy which the Secretary of State might have adopted. There is nothing in the Act of 1990 which requires him to adopt the tests of necessity and proportionality. It is of course entirely consistent with the basic policy of permitting development unless it would cause demonstrable D harm to interests of acknowledged importance. But even that policy is not mandated by Parliament. There may come a Secretary of State who will say with Larkin:

> "Despite all the land left free
> For the first time I feel somehow
> That it isn't going to last
> That before I snuff it, the whole
> Boiling will be bricked in . . .
> And that will be England gone
> The shadows, the meadows, the lanes
> The guildhalls, the carved choirs"

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and promulgate a policy that planning permissions should be granted only F for good reason. There is nothing against this in the statute. And among the good reasons could be the willingness of the developer to provide related external benefits.

The potentiality for conflict between the policy of Circular 16/91 and other equally defensible policies has arisen most acutely in cases in which developers are in competition for a planning permission, that is to say, in which it is accepted that the grant of permission to one developer is a G valid planning reason for refusing it to another. In such cases the presumption in favour of development does not yield an easy answer. If there was no competition, it might be that the proposal of developer A could not be said to cause demonstrable harm to interests of acknowledged importance. But what happens when one has to throw into the scale having to forego the benefits of the far more attractive proposal of H developer B? Is that not harm to an interest of acknowledged importance? I do not think anyone would doubt that in such a case of competition, it would be legitimate to take into account that one developer was willing, for example, to employ the finest architect, use the best materials, lay out beautiful gardens and so forth, whereas the proposal of the other developer, though not unacceptable if it had stood alone, was far inferior. The problem arises when a developer tries to win the competition by offering more off-site benefits.

10. *The Plymouth case*

If it is proper in a case of competition to take into account the architecture and landscaping within the respective development sites, it is difficult logically to distinguish the provision of benefits related to the development but off the site. It is true that the former may be more likely to enhance the value of the developer's land than the latter. But the difference is one of degree and, one might think, a matter for the developer's choice. This was the view of the local planning authority in *Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.* (1993) 67 P. & C.R. 78. It was advised by its planning officers that only one permission should be granted for a superstore on the eastern approach to Plymouth. It thereupon organised a competition. It invited prospective developers to select from a menu of "community benefits," all of which satisfied the test of being fairly related to the proposed development, and indicated that it would take into account the extent to which a developer was willing to pay for items on the menu. Having received two attractive bids which included a number of external benefits, it changed its policy and decided to grant both permissions. This was challenged by the Co-operative Society, which had a competing supermarket nearby, on the ground that the local planning authority had taken into account an offer of benefits which were not necessary, in the sense that they overcame what would otherwise have been planning objections to the development. Because a local planning authority gives no reasons for a decision to grant planning permission, it is not easy to tell what view it has formed about whether a proposed benefit did or did not overcome an objection to the development. It is probably true to say that, as it was agreed that there could be a superstore in the area, the menu of benefits offered by each developer was not necessary to make his development acceptable if his had been the only application. The matter becomes more complicated when, as the council originally intended, acceptance of one application involves rejection of the other, or when, as afterwards happened, it was decided to grant both applications—a change of policy in which the benefits offered no doubt played a substantial part. But the Court of Appeal was content to deal with the matter on the basis that the council had indeed taken into account promises of benefits which, though relating to the proposed development, were not necessary for the grant of permission within the terms of Circular 16/91. It dismissed the appeal on the ground that the test of necessity, whether as explained in the Circular or in any other form, was not a legal requirement. It said that the tests for the vires of a grant of planning permission which took into account benefits offered under a planning obligation were the same as the tests for the validity of a condition laid down by this House in the *Newbury* case [1981] A.C. 578: the planning obligation must be for a planning purpose; it must fairly relate to the proposed development and having regard to it must not be *Wednesbury* unreasonable. There is no additional test of necessity.

11. *Planning obligations and the Newbury tests*

Although I was party to the *Plymouth* decision, 67 P. & C.R. 78 and accepted the transposition of the three *Newbury* tests to the validity of a planning permission granted on the basis of the developer undertaking a planning obligation, I am bound to agree with my noble and learned friend, Lord Keith of Kinkel, that the parallel is by no means exact. The

A analogy was been invoked because, as Lord Scarman pointed out in *Newbury* [1981] A.C. 578, 619A, the first two tests are a judicial paraphrase of the planning authority's statutory duty in section 70(2) of the Act of 1990 to have regard to the provisions of the development plan and "any other material considerations." This duty applies as much to the decision to grant a planning permission (which is what was under attack in the *Plymouth* case) as to the decision to impose conditions (which was under B attack in the *Newbury* case). The third *Newbury* test, *Wednesbury* unreasonableness, is a general principle of our administrative law. But the use of the *Newbury* tests in relation to planning obligations can cause confusion unless certain points are borne clearly in mind.

First, the *Newbury* case was concerned with the validity of a condition and there is a temptation to regard a planning obligation as analogous to C a condition. But section 70(2) does not apply to planning obligations. The vires of planning obligations depends entirely upon the terms of section 106. This does not require that the planning obligation should relate to any particular development. As the Court of Appeal held in *Good v. Epping Forest District Council* [1994] 1 W.L.R. 376, the only tests for the validity of a planning obligation outside the express terms of section 106 are that it must be for a planning purpose and not *Wednesbury* D unreasonable. Of course it is normal for a planning obligation to be undertaken or offered in connection with an application for planning permission and to be expressed as conditional upon the grant of that permission. But once the condition has been satisfied, the planning obligation becomes binding and cannot be challenged by the developer or his successor in title on the ground that it lacked a sufficient nexus with E the proposed development. The reason why the adoption of the *Newbury* tests had any plausibility in the *Plymouth* case was because the case was not concerned with the validity of planning obligations. It turned upon whether the planning obligations undertaken in that case were material considerations which could legitimately be taken into account in granting planning permission. The same is true of this case.

Secondly, it does not follow that because a condition imposing a F certain obligation (such as to cede land or pay money) would be regarded as *Wednesbury* unreasonable, the same would be true of a refusal of planning permission on the ground that the developer was unwilling to undertake a similar obligation under section 106. I say this because the test of *Wednesbury* unreasonableness applied in *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* to conditions is quite inconsistent G with the modern practice in relation to planning obligations which has been encouraged by the Secretary of State in Circular 16/91 and by Parliament in the new section 106 of the Town and Country Planning Act 1990 and the new section 278 of the Highways Act 1980 and approved by the Court of Appeal in *Reg. v. South Northamptonshire District Council, Ex parte Crest Homes Plc.*, 13 October 1994.

Thirdly, while *Newbury* is a convenient judicial paraphrase of the effect H of section 70(2), it cannot be substituted for the words of the statute. The principal questions in a case like this must always be whether the planning obligation was a "material consideration" and whether the planning authority had regard to it.

12. *The necessity test*

This brings me to the submissions in this appeal, the facts of which have been fully stated by my noble and learned friend, Lord Keith of

Kinkel. Mr. Vandermeer for Tesco submitted that Tesco's offer to pay for the West End Link was a material consideration and that the Secretary of State failed to have regard to it. Mr Ouseley for the Secretary of State agreed that it was a material consideration but said that upon a fair construction of the Secretary of State's decision letter, he did have regard to it. Mr. Lockhart-Mummery, for Tarmac, said that the offer was not a material consideration at all. Logically I should start with Mr. Lockhart-Mummery's submission, because if he is right, it does not matter whether or not the Secretary of State had regard to the offer.

Mr. Lockhart-Mummery's submission was that Tesco's offer was not material because it did not have the effect of rendering acceptable a development which would otherwise have been unacceptable. The development would have been perfectly acceptable without it, or at any rate, with an offer of a good deal less. He formulated the test of materiality as follows: "A planning authority may lawfully take into account a developer's offer to provide off-site infrastructure or other benefits whose objective and effect are to render his development *acceptable* so that it may be granted planning permission under section 70 of the Town and Country Planning Act 1990." (My emphasis.)

Mr. Lockhart-Mummery disclaimed any intention of challenging the correctness of the *Plymouth* decision, despite some encouragement from Steyn L.J. in the Court of Appeal. But in my judgment his formulation is in substance a rerun of the unsuccessful submission of Mr. Gilbart in the *Plymouth* case. The key word is that which I have emphasised: acceptable. The planning obligation, he says, must have the effect of making acceptable what would otherwise have been unacceptable. This, it seems to me, is indistinguishable from the test of necessity for the purpose of granting a planning permission which was rejected in the *Plymouth* case.

13. *Materiality and planning merits*

It would be inappropriate for me to rehearse the reasoning in the *Plymouth* case. But I shall, if I may, look at the question from a slightly different perspective. The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.

This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State.

The test of acceptability or necessity put forward by Mr. Lockhart-Mummery suffers in my view from the fatal defect that it necessarily involves an investigation by the court of the merits of the planning

A decision. How is the court to decide whether the effect of a planning obligation is to make a development acceptable without deciding that without that obligation it would have been unacceptable? Whether it would have been unacceptable must be a matter of planning judgment. It is I suppose theoretically possible that a Secretary of State or local planning authority may say in terms that he or it thought that a proposed development was perfectly acceptable on its merits but nevertheless B thought that it was a good idea to insist that the developer should be required to undertake a planning obligation as the price of obtaining his permission. If that should ever happen, I should think the courts would have no difficulty in saying that it disclosed a state of mind which was *Wednesbury* unreasonable. But in the absence of such a confession, the application of the acceptability or necessity test must involve the courts in C an investigation of the planning merits. The criteria in Circular 16/91 are entirely appropriate to be applied by the Secretary of State as part of his assessment of the planning merits of the application. But they are quite unsuited to application by the courts.

14. *Law and policy in the United States*

D It is instructive to compare this basic principle of English planning law with the position in the United States. There the question of what conditions can be imposed on the equivalent of a grant of planning permission has a constitutional dimension because the Fifth Amendment prohibits the taking of property by the state except for a public purpose and upon payment of just compensation. Nevertheless, the debate over when the imposition of a condition amounts to an unconstitutional taking E of property or (in terms of state law) an unreasonable exercise of the planning (or "police") power, has given rise to a debate remarkably similar to that over "planning gain" in the United Kingdom. The courts, following the decision of the Supreme Court in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, apply what has been called the "rational nexus" test. This requires the planning authority which exacts a contribution to infrastructure as a condition of its consent to demonstrate F that "the development will cause a need for new public facilities and that the contribution required is proportionate to that need and will actually be used to provide those facilities." ("Planning Gain and the Grant of Planning Permission: Is the United States' Test of the 'Rational Nexus' the Appropriate Solution?" by Purdue, Healey and Ennis [1992] J.P.L. 1012, 1014.) This, as the authors of the article from which I have quoted G point out, is very similar to the tests of necessity and proportionality in Circular 16/91. In another article, "Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements" Callies and Grant ((1991) 23 The Urban Lawyer 221, 248) say:

> "The necessity to avoid falling foul of the 'taking' doctrine has H meant that United States local governments have always had to be in a position to justify their rules in case of constitutional challenge, and hence to pursue openness and economic transparency . . ."

Purdue, Healey and Ennis add that the rational nexus test "has led some state courts to require sophisticated analysis which goes into questions of past expenditure and double taxation."

My Lords, no English court would countenance having the merits of a planning decision judicially examined in this way. The result may be some

lack of transparency, but that is a price which the English planning system, based upon central and local political responsibility, has been willing to pay for its relative freedom from judicial interference.

15. *Buying and selling planning permissions*

This reluctance of the English courts to enter into questions of planning judgment means that they cannot intervene in cases in which there is sufficient connection between the development and a planning obligation to make it a material consideration but the obligation appears disproportionate to the external costs of the development. *Reg. v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.*, 67 P. & C.R. 78, was such a case, leading to concern among academic writers and Steyn L.J. in the present case that the court was condoning the sale of planning permissions to the highest bidder. My Lords, to describe a planning decision as a bargain and sale is a vivid metaphor. But I venture to suggest that such a metaphor (and I could myself have used the more emotive term "auction" rather than "competition" to describe the process of decision-making process in the *Plymouth* case) is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits. Or take the present case, which is in some respects the converse of the *Plymouth* case. Tarmac say that Tesco's offer to pay £6·6m. to build the West End Link was a blatant attempt to buy the planning permission. Although it is true that Witney Bridge is a notorious bottleneck and the town very congested, the construction of a superstore would make the congestion only marginally worse than if the site had been developed under its existing permission for offices. Therefore an offer to pay for the whole road was wholly disproportionate and it would be quite unfair if Tarmac was disadvantaged because it was unwilling to match this offer. The Secretary of State in substance accepted this argument. His policy, even in cases of competition for a site, is obviously defensible on the ground that although it may not maximise the benefit for Witney, it does produce fairness between developers.

Tesco, on the other hand, say that nothing was further from their minds than to try to buy the planning permission. They made the offer because the local planning authority had said that in its view, no superstore should be allowed unless the West End Link was built. Tesco say that this seemed a sensible attitude because although it was true that the development would add only marginally to the congestion which would have existed if offices had been built, this was an unrealistic comparison. In practice it was most unlikely that anyone would build offices in that part of Witney in the foreseeable future. The fact was that

A the development would make the existing traffic problems a good deal worse. In an ideal world it would have been fairer if the highway authority had paid for most of the road and Tesco only for a proportion which reflected the benefit to its development. But the highway authority had made it clear that it had no money for the West End Link. So there was no point in Tesco offering anything less than the whole cost. Why should this be regarded as an improper attempt to buy the planning permission? B The result of the Secretary of State's decision is that Witney will still get a superstore but no relief road. Why should that be in the public interest?

I think that Tesco's argument is also a perfectly respectable one. But the choice between a policy which emphasises the presumption in favour of development and fairness between developers, such as guided the Secretary of State in this case, and a policy of attempting to obtain the C maximum legitimate public benefit, which was pursued by the local planning authority in the *Plymouth* case, lies within the area of discretion which Parliament has entrusted to planning authorities. It is not a choice which should be imposed upon them by the courts.

I would therefore reject Mr. Lockhart-Mummery's submission that Tesco's offer was not a material consideration. I think that it was open to the Secretary of State to have taken the same view as the Plymouth City D Council did in the *Plymouth* case, 67 P. & C.R. 78, and given the planning permission to Tesco on the grounds that its proposals offered the greater public benefit. But the Secretary of State did not do so. Instead, he applied the policy of Circular 16/91 and decided to attribute little or no weight to the offer. And so, on the ground that its site was marginally more suitable, Tarmac got the permission.

E 16. *The appeal*

This brings me to Mr. Vandermeer's submissions in support of the appeal. He says that although the Secretary of State through Mr. Ouseley now asserts that the offer was a material consideration, that was not the view he took in his decision letter. There he treated Circular 16/91 as being not merely a statement of policy as to the weight to be given to F planning obligations but as a direction that planning obligations which did not satisfy its criteria were not to be treated as material considerations at all.

For the reasons given by my noble and learned friend, Lord Keith of Kinkel, I do not think that the Secretary of State fell into this error. Paragraph 21 of *Planning Policy Guidance 1* (PPG1, March 1992), *General* G *Policy and Principles*, describes the status of the department's circulars in unambiguous terms:

> "The Department's policy statements cannot make irrelevant any matter which is a material consideration in a particular case. But where such statements indicate the weight that should be given to relevant considerations, decision-makers must have proper regard to them."

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The Secretary of State can hardly have forgotten this statement when he came to apply Circular 16/91 in his decision letter. So, for example, when he said in paragraph 7:

> "Accordingly, in his view, since the offer of funding fails the tests of Annex B of Circular 16/91, it cannot be treated either as a reason for granting planning permission to Tesco or for dismissing [the appeal by Tarmac]"

he could not have used the word "cannot" to mean that he was legally precluded from doing so. He clearly meant that he could not do so consistently with his stated policy in Circular 16/91.

17. *Little weight or no weight?*

Finally I should notice a subsidiary argument of Mr. Vandermeer. He submitted that a material consideration must be given some weight, even if it was very little. It was therefore wrong for the Secretary of State, if he did accept that the offer was a material consideration, to say that he would give it no weight at all. I think that a distinction between very little weight and no weight at all is a piece of scolasticism which would do the law no credit. If the planning authority ignores a material consideration because it has forgotten about it, or because it wrongly thinks that the law or departmental policy (as in *Safeway Properties Ltd. v. Secretary of State for the Environment* [1991] J.P.L. 966) precludes it from taking it into account, then it has failed to have regard to a material consideration. But if the decision to give that consideration no weight is based on rational planning grounds, then the planning authority is entitled to ignore it.

*Appeal dismissed.*
*Question of costs adjourned sine die.*

*Solicitors: Berwin Leighton; Treasury Solicitor; McKenna & Co.*

A. R.

A [HOUSE OF LORDS]

*CITY OF EDINBURGH COUNCIL . . . . RESPONDENTS

AND

SECRETARY OF STATE FOR SCOTLAND . . . RESPONDENT

AND

B REVIVAL PROPERTIES LTD. . . . . APPELLANTS

CITY OF EDINBURGH COUNCIL . . . . RESPONDENTS

AND

SECRETARY OF STATE FOR SCOTLAND . . . APPELLANT

AND

C REVIVAL PROPERTIES LTD. . . . . RESPONDENTS

[CONJOINED APPEALS]

1997 June 23, 24; Oct. 16

Lord Browne-Wilkinson, Lord Mackay of Clashfern, Lord Steyn, Lord Hope of Craighead and Lord Clyde

D

*Town Planning—Development—Local authority's development plan—Development of local shopping facilities and demolition of listed building—Whether description of listed building inconsistent with name on list—Whether priority accorded to plan overcome by other material considerations—Town and Country Planning (Scotland) Act 1972 (c. 52), ss. 18A (as inserted by Planning and Compensation Act 1991 (c. 34), s. 58), 52*

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In 1993 the applicants sought outline planning permission for the development of a food store and petrol filling station and ancillary works, and listed building consent for the demolition of a former riding school building on the site. Both were refused by the local planning authority, and the applicants appealed to the Secretary of State. The list contained, under "Name of Building," "Redford Barracks ... (original buildings of 1909–15 only)." Under "Description," it referred to the riding school building, but the reporter found that that had probably been built after 1915. He held that precedence should be given to the entry under "Name of Building" and that accordingly the riding school building was excluded from the list and listed building consent was unnecessary. In relation to the application for planning permission, he held under section 18A of the Town and Country Planning (Scotland) Act 1972[1] that greater weight should be attached to other material considerations than to the local planning authority's development plan, which consisted of the 1985 structure plan and the 1993 local plan, namely expressions of policy and planning guidance more recent than the 1985 plan. He found that, while there was not a significant shortage of food stores or petrol filling stations in the area in question, other stores were performing at levels significantly higher than company averages and that, accordingly, there was an expenditure surplus and thus a quantitative deficiency in local shopping facilities within the meaning of the 1994 structure plan, not yet approved by the Secretary of State. He concluded that outline planning permission should be granted. The Second Division of the Court

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[1] Town and Country Planning (Scotland) Act 1972, s. 18A, as inserted: see post, p. 1458A.

of Session, by a majority on the issue of planning permission, allowed an appeal by the local planning authority.

On appeals by the applicants and the Secretary of State:—

Held, (1) dismissing the applicants' appeal in respect of listed building consent, that the words "original buildings of 1909–15 only" under "Name of Building" in the list did not necessarily refer to buildings completed during the specified years but could be read as referring to the processes of planning, conception, design and the realisation of the architect's work and on that construction the riding school was consistently included under "Description" as a listed building (post, pp. 1449C–F, 1454E–G, 1456F–H).

(2) Allowing the appeals of the applicants and the Secretary of State in respect of planning permission, that the reporter had been entitled in principle to decide that the priority given to the development plan by section 18A of the Act of 1972 was overcome by other material considerations; that a quantitative deficiency in relation to consumer expenditure was most readily established by the fact that other stores were trading above the expected level; that there had been no obligation on the reporter to quantify the extent of the deficiency; and that he had been entitled to decide that a quantitative deficiency was established (post, pp. 1449C–F, 1450H, 1461A, 1463D–E, F–G, 1464A–D).

Decision of the Second Division of the Court of Session affirmed.

The following cases are referred to in the opinions of Lord Hope of Craighead and Lord Clyde:

*Bolton Metropolitan District Council v. Secretary of State for the Environment* (1995) 94 L.G.R. 387, H.L.(E.)

*Hope v. Secretary of State for the Environment* (1975) 31 P. & C.R. 120

*Loup v. Secretary of State for the Environment* (1995) 71 P. & C.R. 175, C.A.

*Poyser and Mills' Arbitration, In re* [1964] 2 Q.B. 467; [1963] 2 W.L.R. 1309; [1963] 1 All E.R. 612

*Simpson v. Edinburgh Corporation,* 1960 S.C. 313

*Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636, H.L.(E.)

*Wordie Property Co. Ltd. v. Secretary of State for Scotland,* 1984 S.L.T. 345

The following additional cases were cited in argument:

*Debenhams Plc. v. Westminster City Council* [1987] A.C. 396; [1986] 3 W.L.R. 1063; [1987] 1 All E.R. 51, H.L.(E.)

*Reg. v. Camden London Borough Council, Ex parte Bellamy,* [1992] J.P.L. 255, D.C.

*Reg. v. Hillingdon London Borough Council, Ex parte Puhlhofer* [1986] A.C. 484; [1986] 2 W.L.R. 259; [1986] 1 All E.R. 467, H.L.(E.)

*Save Britain's Heritage v. Number 1 Poultry Ltd.* [1991] 1 W.L.R. 153; [1991] 2 All E.R. 10, H.L.(E.)

*Shimizu (U.K.) Ltd. v. Westminster City Council* [1997] 1 W.L.R. 168; [1997] 1 All E.R. 481, H.L.(E.)

CONJOINED APPEALS from the Second Division of the Court of Session.

These were conjoined appeals by the applicants, Revival Properties Ltd., and the Secretary of State for Scotland respectively from the Second Division of the Court of Session (Lord Ross, Lord Justice-Clerk, Lord Morison and Lord McCluskey) who on 16 January 1996 allowed an appeal by the local planning authority, the City of Edinburgh District Council, under sections 231 and 233 of the Town and Country Planning (Scotland) Act 1972 relating to listed building consent sought by the

applicants and by a majority (Lord Morison dissenting) an appeal by the local planning authority under sections 231 and 233 relating to a planning application made by the applicants. The appeals had been brought against the decision of a senior reporter, Mr. John H. Henderson. The City of Edinburgh District Council was succeeded under the Local Government etc. (Scotland) Act 1994 by the City of Edinburgh Council.

The appeals were conjoined by order of the House of Lords dated 7 October 1996.

The facts are stated in the opinion of Lord Clyde.

*C. M. Campbell Q.C.* and *C. J. Tyre* (both of the Scottish Bar) for the Secretary of State.

*R. L. Martin Q.C.* and *P. S. Hodge Q.C.* (both of the Scottish Bar) for the applicants.

*W. S. Gale Q.C.* and *M. G. J. Upton* (both of the Scottish Bar) for the local planning authority, the City of Edinburgh Council.

Their Lordships took time for consideration.

16 October. LORD BROWNE-WILKINSON. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Clyde. For the reasons he gives I would make the order which he proposes.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Clyde. For the reasons he has given I would also make the order which he proposes.

LORD STEYN. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Clyde. For the reasons he has given I would also make the order which he proposes.

LORD HOPE OF CRAIGHEAD. My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Clyde. I agree with it, and for the reasons which he gives I also would allow the appeal on the planning law issue and dismiss the appeal on the issue about listed building consent.

I should like however to add a few observations about the meaning and effect of section 18A of the Town and Country Planning (Scotland) Act 1972, and to say rather more about the listed building consent issue which has revealed some practical problems about the way buildings are listed for the purposes of the statute—as to which I am unable, with respect, to agree with the approach taken by the judges in the Second Division.

*The planning issue*

Section 18A of the Act of 1972, which was introduced by section 58 of the Planning and Compensation Act 1991, creates a presumption in favour of the development plan. That section has to be read together with section 26(1) of the Act of 1972. Under the previous law, prior to the introduction of section 18A into that Act, the presumption was in favour

of development. The development plan, so far as material to the application, was something to which the planning authority had to have regard, along with other material considerations. The weight to be attached to it was a matter for the judgment of the planning authority. That judgment was to be exercised in the light of all the material considerations for and against the application for planning permission. It is not in doubt that the purpose of the amendment introduced by section 18A was to enhance the status, in this exercise of judgment, of the development plan.

It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision-taker. The development plan does not, even with the benefit of section 18A, have absolute authority. The planning authority is not obliged, to adopt Lord Guest's words in *Simpson v. Edinburgh Corporation,* 1960 S.C. 313, 318, "slavishly to adhere to" it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority.

The presumption which section 18A lays down is a statutory requirement. It has the force of law behind it. But it is, in essence, a presumption of fact, and it is with regard to the facts that the judgment has to be exercised. The primary responsibility thus lies with the decision-taker. The function of the court is, as before, a limited one. All the court can do is review the decision, as the only grounds on which it may be challenged in terms of the statute are those which section 233(1) of the Act lays down. I do not think that it is helpful in this context, therefore, to regard the presumption in favour of the development plan as a governing or paramount one. The only questions for the court are whether the decision-taker had regard to the presumption, whether the other considerations which he regarded as material were relevant considerations to which he was entitled to have regard and whether, looked at as a whole, his decision was irrational. It would be a mistake to think that the effect of section 18A was to increase the power of the court to intervene in decisions about planning control. That section, like section 26(1), is addressed primarily to the decision-taker. The function of the court is to see that the decision-taker had regard to the presumption, not to assess whether he gave enough weight to it where there were other material considerations indicating that the determination should not be made in accordance with the development plan.

As for the circumstances of the present case, I agree that the reporter was entitled in the light of the material which was before him to give priority to the more recent planning guidance in preference to the development plan, and that the reasons which he gave for his decision in the light of that guidance to grant planning permission were sufficient to explain the conclusions which he had reached.

*The listed buildings issue*

The applicants' argument was that the list of buildings of special or historic interest which the Secretary of State for Scotland has compiled under section 52 of the Act of 1972 did not include the former riding school at Redford Barracks and that the reporter was entitled to make a finding to this effect. Their approach was that the question whether the building was a listed building was a question of fact which the reporter was entitled to decide as part of the case which was before him in the appeal against the refusal of listed building consent. Yet it became clear in the course of counsel's argument that the issue which the applicants regard as one of fact depends upon the proper construction of the entries in the list. So it seems to me that the underlying question—if it is truly one of construction—is one of law.

The structure of the legislation which is contained in sections 52 to 54 of the Act is to this effect. It is the responsibility of the Secretary of State to compile or approve of the list. He may take account, in deciding whether or not to include a building in the list, of the building itself and its setting. Any respect in which its exterior contributes to the architectural or historic interest of any group of buildings of which it forms part may be taken into account. So also may be the desirability of preserving any feature of the building fixed to it or comprised within its curtilage on the ground of its architectural or historic interest. The building itself must be identified in the list, but section 52(7) also provides that, for the purposes of the Act, any object or structure fixed to the building or forming part of the land and comprised within the curtilage of the building shall be treated as part of it. Thus it is not necessary to do more than to identify the building—or, in cases such as the present, the principal buildings—in order to extend the statutory protection to these additional elements. The details of the procedure are set out in the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Regulations 1975 (S.I. 1975 No. 2069 (S.277)) as amended by the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Amendment Regulations 1977 (S.I. 1977 No. 255 (S.35)).

The control which the Act lays down of works for the demolition of a listed building, or its alteration or extension in a manner which would affect its character as a building of special architectural or historic interest, is the prohibition of any such works which have not been authorised. The question whether works of alteration or extension should be authorised can be dealt with as part of an application for planning permission. Section 54(2) provides that, where planning permission is granted for such works, that permission shall operate as listed building consent in respect of those works. But in this case what the applicants wish to do is to demolish the building, so a separate application for listed building consent under Schedule 10 to the Act of 1972 was required. Paragraph 7(2) of that Schedule provides that a person appealing against a decision by the local planning authority to refuse consent may include in his notice as the ground or one of the grounds of his appeal a claim that the building is not of special architectural or historic interest and ought to be removed from the list. But there is no provision in that Schedule or elsewhere in the Act which enables a person aggrieved to include as one of his grounds of appeal that the building to which his application for consent relates is not included in the list as a listed building. The Act assumes, in regard to

the statutory procedures, that the question whether or not a building is a listed building can be determined simply by inspecting the list which the Secretary of State has prepared.

The list itself is not the subject of any prescribed form. The only prescribed form for which the Act of 1972 provides is that for the form of notice which is to be served on every owner, lessee and occupier of the building under section 52(5) stating that the building has been included in, or excluded from, the list as the case may be. The prescribed form of notice is set out in Schedule 5 to the Regulations of 1975. It is in these terms:

> "Notice is hereby given that the building known as.....
> situated in the.....
> has been included in the list of buildings of special architectural or historic interest in that area compiled by the Secretary of State under section 52 of the Town and Country Planning (Scotland) Act 1972 on ..... 19 .....
> Dated ..... 19 .....
>
> (Signature of Authorised Officer)."

It can be seen from this form of notice that the only information which is communicated to the owner, lessee and occupier to indicate the identity of the listed building is the name by which the building is known and the place where it is situated. The effect of section 52(7), as I have said, is to require any object or structure fixed to that building or forming part of the land and comprised within the curtilage of the building to be treated as part of the building for the purposes of the provisions in the Act relating to listed buildings. But the form of notice does not require a description of the building to be given. The assumption is that the name of the building will be sufficient to identify what is in the list.

The list which is available for public inspection under section 52(6) is a more elaborate document, and it is this aspect of the matter which appears to have given rise to some confusion in the present case. It comprises six columns, headed respectively "Map reference," "Name of Building," "Description," "References," "Category" and "Notes." In the column headed "Name of Building" there appears this entry: "REDFORD BARRACKS Colinton Road and Colinton Mains Road [sic] (original buildings of 1909–15 only)." The column headed "Description" contains a very detailed description of the premises. It begins by naming the architect, who is said to have been Harry B. Measures, Director of Barrack Construction, 1909–15. There then follows a comprehensive description of the barracks and the various buildings comprised therein, together with references to various features of architectural or historic interest. In the middle of this description, which occupies nearly four pages on the list, there appears this passage: "Other buildings to S. with large riding school at extreme S.E., all tall single-storey, simple treatment." The column headed "References" contains this entry: "Information courtesy Buildings of Scotland Research Unit."

My impression is that the list which I have been attempting to describe was intended to serve several functions. First, it was intended to identify the listed building. It did this by stating its name and its location. That was all it needed to do in order to record the information which had been given in the prescribed notice to the owner, lessee and occupier. Then it was intended to provide a description of the building. There is no

A requirement for this—nor is there space—in the prescribed form of notice. But a description is a useful thing to include in the list, as decisions may have to be taken from time to time as to whether authorisation should be given under section 53(2)(*a*) of the Act of 1972 to a proposal to demolish, alter or extend the listed building. Both the decision-taker and the developer will, no doubt, find it helpful to know what the features were which persuaded the Secretary of State that the building should be listed B as being of special architectural or historic interest. Lastly, it was intended to provide a list of references to the sources of information, if any, which had been used in compiling the description. On this analysis I would regard the columns headed "Description" and "References," while informative, as subservient to the column headed "Name of Building." In my opinion it is the latter column which serves the statutory function of C identifying the listed building in the list which the Secretary of State is required to keep available for public inspection under section 52(6) of the Act of 1972. In their printed case the applicants state that the inclusion of the words of limitation in this column reflects a practice of compiling the list so that the "Name of Building" column is the official entry which defines the scope of the listing. That observation is consistent with my understanding of the list.

D The Lord Justice-Clerk mentioned in his opinion that counsel for the Secretary of State had pointed out in the course of the hearing before the Second Division that it has been the practice for some time now for the list of buildings of special architectural or historic interest to be set forth in a different form from that which has been used in this case. A specimen form was produced in the course of that hearing from which it E appeared that the list now contained eight columns. The first, which was entitled "Name of Building and/or Address," was headed as being the "Statutory List." The remaining seven columns contained information under various headings not dissimilar to those used in the present case, including "Description," "Reference" and "Notes." They were the subject of a separate heading which read: "The information (cols. 2–8) has no legal significance, nor do errors or omissions nullify or otherwise affect F statutory listing." We were not shown a copy of this form, as the Secretary of State did not appeal against the decision of the Second Division on this point. But the applicants refer to this passage in the Lord Justice-Clerk's opinion in their printed case, in order to make the point that the modern form of list has merely formalised the practice that it is the "Name of Building" column which defines the scope of the listing. The description which we have been given is sufficient to indicate that the G more modern form is an improvement on the previous form, as it removes the possibility of a misunderstanding about the function which the columns headed "Description" and "References" were intended to serve.

It is plain from the way in which the judges of the Second Division approached this issue that they regarded all the columns on the list which was before them in this case as forming part of the statutory listing. For H my part—although counsel for the applicants was content to adopt this approach in presenting his argument—I think that they were in error in taking this view. It does not seem to me that there is any real difficulty in understanding the functions of each of the columns, if the list is read in the context of the legislation which it was designed to serve. But my conclusion that the only column which sets out the statutory listing is that which is headed "Name of Building" does not solve all the problems which have arisen in this case.

The listing of Redford Barracks was in itself sufficient, with the benefit of section 52(7) of the Act of 1972, to include within the statutory listing all objects or structures forming part of the land and comprised within the curtilage. Unless some words of limitation were included every building within the curtilage, however modest or unimportant, would be the subject of the statutory controls. It was no doubt for this reason that the words "(original buildings 1909–15 only)" were included in the column headed "Name of Building." But this was not an entirely satisfactory method of distinguishing between those buildings which were intended to be included in the statutory listing and those which were not. The words which were selected were ambiguous. The dates 1909–15 are the same as those mentioned in the next column as being those between which Harry B. Measures was the Director of Barrack Construction. But it is not clear whether they were intended to refer to the period of design of the buildings or the period of their construction, and if the latter whether the buildings had to be completed by 1915 in order to qualify or it was sufficient that they were commenced before or during that year. In this situation I think that it is permissible to examine the contents of the column headed "Description" in order to see whether it can help to resolve the ambiguity. Phrases are used in various parts of the description such as "some lesser buildings" and "other buildings" which suggest that this was not intended to be a definitive description of the entire premises comprised within the curtilage. But the fact that the riding school is mentioned in the description is sufficient, in view of the ambiguity, to put in issue the question whether that building was included in the statutory listing.

The reporter concluded, on the evidence which was before him, that the riding school was one of the last buildings to be erected, and that this took place after 1915. It was for this reason that he held that the riding school was not covered by the statutory listing and that listed building consent was not required for its demolition. He noted that the view of all the experts who gave evidence at the inquiry was that, if the riding school was built after 1915, it was not covered by the barracks listing. It seems to me however that this evidence was insufficient to resolve the difficulty which had been created by the ambiguity in the list. That evidence did not address the possibility that the riding school was part of the original design for which Harry B. Measures was responsible. Unless it could be asserted that this structure had no part to play in the original design it would not be safe to assume that it was not included in the statutory listing. I would therefore hold, albeit for different reasons, that the result at which the Second Division arrived was the right one, as the reporter had insufficient information before him in the evidence to entitle him to resolve this issue in favour of the developer.

I should like, finally, to add this further observation in regard to the ambiguity in the list. The problem which has arisen in this case suggests that the list, even in its new form, may require some reconsideration in order to remove such ambiguities. It is important that words of limitation which are used to exclude parts of a building from the statutory listing are sufficiently clear to enable those who are interested to identify what parts of the building are subject to the statutory controls and what are not. The fact that the controls are the subject of criminal sanctions provides an added reason for seeking greater clarity in the composition of the list than has been exhibited in this case.

LORD CLYDE. My Lords, in 1993 the applicants who are the second appellants in this appeal sought outline planning permission for the

development of a food store, petrol filling station and ancillary works at a site in Colinton Mains Drive in Edinburgh. They also sought listed building consent for the demolition of a former riding school building which was on the site. The City of Edinburgh District Council refused planning permission and also refused listed building consent. The applicants then appealed to the Secretary of State. A senior reporter was appointed to determine the appeal. He held a public local inquiry and thereafter issued a decision letter dated 7 March 1995. He decided that listed building consent was not required for the demolition of the former riding school building. On the matter of planning permission he allowed the appeal and granted outline planning permission subject to certain conditions. The council then appealed to the Court of Session both on the matter of the listed building consent and on the matter of planning permission. After hearing the appeal the Second Division of the Court of Session by a majority allowed the appeal on both of those matters. The Secretary of State and the applicants have now appealed to this House.

The matter of listed building consent can conveniently be dealt with at the outset. It has been seen and treated as a distinct and separate issue from that of the planning permission. The reporter considered a preliminary question whether listed building consent was required for the demolition of the former riding school building. It has not been suggested that he was not entitled to explore that question and I express no view on the propriety of his doing so. Section 52 of the Town and Country Planning (Scotland) Act 1972 provided for the compilation of lists of buildings of special architectural or historic interest. The provisions of that Act have now been superseded by the recent consolidating statute, the Town and Country Planning (Scotland) Act 1997, but it will be convenient for the purposes of the present case to refer to the legislation in force at the time of the appeal processes. In terms of section 52(1) the lists may be compiled by the Secretary of State or by others with his approval. Section 52(5) provides for notice to be given to the owner, lessee and occupier of a building of its inclusion in or exclusion from the list. That notice is to be given in a prescribed form. But there does not appear to have been any prescribed form for the lists themselves.

There was produced to the reporter a document relating to the City of Edinburgh District headed "List of Buildings of Architectural or Historic Interest." The list was set out in six columns. The first and the last three are not of importance. The second was headed "Name of Building" and the third was headed "Description." In the second column there was entered:

> "REDFORD BARRACKS Colinton Road and Colinton Mains Road [sic] (original buildings of 1909-15 only)."

The third column commenced with the words:

> "Harry B. Measures, Director of Barrack Construction, 1909–15. Two large complexes of building on exceptionally spacious layout . . . comprising chiefly . . ."

There then followed descriptions of a variety of buildings with some architectural detail. Included here, under the subheading "Farriers' Shops and Riding School", were the words "other buildings to S. with large riding school at extreme S.E. . . ." The view taken by the reporter was that in the light of the evidence the building in question had probably been erected after 1915, that precedence should be given to the entry in

the second column, and that on account of the reference to "original buildings of 1909–15 only" the riding school building was excluded from the list notwithstanding its specific mention in the third column. Having taken the view that listed building consent was unnecessary the reporter did not address the question whether the demolition of a listed building should be permitted.

The judges of the Second Division unanimously held that the reporter was not entitled to hold as he had done that the building was not covered by the entry for Redford Barracks in the list. An appeal against that decision was taken only by the applicants. Counsel for the Secretary of State did not address the issue. It should be observed that it would have been useful to have had more evidence about the form used for the compiling of such lists and the relative significance of the respective columns. Plainly it is desirable to compile the list with sufficient clarity and precision to avoid the kind of question which has arisen here. The insertion of a complex of buildings as one entry in a list may well give rise to problems. Even the provision of section 52(7) of the Act which extends the identification to buildings within the curtilage of a building may not produce sufficient clarity, particularly in a case such as the present where the building in question had passed into the separate ownership and occupation of the local authority and had in some way at least become separated from the barracks and other buildings still in military occupation. The argument, however, which was presented in the appeal was essentially that the matter was one of fact for the reporter, or at least was not one which could be open to review. But the critical question here is one of the interpretation of the list and if the reporter has misconstrued it and so misdirected himself that is undoubtedly a matter on which he may be corrected on appeal to a court of law.

On the face of the list there is no evident problem. It was agreed by counsel for the applicants that the whole document with its six columns comprised the "list" and his argument was presented on that basis. The building in issue is specifically mentioned in the document and can readily be taken to be entered on the list. The dates in the second column can be seen to echo the dates in the third column, indicating that it is the work of Harry Measures which is to be listed, and the riding school is noted in the description of the buildings for which he was presumably responsible.

A problem may be thought to arise when it is found that the riding school was built after 1915. But it also appears that the barracks were not completed until the end of 1916. Ambiguity only arises if the words in the brackets are read, as the reporter read them, as if they were intended to refer to buildings built during the specified years. But that is not what is stated and that is not the only possible construction. Even if there was a conflict between the two parts of the list it would be proper to find a construction which would make sense of the whole and that can be readily done by accepting that the period of years to which the passage in brackets refers is a period not of the completion of the building but of the processes of planning, conception, design and, at least to an extent, the realisation of Harry Measures's work. In that way there is no difficulty in recognising that the riding school may consistently with the text in the second column be entered in the third column as a listed building. In my view the judges of the Second Division reached the correct view on this matter and I would refuse the appeal on the matter of the listed building consent.

I turn next to the appeal on the matter of the planning permission. The first point raised on behalf of the Secretary of State in opening his appeal concerned the meaning and effect of section 18A of the Act of 1972. It was stated on his behalf that this was the principal purpose of his appeal. The section had excited some controversy and guidance was required. Neither of the other parties however was concerned to challenge the submission advanced by counsel for the Secretary of State. The views which I would adopt on this part of the appeal accord with his submission and at least in the absence of any contradiction seem to me to be sound.

Ever since the introduction of a comprehensive system for the control of land development in Scotland by the Town and Country Planning (Scotland) Act 1947 planning authorities have been required to prepare a plan which was to serve as a guide for the development of their respective areas. These plans required to be submitted to the Secretary of State for his approval. Following on the reorganisation of local government introduced by the Local Government (Scotland) Act 1973 planning functions became divided between the regions, who were required to prepare "structure plans," and the districts, who were required to prepare "local plans." For the purposes of the present case the structure plan was the Lothian Regional Structure Plan 1985 and the local plan was the South West Edinburgh Local Plan ("S.W.E.L.P."). But the old terminology was also preserved. Section 17 of the Act of 1972 provided that for the purposes of the planning statutes the development plan shall be taken to consist of the structure plan approved by the Secretary of State with any approved alterations and the provisions of the approved local plan with any adopted or approved alterations. In and after the Act of 1947 provision was made for the recognition of the development plan in relation to determinations of applications for planning permission. Section 26(1) of the Act of 1972, echoing the language of section 12(1) of the Act of 1947, required a planning authority in dealing with the application to

> "have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations . . ."

The meaning of this formulation in the context of section 12(1) of the Act of 1947 was set out in a decision in the Outer House of the Court of Session by Lord Guest in *Simpson v. Edinburgh Corporation*, 1960 S.C. 313. His Lordship stated, at pp. 318–319:

> "It was argued for the pursuer that this section required the planning authority to adhere strictly to the development plan. I do not so read this section. 'To have regard to' does not, in my view, mean 'slavishly to adhere to.' It requires the planning authority to consider the development plan, but does not oblige them to follow it. . . . If Parliament had intended the planning authority to adhere to the development plan, it would have been simple so to express it. . . . In my opinion, the meaning of section 12(1) is plain. The planning authority are to consider all the material considerations, of which the development plan is one."

Section 18A was introduced into the Act of 1972 by section 58 of the Planning and Compensation Act 1991. A corresponding provision was introduced into the English legislation by section 26 of the Act of 1991, in the form of a new section 54A to the Town and Country Planning Act

1990. The provisions of section 18A, and of the equivalent section 54A of the English Act, were:

> "*Status of development plans.* Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."

Section 18A has introduced a priority to be given to the development plan in the determination of planning matters. It applies where regard has to be had to the development plan. So the cases to which section 26(1) of the Act of 1972 applies are affected. By virtue of section 33(5) of the Act of 1972 section 26(1) is to apply in relation to an appeal to the Secretary of State. Thus it comes to apply to the present case.

By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission. It is distinct from what has been referred to in some of the planning guidance, such as for example in paragraph 15 of the Planning Policy Guidance Notes PPG1 (January 1988), as a presumption but what is truly an indication of a policy to be taken into account in decision-making. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment* (1995) 71 P. & C.R. 175, 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

Correspondingly the power of the court to intervene remains in principle the same as ever. That power is a power to challenge the validity of the decision. The grounds in the context of planning decisions are contained in section 233 of the Act of 1972, namely that the action is not within the powers of the Act, or that there has been a failure to comply with some relevant requirement. The substance of the former of these grounds is too well-established to require repetition here. Reference may be made to the often quoted formulation by Lord President Emslie in *Wordie Property Co. Ltd. v. Secretary of State for Scotland,* 1984 S.L.T. 345, 347-348. Section 18A has not innovated upon the principle that the court is concerned only with the legality of the decision-making process. As Lord Hoffmann observed in *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] 1 W.L.R. 759, 780:

> "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse.

Counsel for the Secretary of State suggested in the course of his submissions that in the practical application of the section two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be

adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate.

This chapter in the appeal was presented as a criticism of the approach adopted by the majority of the judges in the court below. But that criticism comes at the most to criticism of particular expressions rather than any allegation of error in principle. Lord McCluskey criticised the description given by the reporter in paragraph 181 of his decision letter of the effect of the section. His Lordship stated:

> "But section 18A did not simply 'enhance the status' of development plans; it made the development plan the governing or paramount consideration; and it was to remain so unless material considerations indicated otherwise."

But while the expression used by the reporter may have been somewhat imprecise in not stressing the priority inherent in the enhanced status it does not appear that the reporter fell into error in any misunderstanding of the effect of the section. The submission made by counsel for the Secretary of State on the construction of section 18A was correctly seen by the respondents as not constituting any serious attack on the decision which they sought to defend. The judges in the Second Division correctly recognised that it was competent for the reporter in principle to decide that the more recent material should overcome the priority given to the development plan. The issue was whether he was entitled to take that course on the material before him. The reference to paragraph 181 of the decision letter leads immediately to the substantial dispute in the appeal regarding the reporter's treatment of the problem of retail trade and impact.

In paragraph 181 the reporter begins to set out his conclusions on the chapter of the decision letter which concerns the issue of retail trade and impact. It should be observed at the outset that the structure plan of 1985 indicated a prohibition of developments such as that proposed by Revival except in existing or new shopping centres, and that S.W.E.L.P. expressed at least a presumption against out-of-centre shopping development. The reporter however stated:

> "Dealing first with the question of policy, I should say that, although there is no dispute that the statutory development plan consists of the 1985 structure plan and the S.W.E.L.P., and although recent

A legislation enhances the status of development plans, I believe that in this case it is appropriate to attach greater weight to other material considerations."

That he was entitled in principle to decide that the presumption in favour of the development plan had been overcome by other material considerations was recognised in the court below. The criticism of the B majority of the court was directed rather at his entitlement to take that course in the circumstances of this case. The other material considerations to which the reporter looked consisted of expressions of policy and planning guidance more recent in date than the structure plan of 1985. He noted that while the S.W.E.L.P. was only adopted as recently as 1993 it was required to conform generally with the provisions of the 1985 structure plan. The more recent material of which the reporter considered C account should be taken consisted of the National Planning Guidelines 1986, the Planning Policy Guidance Notes PPG6 (July 1993) and the latest version of the Lothian Region Structure Plan (1994) which had been finalised and sent to the Secretary of State but had not yet been approved. A view was expressed in the court below that it was not appropriate to have considered PPG6 because it applied to England and Wales and not D Scotland. No question was raised in that regard in the present appeal and I refrain from expressing any view about it. The new version of the structure plan represented in the view of the reporter the regional council's most recent thinking on the subject of retailing and it was to the policies set out in that document that he applied his mind.

Chapter 7 of the new structure plan deals with shopping. In paragraph 7.37 it was stated that free-standing developments, such as large E convenience stores, could generate unacceptable traffic levels and affect residential amenity. The paragraph later states that:

> "new stores can only be justified to provide consumer choice or where there will be significant local population increase . . . new developments outside existing or proposed centres should be permitted only if they meet strict criteria."

F

The plan then sets out a policy identified as "S17." That policy related to proposals for major retail developments not in or adjacent to existing or proposed strategic shopping centres. It is understood that the proposed development at Colinton Mains Drive is such a proposal. The policy provides that in considering such proposals "district councils should be satisfied that all of the following criteria are met. . . ." There are then set G out seven criteria of which only two need be quoted:

> "A. Local shopping facilities are deficient in either quantitative or qualitative terms . . . C. They would not, individually or cumulatively, prejudice the vitality and viability of any strategic shopping centre."

The strategic shopping centres are listed earlier in the document, but it H is unnecessary to refer to that in detail.

The reporter was satisfied that all of the seven criteria were met and it was on that basis that he granted the planning permission. It is with criterion A that the present dispute is concerned. The reporter dealt with the matter of quantitative deficiency in paragraph 184 of his letter as follows:

> "The first matter relates to quantitative or qualitative deficiencies in the area. It appears that there may be a slight increase in both population and expenditure per head on convenience goods in the

near future in the study area, but the most obvious indicator of an expenditure surplus is the calculation that certain stores (notably Safeway at Cameron Toll, Morningside and Hunter's Tryst) are performing at levels significantly higher than company averages. Even allowing for the opening of stores at e.g. Straiton (which may be in doubt) and for turnover levels at Colinton Mains substantially higher than would probably be achieved by Tesco in a relatively small store, there would appear to be a quantitative case."

In paragraph 185 he considered the matter of qualitative deficiency and took the view that the argument for such a deficiency was not strong. The case would accordingly have to rest on the basis of a quantitative deficiency. Finally in this part of his letter he added in paragraph 186:

"Many local residents and organisations claim that there is no need for either the proposed foodstore or the [petrol filling station]. I accept that there is not a significant shortage of either, such as might establish a strong presumption in their favour in the public interest which might outweigh relevant objections. However, planning approval does not have to be based on a case of need. I have explained why I consider the policies in the more recent version of the structure plan are to be preferred, and there remains a general presumption in favour of development unless demonstrable harm is shown to interests of acknowledged importance."

The majority of the judges in the Second Division held that the reporter had erred in this part of his decision. The Lord Justice-Clerk was satisfied that the reporter was entitled to regard the National Planning Guidelines and the draft structure plan as justifying a departure from the development plan but considered that the reporter had not had a proper factual basis for overcoming the presumption in section 18A. In particular he considered:

"merely to say that certain stores within the area are trading at exceptionally high levels does not justify the conclusion that there is a deficiency in local shopping facilities in the area in question."

He noted that of the three stores mentioned in paragraph 184 only one, Hunter's Tryst, was, as the reporter had recognised in paragraph 185, within the study area. He also noted that the reporter had accepted in paragraph 186 that there was not a significant shortage of food stores or petrol filling stations. Lord McCluskey questioned whether the reporter had properly addressed the problem of quantitative deficiency at all.

"If he has then he has not even begun to explain how a quantitative deficiency coexists with no significant shortage and a failure to make out any case of need."

He considered that even if a finding of a quantitative deficiency was justified the reporter had given no indication as to why that circumstance should overcome the presumption in favour of the terms of the development plan. Both the Lord Justice-Clerk and Lord McCluskey suggested that the final words of paragraph 184 lacked the conviction of a positive finding.

In my view it is critical to an understanding of the reporter's decision to have a clear understanding of the concept of "quantitative deficiency." This is a matter of the interpretation of the policy S17. It may well be that the point was not made sufficiently clear in the presentation of the

A appeal before the Second Division. Certainly it appears that, as the Lord Justice-Clerk records, counsel were not at one as to what was meant by the reference to quantitative terms and it was on his own initiative that reference was made to paragraph 7.9 of the draft structure plan for a clue to its meaning. That paragraph starts with the sentence "In quantitative terms, demand is determined by trends in consumer expenditure." This is far from providing a definition but it does, as Lord Morison appreciated, B point to the fact that it is consumer expenditure which is being considered as reflected in the turnover in the available shopping facilities. As I understand it from the helpful explanations given to us by counsel for the Secretary of State quantitative deficiency has to do with a comparison between the amount of shopping facility and the amount of customers. It seeks to express a situation where there is a shortage of shopping C floorspace as compared with the number of customers in the locality. It is measured by reference to consumer expenditure. Quantitative deficiency is a concept different from that of need, where what is meant is the kind of necessity which would, for example, justify the sacrifice of some amenity for the purpose of the development. There can be a quantitative deficiency even although there is no "need" for the development in so far as everyone in the area is able to do their shopping albeit with the delay and D inconvenience of a possibly overcrowded shop or of travelling some distance to get there. Once the definition is understood there is no discrepancy between paragraphs 184 and 186 of the decision letter.

The next question is how a quantitative deficiency should be established. Where the approach is one of considering consumer expenditure a quantitative deficiency is most readily established by the E discovery that other stores are trading at a level which is above what would be expected of them, the inference being that there is room to accommodate a further shopping facility. As Lord Morison observed:

> "No other way of demonstrating a quantitative deficiency in a particular area, determined only by consumer expenditure, was suggested to us, and none occurs to me."

F That was the kind of evidence which was led in the present case and it appears that while there was dispute about the reliability of the inferences to be drawn from the figures adduced there was no objection taken to the use of that material in principle as a method of establishing the alleged deficiency.

It was suggested that the reporter was not entitled to find some G deficiency without going on to quantify the extent of the deficiency. I see no obligation on him to do that. The policy S17(A) does not require the finding of any particular extent of the deficiency. If the deficiency is too slight to enable the whole of the proposed new shopping facility to be accommodated then the matter will be covered by criterion C. If the development is greater than can be absorbed by the deficiency then the result may well be to cause prejudice to the vitality and viability of H the existing strategic shopping centres. In that respect criterion C secures the adequacy of the extent of the deficiency identified for the purpose of criterion A. In the present case the reporter indeed went further in his assessment of the deficiency than he strictly needed to go. In the final sentence of paragraph 184 he takes into account not only the possible further store at Straiton but also higher levels at the development site at Colinton Mains than were likely to be achieved by the proposed Tesco store. Even taking these into account he finds that "there would appear

to be a quantitative case." It is evident from that passage that the deficiency was such as to enable the proposed store to be wholly accommodated within it and when account is taken of the hypothesis on which he is proceeding the passage indicates a very positive finding of a quantitative deficiency. What was suggested to be only a tentative finding is in reality clear and certain.

It was argued that the reporter was not entitled to draw the conclusion which he did from the evidence before him. Counsel for the respondents suggested a variety of reasons which might account for the expenditure surplus. He also sought to criticise the quality of the evidence on which the reporter had relied. But it was not suggested that there was no evidence before the reporter which could entitle him to discount such other explanations and to hold that there was an expenditure surplus which pointed to a quantitative deficiency. Whether the evidence did or did not so point was a matter wholly for him to determine. Provided that the evidence was there it was for him to assess it and draw his own conclusions from it. It is no part of the function of a reviewing court to re-examine the factual conclusions which he drew from the evidence in the absence of any suggestion that he acted improperly or irrationally. Nor is it the duty of a reviewing court to engage in a detailed analytic study of the precise words and phrases which have been used. That kind of exercise is quite inappropriate to an understanding of a planning decision.

Counsel for the respondents also sought to argue that the reporter had not given proper or adequate reasons for his decision. In part this point was related to matters to which I have already referred, such as a specification of the extent of the deficiency, the allegedly "tentative" nature of the conclusion on the critical issue, the finding of the quantitative deficiency in the face of the absence of need, and the link between the expenditure surplus and the quantitative deficiency. But in any event the pursuit of a full and detailed exposition of the reporter's whole process of reasoning is wholly inappropriate. It involves a misconception of the standard to be expected of a decision letter in a planning appeal of this kind. As Lord President Emslie observed in *Wordie Property Co. Ltd. v. Secretary of State for Scotland,* 1984 S.L.T. 345, 348:

> "The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."

It is worth reiterating the observations made by Lord Lloyd of Berwick in *Bolton Metropolitan District Council v. Secretary of State for the Environment* (1995) 94 L.G.R. 387 in the context of the requirement on the Secretary of State to notify the reasons for his decision. His Lordship said, at p. 394:

> "There is nothing in the statutory language which requires him, in stating his reasons, to deal specifically with every material consideration. . . . He has to have *regard* to every material consideration; but he need not mention them all."

As to what should be mentioned his Lordship gave two quotations. In *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467, 478 Megaw J. said:

> "Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not

A only be intelligible, but which deal with the substantial points that have been raised."

In *Hope v. Secretary of State for the Environment* (1975) 31 P. & C.R. 120, 123 Phillips J. said:

"It seems to me that the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues."

B

It is necessary that an account should be given of the reasoning on the main issues which were in dispute sufficient to enable the parties and the court to understand that reasoning. If that degree of explanation was not achieved the parties might well be prejudiced. But elaboration is not to C be looked for and a detailed consideration of every point which was raised is not to be expected. In the present case the reporter dealt concisely but clearly with the critical issues. Nothing more was to be expected of him.

The reporter satisfied himself as he was entitled to do that there was quantitative deficiency and that criterion A was met. He then went on to consider the other criteria. He gave careful consideration to criterion C, including in that an assessment of the effect of the development on D Hunter's Tryst and at some length its effect on the shopping centre at Wester Hailes. He was satisfied that criterion C was met and no challenge is made to that conclusion. His unchallenged finding on that matter affirms the adequacy of the deficiency which he found for the purpose of criterion A. He had already decided that the statutory presumption should be overcome by the more recent expressions of policy and in particular the draft structure plan. It was the existence of that recent E guidance, not his finding of a quantitative deficiency, which justified the overcoming of the presumption. It is not in dispute that if the seven criteria were met the reporter was then entitled to grant planning permission.

For the foregoing reasons I would refuse the appeal by the appellant Revival Properties Ltd. on the matter of the listed building consent and I would allow the appeal by both appellants on the matter of the planning permission.

F

The Secretary of State should be entitled to his costs from the council here and one-half of his expenses in the court below. Revival Properties Ltd. should be entitled to one-half of their costs from the council here and one-half of their expenses in the court below.

*Appeal of applicants in respect of listed building consent dismissed.*

G

*Appeals of applicants and Secretary of State in respect of planning permission allowed.*

*Local planning authority to pay Secretary of State's costs in House of Lords and one-half of his expenses in Court of Session and one-half of applicants' costs in House of Lords and one-half of applicants' expenses in Court of Session.*

H

*Solicitors: Treasury Solicitor for Solicitor to Secretary of State for Scotland, Edinburgh; Berwin Leighton for Brodies W.S., Edinburgh; Rees and Freres for Solicitor, City of Edinburgh Council.*

M. G.

A House of Lords

# *Sage *v* Secretary of State for the Environment, Transport and the Regions and another

[2003] UKHL 22

B 2003 Jan 30; April 10

Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry

*Planning — Enforcement notice — Validity — Erection of uncompleted dwelling house in breach of planning control — No further building work in four years before notice served — Uncompleted work only affecting interior of building and* C *not external appearance — Whether completion amounting to "development" requiring planning consent — Whether dwelling house "substantially completed" — Whether enforcement notice served in time — Town and Country Planning Act 1990 (c 8), ss 55(2)(a), 171(B)(1) (as inserted by Planning and Compensation Act 1991 (c 34), s 4)*

The local planning authority served an enforcement notice on a landowner D informing him that he was in breach of planning control in partially erecting a dwelling house, and requiring its removal. No building work was carried out on the structure during the four years preceding service of the notice, and the building was unfit for habitation since the ground floor consisted of rubble, there were no service fittings or staircase, the interior walls were not plastered and the windows were unglazed. The landowner appealed against the enforcement notice on the ground that the building was an agricultural building for which planning permission was not required, or alternatively, that the notice had not been served within the time limit of E four years after "the operations were substantially completed" as specified by section 171(B)(1) of the Town and Country Planning Act 1990[1]. An inspector appointed by the Secretary of State rejected the appeal and held that, having regard to the layout and appearance of the building, it was not an agricultural building but a dwelling house, that the time limit of four years did not begin to run until the whole operation of creating the dwelling house was substantially completed and that, as a question of fact and degree, the house was a building in the course of construction F and was not "substantially completed". The landowner appealed to the High Court on the ground that since all the work remaining to be done on the dwelling house was either internal work or work which did not materially affect the external appearance of the building it was, pursuant to section 55(2)(a) of the Act, work which did not amount to the development of land for which planning permission was required so that there were no further building operations to which an enforcement notice could apply, and that therefore the operations referred to in section 171B(1) must have been G completed. The judge allowed the appeal on those grounds and the Court of Appeal upheld that decision.

On appeal by the planning authority—

*Held*, allowing the appeal, that the exception to "development" in section 55(2)(a) applied only to operations carried out on a completed building for its "maintenance, improvement or other alteration", and did not apply to work carried out by way of completing an incomplete building; that the work needed to complete H the dwelling house was not within the exception so that it still required planning permission and involved breaches of planning control to which an enforcement notice could apply; that a holistic approach was implicit in planning control and if a

[1] Town and Country Planning Act 1990, s 55(2)(a): see post, para 18.
S 171(B)(1), as inserted: see post, para 10.

building operation was not carried out, both externally and internally, fully in accordance with planning permission, the whole operation was unlawful; and that, accordingly, the building operation was not "substantially completed" for the purposes of section 171(B)(1) and the enforcement notice was not served out of time (post, paras 1, 2, 6, 8, 19–29, 42–44).

Decision of the Court of Appeal [2001] EWCA Civ 1100 reversed.

The following cases are referred to in the opinion of Lord Hobhouse of Woodborough:

*Belmont Farm Ltd v Minister of Housing and Local Government* (1962) 13 P & CR 417, DC

*Ewen Developments Ltd v Secretary of State for the Environment* [1980] JPL 404, DC

*Howes v Secretary of State for the Environment* [1984] JPL 439

*McKay v Secretary of State for the Environment* [1989] JPL 590

*Somak Travel Ltd v Secretary of State for the Environment* [1987] JPL 630

The following additional case was cited in argument:

*R v Secretary of State for the Environment, Ex p Baber* [1996] JPL 1034, CA

**APPEAL** from the Court of Appeal

By leave of the House of Lords (Lord Bingham of Cornhill, Lord Mackay of Clashfern and Lord Hobhouse of Woodborough) granted on 24 April 2002, Maidstone Borough Council, in its capacity as local planning authority, appealed from a dismissal by the Court of Appeal (Schiemann, and Keene LJJ and Sir Murray Stuart-Smith) on 28 June 2001, of the planning authority's appeal from a decision of Mr Duncan Ousley QC sitting as a deputy judge of the Queen's Bench Division on 11 October 2000, allowing an appeal by the landowner, Alan Frank Sage, from a decision dated 16 December 1999 of an inspector appointed by the Secretary of State for the Environment, Transport and the Regions, upholding an enforcement notice served on 19 March 1999 by the planning authority on the landowner, informing him that the planning authority considered he was in breach of planning control in partially erecting a dwelling house at Holly Farm, Otham, Maidstone, Kent.

The facts are stated in the opinion of Lord Hobhouse of Woodborough.

*Stephen Hockman QC* and *Richard Barraclough* for the planning authority.

*Alice Robinson* for the landowner.

Their Lordships took time for consideration.

10 April. **LORD NICHOLLS OF BIRKENHEAD**

**1** My Lords, I have had the opportunity of reading a draft of the speech of my noble and learned friend, Lord Hobhouse of Woodborough. I agree that, for the reasons he gives, this appeal should be allowed.

**LORD HOPE OF CRAIGHEAD**

**2** My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hobhouse of Woodborough. I agree with it, and for the reasons which he has given I too would allow the appeal.

A **3** As my noble and learned friend has explained, Mr Sage's primary argument at first instance was that the building was an agricultural building for which he did not need planning permission. This was a pure question of fact, and it was resolved against him conclusively by the inspector's finding that the building was not an agricultural building but was best described as a dwelling house that was in the course of construction.

B **4** This led to the alternative argument that the notice was out of time because the operations that must be substantially completed for the purpose of section 171B(1) of the Town and Country Planning Act 1990 comprise the operations which constituted a breach of planning control, or (as it was put) the operational development, and not the whole operation of completing the dwelling house. The inspector's view was that the four-year period did not begin until the whole operation of creating the dwelling house was C substantially completed. He then held, treating the question as one of fact and degree, that the building in this case was not a substantially completed dwelling house. Here again the inspector's decision on the facts went against Mr Sage and the contrary is not longer arguable. The question which remains is whether the inspector was right when he said that the four-year period did not begin until the whole operation of creating the dwelling house D was substantially completed.

**5** Mr Sage's argument is that the reference in section 171B(1) to the date "on which the operations were substantially completed" has to be read in the light of the wording of the other relevant sections in the 1990 Act, and that by tracing the language of that subsection back through section 171A(1)(a) the reader is required to bring into account the definition of "development" in section 55(1) of the Act, those operations which section 55(2)(a) says are E not to be taken to involve development and the definition of the word "building" in section 336(1). If this approach is right the position is, as Keene LJ explained in paragraphs 27–31 of his judgment, capable of being resolved quite simply by saying that what have to be substantially completed are those operations which amount to a breach of planning control and that operations and works which do not amount to development because they F fall within section 55(2)(a) are not to be taken into account. On this approach, it does not matter that the inspector did not think that the building was a dwelling house. All one needs to find is that there is a building which has been erected in breach of planning control.

**6** I was initially attracted to this approach, as it seemed to me to be consistent with the language of the statute and to be unlikely, as Keene LJ said G in paragraph 32 of the judgment, to give rise to practical difficulties. But I have in the end been persuaded, with respect, that the language of the statute is open to a different interpretation and that it makes better sense of the legislation as a whole to adopt the holistic approach which my noble and learned friend has described. What this means, in short, is that regard should be had to the totality of the operations which the person originally contemplated and intended to carry out. That will be an easy task if the H developer has applied for and obtained planning permission. It will be less easy where, as here, planning permission was not applied for at all. In such a case evidence as to what was intended may have to be gathered from various sources, having regard especially to the building's physical features and its design.

7 If it is shown that all the developer intended to do was to erect a folly, such as a building which looks from a distance like a complete building—a mock temple or a make-believe fort, for example—but was always meant to be incomplete, then one must take the building when he has finished with it as it stands. It would be wrong to treat it as having a character which the person who erected it never intended it to have. But if it is shown that he has stopped short of what he contemplated and intended when he began the development, the building as it stands can properly be treated as an uncompleted building against which the four-year period has not yet begun to run.

8 It must be emphasised that it is not for the inspector to substitute his own view as to what a building is intended to be for that which was intended by the developer. But that was not what the inspector did in this case. It was not just that the building looked to him like a dwelling house that was in course of construction. His conclusion was supported, in his view, by an application which Mr Sage had made in 1994 to use the building for tourist accommodation and by his finding that that remained Mr Sage's stated intention. These matters were relevant to the question which he had to decide, and in my opinion he was entitled on the facts which he found to reach the conclusion which he did.

**LORD HOBHOUSE OF WOODBOROUGH**

9 My Lords, on 19 March 1999, the Maidstone Borough Council (the council) as the relevant planning authority issued and served on Mr Sage an enforcement notice (the notice) under Part VII of the Town and Country Planning Act 1990. The notice informed him that the council considered that he was in breach of planning control in erecting (or, as later amended, partially erecting) a dwelling house and requiring its removal. Mr Sage appealed raising various grounds under section 174(2). Besides applying for planning permission ex post facto, the two main grounds of his appeal were firstly that the building was an agricultural building and did not require planning permission and, secondly, that the notice had been served outside the four-year time limit permitted by section 171B(1), a section inserted into the Act by the Planning and Compensation Act 1991.

10 Section 171B(1) provides:

> "Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed."

This provision followed the lead given by Robert Carnwarth QC in his report to the Secretary of State for the Environment entitled Enforcing Planning Control (HMSO February 1989) which called for greater simplicity and clarity in the law and procedures of enforcement which had become excessively technical and complex and open to evasion and abuse. There can be no doubt that the underlying purpose behind section 171B(1) was to introduce a single easily applied limitation period for operations. Section 171B(2) and (3) adopted in respect of change of use and other breaches four- and ten-year periods respectively, running in either case from the date of the breach.

A **11** The point raised by this appeal by the council to your Lordships' House concerns the construction of section 171B(1) and the starting point of the four-year period—i e "the date on which the operations were substantially completed". Mr Sage contends that it means the date after which the building work remaining to be done would no longer itself involve a breach of planning control, because, if taken on its own, it would not require planning permission. The judge, Duncan Ouseley QC, sitting as a B deputy High Court judge, and the Court of Appeal summarised the point in a brief sentence: "The building operations are complete when those activities which require planning permission are complete." The council on the other hand argue for a holistic construction, asking: has the building been substantially completed and, if so, when? The council, like the inspector, adopt the passage in the Ministry Circular No 10/97, para 280.

C

> "in the case of a single operation, such as the building of a house, the four-year period does not begin until the whole operation is substantially complete. What is substantially complete must always be decided as a matter of fact and degree . . . All the relevant circumstances must be considered in every case."

D The inspector, deciding in favour of the council and upholding the notice, applied the latter approach; the judge and the Court of Appeal (Schiemann LJ, Keene LJ and Sir Murray Stuart-Smith), deciding in favour of Mr Sage, preferred the former.

**12** The inspector heard Mr Sage's appeal (together with two other appeals concerning the same parties) over the space of two days including a view of the relevant premises. Both parties were legally represented and E adduced oral and written evidence. It was accepted by the council that Mr Sage had not done any further building work on the relevant structure during the last four years before the notice was served. It was also common ground that it was an "operation" case falling within section 171B(1) not a change of use case under subsection (2).

**13** The inspector started by considering Mr Sage's contention that it F was an agricultural structure and therefore he had never needed any planning permission to erect it. He considered how it was constructed and concluded that it was constructed with domestic not agricultural features, as a dwelling not as a building to be used for agricultural purposes. It was constructed with cavity block walls. Three elevations were clad with tiles and the fourth with timber boarding (but the cladding was incomplete). The entrance door and the fenestration were typical of a dwelling designed and G constructed for human habitation not agricultural use. The external tile hung walls in his view supported the same conclusion. The building had an upper floor with further fenestration though no stairway had been installed. He applied the test of physical layout and appearance derived from *Belmont Farm Ltd v Minister of Housing and Local Government* (1962) 13 P & CR 417 and *Mckay v Secretary of State for the Environment* [1989] JPL 590.

H **14** The inspector rightly did not investigate the intentions of Mr Sage at various stages in the history nor the uses he had made of the structure from time to time. The character and purpose of a structure falls to be assessed by examining its physical and design features. The relevance of the assessment is to determine whether or not the building operation is one requiring planning permission. The actual use made of the building does not alter the

answer to be given. Keeping a pig in the sitting-room or hens in the kitchen does not turn a dwelling house into an agricultural building even if the humans move out. Permission for a change of use may have to be applied for but that would be a separate question. The starting point for considering the permitted use of a new structure is the character of the building for which permission has been given or does not require to be given (section 75(3)): "the permission shall be construed as including permission to use the building for the purpose for which it is designed."

**15** He expressed his conclusion in the words:

> "As a matter of fact and degree, I consider that, having regard to its layout and appearance, [this building] is not an agricultural building and was not designed as such . . . [It] is best described as a dwelling house that is in course of construction."

Having read the evidence and considered the photographs which have been included in our papers, the inspector's conclusion on this point would seem to have been inevitable. Therefore that ground of appeal failed.

**16** This led on to Mr Sage's further ground for challenging the notice, that it was out of time. The starting point is that the building is to be classified as an unfinished dwelling house. It was unfit for habitation. The floor at ground level consisted of rubble. There were no service fittings. There was no staircase. The interior walls were unfinished, without lining or plaster. None of the windows, including that on the upper floor, was glazed. One witness refers to the roof-light as being glazed. There was no guttering. Mr Sage had said in evidence that the building had originally been glazed but that the glass had been broken by vandals more than four years earlier and he had not replaced it. Mr Sage's evidence was contradicted by other evidence which was inconsistent with the windows ever having been glazed. It appears that the inspector probably did not accept Mr Sage's evidence on this point. But it was not critical to the inspector's decision nor to those of the judge and the Court of Appeal.

**17** On this state of the facts, the issue of the construction of section 171B(1) became critical and was the effective subject matter of Mr Sage's recourse to the jurisdiction of the High Court. On the argument of Mr Sage, it was necessary to consider whether the work needed to complete the structure as a dwelling house was such as of itself to require planning permission, a point which Mr Sage submitted was at least arguable and had not been taken into account by the inspector in arriving at his decision and therefore (as the judge ordered) his decision should be quashed and he be directed to reconsider the appeal against the notice having regard to that factor.

**18** It is convenient to examine this argument at the outset although it is not the central point raised by this appeal. Section 57(1) in Part III of the Act provides that (subject to immaterial exceptions) "planning permission is required for the carrying out of any development of land". "Development" is defined in section 55 as meaning: "the carrying out of building, engineering, mining or other operations in, on, over or under land . . ." Subsection (1A), added in 1991, amplifies this by providing that "building operations" shall include: "(a) demolition of buildings; (b) rebuilding; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a

builder." Subsection (1) is subject to subsection (2) which so far as material provides:

> "The following operations . . . shall not be taken for the purposes of this Act to involve development of the land—(a) the carrying out for the maintenance, improvement or other alteration of any building of works which—(i) affect only the interior of the building, or (ii) do not materially affect the external appearance of the building . . ."

Mr Sage submits that the work remaining to be done was all either internal work or work which did not materially affect the external appearance of the building.

**19** It would be a question of fact whether the external work still to be done would have had a material effect on the building's appearance. But that question would only become significant if the work was work carried out "for the maintenance, improvement or other alteration" of the building. Work carried out by way of completing an incomplete structure would not come within exception (a). So, once it has to be accepted, in accordance with the inspector's finding, that the structure was a dwelling house in the course of construction, it follows that the work would be properly described as work carried out in the course of completing the construction of the building. Exception (a) clearly contemplates and involves a completed building which is to be maintained, improved or altered. It follows that an essential element in the argument of Mr Sage is missing. He cannot on the facts of this case rely upon exception (a) to say that he would not still require planning permission to complete the structure because it would not have amounted to a "development" (the premise upon which his argument under section 171B is founded). The breach of planning control would not have been exhausted; it would be continuing.

**20** The Court of Appeal rejected this conclusion for two reasons. Keene LJ, in paragraph 26, said that so long as the structure had progressed to the stage where it could be said to have an interior, i e, as Mr Sage's counsel put it, say three or four walls and a roof, exception (a) could be applied and the developer could potentially take advantage of it. Schiemann LJ, in paragraph 37, thought that the council's argument introduced a subjective element: "I can see no policy reason why we should construe section 55(2)(a) as limited in its application to buildings which have been completed according to some notional plan." I do not accept either argument. It is not a question of referring to "some notional plan". Ex hypothesi, the erection is an uncompleted dwelling house; what is involved is its completion as a dwelling house by carrying out works essential for a completed dwelling house. The approach of Keene LJ not only does violence to the language used in exception (a) but also would make a mockery of planning control by inviting abuse and evasion.

**21** Returning now to section 171B(1), it can be seen that the same words have been used by the draftsman to describe building operations as in section 55(1), inviting, it is said, the reader to read the two sections together. However it still does not equate the term "operation" with the term "development" as further appears from section 191. But the more important part of Mr Sage's argument is that such a cross-reference is required by the words: "Where there has been a breach of planning control consisting in the carrying out without planning permission of building . . . operations . . ."

The phrase "the date on which the operations were substantially completed" should, he submits, be answered by asking when did those operations reach the stage at which no further breach of planning control was involved. He would then answer that question by reference to exception (a) in section 55(2). Section 171A(1) provides that: "For the purposes of this Act . . . carrying out development without the required planning permission . . . constitutes a breach of planning control." He thus argued that the enforcement notice could only relate to breaches of planning control and that, once no further breach was involved in completing the development, there could be no further building operations to which an enforcement notice and section 171B could apply. Therefore the operations referred to in section 171B must have been completed.

**22** Again these arguments were accepted by the Court of Appeal. Keene LJ, at paragraph 31, said:

> "I conclude that, as a matter of law, operations and other works which do not amount to development are not to be taken into account in deciding whether there has been substantial completion within the meaning of section 171B(1). As the deputy judge pointed out, where all the operations amounting to development have been carried out there is nothing remaining against which the local planning authority could take enforcement action."

Schiemann LJ added, at paragraph 38:

> "I am presently inclined to the view (without the matter having been fully argued) that substantial completion has taken place when there is enough to enable a planning authority to judge whether or not the building has sufficient adverse effects to make it expedient to issue an enforcement notice."

The section might have been drafted as Schiemann LJ prefers but it was not. The criterion he suggests would fly in the face of the simplicity and clarity that the revisions of planning control law were seeking to achieve. As regards the reason given by Keene LJ and the judge, it involves giving a limited meaning to the phrase "building operations", not its natural meaning, and does so on the basis of adopting an extended meaning to exception (a) which is open to the objections I have already referred to. But the most substantial objection to his approach is that it is contrary to the holistic approach upon which this part of planning law is based.

**23** When an application for planning consent is made for permission for a single operation, it is made in respect of the whole of the building operation. There are two reasons for this. The first is the practical one that an application for permission partially to erect a building would, save in exceptional circumstances, fail. The second is that the concept of final permission requires a fully detailed building of a certain character, not a structure which is incomplete. This is one of the differences between an outline permission and a final permission: section 92 of the Act. As counsel for Mr Sage accepted, if a building operation is not carried out, both externally and internally, fully in accordance with the permission, the *whole* operation is unlawful. She contrasted that with a case where the building has been completed but is then altered or improved. This demonstrates the fallacy in Mr Sage's case. He comes into the first category not the second.

A **24** The same holistic approach is implicit in the decisions on what an enforcement notice relating to a single operation may require. Where a lesser operation might have been carried out without permission or where an operation was started outside the four-year period but not substantially completed outside that period, the notice may nevertheless require the removal of all the works including ancillary works: *Ewen Developments Ltd v Secretary of State for the Environment* [1980] JPL 404; *Howes v Secretary* B *of State for the Environment* [1984] JPL 439, Hodgson J; *Somak Travel Ltd v Secretary of State for the Environment* [1987] JPL 630, Stuart-Smith J. The first of these upheld a requirement that the whole of an embankment be removed. In the second the inspector had directed himself that the removal of a hedge and the creation of an access was "a continuous operation and each step in the work prolong[ed] the period for serving the enforcement C notice as regards every earlier step of the development": the judge upheld the notice. The third case involved an unauthorised change of use case from residential to commercial use. The notice not only required the cessation of the commercial use but also the removal of an internal staircase which had been put in to facilitate that use though in itself the staircase had not required permission.

D **25** These decisions underline the holistic structure of planning law and contradict the basis upon which the Court of Appeal reached its decision in favour of Mr Sage.

**26** Finally, it was argued for Mr Sage that the inspector should have had express regard to an inspector's decision letter reported in [1972] JPL 385 where the facts bore some similarity to those of the present case and he had held the enforcement notice to be out of time. However that decision was E based upon the finding by the inspector that "the appeal building had become a viable building more than four years before [the] service of the notice and that in the form which it then took it [was] immune from enforcement action". The inspector's finding in the present case was that the structure was best described as a dwelling in the course of construction. The inspector was right to think that the 1972 decision did not help; indeed it was adverse to Mr Sage's case.

F **27** Accordingly the inspector's decision was correct. The notice had not been served after the end of the period of four years beginning with the date on which the building operations were substantially completed. Indeed they had still not been substantially completed at the date of the notice. The appeal should be allowed and Mr Sage's CPR Pt 8 proceedings dismissed and the orders of the judge and the Court of Appeal set aside, including the G costs orders made in favour of Mr Sage.

**28** Leave to appeal to your Lordships' House was given "on terms that, if successful, the petitioners do not seek any order for costs against the respondent". Accordingly no order will be made in respect the costs in this House or in the courts below.

H **LORD SCOTT OF FOSCOTE**

**29** My Lords, I have had the advantage of reading in advance the opinion of my noble and learned friend, Lord Hobhouse of Woodborough, and gratefully adopt his exposition of the facts and statutory provisions that have given rise to this appeal to the House. I, like your Lordships, have come to the conclusion that this appeal by Maidstone Borough Council should be

allowed and I am in general agreement with the reasons expressed by Lord Hobhouse as to why that should be so. There is, however, an aspect of this case which seems to me unsatisfactory and I think I should explain what it is.

**30** The purpose of section 171B of the Town and Country Planning Act 1990 (added to the 1990 Act by amendment with effect from 2 January 1994: see section 4, Planning and Compensation Act 1991 and the Planning and Compensation Act 1991 (Commencement No 5 and Transitional Provisions) Order 1991 (SI 1991/2905)) was, as Lord Hobhouse has explained in paragraph 10 of his opinion, to introduce a straightforward, easily applied, set of time limits within which enforcement action to remedy breaches of planning control must be brought. The section divides breaches of planning control into three categories.

**31** First, where the breach consists of "building, engineering, mining or other operations" over land, enforcement action cannot be taken after four years from "the date on which the operations were substantially completed" (subsection (1)). Second, where the breach consists of a change in the use of a building to use as a single dwelling house, enforcement action cannot be taken after four years "beginning with the date of the breach" (subsection (2)). And, third, in the case of any other breach of planning control, enforcement action cannot be taken after ten years beginning with the date of the breach (subsection (3)).

**32** In the present case Mr Sage, without planning permission, commenced the building of a dwelling house. In 1994, however, while the dwelling house was still uncompleted he ceased his building works. The building, such as it then was, although uncompleted as a dwelling house, had reached a stage of construction in which it was capable of use for other purposes. It could, in particular, be used for agricultural purposes. Hay, straw or grain could be stored in it. Agricultural machinery of a size small enough to be manoeuvred through the single entrance door could be sheltered in it. Livestock or poultry could be kept in it.

**33** The council served an enforcement notice on Mr Sage on 19 March 1999. This was more than four years after the building work had ceased. The issue before the inspector centred on the question whether or when the building operations were "substantially completed". It is, in my opinion, important to notice how the argument proceeded before the inspector and in the courts below.

**34** The inspector recorded in his decision letter (paragraph 22) that the issue was whether the building was an agricultural structure, as Mr Sage contended, or an uncompleted dwelling house, as the council contended. In paragraph 26 the inspector made the important finding that "as a matter of fact and degree . . . having regard to its layout and appearance, [the building] is not an agricultural building and was not designed as such". This finding was not challenged in the courts below and was expressly accepted before your Lordships by counsel for Mr Sage.

**35** Accordingly, in the courts below and before the House the argument was whether, for the purposes of section 171B(1) the building of the intended dwelling house, in the state in which the building works stood in 1994, was "substantially completed". My noble and learned friend, Lord Hobhouse, has analysed the arguments and concluded that the inspector's decision that the building operations were not substantially completed was

correct. On the premise that the inspector was faced with an uncompleted dwelling house, I respectfully agree.

**36** My concern, however, is with the premise. I have no doubt at all that the inspector was right in concluding that what had been designed by Mr Sage and what he had been building was a structure intended for use as a dwelling house. But the classification of a building, for planning purposes and as a matter of common sense, is not immutable but can change if the use to which the building is put changes. It is a common feature in this country for agricultural barns to be converted into dwellings. Once the conversion is complete and use of the property as a dwelling commences, and perhaps at an earlier point of time, the classification of the building as a barn ceases to be accurate. Planning permission for any building operations involved in the conversion and for the change of use should, of course, have been obtained. But the change in the appropriate classification of the building, from agricultural barn to dwelling house, would not depend on whether planning permission had been obtained. It would be a question of fact.

**37** Conversely, dwellings may become agricultural barns. There are throughout the countryside, usually well off the beaten track, innumerable examples of buildings which have been farm workers' cottages but which, with increasing agricultural mechanization, have become surplus to farming requirements and have, usually in some state of disrepair, become used for storage of hay or straw or for sheltering livestock. Planning permission is, I suspect, very rarely sought for this change of use, but here, too, classification of the building as a dwelling or as a barn is a question of fact, dependent on the permanency of the use to which it is being put and the intentions of the owner in that regard.

**38** Just as change of use can change the appropriate classification of a completed building so, too, in my opinion, there can be no logical objection to the appropriate classification of a building in course of construction being changed by use, or by intentions for future use, of the uncompleted building inconsistent with its original classification. As with a completed building, the change could be either a change from an uncompleted agricultural building to an uncompleted dwelling, or a change from an uncompleted dwelling to an agricultural barn, whether completed or uncompleted.

**39** For example, under the Town and Country Planning General Development Order 1988 (SI 1988/1813) planning permission is in general not necessary for the erection of a building which is reasonably necessary for the purposes of agriculture. A farmer who commenced the construction of such a building would not, by doing so, be in breach of planning control. But if, before the building operations were complete, his intentions changed and he began to install a bathroom and other features indicative of a dwelling, the operations would be in breach of planning control. Conversely, I suggest, in a case where the construction of a building as an additional dwelling has been commenced by a farmer but before the building is complete he changes his mind, decides to use the uncompleted building for agricultural purposes and actually does commence and continue that use, the classification of the structure as an uncompleted dwelling would no longer be accurate. The structure would have become an agricultural building.

**40** The correct application of the section 171B time limits to a case where the building operations intended at the outset have not been

completed but the use to which the structure has been put since the building operation ceased has changed the nature of the building from one which did require planning permission to one which did not may raise difficult questions of fact and law.

**41** In principle, however, there must, in my opinion, be some time limit after which it would no longer be open for enforcement action in respect of the original planning breach to be taken. The present case may be taken as an example. The building works ceased in 1994. The enforcement action was taken in 1999. Let it be assumed that at some point between those two dates Mr Sage decided he would not complete the originally intended dwelling but would instead use the structure for his agricultural purposes and that he thereafter did use the structure for those purposes. It cannot, in my opinion, be the case that for an indefinite and open-ended period the council would remain free to commence enforcement action contending that the structure still remained a substantially uncompleted dwelling house. Such a state of affairs would, in my opinion, be inconsistent with the scheme of section 171B.

**42** These reflections are of no assistance to Mr Sage in the present case. There is no evidence of the use to which the uncompleted structure was put by Mr Sage in the period between 1994 and 1999. There are no facts in evidence which enable to be identified a date after which the 1994 structure could be regarded as no longer an uncompleted dwelling but as having become an agricultural building.

**43** There have, naturally, been no submissions from counsel on either side as to how section 171B would have had to be applied if there had been such evidence. It seems to me, however, well arguable that it would no longer be open for enforcement action to be taken in respect of an uncompleted dwelling house if a period of more than four years had elapsed since the structure had become, de facto, an agricultural building. I think it is important to be clear that nothing in the result of the present case decides that issue. However, I agree that this appeal must be allowed and the order proposed by Lord Hobhouse should be made.

**LORD RODGER OF EARLSFERRY**

**44** My Lords, I have had the opportunity of reading the speech of my noble and learned friend, Lord Hobhouse of Woodborough, in draft. For the reasons that he gives I too would allow the appeal and make the order which he proposes.

*Appeal allowed.*
*No order as to costs.*

*Solicitors: Sharpe Pritchard; Brachers, Maidstone.*

S H

# R. (ON THE APPLICATION OF HEATH AND HAMPSTEAD SOCIETY) v CAMDEN LBC

QUEEN'S BENCH DIVISION

(Sullivan J.): April 3, 2007[1]

[2007] EWHC 977 (Admin); [2007] 2 P. & C.R. 19

Building footprints; Green belt; Measurements; Planning permission; Residential development; Visual amenity

H1 *Town and country planning—Metropolitan Open Land—PPG 2—para.3.6—Principles of Green Belt and Metropolitan Open Land development—test for ascertaining whether building "materially larger"—relevance of qualitative factors—grant of planning permission for replacement of existing part 1, part two-storey building with new part 2, part three-storey building—whether replacement building "materially larger" than previous building—whether material increase to be ascertained by reference to dimensions only—whether visual amenity and bulk of replacement building could be considered—whether planning authorities' conclusion that replacement building was not materially larger was perverse*

H2 The claimant sought a quashing order in respect of a planning permission granted by the defendant to the interested parties on January 23, 2006 for the demolition and replacement of The Garden House in the Vale of Heath, Hampstead, London, a part 1, part two-storey dwellinghouse with associated landscaping and brick shed. A part 2, part three-storey dwellinghouse with associated landscaping was to replace the existing one and was to be erected in its place. The Vale of Heath, on the north-western edge of the Hampstead Conservation Area, was designated in the Development Plan as Metropolitan Open Land (MOL).

H3 Pursuant to para.3.249 of the Camden Revised Deposit Draft UDP, MOL was to be afforded the same level of protection as the Green Belt. PPG 2: Green Belts provided further that there was a general presumption against inappropriate development except in very special circumstances (para.3.1), that inappropriate development was, by definition, harmful to the Green Belt (para.3.2) and that replacement of existing buildings would be appropriate, providing the new dwelling was not materially larger than the dwelling it replaced (para.3.l6).

H4 The claimant argued that the officer's report and his subsequent responses to members during the defendant's planning sub-committee discussions did not properly advise members so as to enable them to answer the key question of

[1] Paragraph numbers in this judgment are as assigned by the court.

whether the new dwelling was "materially larger". The planning authority should simply have been concerned with a mathematical comparison of building size, and it was not permissible to have regard to qualitative factors, such as visual impact. Alternatively, as the new building resulted in a three-fold increase in floor space, a four-fold increase in volume, and a doubling in size of its footprint, the conclusion that the dwelling was not materially larger was perverse. The defendant argued that the officer's advice enabled members to address the key question, which was not simply a matter of comparing dimensions, that they did in fact address that question, and that the conclusion that the new dwelling was not materially larger than the existing dwelling was one that was reasonably open to them, and a matter of planning judgment with which the court should not intervene.

H5 **Held,** allowing the application that:

H6 (1) It had not been suggested by the defendant's sub-committee that this was a case where "very special circumstances" would justify inappropriate development within the Metropolitan Open Land. The key issue to be determined, in accordance with PPG 2, para.3.6, was therefore whether the replacement dwelling was "materially larger" than the dwelling it replaced.

H7 (2) When deciding this issue, the planning authority was not "solely" concerned with a mathematical comparison of relevant dimensions. However, the exercise under para.3.6 was primarily an objective one by reference to the building's size. Which physical dimension was most relevant for the purpose of assessing the relevant size of the existing and replacement dwellinghouses depended on the circumstances of each particular case. Loss of unbuilt on land (openness), within the Green Belt or Metropolitan Open Land areas was of itself harmful to the underlying policy objective.

H8 (3) It was impossible to avoid the conclusion that that the replacement was materially larger, very much larger, than the existing house. The planning officer's report and responses to questions of the members had simply failed to grapple with the key question. Whilst regard could be had to matters such as bulk, height, mass and prominence, it was quite another thing to set consideration of the physical increase to one side altogether and, in effect, substitute a test of visual intrusiveness.

H9 (4) The only way the defendant could have come to the conclusion that the replacement dwelling was not materially larger than the existing one was to set aside all measurements and approach the question solely by reference to a qualitative judgment as to its visual impact. The application for judicial review had to be allowed and the permission quashed.

H10 **Cases referred to in the judgment:**

(1) *Surrey Homes Ltd v Secretary of State for Environment, Transport and the Regions* [2001] J.P.L. 379

(2) *Brentwood BC v Secretary of State for Environment, Transport and the Regions* (1996) 72 P. & C.R. 61; [1996] J.P.L. 939

(3) *South Somerset DC v Secretary of State for Environment* (1993) 66 P. & C.R. 83; [1993] 1 P.L.R. 80; [1993] 26 E.G. 121

H11 **Application** by Heath and Hampstead Society Chelmsford BC under for judicial review and a quashing order in respect of a planning permission granted by the defendant, the London Borough of Camden, dated January 23, 2006 to grant permission to the interested parties for the demolition of The Garden House, Vale of Heath, London NW3, a part 1, part two-storey dwellinghouse and its replacement by a part 2, part three-storey dwellinghouse. The claimant argued, inter alia, that the defendant's planning officers had not properly advised members so as to enable them to answer the key question of whether the replacement building was materially larger. The facts are set out in the judgment below.

H12 *David Altaras*, instructed by J. Hunt & Listners, for the claimant.
*Peter Harrison Q.C.* and *Karen McHugh*, instructed by Camden LBC's Legal Department, for the defendant.
*David Elvin QC* and *Charles Banner*, instructed by David Cooper & Co, for the interested party.

**JUDGMENT**

1 **Sullivan J.:**

**Introduction**

2 In this application for judicial review the claimant seeks a quashing order in respect of a planning permission granted by the defendant to the interested parties on January 23, 2006 (the planning permission) for the—

> "demolition of the existing part 1, part 2-storey dwellinghouse with associated terraces and brick shed and erection of a part 2, part 3-storey dwellinghouse with associated landscaping."

The existing dwellinghouse is The Garden House in the Vale of Health, London, NW3. The Garden House is described in the officer's report at the meeting of the defendant's Development and Control Sub-committee on January 19, 2006 as—

> "a modest 2-storey pitched roof single dwellinghouse, dating from the 1950s, with a detached brick shed against the rear boundary wall near the entrance."

3 The application site is a backland site to the rear of 7–12 Heath Villas. The site slopes down towards Hampstead Pond which borders the site to the east. The Vale of Health is close to the north-western edge of Hampstead Heath and the site is within the Hampstead and Highgate Ridge Area of Special Character and the Hampstead Conservation Area. In the Development Plan it is defined as Private Open Space (POS) and, of particular relevance for the purposes of these proceedings, it is designated as Metropolitan Open Land (MOL).

**MOL, the Development Plan and other policy guidance**

4 The Development Plan comprised the London Plan and the defendant's Unitary Development Plan (UDP). When the sub-committee met on January 19, 2006 the Camden Unitary Development Plan of 2000 was the adopted plan. However the

Camden Revised Deposit Draft UDP 2004 was a significant way through the adoption process. It was adopted in June 2006.

5 The parties were agreed that, in order to avoid unnecessary duplication, it was sensible to consider the policies in the revised UDP. The relevant policies in the London Plan, which replaced the guidance in RPG 3 as from February 2004, are as follows:

**"Policy 3D.9 Metropolitan Open Land**

The Mayor will and boroughs should maintain the protection of Metropolitan Open Land (MOL) from inappropriate development. Any alterations to the boundary of MOL should be undertaken by boroughs through the UDP process, in consultation with the Mayor and adjoining authorities. Land designated as MOL should satisfy one or more of the following criteria:

- land that contributes to the physical structure of London being clearly distinguishable from the built-up area
- land that includes open air facilities, especially for leisure, recreation, sport, arts and cultural activities and tourism which serve the whole or significant parts of London
- land that contains features or landscapes of historic, recreational, nature conservation or habitat interest of value at metropolitan or national level
- land that forms part of a Green Chain and meets one of the above criteria.

Policies should include a presumption against inappropriate development of MOL and give the same level of protection as the Green Belt. Essential facilities for appropriate uses will only be acceptable where they do not have an adverse impact on the openness of MOL.

3.248 The Metropolitan Open Land (MOL) designation is unique to London and protects strategically important open spaces within the built environment. Although MOL may vary in size and primary function in different parts of London, it should be of strategic significance, for example by serving a wide catchment area or drawing visitors from several boroughs. MOL is the same as the Green Belt in terms of protection from development and serves a similar purpose. It performs three valuable functions:

- protecting open space to provide a clear break in the urban fabric and contributing to the greener character of London
- protecting open space to serve the needs of Londoners outside their local area
- protecting open space that contains a feature of the landscape of national or regional significance.

3.249 MOL will be protected as a permanent feature, and afforded the same level of protection as the Green Belt. Appropriate development should minimise any adverse impact on the open character of MOL through sensistive design and siting and be limited to small scale structures to support outdoor open space uses. The boundary of MOL should only be altered in

exceptional circumstances and should be undertaken through the UDP process in consultation with the Mayor. Development that involves the loss of MOL in return for the creation of new open space elsewhere will not be considered appropriate."

6 It will be noted that the London Plan does not define what is appropriate development within MOL. That definition is contained in Policy N1 in the Revised UDP, which is in these terms:

**"N1— Metropolitan Open Land**

The council will only grant planning permission for appropriate development on Metropolitan Open Land. Appropriate development is considered to be:

a) cemeteries;
b) open air sport and recreational facilities;
c) open air leisure, arts and cultural facilities;
d) open air tourist facilities;
e) allotments;
f) the construction of new buildings for essential facilities associated with criteria a), b); and
g) the limited extension, alteration or replacement of existing dwellings."

The explanatory text is in these terms:

"4.8 Metropolitan Open Land, as shown on the Proposals Map, is open space that is clearly distinguishable from the built-up area and is significant beyond the Borough and therefore receives the same presumption against development as green belt land. Metropolitan Open Land brings benefits to the whole of London by providing useful and attractive breaks in the built-up area and by retaining a variety of high quality open spaces, landscapes and areas important for their recreational, amenity, bio-diversity, structural, educational, social and cultural roles.

4.9 There are four main areas of Metropolitan Open Land in Camden:

Hampstead Heath and 14 adjoining areas;
Regents Park;
Primrose Hill and the adjoining Barrow Hill Reservoir and the area made up of Highgate Cemetery (East and West); and
Waterlow Park and Fairseat.

4.10 There is a long-term commitment by local and central government to maintain and enhance Metropolitan Open Land by keeping it free from inappropriate development and their uses. As set out in policy N2A, only development ancillary to a use taking place on Metropolitan Open Land, for which there is a demonstrable need that cannot reasonably be satisfied elsewhere, is appropriate. Appropriate uses on Metropolitan Open Land, which recognise the landscape and nature conservation value of the land and its importance as a place of informal recreation, are set out in policy N1. For

the purpose of N1, new buildings for essential facilities should be genuinely required for uses of land that preserve the openness of Metropolitan Open Land. Examples of these are outlined in Planning Policy Guidance 2: Green Belts. The Council will also welcome the removal of existing non-appropriate buildings."

7 Since the Development Plan makes it clear that "MOL is the same as Green Belt in terms of protection and serves a similar purpose" (see above), the policy guidance in PPG 2: Green Belts is of particular significance. Paragraph 1.4 of PPG 2 identifies the underlying purpose of Green Belts:

> "1.4 The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the most important attribute of Green Belts is their openness."

Paragraphs 3.1 and 3.2 are in these terms:

> "3.1 The general policies controlling development in the countryside apply with equal force in the Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such development should not be approved, except in very special circumstances. See paragraphs 3.4, 3.8, 3.11 and 3.12 below as to development which is inappropriate.
>
> 3.2 Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development."

Paragraphs 3.4 and 3.6 deal with new buildings in the Green Belt:

> "3.4 The construction of new buildings inside a Green Belt is inappropriate unless i is for the following purposes:
>
> —agriculture and forestry . . .;
>
> —essential facilities for outdoor sport and outdoor recreation, for cemeteries, and for other uses of land which preserve the openness of the Green Belt and which do not conflict with the purposes of including land in it . . .;
>
> —limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6 below);
>
> —limited infilling in existing villages . . . and limited affordable housing for local community needs under development plan policies according to PPG 3 . . .; or
>
> —limited in filling or redevelopment of major existing developed sites identified in adopted local plans, which meets the criteria in paragraph C3 or C4 of Annex C1.

> . . .
>
> 3.6 Provided that it does not result in disproportionate additions over and above the size of the *original* building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces. Development plans should make clear the approach local planning authorities will take, including the circumstances (if any) under which replacement dwellings are acceptable."

Paragraph g) of Policy N1 in the UDP repeats the third indent in para.3.4 of PPG 2.

8 It is common ground that the interested parties propose to replace the existing Garden House with a new dwelling rather than extend or alter the existing dwelling. The relevant test in para.3.6 of PPG 2 was therefore that such a replacement dwelling "need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces".

**The issue**

9 It was not suggested to the sub-committee that this was a case where very special circumstances would justify inappropriate development within Metropolitan Open Land. Thus the key question which the sub-committee had to address was: is the proposed new dwelling "materially larger" than the existing dwelling? In a nutshell, the issue between the parties is as follows. On behalf of the claimant, Mr Altaras submits that the officer's report and subsequent advice during the committee's discussions did not properly advise members so as to enable them to answer that key question, and that if the question is properly addressed there can be only one answer—that the proposed new dwelling was materially larger than the existing dwelling. Any other conclusion would be perverse.

10 On behalf of the defendant, Mr Harrison Q.C. (whose submissions were adopted by Mr Elvin Q.C. on behalf of the interested parties) submitted that the officer's advice enabled members to address the key question, that they did in fact address that question, and their conclusion that the proposed new dwelling was not materially larger than the existing dwelling was one that was reasonably open to them. Their conclusion was a matter of planning judgment with which this court should not interfere.

**The parties' submissions**

11 Mr Altaras' primary submission was that when deciding whether a replacement was "materially larger" than the dwelling which it replaced, the local planning authority was simply concerned with a mathematical comparison of the relevant dimensions, whether footprint, floor space, built volume, width, height, etc. Questions of visual impact, and in particular the effect of the new dwelling on the perceived openness of Metropolitan Open Land, were irrelevant at that stage of the exercise. They might subsequently become relevant when a decision had been taken as to whether the replacement dwelling was or was not appropriate development in Metropolitan Open Land. If it was concluded (on the basis of a comparison of the relevant dimensions) that the replacement dwelling was not

materially larger than the existing dwelling, then the merits of the application—including, for example, its visual impact and, in the circumstances of the present case, whether the new dwelling would preserve or enhance the character or appearance of the conservation area—would be considered in the normal way.

12 On the other hand, if it was concluded (on the basis of comparison of relevant dimensions) that the replacement dwelling was materially larger than the existing dwelling, then very special circumstances would have to be demonstrated to justify the grant of planning permission. But those circumstances could include, for example, that a smaller but particularly unattractive and visually intrusive dwelling would be replaced by a materially larger but much more attractive dwelling which, by reason of careful design, would be much less visually intrusive.

13 If that primary submission was rejected, and it was permissible to have regard to qualitative factors such as visual impact when deciding whether a replacement dwelling was materially larger than an existing dwelling, he submitted that those factors could not exclude quantitative factors altogether: if a replacement dwelling was, in terms of measurable dimensions, say, twice as large as the dwelling it replaced, then it was "materially larger" however inconspicuous it might be in visual terms.

14 Mr Harrison and Mr Elvin submitted that the key question was not whether the replacement dwelling was larger than the existing dwelling (which might well require a straightforward mathematical calculation) but whether it was *materially* larger. Whether an increase in size was or was not material was a matter of planning judgment and that judgment would necessarily be informed by the underlying policy objective. Thus, the visual impact of an increase in size was a relevant consideration. The exercise was not simply a mathematical one of comparing dimensions old and new. The defendant and the interested parties pointed out that neither Policy N1 in the UDP nor para.3.6 of PPG 2 contained any mathematical formula, for example, an increase in floor space of up to 10 per cent was appropriate development. This was to be contrasted with the more prescriptive advice in Annex C to PPG 2 which deals with the circumstances in which the redevelopment of major existing developed sites in the Green Belt, such as hospitals, military establishments, etc. may be appropriate development. Paragraph C4 contains specific limitations on the height and footprint of any new buildings in those circumstances.

15 Both the defendant and the interested parties relied on the decision of Mr Christopher Lockhart-Mummery Q.C., sitting as a Deputy Judge of the Queen's Bench Division, in *Surrey Homes Ltd v Secretary of State for Environment, Transport and the Regions*, CO/1273/2000, as supporting their submission that the question "is the replacement dwelling materially larger than the existing dwelling?" was not to be answered simply by a comparison of dimensions. In *Surrey Homes* the court was concerned with a replacement house in the Metropolitan Green Belt. The existing dwelling had a total floor space of 617sq m and the proposed replacement dwelling had a floor space of 666sq m, an increase of 7.9 per cent (see [3] of the judgment). In [22]–[24] the learned deputy judge said:

> "22 The second, and potentially more important submission, is that both in PPG 2, and perhaps more particularly in Policy RUD 7, the term 'materially

larger' is to be judged exclusively by reference to floor space. It was submitted that if a house is not materially larger in floor space terms than the one it is to replace, it cannot appear larger and, in particular, cannot be 'materially larger' for the purposes of the relevant policies.

23 I do not accept this submission. In most cases floor space will undoubtedly be the starting point, if indeed it is not the most important criterion.

But I entertain no doubt that the concept of whether the dwelling is 'materially larger' cannot be assessed by reference to matters such as bulk, height, mass and prominence. These are all matters going to the openness of the Green Belt. They are plainly all material considerations relevant to deciding on the meaning of the term in the context in which it arise, namely Green Belt policy.

24 Indeed, were it otherwise, absurd results could arise. One could have equivalent or possibly even reduced floor space, but disposed within a tower-like structure, having far more impact on the Green Belt. It would give a strange result, in my judgment, if an inspector were debarred from concluding that the proposed structure harmed oppenness and was inappropriate development."

16 Mr Altaras submitted that *Surrey Homes* was wrongly decided in this respect; alternatively, that he could not distinguish since it related to replacement dwellings in the Green Belt as opposed to Metropolitan Open Land. To be fair to Mr Altaras, the latter submission was made but faintly. It is plainly untenable since the development plan makes it plain that Metropolitan Open Land is to be given the same level of protection as Green Belt (see above). Thus the advice in para.3.6 of PPG 2 (however it may be interpreted) is of equal relevance to replacement dwellings in Metropolitan Open Land.

17 Mr Altaras referred to an earlier decision by the same deputy judge—*Brentwood BC v Secretary of State for Environment, Transport and the Regions*—dated December 18, 1998. In that case, which was concerned with an extension to a dwelling in the Green Belt, the relevant development plan policy contained specific guidance in respect of the size of permissible extensions:

> "The total size of the dwelling as extended will not normally exceed the original habitable floor space by more than 37 sq metres."

The inspector allowed the appeal. The local planning authority challenged the decision on a number of grounds. On 9 of the transcript the learned deputy judge said:

> "I turn to deal with the fourth ground of challenge which Mr Ground was uncertain whether to press home. It is accepted on behalf of the Secretary of State that the 'original' building, for the purposes of paragraph 3.6 of PPG 2, denotes for the purposes of the present case, the original dwelling of 1948 comprising 45 sq metres. The proposals, therefore, in the terms of paragraph 3.6 involved an addition resulting in 123 sq metres in comparison to the original floor space of 45 sq metres. Paragraph 3.6 does not incorporate any term of flexibility, such as 'normally'. Further, there are no considerations

> expressly imported into paragraph 3.6 relating to openness or activity. As I understand it, paragraph 3.6 is intended to be an objective criterion by reference to size, needing other factors which might be capable of being introduced in the context of whether very special circumstances exist such as to justify inappropriate development in the Green Belt.
>
> In relation to this critical part of national policy the Inspector finds that the proposal would 'not conflict' with it. No reason is given by him relating to the essential criterion of proportionate size. Where one is dealing with a proposal involving approximately a threefold increase in size, it was, in my judgment, incumbent upon this Inspector to give reasons for what otherwise would be a most startling conclusion. No such reasons relevant to the specific criterion in question were given. On this further ground, I would quash this decision letter."

18 Mr Harrison pointed out correctly that ground 4 was essentially a reasons challenge. The issue raised in the present case was not before the court.

**Surrey Homes—My conclusions**

19 I do not accept the submission that *Surrey Homes* was wrongly decided. It follows that I do not accept the submission that when deciding whether the replacement dwelling is or is not "materially larger" than the dwelling it replaces, the local planning authority is *solely* concerned with a mathematical comparison of relevant dimensions.

20 However I do accept Mr Altaras's fall back submission that the exercise under para.3.6 is *primarily* an objective one by reference to size. Which physical dimension is most relevant for the purpose of assessing the relative size of the existing and replacement dwellinghouse, will depend on the circumstances of the particular case. It may be floor space, footprint, built volume, height, width, etc. But, as Mr Lockhart-Mummery said in *Surrey Homes*:

> ". . . In most cases floor space will undoubtedly be the starting point, if indeed it is not the most important criterion."

It is one thing to say that in a case where the increase in dimensions is marginal in quantitative terms, some regard may be had to other matters "such as bulk, height, mass and prominence"; it is quite another thing to set consideration of the physical increase in size to one side altogether, and, in effect, to substitute a test such as "providing the new dwelling is not more visually intrusive than the dwelling it replaces" for the test in para.3.6: "providing the new dwelling is not materially larger than the dwelling it replaces."

21 Paragraph 3.6 is concerned with the size of the replacement dwelling, not with its visual impact. There are good reasons why the relevant test for replacement dwellings in the Green Belt and Metropolitan Open Land is one of size rather than visual impact. The essential characteristic of Green Belts and Metropolitan Open Land is their openness (see [7] above). The extent to which that openness is, or is not, visible from public vantage points and the extent to which a new building in the Green Belt would be visually intrusive are a separate issue. Paragraph 3.15 of PPG 2 deals with "visual amenity" in the Green Belt in those terms:

> "The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design."

The fact that a materially larger (in terms in footprint, floor space or building volume) replacement dwelling is more concealed from public view than a smaller but more prominent existing dwelling does not mean that the replacement dwelling is appropriate development in the Green Belt or Metropolitan Open Land.

22 The loss of openness (i.e. unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective. If the replacement dwelling is more visually intrusive there will be further harm in addition to the harm by reason of inappropriateness, which will have to be outweighed by those special circumstances if planning permission is to be granted (para.3.15 of PPG 2, above). If the materially larger replacement dwelling is less visually intrusive than the existing dwelling then that would be a factor which could be taken into consideration when deciding whether the harm by reason of inappropriateness was outweighed by very special circumstances.

**Dimensions**

23 Against this background, I turn to the comparative dimensions of the proposed replacement dwelling and the existing dwelling. In terms of floor space, the report told members that the floor space of the existing dwelling was 186sq m and that of the replacement dwelling was 626sq m. The first of these figures was subsequently revised by the officer during the members' discussion of the report. The officer stated that the figure was closer to 146sq m, the figure that had been put forward by the claimant. The interested parties' architect explained that the figure of 186sq m included the garden shed. Thus there was at least a three-fold or a four-fold increase in floor space (depending on whether or not one included a garden shed in the calculation). In terms of built volume, the officer did not question the calculation which was put forward by the claimant that there was almost a four-fold increase. In terms of footprint, the officer advised members that there was a doubling in size. The claimant contended that, looking at the building alone, the footprint was increased by nearly two-and-a-half times. Considering the external paving alone, the claimant contended that there was a five-fold increase in size.

24 Since the exercise is primarily an objective one by reference to size rather than visual impact, the replacement dwelling is "plainly materially" larger than the existing dwelling. Mr Altaras rightly submitted that it would be a nonsense to say that a house which was either twice or four times bigger than another house (depending on which method of measurement was adopted) was not "materially larger" than that other house. Mr Harrison fairly conceded that even if visual impact was a relevant consideration and the view was taken that a replacement building would not be visually intrusive, there would come a point where it could not sensibly be denied that an increase in physical size (measured by a reference to relevant dimensions) was material. Even on Mr Harrison's approach, which

wrongly, in my judgment, accords pre-eminence to visual impact rather than physical measurement, that point must have been passed on the facts of the present case.

25 Setting aside the claimant's calculation (which was not disputed by the officer) in respect of the increase in the external paving and looking simply at the replacement building, it was, depending on whether one measured footprint, floor space or volume, between two and four times as large as the existing dwelling. This increase in size was so substantial that there could be no doubt whatsoever that the replacement dwelling was "materially larger" than the dwelling it was to replace. The only way in which one could come to a contrary conclusion would be to set aside all measurements and approach the question "is the replacement dwelling materially larger than the existing dwelling?" solely by reference to a qualitative judgment as to its visual impact. That was the erroneous approach that was adopted in the officer's report and subsequent advice to the committee.

**Officer's report**

26 Having listed a very large number of relevant policies, including policy N1 above, the report summarised the "principal material considerations". Having described the proposal, the report then dealt with the "Principle of Development and the Demolition of Buildings in Conservation Area".

27 Under the heading Residential Use, the report stated in para.6.4:

> "The replacement single-family dwellinghouse raises no land use policy issues. Where existing dwellings do occur in MOL, it seems right to acknowledge that extensions etc, may be appropriate, and this is specifically referred to in PPG 2 on Green Belts. This guidance in paragraph 3.6 specifically states [the guidance is then set out]. The proposed residential use and its limited extension in size are therefore considered to be appropriate. This is further discussed in paragraph 6.8 below . . ."

The report then dealt with bulk, height, footprint and layout. Within this section of the report the officer stated that there would be a doubling of the existing ground floor footprint. The figures for the existing and proposed floor space (the former being subsequently revised) were set out at the beginning of the report but were not the subject of further comment by the officer.

28 Under the heading Bulk, Height, Footprint and Layout, para.6.5.1 of the report stated, in part:

> "6.5.1 . . . The height of the new flat roof, which would be covered in sedum, would be 1.5 metres lower than the existing pitch roof ridge, although the new roof would be equally higher than the existing roof eaves here. The house as viewed from the front (pond) side will also be wider than the existing one by a total of 3.5 metres. Thus, it is accepted that the overall size and bulk of the front elevation visible from the pond will be greater than the existing front elevation of the house. The proposed grassy 'bund' to the east (pond) side would be some 0.8 metres above the existing ground level, and this raised embankment would result in the whole of the basement storey and the bottom part of the northern ground floor being obscured from views, especially from

across the pond, so that the building would appear as a 2-storey structure with sloping lawn in front.

6.5.2 Most of the increased footprint would be towards the rear of the site, filling in the space between the rear elevation of the existing building and the rear garden wall. Thus, most of the increased bulk is directed towards the rear of the site, which is not visible from the public realm. This increase in bulk would therefore not be noticeable from the views across the pond and is therefore not considered to be visually intrusive. The increased footprint towards the pond (east) would cover part of the existing hard surface concrete slabs and raised terracing to front of the existing house. It is not considered to result in a material loss of front garden space . . . it is considered that the new building would appear from the pond as an essential 2-storey flat roofed building, located to the rear of the site and partially screened by greenery.

6.5.3 It is thus considered that, in this context, the combined effect of height, footprint and form would result in an envelope that would be compatible with the surrounding environment. The staggered layout, the green flat roof, the terraces and planting boxes, and large glazed areas to the front would also assist in reducing the perceived bulk of the building. The overall form and layout of the building would thus respect the varied townscape character of this area, as identified in paragraph 6.5 above.

. . .

6.5.6 On balance, it is considered that, in the light of the existing part 1, part 2-storey pitched roof building, the proposed massing and bulk of the new building together with its form and design in the sensitive location, would not cause demonstrable harm to the character and appearance of this part of Hampstead Conservation Area."

29 The report next dealt with design. This was followed by a section of the report which dealt with "Impact on Hampstead Conservation Area and the Heath". Within that part of the report there was para.6.7.2, which was in these terms:

"6.7.2 As stated before, the proposed scheme would involve an increase in footprint that will be contained mostly within the rear of the site, and as such would not be widely visible from the public realm. Furthermore, the new building would be lower and it would similarly located to the rear of the site than the existing pitched roof building. It is considered that this visible increase in bulk at the front would not cause unreasonable loss of views of the Heath or the pond from properties along the Vale of Health and the perception of a greater mass of building bulk in respect of the front elevation would not seriously harm views from the fringes of the Heath or its setting. In addition, the green roof would assist in assimilating the new building into the natural setting in this view."

30 "Development on Metropolitan Open Land and Private Open Space" was dealt with in para.6.8 of the report. It is necessary to read paras 6.8–6.8.5 in full:

"6.8 MOL brings benefits to the whole of London and within the local urban area by providing useful and attractive breaks in the built up area and by retaining a variety of high quality open spaces, landscapes and areas

important for recreation, nature conservation, cultural and historic values. There is a strong need to protect existing open land and a need to consider the nature and form of development and land uses in the vicinity of the MOL especially to protect its setting.

6.8.1 The general approach to MOL is to protect openness and allow only appropriate ancillary development. *As discussed in paragraph 6.4 above, residential extensions/alterations may be considered appropriate development within MOL on the basis that they would not result in a significant increase in size of the original dwelling* (emphasis added).

6.8.2 [Deals with certain other examples where applications/appeals had been allowed/dismissed on other sites within MOL.]

6.8.3 MOL which is defined as '*Open Land within the built-up area which has a wider than Borough significance and which receives the same presumption against development as green belt*' is protected by both policies EN46 and N1 (revised draft UDP) against inappropriate development in the context of protection of open land. Policy N1 specifically refers to limited extension, alteration or replacement of existing dwellings to be appropriate development on MOL.

6.8.4 The MOL in question is the private garden of the existing residential property, which is not available to the public for general enjoyment and recreation. The contribution that this private garden makes to the MOL as a whole is not considered to change as a result of the proposed replacement scheme, although the footprint of the new building will result in a minor decrease in the area designated MOL (ie the existing building occupies less MOL). *However, it is considered that the enlarged footprint of the proposed dwelling is largely achieved towards the rear of the site and, as this will not be visible from the ponds, it is considered that this will only have a minimal impact on the character and setting of the MOL and the Heath*. The replacement house is not considered to cause demonstrable harm to the existing openness or setting of the site and the surrounding land, or to the nature and form of development and land uses in the vicinity of the MOL. The proposed house is not considered to alter the balance between built and open space and, on balance, the proposed replacement house on MOL & POS is therefore considered acceptable (emphasis added).

6.8.5 On balance, it is considered that the extent of the 'loss' of MOL is not significant and it will not harm the integrity of the MOL nor result in demonstrable harm to the character and appearance of the Heath at Hampstead Conservation Area."

31 The report dealt with a number of other issues such as unstable land, trees and landscaping, traffic, amenity for occupiers, etc. before recommending that planning permission be granted subject to a number of conditions. The defendant's reasons for granting planning permission, as set out in the planning permission itself, stated that the proposal was in general accordance with development plan policies and referred the reader to the report for a more detailed understanding of the members' reasons for granting planning permission. In short, the members adopted the reasons given in the report as their reasons for granting permission.

32 I am mindful of the fact that the report is not to be construed as though it was a statutory instrument. The dicta of Hoffmann L.J. (as he then was) in *South Somerset DC v Secretary of State for Environment* [1993] 1 P.L.R. 80 apply with even greater force to an officer's report to a planning committee. Hoffman L.J. was dealing with an inspector's decision letter:

> "The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to polices must be taken in the context of the general thrust of the inspector's reasoning. A reference to a policy does not necessarily mean that it played a significant part in the reasoning: it may have been mentioned only because it was urged on the inspector by one of the representatives of the parties and he wanted to make it clear that he had not overlooked it. Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the relevant policy or proposed alteration to the policy." (page 83.)

33 The parties are agreed that in a Green Belt or Metropolitan Open Land case the question whether the proposed development is appropriate or inappropriate development within the Green Belt or Metropolitan Open Land is a "threshold question". For this reason it is usually determined at the outset of any report or decision letter because a decision that the proposed development is inappropriate will result in a refusal of planning permission unless very special circumstances sufficient to outweigh the harm due to inappropriateness and any other harm have been demonstrated by the applicant. On the other hand, if the proposal is found to be appropriate development then the application will be considered in the normal way, having regard to such factors as, for example, visual impact, the impact on a conservation area, traffic considerations, and so forth.

34 It is a curious feature of this report that this "threshold question" was not raised, insofar as it was clearly raised at all, until after a lengthy discussion of, inter alia, the visual impact of the proposed replacement dwelling, its design and its impact upon the conservation area. It is particularly unfortunate that when the issue of Metropolitan Open Land was eventually dealt with in the report, the correct test was not set out in para.6.8.1 (see above). This was not an extension or an alteration of an existing dwelling; it was a replacement dwelling. The question was not whether there would be "a significant increase in size" but whether the replacement dwelling was "materially larger" than the existing dwelling. Mr Harrison says that that unfortunate error is of little consequence because the correct test in para.3.6 of PPG 2 was set out in para.6.4. However para.6.4 deals with the principle of residential use rather than the application of Metropolitan Open Land policy. It cross-refers to para.6.8 for those who are concerned to understand the officer's approach to Metropolitan Open Land. It is therefore in para.6.8.1 where one would expect to find the correct test for the threshold question set out.

35 While one has to read the report as a whole, para.6.8.4 would appear to be the critical paragraph where, insofar as the threshold question is addressed, it is answered by the report. In its approach para.6.8.4 echoes the approach that had

been foreshadowed earlier in the report, for example in para.6.7.2 where it was acknowledged that there would be an increase in footprint, but the point was made that this increase "will be contained mostly within the rear of the site and as such would not be widely visible from the public realm".

36 Considering para.6.8.4 in a little more detail, it is difficult to see how that fact that this particular MOL was a private garden which was not available to the public for general enjoyment and recreation could be relevant to the question whether the replacement dwelling was or was not materially larger than the existing dwelling. The MOL designation protects the openness of private open space that is subject to designation just as much as it protects the openness of open space to which the public have access and which is subject to the designation. Again the emphasis in para.6.8.4 is on the extent to which the enlarged footprint will be visible from the public realm:

> "However, it is considered that the enlarged footprint of the proposed dwelling is largely achieved towards the rear of the site and, as this will not be visible from the ponds, it is considered that this will only have a minimal impact on the character and setting of the MOL . . ."

The paragraph then goes on to contend that—

> "The replacement house is not considered to cause demonstrable harm to the existing openness or setting of the site and the surrounding land . . ."

The question was not whether the replacement house would cause "demonstrable harm" but whether it was materially larger than the existing house.

37 The planning officer's approach can be paraphrased as follows:

> "The footprint of the replacement dwelling will be twice as large as that of the existing dwelling, but the public will not be able to see very much of the increase."

It was the difficulty of establishing in many cases that a particular proposed development within the Green Belt would of itself cause "demonstrable harm" that led to the clear statement of policy in para.3.2 of PPG 2 that inappropriate development is, by definition, harmful to the Green Belt. The approach adopted in the officer's report runs the risk that Green Belt or Metropolitan Open Land will suffer the death of a thousand cuts. While it may not be possible to demonstrate harm by reason of visual intrusion as a result of an individual—possibly very modest—proposal, the cumulative effect of a number of such proposals, each very modest in itself, could be very damaging to the essential quality of openness of the Green Belt and Metropolitan Open Land.

38 Turning to para.6.8.5, the question was not whether the "loss" of Metropolitan Open Land as a result of this particular development was "significant". Again it would be extremely difficult in many cases to demonstrate that a "loss" of Metropolitan Open Land or Green Belt as a result of a particular proposal would be "significant". It is precisely this danger that the policy approach in para.3.2 of PPG 6 is intended to avoid. The question was whether the replacement dwelling was materially larger, not whether it was no more visually intrusive from the Heath. The report simply failed to grapple with that key question.

**Committee discussion**

39 It is unnecessary to consider the transcript of the committee's discussion in any great detail because at the end of the debate those members who voted in favour of granting planning permission adopted the report as the reasons for their decision (see Reasons for Granting Planning Permission on the planning permission itself). I do not propose therefore to extend this judgment by numerous citations from the transcript of the members' deliberations. The record of the meeting must be read as a whole, and I have done so. It is significant that the officer's lengthy introduction at the start of the meeting dealt with whether the replacement building would be more distinguished in architectural terms than the existing building. It also explained why the officer considered that the development was "an appropriate development". Unfortunately the advice did not make it clear that the question of appropriateness was to be tested by reference to size as opposed to the very many other factors—appearance, etc.—which would normally be taken into consideration in deciding whether or not a proposed development was "appropriate" in planning terms.

40 Thus one finds a repeat of the approach in para.6.8.4 of the report in this extract from the transcript where the officer advises the members:

> "... and so what we're looking at is whether any increase in the size of either the building in bulk and mass in terms of its footprint in erodes that openness and detracts from the metropolitan land as a whole or the setting of the Heath. Although as I pointed out at the beginning, the building will be wider, the great majority of the additional bulk that's created and the footprint in terms of how it's enlarged is done in way which won't be visible from the majority of public views. It's tucked away at the back and the side between the existing building and retaining wall at basement level and because of that, the perception of the building, although it will be wider, won't be very different in terms of the enjoyment that people have of that metropolitan open land particularly when viewed from across the ponds and as such it will have a fairly minimal effect on the character of it such that we don't think it's in conflict with the policy and the guidance as to how that policy should be interpreted."

41 To their great credit, some of the councillors, including the chairman, who voted to refuse planning permission, did realise that the real question was one of size rather than one of visual impact, but in response to questions the officer repeated the erroneous advice that had been given in the report. Two exchanges will suffice to illustrate this point. One councillor asked:

> "... EN 46 [that] refers to the replacement of existing dwellings need not be inappropriate on an MOL providing the dwelling is not materially larger than the one that it replaces. Given that in footprint terms we're talking double, in volume terms we're talking quadruple, could you answer what you would consider to be materially larger if that isn't materially larger?"

The officer answered:

> "I think the two things I would refer you back to really is that what we are looking at is appropriate development and whether this development is appropriate and the guidance in terms of the measure of that is whether it's materially larger and I think what I've tried to stress in the presentation in dealing with the questions is because of the particular context of this development, that the way it sits on its side, the way it relates to the back floor, the fact that the . . . overriding perception that you have of the way it relates to the character and appearance of that part of the metropolitan open land is a visual one. It's not a measure of footprint and it's not necessarily even a measure of massing and bulk. What it's looking at is whether visually you will see a different and an adverse effect on all of those things and although yes the building is significantly bigger, the footprint's bigger, that the volume is bigger, the floor space is bigger. All of that is disposed on the site in such a way that visually although you will see a building that's about 3.5 metres wider, it will be less high, it will related in a very similar way to the open backdrop and at the levels of the site that the setting and *I think it's in that context that we're saying it won't be materially bigger because you will see very little of all of that addition.*" (emphasis added.)

42 The chairman made a final attempt to address the key question:

> ". . . I think now PPG 2 was being done to death and it really does seem to show that when a building is so much bigger than that which it replaces it is not appropriate to build on the MOL even if it's at the back of the building and the fact that the design of the building fits neatly into the space and it doesn't look very big really doesn't seem to be a justification for covering this quite large area of designated metropolitan and open land with building, with concrete. The reason why this particular section was metropolitan open land is that it's a buffer between the houses in the vale and the pond. It wasn't anything to do with being part of the Heath as it were, it didn't have to run over it, it didn't matter whether it was a private garden, it didn't matter that the public weren't admitted to it, that isn't really part of the definition of metropolitan open land . . . I cannot see why because the building on this particular house is at the back that it makes it all right. I mean it's a bit like Peepo if you can't see it it doesn't really matter—the eye of the beholder—and this seems to me to be a wrong way to be looking at it. The precedent could be extremely worrying here . . . there will certainly be applications elsewhere. Finally I think I mean, why special circumstances, I can't see why it's special, it's special because it isn't seen. It doesn't make sense."

Although not expressed in the language of a formal policy document or judgment, the chairman's observations were spot on.

43 The officer's response was in these terms:

> "Well I think special circumstances is not really the thing we should be hung on. It's whether it complies with the policies that we have in our unitary development plan, significantly whether it complies with the policies in the revised deposit draft which the executive approved on the 11 of January and

> most importantly whether any harm will be caused and what you always have to look at is, you know, I say almost every time I present an application to you is what harm can you identify from the development and I can only reiterate what I've said previously which is that the importance of the metropolitan open land in this context is the openness, it's fundamentally what sits in front of the building in the way that that provides a context of the building and, you know, when we talk about concreting over metropolitan open land, virtually everything that is proposed to build over is already a hard surface and what we are saying is that the areas in which the building is proposed to be extended will have a minimal visual impact on the metropolitan open land in the way in which this building sits on its site and relates to its immediate context both in front and behind and finally I mean, I really don't think there's any danger of a precedent being created. I mean this is a unique set of circumstances. When you are looking . . . at the impact which the general form has whether it's an extension to an existing building, new house, a replacement to an existing house, you're looking at the particular impact which that building has and I think if the committee approved this development, it certainly wouldn't open the floodgates for all of the land you see around about it to be developed over. We would be able to look at each one in terms of whether it complied with the policies and whether any harm flowed from development and it may not stop people making applications, but it certainly wouldn't mean we have to approve them."

44 In my judgment the claimant is right to contend that this approach—to ask what harm would a particular replacement dwelling do in terms of its visual impact from public vantage points within the MOL—is the antithesis of the approach which should be adopted when deciding the threshold question: is this replacement dwelling appropriate development within Metropolitan Open Land? At the risk of repetition, the question is not whether the replacement dwelling would be more visually intrusive from the public realm, but whether it would be materially larger than the existing dwelling. That is principally a question of size, actual rather than perceived size. It is one thing to say that the perception of size may be relevant in deciding whether a measured increase in size is material, it is quite another to substitute an assessment of visual impact for a measurement of size. Although the perception of size may be relevant in marginal cases, the tail must not be allowed to wag the dog. On any basis it is impossible to avoid the conclusion that this replacement dwelling was materially larger, very much larger, than the existing house.

45 It therefore follows that this application for judicial review must be allowed and the permission quashed.

Reporter—Colin Thomann

Case No: CO/6776/2009

**Neutral Citation Number: [2010] EWHC 1621 (Admin)**
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

**Sitting at:**
**Birmingham Civil Justice Centre**
**Priory Courts**
**33 Bull Street**
**Birmingham**
**B4 6DS**

Date: Friday, 12th February 2010

**Before:**

**MR JUSTICE HICKINBOTTOM**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

**MELAP SINGH** — **Claimant**

**- and -**

**(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT** — **First Defendant**

**(2) SANDWELL BOROUGH COUNCIL** — **Second Defendant**

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**Miss Clover** appeared on behalf of the **Claimant**.

**Mr Kimblin** appeared on behalf of the **First Defendant**.

The **Second Defendant** was not represented, but representatives attended to observe.

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**Judgment**
**(As Approved)**

**MR JUSTICE HICKINBOTTOM:**

## Introduction

1. This is an application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") in which the Claimant, Melap Singh, seeks to quash a decision dated 5 June 2009 of an inspector (Mr D A Hainsworth, "the Inspector"), appointed by the First Defendant Secretary of State, in which he dismissed an appeal by the Claimant against the refusal by the Second Defendant planning authority of a Certificate of Lawful Use or Development for which he had applied under section 191(1) of the 1990 Act.

## Background

2. A landowner is entitled to make any number of applications for planning permission for development of the same land. The owners of 128 Harborne Road, Oldbury (which occupies a site at the corner of Harborne Road and Lenwade Road) have taken full advantage of that right.

3. In 2003 the then-owner submitted an application for the construction of a two-storey extension at the back of the existing house, with a family room on house level and a double garage below. The development also involved a proposed driveway opening onto Lenwade Road. The development was shown on a number of plans lodged with the application. Full planning permission was granted on 16 April 2003, with reference number DC/02/39783 ("the 2003 Permission"). The grant was subject to a number of conditions, including:

> "1. The development must conform with the terms of, and the plans accompanying the application for permission and must remain in conformity with such terms and plans, save as may be otherwise required by… approved amendments….
>
> 2. …
>
> 3. The landscaping and planting scheme shown on the approved plan shall be implemented within three months of the development being brought into use."

4. The Claimant obtained an interest in the property in July 2004, with the 2003 Permission in place - although no works under it had by then commenced.

5. On 6 December 2004 he applied for planning permission for demolition of the existing double garage and single-storey extension, and the construction of a new house (to be 126 Harborne Road, "the new dwelling") alongside the existing house (which was to remain as 128 Harborne Road, "the existing dwelling"). A driveway was shown on the plans leading off Lenwade Road, to a detached double garage that would have a garage for each of the dwellings, and three parking places. Although the driveway was to emerge into Lenwade Road at the same point as the proposed driveway under the 2003 Permission, it

was proposed that the new dwelling would be built on part of the driveway and turning circle shown in the plans of that earlier permission. Under the proposed new development, part of the garden area to the existing dwelling would also fall within the garden area of the new dwelling.

6. On 3 March 2005 planning permission was granted for that development with reference number DC/04/43719 (later amended retrospectively but, for the purposes of this application, immaterially by DC/06/47185) ("the 2005 Permission"). That permission was subject to the same Condition 1 as the 2003 Permission.

7. In 2006 the Claimant submitted a further planning application involving the construction of a domestic store behind the existing dwelling, removal of trees, raising ground levels, construction of a retaining wall, and rationalization of amenity space; all substantively relating to the existing (rather than the new) dwelling. Planning permission was granted in relation to that in August 2009, following an appeal ("the 2009 Permission") - but, save possibly for one aspect to which I shall come, that permission is not relevant to this application.

8. The Claimant commenced the works in respect of the development permitted under both the 2003 and 2005 Permissions. In relation to the 2003 Permission, retaining walls were built and trenches excavated. It is rightly not in issue that that amounts to a material operation comprised in the development - and therefore the development has commenced. In relation to the 2005 Permission, the new dwelling was completed, and the Claimant and his family are living in it as a family home.

9. The new dwelling have been completed, the Claimant then wished to build the extension the subject of the 2003 Permission, and, on 26 November 2008, he applied for a Certificate of Lawful Use or Development, the application being for "completion of part-constructed family room and garage extension as [the 2003 Permission]". Again, a plan accompanied the application, which proposed that a single-storey extension behind the existing dwelling be knocked down, and one of the double garages behind the new dwelling be converted into a car port that would enable a car to drive through that building to access the new garage building behind the existing dwelling.

10. That application was refused by the local planning authority on 31 December 2008, for reasons which included that the 2003 Permission was incompatible with, and was superseded by, the implementation of the 2005 Permission.

11. On 5 June 2009 the Claimant's appeal to the Secretary of State against that refusal was dismissed by the Inspector. The Inspector was satisfied that the planning authority's refusal of the application was well-founded and a certificate should not be granted because, he found, it was impossible to complete the 2003 development. His findings and reasons that led him to that conclusion are effectively set out in paragraph 11 of his decision, as follows:

> "… [I]t would not be possible to complete the development in accordance with the terms of [the 2003 Permission]. Firstly, the driveway could not be constructed as approved,

> because of the double garage that belongs to the new [dwelling] has been built on some of the area needed for the driveway. Secondly, the turning area could not be constructed as approved, because part of this area is now in the garden area of the new [dwelling]. Thirdly, the garden could not be laid out as approved, because some of it is now in the garden area of the new [dwelling]."

12. It is against that decision that the Claimant now appeals, on the ground that the Inspector erred by misinterpreting and misapplying the law on "impossibility", and hence erred in his conclusion that the 2003 Permission was, at the date of his decision, not capable of implementation and completion.

**The Law**

13. I was referred to a number of authorities, including Lucas & Sons v Dorking and Horley Rural District Council [1964] 17 P & CR 111, Pilkington v Secretary of State for the Environment [1973] 1 WLR 1527, Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] 1 AC 132 and Sage v Secretary of State for the Environment, Transport and the Regions [2003] 1 WLR 983, as well as provisions under the planning regulatory Scheme, from which I derive the following.

14. Under the planning regime, a landowner is entitled to make any number of applications for planning permission for the development of the same land "which his fancy dictates", even though they may be mutually inconsistent: and the planning authority must deal with any such applications made (Pilkington, per Lord Widgery LCJ at page 1531E-F, and Pioneer Aggregates per Lord Scarman at page 144C).

15. Although the planning regime was intended to be a comprehensive code, it may have lacunae - in the form of circumstances not envisaged or catered for at all by the regime - that require to be filled by the common law (Pioneer Aggregates per Lord Scarman at page 141A-B). One such lacuna was identified in Pilkington. Where there are different developments for which separate permissions have been granted, and one has been completed or at least implemented, can the development permitted by the second permission proceed, and if so in what circumstances? The regulatory scheme did not cover that eventuality. Lord Widgery in Pilkington said at page 1532A-B:

> "For this purpose I think one looks to see what is the development authorised in the permission which has to be implemented. One looks first to see that full scope of that which has been done or can be done pursuant to the permission which has been implemented. One then looks at the development which was permitted in the second permission, now sought to be implemented, and one asks oneself whether it is possible to carry out the development proposed in that second permission, having regard to that

> which was done or authorised to be done under the permission which has been implemented."

16. Pilkington was approved by the Court of Appeal in Hoveringham Gravels v Chiltern District Council [1977] 76 LGR 533: and the theme of the passage I have quoted was taken up in Pioneer Aggregates, particularly in the speech of Lord Scarman (with whom the entire Judicial Committee agreed), who confirmed that by proceeding with one development, that may make "the development authorised in [another] permission incapable of being implemented" (page 145A). He did not consider that there would be any uncertainty or, it seems, difficulty in the application of this principle. He said (at page 145C):

> "There is, or need be, no uncertainty arising from the application of the rule. Both planning permissions will be in the public register: examination of their terms combined with an inspection of the land will suffice to reveal whether development has been carried out which renders one or other of the planning permissions incapable of implementation."

17. May I make four observations in relation to that principle.

18. First, the principle derives from the general law. Of course, in a specific case, the terms of the planning permissions granted may be particular. They may be crucial.

19. Second, of the subsequent development, Lord Scarman used the term "incapable of *implementation*" (emphasis added). "Implementation" is a term of art in planning. A development does not have to be completed for the permission under which it is done to have been "implemented". There is no dispute before me that the 2003 Permission had been both "commenced" and "implemented" by the operations under it which had been performed. The Inspector found it so. The issue in this case is not whether the 2003 Permission can be lawfully *implemented*, but rather whether or not the development or building operation permitted by it can be lawfully *completed*, having regard to the circumstances as they appeared to the Inspector at the time of his decision, including of course the operations which had already been done in pursuance of development permitted by the 2005 Permission.

20. Third, reflecting the holistic structure of the planning regime, for a development to be lawful it must be carried out fully in accordance with any *final* permission under which it is done, failing which the whole development is unlawful (Sage per Lord Hobhouse, giving the only substantive speech, at [23]-[25]) Taken with my second observation, that means that if a development for which permission has been granted cannot be completed because of the impact of other operations under another permission, that subsequent development as a whole will be unlawful.

21. Fourth, Miss Clover for the Claimant expressly relies upon the *de minimis* principle. Whilst there is no doubt room for that principle in relation to changes to a development

for which planning permission has been granted (see for example Lucas at page 114), Miss Clover conceded that a change to a development for which permission has been granted is not allowed under that permission merely because it is minor or immaterial. That concession was well made. On application by a person with an interest in the relevant land, section 96A of the 1990 Act (enacted in the light of the decision in Sage) gives a planning authority express power to change a planning permission if they are satisfied that that change is not material. Such a provision would be otiose if they could make such (immaterial) changes in any event. Whether a change is material or not is a matter of fact and degree for the authority, which must have regard to the effect of the change in making that decision. If the change is material, then it requires the consent of the planning authority following an application under section 73, which, for self-evident reasons, requires a more sophisticated procedure. However, any change - material or not - requires the consent of the planning authority under section 73 or section 96A.

**Discussion**

22. In this appeal, Miss Clover accepted, frankly and rightly, that the 2003 Permission development and the 2005 Permission development could not both be done in full accordance with the permissions granted. However, she submitted that changes to the 2003 Permission development, necessitated by the development that has been done under the 2005 Permission, were *de minimis*, and could be done under the 2003 Permission without any further consent of the planning authority. Her core contentions are set out in her written submissions at paragraphs 26-28. She submits that it is not necessary to implement the 2003 Planning Permission:

> "… in its entirety, exactly as it appears in the application and plans as granted. There is a sliding scale based on fact and degree, and common sense, as to whether what is proposed to be implemented is substantially the same as the originally permission envisaged, or whether it is so different that it cannot really be said that the original permission is being implemented at all." (paragraph 27).
>
> "The present case falls on the right side of that line. [The 2003 Permission] is being implemented as it was originally envisaged, by implementing the garage and the family room, notwithstanding the necessary changes to the drive and garden layout." (paragraph 28).
>
> "The development is precisely the same garage and family room, but with a different drive and garden layout. The [planning authority] in this case would not be able to say that they were being presented with an entirely different proposal. It would be exactly the same proposal, with minor amendments." (paragraph 26).

23. Although she concedes that, "The driveway and garden layout are no longer physically capable of being implemented as shown on the plan and application of [the 2003

Permission]", it is sufficient, she submits, that the development can be "substantially implemented as originally envisaged" (written submissions, conclusions (iv) and (v)): and the Inspector erred in law finding otherwise.

24. I do not find this submission compelling. It is based upon the false premise that, where a *final* planning permission has been granted (as it has been under the 2003 Permission), it is not necessary to implement that permission "… in its entirety, exactly as it appears in the application and plans as granted". But that is precisely what *is* necessary.

25. As I have indicated, as a matter of law, a development generally must be regarded holistically and, where some parts of it are physically incapable of being implemented (or completed), then the whole development becomes unlawful. Of course, on its proper construction, a particular planning permission may authorise the carrying out of a number of independent acts of development. That was found by Winn J to be the case in Lucas (see Pilkington per Lord Widgery at page 1533H). But Lucas was an exceptional case (Pilkington at page 1533F), and in this case it was not suggested (nor could it be properly suggested) by Miss Clover that the development permitted by the 2003 Permission was severable in that way. Miss Clover submitted that the driveway and landscaping elements of that permission were severable, only in the sense that they were such unimportant elements of the development as to be *de minimis*.

26. However, in this case, the driveway and landscape cannot simply be disregarded from a planning stance. The fact that the "particular development" in the 2003 Permission is described simply in terms of "family room and garage extension" is, of course, not determinative or even, in my view, illuminating on this issue. As well as both driveway and landscaping being the subject of the plans which were approved (cf Condition 1), landscape was the subject of an express condition of the 2003 Permission. That is one further mark of its importance in planning terms.

27. Indeed, in relation to those conditions, in this case, the Defendant does not have to rely upon only the general law alone, because that law is supplemented or supported by Condition 1 of the 2003 Permission, which required the development to be done in accordance with the plans submitted: and Condition 3, which requires the landscape etc to be done in accordance with the plans submitted. Following the development under the 2005 Permission - the construction of the new dwelling and other operations under that permission - the Inspector found that those conditions are impossible of compliance. They were conditions of the permission, and the fact that the driveway and landscaping may not now generally require planning permission is not to the cause.

28. Given the nature of the section 191(1) application, it is difficult to see how the degree to which the Claimant is unable to comply with the 2003 Permission, as a result of the 2005 Permission development now done, could be regarded as immaterial, yet alone *de minimis* - but, in any event, that is a matter of fact incorporating planning judgment, not for this court.

29. Miss Clover took me to the first instance decisions of Prestige Homes (Southern) Ltd v Secretary of State for the Environment [1992] 3 PLR 125 and R v Arfon Borough

Council ex parte Walton Commercial Group Ltd [1997] JPL 237 in support of her submissions, both cases heard by judges particularly experienced in planning. However, both of those cases clearly and expressly applied Pilkington, including the principle drawn from that House of Lords' case that whether two developments are compatible is a matter of fact and degree dependent upon the specific facts of the case. Neither supports the suggestion that the court should embark upon a merits review, as suggested by Miss Clover's submissions. That is not the court's function.

30. The Inspector found that it would not be possible to complete the development the subject of the 2003 Permission, because the driveway and turning area as approved in that permission had been built over - by the new dwelling - and the garden area of the existing dwelling could not be laid out as approved because it now fell within the garden area of the new dwelling. Those are matters of planning judgment quintessentially for the planning authority and, in its shoes on appeal, the Inspector. It is not arguable that the Inspector erred in law in making the primary findings of fact that he did, which Miss Clover does not challenge; or in making his factual conclusion with regard to the impossibility of completing the 2003 Permission development.

31. Miss Clover submitted that the changes to the 2003 Permission, necessary to make it compatible with the 2005 Permission development "have been approved by virtue of the grant of [the 2005 Permission]… and also the grant of [the 2009 Permission]": because it was perfectly clear from the applications that led to those permissions that the driveway and garden area to the existing dwelling with the 2003 Permission development would be lost - and the planning authority, in granting those permissions, clearly marked that they did not consider it important to retain them. That was, she submitted, another mark that they were not "fundamental elements" of the 2003 Permission, and can readily be regarded as *de minimis*.

32. However, again, with respect, that is based upon a false premise, namely that, when a planning authority is asked to consider an application for permission for a development, it must take into account other permissions already granted. It is not the duty of a planning authority to relate one planning application or permission to another, to assess whether they are contradictory. They must regard each application as a proposal for a separate and independent development, and consider the merits of each application on that basis (Pilkington, per Lord Widgery at page 1531H).

33. As I have indicated, the planning scheme centred on the 1990 Act is intended to be a comprehensive scheme. Where a person wishes to change a development for which he has a final planning permission, the scheme does not allow such a change without the consent of the planning authority, under (for example) section 73 or section 96A. By applying for a section 191 Certificate, the Claimant sought to short-circuit or bypass those provisions. He is not entitled to do so. As Mr Kimblin for the Defendant submitted, that has the unsurprising result that the claimant cannot benefit from two inconsistent permissions in respect of the same land.

34. If the claimant wishes to pursue his project for developing the back of the existing dwelling, 128 Harborne Road, then his proper course is to apply to the planning authority

for the appropriate consent, for example, by way of section 73 or section 96A. The matter can then, in the appropriate forum and after any appropriate consultation, be considered on its merits.

**Conclusion**

35. For those reasons, I do not consider that the Inspector erred, and I refuse the application.

**MR KIMBLIN**: My Lord, there is just the question of costs. I ask for the Secretary of State's costs, if I might, and a statement of costs with a view to summary assessment. The sum is £8,354. I have trimmed that down, because the hearing has been somewhat shorter than the schedule anticipates.

**MR JUSTICE HICKINBOTTOM**: Yes.

**MR KIMBLIN**: If I could invite my Lord to turn to the second, attendance at hearings marked as five hours, just to make it easy we trimmed £300 of that, and it would make the claim £8,050, and that is what I would ask for.

**MR JUSTICE HICKINBOTTOM**: Yes, just give me one moment.

(*Pause*)

**MR JUSTICE HICKINBOTTOM**: Could you help me with this? Four hours travel and waiting time: that would be for those instructing you, because your brief fee covers all of that. Your brief fee covers all of that for you, is that right?

**MR KIMBLIN**: My Lord, that is right. The four hours of travel is for my instructing solicitor.

**MR JUSTICE HICKINBOTTOM**: Yes, thank you.

**MISS CLOVER**: My Lord, I have no submissions upon it, thank you.

**MR JUSTICE HICKINBOTTOM**: The Claimant, having been unsuccessful in the application, is liable for the First Defendant's costs. There will be no order for costs in relation to the Second Defendant, the planning authority. In relation to the Secretary of State's costs and the schedule, I am satisfied that the aggregate amount is both reasonable and proportionate to the issues. The rates claimed in respect of the personnel involved are patently reasonable; and, having looked at each of the elements, it seems to me that each is both reasonable and proportionate.

I will make an order that the Claimant pays the First Defendant's costs of the application, summarily assessed in the sum of £8,054.66.

Anything else?

**MISS CLOVER**: My Lord, I do not think there is.

**MR JUSTICE HICKINBOTTOM**: Thank you both.

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A

Supreme Court

# Tesco Stores Ltd *v* Dundee City Council (Asda Stores Ltd and another intervening)

[2012] UKSC 13

B

2012 Feb 15, 16; March 21

Lord Hope of Craighead DPSC, Lord Brown of Eaton-under-Heywood, Lord Kerr of Tonaghmore, Lord Dyson, Lord Reed JJSC

*Planning — Development — Local authority's development plan — Sequential approach to retail site selection required — Central development preferred — Proposal for out of town superstore — Objection that smaller district centre site*
C *available — Local authority determining that district centre site not suitable — Planning permission granted — Whether local authority applying the correct test for suitable site when applying sequential approach*

A large supermarket group, A Ltd, submitted an application to the local authority for planning permission to build a superstore, comprising foodstore, café and petrol station, with associated car parking, access roads and landscaping at a
D disused industrial site on the outskirts of a city. The proposal also provided for improvements to the junction with the main road into the city and other neighbouring roads, the upgrading of a pedestrian underpass and the provision of footpaths and cycle ways. The local structure and development plans provided for a sequential approach to site selection for new retail development which meant that large out of centre retail development would only be acceptable when it could be established that no suitable site was available, in the first instance, within and
E thereafter on the edge of a city, town or district. A rival supermarket group, T Ltd, objected to the proposal on the basis that there was a suitable site within a local district centre which T Ltd had itself recently vacated. That site could, however, only accommodate a store of around half the size of the one proposed by A Ltd. The local authority accepted that A Ltd's proposal was not in accordance with the development plan with regard to, inter alia, retailing policy but concluded that the proposal did not undermine the core strategies of the plan and that the economic and planning benefits of the proposed development were of sufficient weight to justify
F granting planning permission subject to certain conditions. T Ltd petitioned the Court of Session for judicial review of the decision on the ground that the local authority had misinterpreted the development plan, in that, when applying the sequential approach to retail site selection the question was not, as the local authority had considered, whether a district centre site was "suitable for the development proposed by the applicant" but whether the site was "suitable for meeting identified deficiencies in retail provision in the area" and that error had vitiated the local
G authority's decision that a departure from the development plan was justified. The Lord Ordinary dismissed the petition and the Inner House refused T Ltd's reclaiming motion.

On appeal by T Ltd —

*Held*, dismissing the appeal, that, when considering whether material considerations justified departing from the development plan, a local authority was required to proceed on the basis of a proper interpretation of the relevant provisions
H which was a matter of textual interpretation not of planning judgment; that the natural reading of the strategic and development plans was that the word "suitable", in the context of the sequential approach, referred to the suitability of a site for the proposed development; that, however, it would be an over-simplification to say that the characteristics of a proposed development, such as its scale, were necessarily determinative for the purposes of the sequential test and an applicant was expected to

have prepared his proposals in accordance with the development plan and to have thoroughly assessed sequentially preferable locations; that, provided the applicant had done so, the question for the local authority was whether an alternative site was suitable for the proposed development not whether the proposed development could be altered or reduced to fit an alternative site; that, further, even if the local authority had misinterpreted the development plan the error would only be material if there had been a real possibility that its determination might otherwise have been different; and that, in the circumstances, there had been no such possibility ( post, paras 18, 21, 24–27, 28, 29, 31, 32, 35, 37, 38, 39).

Dicta of Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, 1459, HL(Sc) applied.

Decision of the Inner House [2011] CSIH 9; 2011 SC 457 affirmed.

The following cases are referred to in the judgments:

*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; [1947] 2 All ER 680, CA

*Edinburgh Council (City of) v Scottish Ministers* 2001 SC 957

*Edinburgh Council (City of) v Secretary of State for Scotland* [1997] 1 WLR 1447; [1998] 1 All ER 174, HL(Sc)

*Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86; (1986) 54 P & CR 361, CA

*Horsham District Council v Secretary of State for the Environment* (1991) 63 P & CR 219, CA

*Lidl UK GmbH v Scottish Ministers* [2006] CSOH 165

*Northavon District Council v Secretary of State for the Environment* [1993] JPL 761

*R v Derbyshire County Council, Ex p Woods* [1998] Env LR 293; [1997] JPL 958, CA

*R v Rochdale Metropolitan Borough Council, Ex p Milne (No 2)* [2001] Env LR 406; 81 P & CR 365

*R v Teesside Development Corpn, Ex p William Morrison Supermarket plc* [1998] JPL 23

*R (Heath & Hampstead Society) v Vlachos* [2008] EWCA Civ 193; [2008] 3 All ER 80, CA

*R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72; [2008] QB 836; [2008] 3 WLR 375; [2008] 2 All ER 1023, CA

*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759; [1995] 2 All ER 636, HL(E)

The following additional cases were cited in argument:

*Dawn Developments Ltd v South Lanarkshire Council* [2011] CSOH 170

*Derwent Holdings Ltd v Trafford Borough Council* [2011] EWCA Civ 832; [2011] NPC 78, CA

*Findlay's Executors v West Lothian District Council* [2006] CSOH 188; [2007] RVR 263

*Freeport Leisure plc v West Lothian Council* 1998 SC 215

*Land Securities Group plc v Scottish Ministers* [2006] UKHL 48; 2007 SC (HL) 57, HL(Sc)

**APPEAL** from the Inner House of the Court of Session

The petitioner, Tesco Stores Ltd, sought judicial review of a decision dated 18 January 2010 of the local authority, Dundee City Council, to grant outline planning permission to the interveners, Asda Stores Ltd and MacDonald Estates Group plc, for the erection of a foodstore, café, petrol station and associated car parking, at Myrekirk Road, Dundee. In the Outer House of the Court of Session the Lord Ordinary, Lord Brailsford, dismissed

the petition on 15 September 2010 [2010] CSOH 128. The petitioner reclaimed and on 11 February the Inner House (Lord Justice Clerk (Gill), Lord Emslie and Lady Smith) refused the motion 2011 SC 457. By a notice of appeal filed on 24 March 2011 the petitioner appealed to the Supreme Court. The grounds of appeal were that the local authority had improperly interpreted the policy guidance laid down in Scottish Office Development Department, National Planning Policy Guideline 8: Town Centres and Retailing (Revised 1998) and failed to consider its own policy contained in the Dundee and Angus Structure Plan 2001–2016 and the Dundee Local Plan of August 2005.

The facts are stated in the judgment of Lord Reed JSC.

*Martin Kingston QC* and *Jane Munro* (instructed by *Semple Fraser LLP, Edinburgh*) for the petitioners.

*Douglas Armstrong QC* and *James Findlay QC* (instructed by *Gillespie Macandrew LLP, Edinburgh*) for the local authority.

*Malcolm Thomson QC* and *Kenny McBrearty* (instructed by *Brodies LLP, Edinburgh*) for the interveners.

The court took time for consideration.

21 March 2012. The following judgments were handed down.

**LORD REED JSC** (with whom **LORD BROWN OF EATON-UNDER-HEYWOOD, LORD KERR OF TONAGHMORE** and **LORD DYSON JJSC** agreed)

**1** If you drive into Dundee from the west along the A90 (T), you will pass on your left a large industrial site. It was formerly occupied by NCR, one of Dundee's largest employers, but its factory complex closed some years ago and the site has lain derelict ever since. In 2009 Asda Stores Ltd and MacDonald Estates Group plc, the interveners in the present appeal, applied for planning permission to develop a superstore there. Dundee City Council, the respondents, concluded that a decision to grant planning permission would not be in accordance with the development plan, but was nevertheless justified by other material considerations. Their decision to grant the application is challenged in these proceedings by Tesco Stores Ltd, the petitioners, on the basis that the respondents proceeded on a misunderstanding of one of the policies in the development plan: a misunderstanding which, it is argued, vitiated their assessment of whether a departure from the plan was justified. In particular, it is argued that the respondents misunderstood a requirement, in the policies concerned with out of centre retailing, that it must be established that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres.

*The legislation*

**2** Section 37(2) of the Town and Country Planning (Scotland) Act 1997, as in force at the time of the relevant decision, provides:

> "In dealing with [an application for planning permission] the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

Section 25 provides: A

> "Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise— (a) to be made in accordance with that plan . . ."

*The development plan* B

**3** The development plan in the present case is an "old development plan" within the meaning of paragraph 1 of Schedule 1 to the 1997 Act. As such, it is defined by section 24 of the 1997 Act, as that section applied before the coming into force of section 2 of the Planning Etc (Scotland) Act 2006, as including the approved structure plan and the adopted or approved local plan. The relevant structure plan in the present case is the Dundee and C
Angus Structure Plan, which became operative in 2002, at a time when the NCR plant remained in operation. As is explained in the introduction to the structure plan, its purpose is to provide a long term vision for the area and to set out the broad land use planning strategy guiding development and change. It includes a number of strategic planning policies. It sets the context for local plans, which translate the strategy into greater detail. D
Its preparation took account of national planning policy guidelines.

**4** The structure plan includes a chapter on town centres and retailing. The introduction explains that the relevant government guidance is contained in National Planning Policy Guidance 8, *Town Centres and Retailing* (revised 1998). I note that that document ("NPPG 8") was replaced in 2006 by *Scottish Planning Policy: Town Centres and Retailing* E
("SPP 8"), which was in force at the time of the decision under challenge, and which was itself replaced in 2010 by *Scottish Planning Policy* ("SPP"). The relevant sections of all three documents are in generally similar terms. The structure plan continues, at para 5.2:

> "A fundamental principle of NPPG 8 is that of the sequential approach to site selection for new retail developments . . . On this basis, town F
> centres should be the first choice for such developments, followed by edge of centre sites and, only after this, out of centre sites which are currently or potentially accessible by different means of transport."

In relation to out of centre developments, that approach is reflected in *Town Centres and Retailing* Policy 4: Out of Centre Retailing:

> "In keeping with the sequential approach to site selection for new G
> retail developments, proposals for new or expanded out of centre retail developments in excess of 1000 square metres gross will only be acceptable where it can be established that: no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres; individually or cumulatively it would not prejudice the vitality and viability of existing city, town or district centres; the proposal H
> would address a deficiency in shopping provision which cannot be met within or on the edge of the above centres; the site is readily accessible by modes of transport other than the car; the proposal is consistent with other structure plan policies."

A 5 The relevant local plan is the Dundee Local Plan, which came into operation in 2005, prior to the closure of the NCR plant. Like the structure plan, it notes that national planning policy guidance emphasises the need to protect and enhance the vitality and viability of town centres. It continues, at para 52.2:

> "As part of this approach planning authorities should adopt a
B sequential approach to new shopping developments with first preference being town centres, which in Dundee's case are the city centre and the district centres."

That approach is reflected in Policy 45: Location of New Retail Developments:

> "The city centre and district centres will be the locations of first choice
C for new or expanded retail developments not already identified in the local plan. Proposals for retail developments outwith these locations will only be acceptable where it can be established that: (a) no suitable site is available, in the first instance, within and thereafter on the edge of the city centre or district centres; and (b) individually or cumulatively it would not prejudice the vitality and viability of the city centre or district centres;
D and (c) the proposal would address a deficiency in shopping provision which cannot be met within or on the edge of these centres; and (d) the site is readily accessible by modes of transport other than the car; and (e) the proposal is consistent with other local plan policies."

6 It is also relevant to note the guidance given in NPPG 8, as revised in 1998, to which the retailing sections of the structure plan and the local plan
E referred. Under the heading "Sequential Approach", the guidance stated:

> "12. Planning authorities and developers should adopt a sequential approach to selecting sites for new retail, commercial leisure developments and other key town centre uses . . . First preference should be for town centre sites, where sites or buildings suitable for conversion are available, followed by edge of centre sites, and only then by out of
F centre sites in locations that are, or can be made easily accessible by a choice of means of transport . . .
>
> "13. In support of town centres as the first choice, the Government recognises that the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. In preparing their proposals developers and retailers should
G have regard to the format, design, scale of the development, and the amount of car parking in relation to the circumstances of the particular town centre. In addition they should also address the need to identify and assemble sites which can meet not only their requirements, but in a manner sympathetic to the town setting. As part of such an approach, they should consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or
H sub-dividing large proposals, in order that their scale might offer a better fit with existing development in the town centre . . .
>
> "14. Planning authorities should also be responsive to the needs of retailers and other town centre businesses. In consultation with the private sector, they should assist in identifying sites in the town centre

which could be suitable and viable, for example, in terms of size and siting for the proposed use, and are likely to become available in a reasonable time . . .

"15. Only if it can be demonstrated that all town centre options have been thoroughly addressed and a view taken on availability, should less central sites in out of centre locations be considered for key town centre uses. Where development proposals in such locations fall outwith the development plan framework, it is for developers to demonstrate that town centre and edge of centre options have been thoroughly assessed. Even where a developer, as part of a sequential approach, demonstrates an out of centre location to be the most appropriate, the impact on the vitality and viability of existing centres still has to be shown to be acceptable . . ."

*The consideration of the application*

7 The interveners' application was for planning permission to develop a foodstore, café and petrol filling station, with associated car parking, landscaping and infrastructure, including access roads. The proposals also involved improvements to the junction with the A90 (T), the upgrading of a pedestrian underpass, the provision of footpaths and cycle ways, and improvements to adjacent roadways. A significant proportion of the former NCR site lay outside the application site. It was envisaged that vehicular access to this land could be achieved using one of the proposed access roads.

8 In his report to the respondents, the Director of City Development advised that the application was contrary to certain aspects of the employment and retailing policies of the development plan. In relation to the employment policies, in particular, the proposal was contrary to policies which required the respondents to safeguard the NCR site for business use. The director considered however that the application site was unlikely to be redeveloped for business uses in the short term, and that its redevelopment as proposed would improve the development prospects of the remainder of the NCR site. In addition, the infrastructure improvements would provide improved access which would benefit all businesses in an adjacent industrial estate.

9 In relation to the retailing policies, the director considered the application in the light of the criteria in Retailing Policy 4 of the structure plan. In relation to the first criterion he stated:

"It must be demonstrated, in the first instance, that no suitable site is available for the development either within the city/district centres or, thereafter on the edge of these centres . . . While noting that the Lochee district centre lies within the primary catchment area for the proposal, [the retail statement submitted on behalf of the interveners] examines the potential site opportunities in and on the edge of that centre and also at the Hilltown and Perth Road district centres. The applicants conclude that there are no sites or premises available in or on the edge of existing centres capable of accommodating the development under consideration. Taking account of the applicant's argument it is accepted that at present there is no suitable site available to accommodate the proposed development."

A In relation to the remaining criteria, the director concluded that the proposed development was likely to have a detrimental effect on the vitality and viability of Lochee district centre, and was therefore in conflict with the second criterion. The potential impact on Lochee could however be minimised by attaching conditions to any permission granted so as to restrict the size of the store, limit the type of goods for sale and prohibit the B provision of concessionary units. The proposal was also considered to be in conflict with the third criterion: there was no deficiency in shopping provision which the proposal would address. The fourth criterion, concerned with accessibility by modes of transport other than the car, was considered to be met. Similar conclusions were reached in relation to the corresponding criteria in Policy 45 of the local plan.

10 In view of the conflict with the employment and retailing policies, C the director considered that the proposal did not fully comply with the provisions of the development plan. He identified however two other material considerations of particular significance. First, the proposed development would bring economic benefits to the city. The closure of the NCR factory had been a major blow to the economy, but the redevelopment of the application site would create more jobs than had D been lost when the factory finally closed. The creation of additional employment opportunities within the city was considered to be a strong material consideration. Secondly, the development would also provide a number of planning benefits. There would be improvements to the strategic road network which would assist in the free flow of traffic along the A90 (T). The development would also assist in the redevelopment of the whole of the former NCR site through the provision of enhanced E road access and the clearance of buildings from the site. The access improvements would also assist in the development of an economic development area to the west. These benefits were considered to be another strong material consideration.

11 The director concluded that the proposal was not in accordance with the development plan, particularly with regard to the employment and F retailing policies. There were however other material considerations of sufficient weight to justify setting aside those policies and offering support for the development, subject to suitable conditions. He accordingly recommended that consent should be granted, subject to specified conditions.

12 The application was considered by the respondents' entire council sitting as the respondents' development quality committee. After hearing G submissions on behalf of the interveners and also on behalf of the petitioners, the respondents decided to follow the director's recommendation. The reasons which they gave for their decision repeated the director's conclusions:

> "It is concluded that the proposal does not undermine the core land use and environmental strategies of the development plan. The planning and H economic benefits that would accrue from the proposed development would be important to the future development and viability of the city as a regional centre. These benefits are considered to be of a significant weight and sufficient to set aside the relevant provisions of the development plan."

*The present proceedings*

**13** The submissions on behalf of the petitioners focused primarily upon an alleged error of interpretation of the first criterion in Retailing Policy 4 of the structure plan, and of the equivalent criterion in Policy 45 of the local plan. If there was a dispute about the meaning of a development plan policy which the planning authority was bound to take into account, it was for the court to determine what the words were capable of meaning. If the planning authority attached a meaning to the words which they were not properly capable of bearing, then it made an error of law, and failed properly to understand the policy. In the present case, the director had interpreted "suitable" as meaning "suitable for the development proposed by the applicant"; and the respondents had proceeded on the same basis. That was not however a tenable meaning. Properly interpreted, "suitable" meant "suitable for meeting identified deficiencies in retail provision in the area". Since no such deficiency had been identified, it followed on a proper interpretation of the plan that the first criterion did not require to be considered: it was inappropriate to undertake the sequential approach. The director's report had however implied that the first criterion was satisfied, and that the proposal was to that extent in conformity with the sequential approach. The respondents had proceeded on that erroneous basis. They had thus failed to identify correctly the extent of the conflict between the proposal and the development plan. In consequence, their assessment of whether other material considerations justified a departure from the plan was inherently flawed.

**14** The respondents had compounded their error, it was submitted, by treating the proposed development as definitive when assessing whether a "suitable" site was available. That approach permitted developers to drive a coach and horses through the sequential approach: they could render the policy nugatory by the simple expedient of putting forward proposals which were so large that they could only be accommodated outside town and district centres. In the present case, there was a site available in Lochee which was suitable for food retailing and which was sequentially preferable to the application site. The Lochee site had been considered as part of the assessment of the proposal, but had been found to be unsuitable because it could not accommodate the scale of development to which the interveners aspired.

**15** In response, counsel for the respondents submitted that it was for the planning authority to interpret the relevant policy, exercising its planning judgment. Counsel accepted that, if there was a dispute about the meaning of the words in a policy document, it was for the court to determine as a matter of law what the words were capable of meaning. The planning authority would only make an error of law if it attached a meaning to the words which they were not capable of bearing. In the present case, the relevant policies required all the specified criteria to be satisfied. The respondents had proceeded on the basis that the proposal failed to accord with the second and third criteria. In those circumstances, the respondents had correctly concluded that the proposal was contrary to the policies in question. How the proposal had been assessed against the first criterion was immaterial.

**16** So far as concerned the assessment of "suitable" sites, the interveners' retail statement reflected a degree of flexibility. There had been

A a consideration of all sites of at least 2.5 hectares, whereas the application site extended to 6.68 hectares. The interveners had also examined sites which could accommodate only food retailing, whereas their application had been for both food and non-food retailing. The Lochee site extended to only 1.45 hectares, and could accommodate a store of only half the size proposed. It also had inadequate car parking. The director, and the respondents, had accepted that it was not a suitable site for these reasons.
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*Discussion*

17 It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86, 94, per Woolf J, affirmed (1986) 54 P & CR 361; *Horsham*
C *District Council v Secretary of State for the Environment* (1991) 63 P & CR 219, 225–226, per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by
D section 25 of the 1997 Act. The effect of the predecessor of section 25, namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with which the other members of the House expressed their agreement. At p 1459, his
E Lordship observed:

> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan
F which is relevant to the application or fails properly to interpret it."

18 In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde
G described as "a proper interpretation" of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or
H irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a "proper interpretation" of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in

decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

**19** That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780, per Lord Hoffmann. Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.

**20** The principal authority referred to in relation to this matter was the judgment of Brooke LJ in *R v Derbyshire County Council, Ex p Woods* [1997] JPL 958, 967. Properly understood, however, what was said there is not inconsistent with the approach which I have described. In the passage in question, Brooke LJ stated:

> "If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision-maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy."

By way of illustration, Brooke LJ referred to the earlier case of *Northavon District Council v Secretary of State for the Environment* [1993] JPL 761, which concerned a policy applicable to "institutions standing in extensive grounds". As was observed, the words spoke for themselves, but their application to particular factual situations would often be a matter of judgment for the planning authority. That exercise of judgment would only be susceptible to review in the event that it was unreasonable. The latter case might be contrasted with the case of *R (Heath & Hampstead Society) v Vlachos* [2008] 3 All ER 80, where a planning authority's decision that a replacement dwelling was not "materially larger" than its predecessor,

within the meaning of a policy, was vitiated by its failure to understand the policy correctly: read in its context, the phrase "materially larger" referred to the size of the new building compared with its predecessor, rather than requiring a broader comparison of their relative impact, as the planning authority had supposed. Similarly in *City of Edinburgh Council v Scottish Ministers* 2001 SC 957 the reporter's decision that a licensed restaurant constituted "similar licensed premises" to a public house, within the meaning of a policy, was vitiated by her misunderstanding of the policy: the context was one in which a distinction was drawn between public houses, wine bars and the like, on the one hand, and restaurants, on the other.

**21** A provision in the development plan which requires an assessment of whether a site is "suitable" for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word "suitable", in the policies in question, means "suitable for the development proposed by the applicant", or "suitable for meeting identified deficiencies in retail provision in the area", is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed.

**22** It is of course true, as counsel for the respondents submitted, that a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion, on the question whether the proposal was in accordance with the policy, as it would have reached if it had construed the policy correctly. That is not however a complete answer to a challenge to the planning authority's decision. An error in relation to one part of a policy might affect the overall conclusion as to whether a proposal was in accordance with the development plan even if the question whether the proposal was in conformity with the policy would have been answered in the same way. The policy criteria with which the proposal was considered to be incompatible might, for example, be of less weight than the criteria which were mistakenly thought to be fulfilled. Equally, a planning authority might misconstrue part of a policy but nevertheless reach the same conclusion as it would otherwise have reached on the question whether the proposal was in accordance with the development plan. Again, however, that is not a complete answer. Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations.

**23** In the present case, the Lord Ordinary rejected the petitioners' submissions on the basis that the interpretation of planning policy was always primarily a matter for the planning authority, whose assessment could be challenged only on the basis of unreasonableness: there was, in particular, more than one way in which the sequential approach could reasonably be applied: [2010] CSOH 128 at [23]. For the reasons I have explained, that approach does not correctly reflect the role which the court has to play in the determination of the meaning of the development plan. A different approach was adopted by the Second Division: since, it was said,

the proposal was in head-on conflict with the retail and employment policies of the development plan, and the sequential approach offered no justification for it, a challenge based upon an alleged misapplication of the sequential approach was entirely beside the point: 2011 SC 457, para 38. For the reasons I have explained, however, even where a proposal is plainly in breach of policy and contrary to the development plan, a failure properly to understand the policy in question may result in a failure to appreciate the full extent or significance of the departure from the development plan which the grant of consent would involve, and may consequently vitiate the planning authority's determination. Whether there has in fact been a misunderstanding of the policy, and whether any such misunderstanding may have led to a flawed decision, has therefore to be considered.

**24** I turn then to the question whether the respondents misconstrued the policies in question in the present case. As I have explained, the petitioners' primary contention is that the word "suitable", in the first criterion of Retailing Policy 4 of the structure plan and the corresponding Policy 45 of the local plan, means "suitable for meeting identified deficiencies in retail provision in the area", whereas the respondents proceeded on the basis of the construction placed upon the word by the Director of City Development, namely "suitable for the development proposed by the applicant". I accept, subject to a qualification which I shall shortly explain, that the director and the respondents proceeded on the latter basis. Subject to that qualification, it appears to me that they were correct to do so, for the following reasons.

**25** First, that interpretation appears to me to be the natural reading of the policies in question. They have been set out in paras 4 and 5 above. Read short, Retailing Policy 4 of the structure plan states that proposals for new or expanded out of centre retail developments will only be acceptable where it can be established that a number of criteria are satisfied, the first of which is that "no suitable site is available" in a sequentially preferable location. Policy 45 of the local plan is expressed in slightly different language, but it was not suggested that the differences were of any significance in the present context. The natural reading of each policy is that the word "suitable", in the first criterion, refers to the suitability of sites for the proposed development: it is the proposed development which will only be acceptable at an out of centre location if no suitable site is available more centrally. That first reason for accepting the respondents' interpretation of the policy does not permit of further elaboration.

**26** Secondly, the interpretation favoured by the petitioners appears to me to conflate the first and third criteria of the policies in question. The first criterion concerns the availability of a "suitable" site in a sequentially preferable location. The third criterion is that the proposal would address a deficiency in shopping provision which cannot be met in a sequentially preferable location. If "suitable" meant "suitable for meeting identified deficiencies in retail provision", as the petitioners contend, then there would be no distinction between those two criteria, and no purpose in their both being included.

**27** Thirdly, since it is apparent from the structure and local plans that the policies in question were intended to implement the guidance given in NPPG 8 in relation to the sequential approach, that guidance forms part of the relevant context to which regard can be had when interpreting the policies. The material parts of the guidance are set out in para 6 above.

A They provide further support for the respondents' interpretation of the policies. Para 13 refers to the need to identify sites which can meet the requirements of developers and retailers, and to the scope for accommodating the proposed development. Para 14 advises planning authorities to assist the private sector in identifying sites which could be suitable for the proposed use. Throughout the relevant section of the guidance, the focus is upon the
B availability of sites which might accommodate the proposed development and the requirements of the developer, rather than upon addressing an identified deficiency in shopping provision. The latter is of course also relevant to retailing policy, but it is not the issue with which the specific question of the suitability of sites is concerned.

**28** I said earlier that it was necessary to qualify the statement that the director and the respondents proceeded, and were correct to proceed, on
C the basis that "suitable" meant "suitable for the development proposed by the applicant". As para 13 of NPPG 8 makes clear, the application of the sequential approach requires flexibility and realism from developers and retailers as well as planning authorities. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers' and retailers' taking an inflexible
D approach to their requirements. On the other hand, as Sedley J remarked in *R v Teesside Development Corpn, Ex p William Morrison Supermarket plc* [1998] JPL 23, 43, to refuse an out of centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises that developers and retailers should have regard to the circumstances of the particular town
E centre when preparing their proposals, as regards the format, design and scale of the development. As part of such an approach, they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale may fit better with existing development in the town centre. The guidance also advises that planning authorities
F should be responsive to the needs of retailers. Where development proposals in out of centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge of centre options have been thoroughly assessed. That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable.

G **29** It follows from the foregoing that it would be an over-simplification to say that the characteristics of the proposed development, such as its scale, are necessarily definitive for the purposes of the sequential test. That statement has to be qualified to the extent that the applicant is expected to have prepared his proposals in accordance with the recommended approach: he is, for example, expected to have had regard to the circumstances of the particular town centre, to have given consideration to the scope for
H accommodating the development in a different form, and to have thoroughly assessed sequentially preferable locations on that footing. Provided the applicant has done so, however, the question remains, as Lord Glennie observed in *Lidl UK GmbH v Scottish Ministers* [2006] CSOH 165 at [14], whether an alternative site is suitable for the proposed development, not

whether the proposed development can be altered or reduced so that it can be made to fit an alternative site.

**30** In the present case, it is apparent that a flexible approach was adopted. The interveners did not confine their assessment to sites which could accommodate the development in the precise form in which it had been designed, but examined sites which could accommodate a smaller development and a more restricted range of retailing. Even taking that approach, however, they did not regard the Lochee site vacated by the petitioners as being suitable for their needs: it was far smaller than they required, and its car parking facilities were inadequate. In accepting that assessment, the respondents exercised their judgment as to how the policy should be applied to the facts: they did not proceed on an erroneous understanding of the policy.

**31** Finally, I would observe that an error by the respondents in interpreting their policies would be material only if there was a real possibility that their determination might otherwise have been different. In the particular circumstances of the present case, I am not persuaded that there was any such possibility. The considerations in favour of the proposed development were very powerful. They were also specific to the particular development proposed: on the information before the respondents, there was no prospect of any other development of the application site, or of any development elsewhere which could deliver equivalent planning and economic benefits. Against that background, the argument that a different decision might have been taken if the respondents had been advised that the first criterion in the policies in question did not arise, rather than that criterion had been met, appears to me to be implausible.

*Conclusion*

**32** For these reasons, and those given by Lord Hope of Craighead DPSC, with which I am in entire agreement, I would dismiss the appeal.

**LORD HOPE OF CRAIGHEAD DPSC**

**33** The question that lies at the heart of this case is whether the respondents acted unlawfully in their interpretation of the sequential approach which both the structure plan and the relevant local plan required them to adopt to new retail developments within their area. According to that approach, proposals for new or expanded out of centre developments of this kind are acceptable only where it can be established, among other things, that no suitable site is available, in the first instance, within and thereafter on the edge of city, town or district centres. Is the test as to whether no suitable site is available in these locations, when looked at sequentially, to be addressed by asking whether there is a site in each of them in turn which is suitable for the proposed development? Or does it direct attention to the question whether the proposed development could be altered or reduced so as to fit into a site which is available there as a location for this kind of development?

**34** The sequential approach is described in National Planning Policy Guidance Policy 8, *Town Centres and Retailing*, para 5.2 as a fundamental principle of NPPG 8. In *R v Rochdale Metropolitan Borough Council, Ex p Milne (No 2)* [2001] Env LR 406, paras 48–49, Sullivan J said that it

A was not unusual for development plan polices to pull in different directions and, having regard to what Lord Clyde said about the practical application of the statutory rule in *City of Edinburgh v Secretary of State for Scotland* [1997] 1 WLR 1447, 1459, that he regarded as untenable the proposition that if there was a breach of any one policy in a development plan a proposed development could not be said to be "in accordance with the plan". In para 52, he said that the relative importance of a given policy to the overall objectives of the development plan was essentially a matter for the judgment of the local planning authority and that a legalistic approach to the interpretation of development plan policies was to be avoided.

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35 I see no reason to question these propositions, to which Mr Kingston for the petitioners drew our attention in his reply to Mr Armstrong's submissions for the respondents. But I do not think that they are in point in this case. We are concerned here with a particular provision in the planning documents to which the respondents are required to have regard by the statute. The meaning to be given to the crucial phrase is not a matter that can be left to the judgment of the planning authority. Nor, as the Lord Ordinary put it in his opinion at [2010] CSOH 128 at [23], is the interpretation of the policy which it sets out primarily a matter for the decision-maker. As Mr Thomson for the interveners pointed out, the challenge to the respondents' decision to follow the director's recommendation and approve the proposed development is not that it was *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) but that it was unlawful. I agree with Lord Reed JSC that the issue is one of law, reading the words used objectively in their proper context.

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E 36 In *Lidl UK GmbH v Scottish Ministers* [2006] CSOH 165 the appellants appealed against a decision of the Scottish Ministers to refuse planning permission for a retail unit to be developed on a site outwith Irvine town centre. The relevant provision in the local plan required the sequential approach to be adopted to proposals for new retail development outwith the town centre boundaries. Among the criteria that had to be satisfied was the requirement that no suitable sites were available, or could reasonably be made available, in or on the edge of existing town centres. In other words, town centre sites were to be considered first before edge of centre or out of town sites. The reporter held that the existing but soon to be vacated Lidl town centre site was suitable for the proposed development, although it was clear as a matter of fact that this site could not accommodate it. In para 13, Lord Glennie noted that counsel for the Scottish Ministers accepted that a site would be "suitable" in terms of the policy only if it was suitable for, or could accommodate, the development as proposed by the developer. In para 14, he said that the question was whether the alternative town centre site was suitable for the proposed development, not whether the proposed development could be altered or reduced so that it could fit in to it.

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37 Mr Kingston submitted that Lord Glennie's approach would rob the sequential approach of all its force, and in the Inner House it was submitted that his decision proceeded on a concession by counsel which ought not to have been made: 2011 SC 457, para 31. But I think that Lord Glennie's interpretation of the phrase was sound and that counsel was right to accept that it had the meaning which she was prepared to give to it. The wording of the relevant provision in the local plan in that case differed slightly from that

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with which we are concerned in this case, as it included the phrase "or can reasonably be made available". But the question to which it directs attention is the same. It is the proposal for which the developer seeks permission that has to be considered when the question is asked whether no suitable site is available within or on the edge of the town centre.

**38** The context in which the word "suitable" appears supports this interpretation. It is identified by the opening words of the policy, which refer to "proposals for new or expanded out of centre retail developments" and then set out the only circumstances in which developments outwith the specified locations will be acceptable. The words "the proposal" which appear in the third and fifth of the list of the criteria which must be satisfied serve to reinforce the point that the whole exercise is directed to what the developer is proposing, not some other proposal which the planning authority might seek to substitute for it which is for something less than that sought by the developer. It is worth noting too that the phrase "no suitable site is available" appears in Policy 46 of the local plan relating to commercial developments. Here too the context indicates that the issue of suitability is directed to the developer's proposals, not some alternative scheme which might be suggested by the planning authority. I do not think that this is in the least surprising, as developments of this kind are generated by the developer's assessment of the market that he seeks to serve. If they do not meet the sequential approach criteria, bearing in mind the need for flexibility and realism to which Lord Reed JSC refers in para 28 above, they will be rejected. But these criteria are designed for use in the real world in which developers wish to operate, not some artificial world in which they have no interest doing so.

**39** For these reasons which I add merely as a footnote I agree with Lord Reed JSC, for all the reasons he gives, that this appeal should be dismissed. I would affirm the Second Division's interlocutor.

*Appeal dismissed.*

Ms B L Scully, Barrister

Neutral Citation Number: [2013] EWHC 2525 (Admin)

Case No: CO/670/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday August 13th 2013

**Before** :

**FRANCES PATTERSON QC**

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**Between :**

| | |
|---|---|
| **Truro City Council** | **Claimant** |
| **- and -** | |
| **Cornwall City Council** | **Defendant** |

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**Philip Coppel QC** (instructed by **Follett Stock**) for the **Claimant**
**Jonathan Clay** (instructed by **The City Solicitor**) for the **Defendant**

Hearing dates: 24th and 25th July 2013

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# Approved Judgment

Judgment
As Approved by the Court

**Frances Patterson QC:**

Introduction

1. This is a challenge by way of judicial review by Truro City Council, "the claimant", to a planning permission granted on the 26 October 2012 by Cornwall Council, "the defendant" for the demolition of two houses and construction of Truro Eastern District Centre to comprise Park and Ride, Household Waste and Recycling facility, Cornish Food Centre (Use Class A1), Energy Centre, Hub Building, residential development (97 dwellings and separate lodge house), formation of four new vehicular accesses (A39 Newquay Road), two accesses off A390 Union Hill, bus only access (A39/A390 Union Hill), car and cycle parking, open space, landscaping, and associated works.

2. The challenge was lodged on the 21st January 2013. Permission was granted on the papers by Mr Justice Collins on the 6th March 2013.

Background

3. The Planning Application was submitted by Cornwall Council, the Duchy of Cornwall and Waitrose Limited. The latter two parties have taken no part in the proceedings. The Planning Application was for the development of a green field site of some 19 ha on the eastern edge of Truro adjacent to the developed area of the city. It was a controversial development proposal. Amongst the objectors was Truro City Council, the claimant. It made representations that, inter alia,

    i) The planning application was premature;

    ii) The proposal would result in the loss of high quality agricultural land;

    iii) The proposed development would cause material harm to and adversely impact upon the vitality of Truro city centre contrary to policy in PPS4;

    iv) That the proposed development was in conflict with the Development Plan, especially because new residential development in the open countryside was not justified.

4. Cornwall's Principal Planning Delivery Officer prepared lengthy reports on the application for consideration by the Council's Strategic Planning Committee. That met, first, on the 15th December 2011 to consider the application. The decision on the application was deferred on that day:

    i) To complete further work in relation to the sequential test for the retail disaggregation option;

    ii) To undertake further work on the buffer zone;

    iii) To undertake further work on the estimated traffic generation of the figures;

    iv) To undertake further work in relation to prematurity of the application.

5. A further report on those matters was prepared for consideration by the Strategic Planning Committee which met again on the 8th March 2012. At that meeting members resolved that authority be delegated to the Head of Planning and Regeneration to grant conditional planning permission, with the decision deferred and subject to:

   i) " That the application be referred to the Secretary of State pursuant to paragraph 5(1)(ii) of the Town and Country Planning (Consultation) (England) Direction 2009.

   ii) That consequent upon the Secretary of State deciding not to call in the application that the planning permission be granted subject to conditions and to the completion of a planning obligation, the heads of terms of which are set out in the report.

   iii) That authority be delegated to the Head of Planning and regeneration in consultation with the Chairman, Vice Chairman and Electoral Division Members to approve the satisfactory completion of a Section 106 planning obligation to secure the community benefits (*The request for community benefits related to the need to provide funding for a series of measures which would directly mitigate against the defined loss of trade within the city centre arising from the new retail store, particularly because of the impact on city centre food retailing) to include the establishment of a Liaison Group to help guide the distribution of the developers contributions."

6. The application was referred to the Secretary of State on the 16th June 2012. On the 7th July 2012 a letter confirming that the Secretary of State did not wish to call in the application and that the decision should remain with Cornwall Council was received from the National Planning Case Unit (NPCU).

7. On the 24th October 2012 the defendant's Development Manager, Mr Tony Lee, emailed an update note to the defendant's Head of Planning and Regeneration and Chairman of Strategic Planning. That reported on matters since the 8th March resolution. Amongst other things the note reviewed the application against the new National Planning Policy framework (NPPF) which had been published on 27th March with immediate effect.

   The note concluded:

   > "A reassessment of the application by the SPC, following the publication of the NPPF, would appear to be unwarranted and inconsistent with the NPPF presumption in favour of sustainable development which the application is clearly able to deliver. The decision by the NPCU not to call in the application would appear to be consistent with its view."

8. Planning permission was granted on the 26th October 2012 subject to 46 conditions and a planning obligation between the defendant and the Duchy of Cornwall.

9. The reason for the grant of planning permission was summarised on the decision notice as follows:

> "The proposal constitutes sustainable development which fulfils economic, social and environmental roles, contributing to a strong, competitive economy, safeguarding the viability of the city centre, delivering sustainable transport, making a small but significant housing contribution, including 34 local needs affordable housing units, is of a good standard of design, safe, accessible and which both improves integration and addresses flood risk. Whilst having what is considered to be negative landscape impacts and involves loss of agricultural land (not of the most versatile and highest quality grade), mitigation measures seek to limit impacts and address biodiversity concerns; the proposal seeks to address food production issues and delivers sustainable transport infrastructure in accordance with advice in the National planning Policy Framework such that the benefits sufficiently the identified negative impacts."

Claimant's Case

10. The claimant challenges the planning permission on six grounds. They are

i) Whether the defendant complied with its duty under s38(6) of the Planning Compulsory Purchase Act 2004;

ii) Whether the defendant gave adequate reasons for the grant of planning permission in accordance with article 31 of the Town and Country Planning (Development Management Procedure)(England) Order 2010;

iii) Whether the defendant ought to have refused planning permission on the grounds of prematurity;

iv) Whether the defendant failed to have regard to material considerations that had arisen since the resolution of the 8th March 2012 to grant consent, namely,

i. progress that had been made in the local plan and neighbourhood plan;

ii. progress that had been made on a site known as Langarth Farm.

v) Whether the defendant misdirected itself as to the availability of

(i) The sequentially superior site at Pydar Street, Truro;

(ii) On the possibility of disaggregation

vi) Whether the defendant misdirected itself as to the meaning of its affordable housing policy.

Ground One

Whether the defendant complied with its duty under section 38(6) of the Planning and Compulsory Purchase Act 2004?

Legal Framework

11. Under section70(2) of The Town and County Planning Act 1990, when a planning application is made to a local authority:

> "In dealing with such an application the authority shall have regard to provisions of the Development Plan, so far as material to the application, and to any other material considerations."

Under section 38(6) of the Planning and Compulsory Purchase Act 2004,

> "If regard is to be had to the Development Plan for the purpose of the determination to be made under the planning acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

12. The meaning of section 38(6) has been the subject of judicial decision. In *City of Edinburgh Council v the Secretary of State for Scotland and others [1997]* UKHL38 the House of Lords considered section 18(a) of the Town and Country Planning Scotland Act 1972 which is in the same terms as section 38(6) of the Planning and Compulsory Purchase Act 2004. Because a fair amount of the argument before me turned on the nature of the duty of section 38(6) imposed on a Local Planning Authority it is necessary to set out relevant parts of the judgments. Lord Clyde said at pp1457- 1459 as follows:

> "By virtue of section 18 A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought useful to talk of presumptions in this field it can be said that there is now a presumption that the Development Plan is to govern the decision on an application for planning permission. It is distinct from what has been referred to in some of the planning guidance, such as for example in paragraph 15 of PPG1 of 1988, as a presumption but what is truly an indication of a policy to be taken into account in decision-making. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the Development Plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.

> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the Development Plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he falis to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it.. He will also have to consider whether the development proposed in the application before him does or does not accord with the Development Plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of he whole plan the proposals does or does not accord with it.. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether they are considerations of such weight as to indicate that the development plan should not be accorded the priority which statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

Lord Hope said (at pp ) as follows:

> "It is not in doubt that the purpose of the amendment introduced by section 18A was to enhance the status, in this exercise of judgment, of the Development Plan.
>
> It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision taker. The Development Plan does not, even with the benefit of section 18A, have absolute authority. The planning authority is not obliged to adopt Lord Guest's words in *Simpson v Edinburgh Corporation, 1960 S.C. 313, 318, " slavishly to adhere to*" it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what has been laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the

> decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up to date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority…….
>
> The function of the court is to see that the decision taker had regard to the presumption, not to assess whether he gave enough weight to it where there were other material considerations indicating that the determination should not be made in accordance with the Development Plan."

13. In *Cala Homes (South) Ltd v Secretary Of State for Communities and Local Government [2011]* EWHC 97 Lindblom J having set out extracts from City of Edinburgh said (at paragraph 28):

> "From this analysis it is clear that although section 38(6) requires a local planning authority to recognize the priority to be given to the Development Plan, it leaves the assessment of the facts and the weighing of all material considerations with the decision-maker. It is for the decision-maker to assess the relative weight to be given to all material considerations, including the policies of the Development Plan."

The Court of Appeal in dismissing the appeal from Lindblom J's Judgment did not doubt that approach.

Argument

14. The Claimant submits that the approach required by the City of Edinburgh was not followed. The centrality of the Development Plan to the decision-making process means that it is not sufficient just to state the policies of the Development Plan and their age. If there is to be a departure from the adherence to section 38(6) the local planning authority has to identify how it has gone through the appropriate process and explain that departure. It is under a duty to act with rigour and particularity.

15. The defendant submits that it always recognised that the development was in conflict with the Development Plan. The officer reports identified the relevant local and national policy and members were correctly advised on conflict with the Development Plan and the weight to be attached to it because the policies were out of date. The claimant itself recognised that the policies were out of date and the attachment of less weight to Development Plan policies was entirely consistent with paragraphs 12 and 14 of the NPPF. It is unrealistic, the defendant submits, that in respect of each policy a Decision-maker is required to set out all the changes that have occurred that make the policy out of date. Such a methodology is not required by the City of Edinburgh.

Discussion

16. The starting point is the Development Plan. At the material time it comprised the Cornwall Structure Plan, approved in 2004, the saved policies in the Carrick District Local Plan, adopted in 1998, and the Balancing Housing Markets DPD 2008.

17. The first report to the Strategic Planning Committee of the 15th December 2011 is some 76 pages. It dealt at some length with the various elements of the mixed use proposals identified in the planning application as a departure from the Development Plan and advised that, if members wanted to approve the application, it was one that would require referral to the Secretary of State.

18. The report began with a summary followed by a more detailed appraisal of what were seen as the key issues. The first section is headed, "The principle of development including policy considerations and prematurity." That section reads:

> "1.5 The site is located in the rural area and is outside but adjacent to the developed area of Truro. The land is not allocated in the Development Plan and the proposal has been advertised as and would constitute a departure from Saved policies in the Development Plan.
>
> 1.6 Like many centres, Truro suffers from the effects of traffic congestion. A key factor are the major traffic arteries the A39 and A390 which converge on the city from the East and West, merging in what becomes a bottle-neck at peak periods between Union Hill in the East and Arch Hill in the West. The Western Park & Ride (P&R) at Langarth has helped ease congestion and was conceived as a multi-stop strategy. This proposal to site an Eastern P&R at the Eastern confluence of the A39 and A390 seeks to build upon this success and ease traffic congestion especially at peak periods, reduce journey times, improve convenience and free up town centre parking for short stay visits . The proposed development, while allowing linked trips to the various uses, generates an additional demand which to some extent has the potential to negate the benefits arising out of P&R. The assessment of the overall transportation benefits to Truro therefore to a significant extent holds the key to whether this scheme should be encouraged or resisted, having regard to the other pros, cons and material considerations implicit in such a complex proposal, including any conflict with aspects of the Development Plan.
>
> 1.7 Given the age of the Development Plan, the status and time frame for the Core Strategy (estimate 2014), the absence of any interim policy guidance likely to hold substantial weight emerging in the interim and the present transportation situation, it is necessary to consider the issue of prematurity. In short, do the strategic nature of the proposals give rise to issues which should only rightly be resolved through the Plan process ? My considered view is that there is

sufficient evidence of need to support the location of a P&R, moreover that this location is optimum and transportation benefits of the proposal are evident. The Development Plan is outdated and the need for infrastructure to serve the City's transportation and waste needs is well known and has been the subject of much discussion and consideration. In the absence of up to date policy guidance this opportunity for much-needed infrastructure to ease congestion and improve opportunities for Truro, while a Departure, is not premature and should not be set aside lightly.

1.8 The extent of housing proposed, 98 units, is not significant in strategic housing supply terms. As such I consider that the recent planning appeal decision at Winchester involving Cala Homes which was dismissed as being of a strategic nature and premature in advance of the Core Strategy process-which itself was well advanced-are not comparable."

It is clear from that section that the transportation aspects of the development were regarded as a highly material consideration.

The next section of the report proceeds to deal with transportation issues. As there was no dispute on the transportation aspect they formed very little part of the argument before me. Nevertheless, they are part of the overall consideration that the planning committee had to make of the planning application. Relevant parts of that section are as follows:

1.9 Transportation issues, principally relating to the development of P&R, are the driving force behind the proposals and are therefore among the key considerations. Congestion in the City is an increasing factor, with the A39 and A390 feeding into the City from two directions, creating a central bottle-neck which affects how traffic by-passes and accesses the City. It is the management of how traffic is funnelled through and to the City that P&R, along with other associated highway measures, is designed to improve. Congestion is an important factor in the quality of life of residents, sustainability and in the economic health of the City……

1.12 Much more is said in the report below about the pros and cons of the location and the proposals. However, my conclusion is that the application site is the optimum site available for an Eastern P&R, best suited as it sits at the confluence of the A39 and A390, capturing traffic from both the North and East with the need for only one set of infrastructure and most conveniently located for maximum use.

Highways colleagues acknowledge this is a complex development with an impact on the highway network and conclude there are considerable advantages which will accrue from the implementation of the scheme as a whole. This relates primarily to the completion of the East-West linked Park & Ride scheme for Truro and the attendant benefits it would bring to the people of Truro. A 'do nothing' approach gives rise to serious concerns that in a few years considerable traffic delays along the corridor into Truro from the East will be compounded. The capacity improvements of removing 15% of inbound morning peak traffic and modest evening peak improvement with the 25% capacity improvement at Union Hill is based on the position estimated to exist at 2018. It must be acknowledged that the benefits of network improvements tend to fall away gradually to present levels but that is dependent upon traffic growth (at present levels this is at a flat rate) and other factors. The proposals also offer improved pedestrian and cycle crossing facilities at a number of junction, improved cycle and passenger transport links. The initial gains in capacity, reduced congestion and improved journey times will diminish over time. The traffic modelling demonstrated Truro's roads would benefit from the proposals and this infrastructure improvement would be a key asset to the City thereby contribute positively to Truro's future and its key role in the local economy, about which more is said below

1.13 While some do not consider this site to be the best P&R solution (and these issues are explored more fully in the report), engineers do and overall I concur. There is though considerable support for P&R and varying degrees of support for other elements of the scheme. There is also a great deal of opposition to P&R to the development of the valley and to the mixed use elements of the scheme. It is unlikely that the greater benefits of the provision of the Eastern Park and Ride will be achievable in the future unless this scheme is considered in whole as a package. On balance the transportation improvement opportunities are considered vital to the City's transportation strategy and overall outweigh the negative scheme impacts.

Although an on-balance judgment the report regarded the transportation benefits described in full in the report as sufficient in themselves to outweigh the negative impacts of the scheme. It is apparent that the officers were bringing clearly to the

attention of the members the importance of the transportation elements of the proposal as a highly material consideration.

19. The report moved on to consider the retail issues including the local economy. It concluded at paragraph 1.19 as follows:

> 1.19 Having regard to the range of positive, negative and neutral impacts associated with this proposal it is unlikely to affect any planned town centre investment or the delivery of Development Plan allocations, whilst it could also add to choice and competition. There are however some negative impacts associated with the proposal, including the diversion of up to 8-9% of Truro city centre's convenience goods turnover and a potential impact upon the regular Farmers Market within the city centres. However, in overall terms, it is not considered that the proposed development will affect the health of the city centre as a whole. On balance, the potential benefits to the Cornish food industry through this potentially innovative initiative are such that the retail proposals are recommended favourably.

It should be recorded at this stage that the council had employed independent retail consultants, GVA Grimley, to advise them on retail issues.

20. The defendant employed independent consultants also to advise on ecology matters as the site was a Greenfield site and close to a special area of conservation, a site of special scientific interest and a site of county wildlife importance. With mitigation, the measures proposed were regarded as sufficient to negate the potential impact on each of the ecological receptors.

21. Landscape impact was assessed as negative. Design and layout were assessed with the proposal being recorded as extremely well-designed producing a scheme of good quality.

22. Agricultural issues were reviewed concluding that there would be a loss of versatile agricultural land and the loss of land to a farmer.

23. The household waste and recycling centre (HWRC) was recorded as a much-needed and long-overdue facility. Its location at the edge of the city was said to be ideal to minimise long-distance trips and to enable heavy vehicles servicing the site to avoid Truro.

24. Although not an allocated housing site the provision, within the application, for 97 houses, including affordable housing, was said to make a valuable contribution to the housing stock as there was an unmet 5-year housing supply target.

25. A planning obligation with the heads of terms placed before the committee was recommended as necessary to make the development acceptable in planning terms. The recommendation was:

1.35 It is recommended that the transport infrastructure and other benefits of the proposal are substantial and outweigh the harm identified, in particular in relation to landscape impacts and conflicts with aspects of the Development Plan and that permission be granted on the basis outlined on the front page of this report.

26. The report then proceeded to deal with each of the issues in greater detail.

27. Section 6 dealt with the relevant local, national, regional policy guidance. In that section the component parts of the statutory Development Plan are identified. The report recited that the Cornwall Structure Plan and Carrick District-wide Local Plan were both dated within the context of the national planning policy arena. Part of the site had been identified in the Truro and Three Milestone Area Action Plan (AAP) as a district centre, Park & Ride, potential waste and recycling site and housing option (urban area) but that AAP could not be progressed without further work through the core strategy (CS). As a result the AAP could be afforded no material weight and only limited weight could be afforded to the core strategy. The Truro and Kenwyn neighbourhood plan had not progressed to any consultation stage. As a result no weight could be afforded to it.

28. Section 9, of the report provided an assessment of the key planning issues. Having set out the parts of the Development Plan, the then-draft NPPF and the emerging parts of the Development Plan the report continued.

> "I am of the opinion that there is sufficient evidence of transportation need and benefits to public transport and wider non car models of travel such that support may be given in principle to siting a P&R in advance of further policy progression. This location provides the optimum transportation benefits securing access from traffic from both the East and the North before entering the City traffic bottle-neck between Tregolls Road and Morlaix Avenue. The Development Plan is outdated and the need for infrastructure to serve the City's transportation and waste needs is well known and has been the subject of much discussion and consideration. In the absence of an up to date Development Plan and policy guidance this opportunity for much-needed infrastructure to ease congestion and improve opportunities for Truro, while a Departure, is not considered to be premature and should not be set aside lightly.
>
> The co-location of mixed uses is a positive element of the scheme and there are significant benefits arising from co-location which are discussed elsewhere. The introduction of a new HWRC will benefit the residents of Truro and the wider area who currently have to travel significant distances to United Downs for recycling. The retail offer has the potential to add value to the Cornish food industry without significant adverse effects on the centre. Combined trips may help towards reducing congestion and the detailed traffic implications,

positive and negative are explored in the transportation chapter of this report.

As such it can be seen that the development, while contrary to the provisions of the Development Plan, is consistent in part with the evidence which informed the preparation of emerging guidance and the development has the potential for both positive and negative impacts. It is little different from many development proposals in this latter regard and though agricultural, immediately borders the Eastern part of the city and in principle would be considered to be an urban extension of the city."

29. The report concluded by referring to the significant transportation, waste, housing and potential benefits to the Cornish food industry as overriding issues associated with the benefits of the development of the site which justified approval and outweighed the negative impacts of the scheme.

30. Mr Coppel QC, for the claimant, accepted that the conflict with the Development Plan was acknowledged on the face of the report but submitted that the defendant has fallen into error.

31. In particular, he referred to the Carrick District Local Plan and the retail policies within that document which focused retail development into the town centres, including Truro, to enhance their vitality and viability and which were to resist out of town shopping initiatives. Saved policies 7(a) and 7(g) were relied upon. They read:

"Policy 7A

Retail developments within Falmouth, Penryn and Truro will be consolidated within or adjoining the central shopping area identified on the Proposals map. Proposals for significant development outside of these areas will be required to show that the needs of the area cannot be adequately provided for within or adjoining the Central Shopping Area having regard for the need for flexibility in respect of the format, design and scale of development (including the amount of parking) and it would have no significant adverse impact upon the long term viability and vitality of the centre as a whole.

Policy 7G

Proposals for supermarket and superstores located outside of the town centres of Falmouth, Penryn and Truro will only be permitted where the needs of the area cannot be accommodated within or adjoining the central shopping areas identified in Policy 7A and where all of the following criteria are met:-

i) There is no significant conflict with policies for the environment and built environment;

ii) The development would have no significant adverse impact upon the vitality and viability of the centre as a whole when considered on its own or together with any other recent and committed large scale developments in the locality;

iii) Adequate parking can be provided in accordance with approved standards as set out in Policy 5EA;

iv) The development would not involve the loss of industrial land or buildings;

v) A safe means of access exists or can be provided and the roads leading to the site are capable of catering for the volume of traffic likely to be generated;

vi) The site should allow for satisfactory landscaping particularly in respect of large car parking areas;

vii) The scale and design being compatible with surrounding land uses;

viii) There are no problems in the provision of essential services including water supply, surface water and sewage disposal;

ix) The development is accessible to public transport, cyclists and pedestrians.

Where any future changes to the retail character of such developments would threaten the vitality and viability of a town centre shopping area, the district planning authority will seek an obligation under section 106 of the Town and Country Planning Act 1990 to limit the range of goods sold and to restrict future sub-divisions."

He submitted that there was no reference to the conflict with those policies and why they were out of date.

32. The saved policies from the Carrick District Local Plan were adopted in 1998. They were based on PPG6 published in 1996. Since that time that PPG had been replaced by a revised PPS6 and then by PPS4. Policies in the local plan were of some 13 years' or so vintage. It is quite right that the chronological age of a policy is of little or no relevance if the policy itself is reflective of the National Planning Policy position. Policies from the Cornwall Structure Plan were not referred to by the claimant in this context. But the emphasis in national retail policy had developed and that was something to be considered in the report.

33. The report sets out that the council had taken independent advice from GVA Grimley who had prepared the Cornwall Retail Study of 2010. They were asked to consider the proposals in the context of the Development Plan and other material planning policy considerations such as PPS4: Planning for Sustainable Economic Growth (2009) together with the review of all relevant application documents. The retail section of

the report is, in itself, some 14 pages in length. The retail section of the report reviewed the Development Plan policy position as follows:

> "Within the Local Plan proposals map the application site lies outside of the defined Central Shopping Area in Truro city centre and, given the distance to this defined area, can be classified as an out of centre location. On the basis of this definition, Policy 7G of the Local Plan, Policy EC6 of RPG10 and Policy 14 of the Structure Plan will apply to this proposal. In addition, the proposed development should also be considered against policies EC14-17 of PPS4.
>
> There is not a Development Plan policy to support the application site becoming a defined district centre in the local retail hierarchy and therefore it should be treated as an out-of-centre development proposal. No material weight can be afforded to the draft AA in advance of the process to pursue the Council's Core Strategy through to adoption. This reinforces the need to define the application site as an out-of-centre location."

34. It then reviewed issues of retail capacity, disaggregation of the retail aspects of the development and, following the sequential approach, reviewed the analysis submitted by the applicant on alternative development sites. It then concluded

> "Therefore, on the basis that it can be concluded that the retail elements of the proposed development cannot be disaggregated, it is considered that the retail elements of the proposed development meet the provisions of the sequential approach as set out in Policy 7G of the Carrick District-wide local Plan and policies EC15 and EC17.1(i) of PPS4."

35. The report then proceeded to look at the retail impact of the proposals against the criteria in the then-current PPS4. It concluded that the health of the city centre as a whole would not experience any significant adverse impact. The summary and conclusions to this section read:

> "Policy EC17.1 of PPS4 indicates that planning applications for main town centres uses that are not in an existing centre and not in accordance with an up to date development pan should be refused where the applicant has not demonstrated compliance with the requirements of the sequential approach or there is clear evidence that the proposal is likely to lead to significant adverse impacts in terms of any one of the tests at policies EC16.1 or EC10.2 of PPS4
>
> In this instance, the compliance of the proposed development with the sequential approach is heavily influenced by the ability to disaggregate the Waitrose and Cornish Food Hall retail floor space elements. The applicants' case is reliant on the financial link between these elements and there is some missing

information/analysis from what otherwise is a prima facie justification that the Cornish Food Hall requires the financial support of the proposed Waitrose.

If weight is afforded to the benefits of the Cornish Food Hall use to the local economy and accepting the applicant's case that the proposed development is the only way of providing this use in a financially viable format, then a conclusion can be made that disaggregation of these retails elements is not a realistic option. On this basis, alternative sites should be assessed on the basis of their ability to accommodate the entire retail element of the proposed development and analysis has found that there are unlikely to be any suitable, available, and viable alternative locations either within or on the edge of Truro city centre.

With regard to the impact of the proposed development, a decision will need to judge whether any of the negative aspects of the scheme outlined about constitute a significant adverse impact. If it is considered that there are one or more significant adverse impacts, PPS4 suggests that the application should be refused under Policy EC17.1 (although this does not side-step need to take account of the Development Plan and other material planning considerations). None of the impacts associated with the proposed development could be likely to be classified as significantly adverse in their own right.

As such this proposal falls to be considered under EC17.2 of PPS4 which notes that planning application should be determined by taking account of the positive and negative impacts of the proposal in terms of policies EC10.2 and EC16.1 and any other material considerations."

Because the members wanted more information on the issue of the sequential test and disaggregation further work was requested from the applicant's consultants. That was then analysed in the second report of March 8th 2012 under the heading "Sequential Test and Retail Disaggregation."

36. The conclusions on that aspect began by reminding members of the national position as follows:

> "2.21 Policy EC17.1 of PPS4 indicates that planning applications for main town centre uses that are not in an existing centre and not in accordance with an up to date Development Plan should be refused where the applicant has not demonstrated compliance with the requirements of the sequential approach or there is clear evidence that the proposal is likely to lead to significant adverse impacts in terms of any one of the tests at policies EC16.1 or EC10.2 of PPS4."

The report proceeded by restating the position on retail impact and then continued :

> "2.25 As such, officers remain of the opinion that whilst the proposal will have a negative impact on Truro city centre it is not large enough on its own to suggest a significant adverse impact or fundamentally affect the overall health of the city centre. On this basis, and accepting that the sequential test has been met, the application cannot be resisted under EC17.1 of PPS4 and should be determined based upon the relative merits of the case.
>
> 2.26 It remains the position that the Council needs to control the future use of the proposed ToC unit to ensure that it is occupied by a ToC-style operation and that it cannot become part of an expanded Waitrose store in the future.
>
> 2.27 The sequential report demonstrates that there are no suitable sites to accommodate the two retail units if disaggregated. There is no doubt a prima facie case regarding financial viability can be made, given that this is a new and untested retail format in Cornwall. In accepting the assertion that the ToC unit must be located adjacent to the proposed Waitrose store and receive financial support from Waitrose, then we accept the case against disaggregation is proven as far as it can reasonably be expected with a new and innovative venture such as the one proposed."

The final conclusion was set out in paragraph 7.4 which reads:

> "7.4 The issues continue to hinge upon whether the significant transportation benefits of Park & Ride including improved capacity and improvements to non car modes, (notwithstanding that the mixed use element will negate some of those benefits), together with the wider waste, housing and potential benefits to the Cornish food industry, (notwithstanding the limited adverse retail impacts) are such that they sufficiently outweigh the negative landscape and other identified impacts."

The recommendation of the second report was that planning permission should be granted subject to conditions.

37. The update note of October 24th 2012 considered the effect of the NPPF as follows, where material:

> "2.1 The NPPF is also material in that it scrapped the PPGs and PPSs and replaced them with a requirement for development that is sustainable to go ahead, without delay and it provides a presumption in favour of

> sustainable development. The framework sets out clearly what could make a development unsustainable and provides 12 principles to support sustainable development.
>
> The reports considered by SPC referred to the draft NPPF but its introduction post dated the March SPC. The sequential test for retail development remains and is enhanced by an impact test in the NPPF. Although the NPPF is not specifically addressed in the Officers report the assessment by officers and consultants engaged to give detailed advice on these matters is sufficiently close to the principles of the NPPF so as not to be materially deficient or undermined by the publication of the NPPF. The objectives of the development to achieve improvement to the economy, transport, waste and housing needs of people in Truro and beyond in a sustainable way is evident throughout the application and reports."

38. What the reports and update note demonstrate is a consistent theme of identifying and weighing material considerations that, in the event, overrode any conflict with the Development Plan. The transportation, waste and housing benefits, in particular, were stated throughout the process as being other material considerations that indicated that planning permission should be granted.

39. On analysis it is apparent, in my judgment, that the defendant was aware of the primacy of the Development Plan; it was not relegated, as submitted, to the category of other material considerations. The conflict of the proposed development with the Development Plan was recognised throughout the process as evidenced in the reports to the committee and by referral to the NPCU. It is important to read the reports as a whole. When doing so it is apparent that the defendant did apply rigour to its approach by first looking at the Development Plan position and then considering other material considerations and considering what weight was to be attached to them.

40. Even when focusing on the retail aspects it is apparent from what I have set out above that the report took the Development Plan as its starting point, then considered national policy and reached conclusions on the acceptability or otherwise of the proposal. Far from just stating the retail policies and their age, as the claimant submits, they were subject to analysis of considerably greater depth. It is apparent, therefore, that when the defendant departed from the Development Plan the reasons for so doing, on a fair reading of the reports, are clear. It is not realistic to expect every officer report to consider each Development Plan policy on an individual basis and in each case set out with particularity why that policy is no longer up to date and to be followed. The degree of particularity required will vary on a case-by-case basis. What is needed is a clear examination of the Development Plan and the policies relevant to the application in question. If it is not to be followed, because material considerations indicate otherwise, those material considerations need to be clearly set out together with the weight attached to them so that it is clear that they override the statutory Development Plan.

41. That is what the report did here. It noted at the outset that there was a conflict with the Development Plan. It noted those considerations which supported the application and those which did not, such as the landscape. It attributed weight to those material considerations such as transportation, waste disposal and housing and concluded that the weight to be attached to them was such as to override the priority that would otherwise attach to the Development Plan. Ultimately, the members agreed with that analysis and resolved to grant planning permission. The exercise was, in my judgment, conducted with appropriate rigour.

42. It follows, that ground one fails.

Ground Two

42. Whether the defendant gave adequate reasons for the grant of planning permission in accordance with article 31 of the Town and County Planning (Development Management Procedure) (England) Order 2010.

Legal framework

43. Paragraph 31 of the Town and County Planning (Development Management Procedure) (England) Order 2010 where material reads:

> "**31.**—(1) when the local planning authority gives notice of a decision or determination on an application for planning permission or for approval of reserved matters—
>
> b) where planning permission is granted, the notice shall—
>
> i. include a summary of their reasons for grant of permission
>
> ii. include a summary of the policies and proposals in the Development Plan which are relevant to the decision to grant permission; and
>
> iii. where the permission is granted subject to conditions, state clearly and precisely their full reasons for each condition imposed, specifying all policies and proposals in the Development Plan which are relevant to the decision;
>
> c) where planning permission is refused, the notice shall state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the Development Plan which are relevant to the decision."

44. That duty and its extent under its predecessor, the Town and County Planning (General Development and Procedure) Order 1995 have been reviewed in several cases relied upon by the parties.

45. In the case of *R (on the application of Tratt) v Horsham District Council* [2007] EWHC 1485 Collins J said:

“18. Although not specifically raised by either counsel, it seems to me that there was a failure here to include a summary of the relevant policies. It is in my judgment insufficient simply to identify a policy without indicating what it concerns. What is required is a summary of the relevant policies, not merely a list of policies which are considered to be relevant. The summary need be no more than a few words identifying the relevant aspect of any policy but that in my view at least must be given. Accordingly, the decision failed to comply with that part of article 22(1)(b)(i). However, as I say, that point was not taken by Mr. Kolinsky and he concentrated on what he submitted was a defect in the reason, as it was stated. He submitted that that could not on any view be regarded as a sufficient reason for granting the permission in the circumstances of this case.

20. Sullivan J helpfully sets out what led to the decision of Parliament to include article 22(1) in its present form and Sullivan J's experience in planning is of course second to none. In paragraph 53 he said this, on page 588:

> "53. Over the years the public was first enabled and then encouraged to participate in the decision-making process. The fact that, having participated, the public was not entitled to be told what the local planning authority's reasons were, if planning permission was granted, was increasingly perceived as a justifiable source of grievance, which undermined confidence in the planning system. Thus the requirement to give summary reasons for a grant of planning permission should be seen as a further recognition of the right of the public to be involved in the planning process. While the requirement to give 'full reasons' for a refusal of planning permission, or for the imposition of conditions, will principally be for the benefit of the applicant for planning permission, who will be better able to assess the prospects of an appeal to the Secretary of State, the requirement to give summary reasons for the grant of planning permission will principally be for the benefit of interested members of the public. The successful applicant for planning permission will not usually be unduly concerned to know the reasons why the local planning authority decided to grant him planning permission.

> 54. Parliament decided that this extension of the public's rights under the Planning Code was necessary even though in many cases it could reasonably be inferred that the members would have granted planning permission because they agreed with the planning officer's report. Parliament could have, but did not, limit the obligation to give summary reasons to those cases where the councillors did not accept their officers' recommendation."
>
> Pausing there, clearly, interested members of the public will be those for whom the reasons to grant will be of the greatest concern but it must be remembered that an objector may well want to know whether there is a prospect of a claim for judicial review of the decision and therefore the summary reasons will be material so that he can indeed consider whether the Council has on the face of it properly had regard to all to which it ought to have had regard. Equally, the applicant may also have an interest to know and to be satisfied that there is no legal problem in the grant because obviously if there were he would know that it might be dangerous for him to go ahead immediately in reliance upon that permission, particularly if there had been vociferous and detailed objection by interested parties to it. Accordingly, as it seems to me, the need to give reasons is based upon the same considerations as the need to give full reasons for the refusal of a planning permission but of course, as Sullivan J pointed out, so far as the applicant is concerned, if there is a refusal, it is wider than whether there was an error of law because he has to consider whether there is a chance that, were he to appeal, that appeal might meet with success."

46. The Court of Appeal in the case of *R (Siraj) v Kirklees Metropolitan Council* [2012] EWCA Civ 1286 considered what was required. Sullivan LJ said:

> "14. A local planning authority's obligation to give summary reasons when granting planning permission is not to be equated with the Secretary of State's obligation to give reasons in a decision letter when allowing or dismissing a planning appeal. I mention this because, although Mr Roe in his oral submissions before us recognised that there was indeed such a distinction between summary reasons and the reasons to be expected in a decision letter, the appellant's skeleton argument relied on the speech of Lord Brown

in South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953 at paragraph 36. It is important to remember that that case was concerned with the adequacy of reasons in a Secretary of State's decision letter. Although a decision letter should not be interpreted in a vacuum, without regard for example to the arguments that were advanced before the inspector, a decision letter is intended to be a "stand-alone" document which contains a full explanation of the Secretary of State's reasons for allowing or dismissing an appeal. By their very nature a local planning authority's summary reasons for granting planning permission do not present a full account of the local planning authority's decision-making process.

15. When considering the adequacy of summary reasons for a grant of planning permission, it is necessary to have regard to the surrounding circumstances. Precisely because the reasons are an attempt to summarise the outcome of what has been a more extensive decision-making process. For example, a fuller summary of the reasons for granting planning permission may well be necessary where the members have granted planning permission contrary to an officer's recommendation. In those circumstances, a member of the public with an interest in challenging the lawfulness of planning permission will not necessarily be able to ascertain from the officer's report whether, in granting planning permission, the members correctly interpreted the local policies and took all relevant matters into account and disregarded irrelevant matters.

16. Where on the other hand the members have followed their officers' recommendation, and there is no indication that they have disagreed with the reasoning in the report which lead to that recommendation, then a relatively brief summary of reasons for the grant of planning permission may well be adequate. Mr Roe referred us to the observations of Collins J in paragraph 28 of his judgment in R (on the application of Midcounties Co-operative Ltd) v Forest of Dean DC [2007] EWHC 1714 (Admin). For my part, I would respectfully endorse the observations of Sir Michael Harrison in paragraphs 47 to 50 of R(Ling)( Bridlington) Limited v East Riding of Yorkshire County Council [2006] EWHC 1604 (Admin)."

As was said later, in paragraph 24, "this was a summary. In that summary the respondent was not required to give reasons."

47. Richards LJ giving judgment in *R (on the application of Telford Trustee No 1. Ltd) v Telford and Wrekin Council* [2011] EWCA Civ 896 dealt with submissions that the reasons given by a local authority were insufficient because they did not explain why the main issues had been decided in favour of the applicant for planning permission as follows,:

> "If one asks why planning permission was granted, then the answer which is apparent on the face of the summary reasons is that it was granted because, so far as material, the proposal was assessed to be in accordance with PPS4. If one goes on to ask why it was assessed to be in accordance with PPS4, and in particular why it was assessed to meet the requirements of the sequential approach and the impact assessment, one is drawn ineluctably into the giving of reasons for reasons and/or the giving of reasons for rejecting the Trustees' objections. I am wholly unpersuaded that, in the circumstances of this case, it was necessary for the Council to go down that route in order to fulfil the requirement to give a summary of the reasons for the grant of planning permission." ( paragraph 57)

Argument

48. The claimant submits that the summary reasons given by the defendant on the decision notice are inadequate. This was a large controversial development. Thirteen key issues were identified in the report to committee. For many of them not a word is to be found in the reasons which consist of a "perfunctory procession of planning platitudes." By way of example there was no reference to conflicts with the Development Plan or prematurity. The development policies were simply listed.

49. The defendant submits that there is no obligation to set out all things that were looked at but which were not significant. A summary of the reasons for the grant of permission is sufficient. The identification and summary of the Development Plan policies is also sufficient.

Discussion

50. I have set out the reasons for approval above.

51. The reasons for the grant of planning permission are shortly stated but follow on from detailed officer reports the recommendations in which were ultimately followed by the Committee. The relevant Development Plan policies in the Cornwall Structure Plan 2004, the saved policies of the Carrick District-wide Local Plan 1998 and the Balancing Housing Markets DPD are listed together with their title. No criticism is made of the reasons which were set out for each of the conditions on the planning permission.

52. As Sullivan LJ said in Siraj where members have followed their officer recommendation and there is no indication that they have disagreed with the reasoning in the report leading to the recommendation then a relatively brief summary

of reasons may well be adequate. In my judgment, that is the position here. It was submitted that the voting by the members was reasonably close. That is correct, but the majority of members acceded to the recommendation that was made. In those circumstances, the fact that a significant minority were exercising their democratic right to vote against the application does not affect the approach to the giving of reasons. The members had initially been troubled by various aspects of the application before them and so had deferred the decision before delegating approval to officers on the 8th March 2012 upon being satisfied with the additional information that they received in the second report. There was no necessity, therefore, to provide extensive reasons.

53. It has to be remembered that the duty of the local planning authority was to provide reasons for the granting of planning permission. It was not to repeat each of the main issues in the report to members and set out how they were resolved. In that context, it is not surprising that there was no mention of conflict with the Development Plan or prematurity; they were not reasons for the grant of permission. They were prior issues which had arisen and been resolved by the members as part of the balancing exercise that they undertook to determine whether planning permission should be granted.

54. Retail issues are dealt with somewhat elliptically by referring to "sustainable development which fulfils the economic, social and environmental roles, contributing to a strong competitive economy safeguarding the viability of the city centre". However, that was the overall conclusion of the committee based upon advice they received about the impact on the health of the town centre as a whole and the absence of any adverse affect on the Development Plan retail proposals. To go further would be to advance into the territory of giving reasons for reasons.

55. The claimant submits that there is no reference in the reasons to residential amenity which is identified as one of the main issues in the committee report. That is true. In the first report though many of the residential amenity issues were thought to be appropriate to be dealt with by way of condition and it is clear from the last sentence of the reasons that the "benefits sufficiently outweigh the identified negative impacts" so that whatever residential disamenity there was it was outweighed by the overall benefits. Examination of the conditions on the planning permission confirms that many did deal with residential amenity issues. I do not think that the local planning authority was under a duty to do more in the reasons advanced for the grant of permission.

56. In terms of the policies they are set out, listed, and given their title. That is sufficient to identify the policy and the topic to which it relates. Read with the reasons there is sufficient for a member of the public to know what was considered and why the local planning authority thought it was appropriate to grant planning permission. If they wanted anything further they could seek the committee reports. If I am wrong on this aspect I would not have quashed the planning permission. Rather, I would have held that the deficiency did not cause the claimant or anyone else substantial prejudice. The reasons why planning permission was granted can be seen from the officer reports. The remedy then, would have been mandatory relief requiring the reasons to be made good: see *R (on the application of Prideaux) v Buckinghamshire County Council & FCC Environment UK Limited* [2013] EWHC 1054 at 168.

Ground Three: whether the application was premature ?

Legal Position

57. The case of *Arlington Securities Ltd v Secretary of State for the Environment and another* [1989] 2 EGLR 179 (CA) confirmed that the issue of prematurity could be a material consideration. The case concerned planning permission for a business park covering a site of 180 acres and possibly generating 7000 jobs. Challenged on the basis of inadequate reasons and that prematurity was not a good ground for the refusal of planning permission Nicholls LJ said:

> "Third, I can see nothing unreasonable in the view of the Secretary of State which is implicit, if not explicit, in paras 5 and 6 of his decision letter, that this development is of such a size and importance, covering, as I have said, 18 acres and generating eventually some 7000 jobs, that in the public interest its implications ought to be investigated and considered by the local plan process, and that in this case the risk of prejudice and error which could arise if a decision were made regarding this development without that process having been undertaken outweighed the prejudice resulting from Arlington's having to wait for that process to unwind. This was so because of the major implications mentioned in para 5. It was also so because of the need to find the most suitable site in Crawley borough for such a major development as mentioned in para 6.
>
> I considered that it was open to the Secretary of State to form the view that in this way and having regard to the size and importance of the development and the significance of the implications arising from the creation of thousands of new jobs, to permit the development at this stage would in this case cause demonstrable harm to interests of acknowledged importance."

The case of *Larkfleet Limited v Secretary of State for Communities & Local Government and South Kesteven District Council* [2012] EWHC 3592 considered the issue of prematurity more recently. Kenneth Parker J having reviewed the relevant policy said:

> "Prematurity as correctly understood and applied, is simply one relevant circumstance among others, and the weight to be given to it will depend crucially on the individual circumstances of each case. Prematurity no more than the completed operation of area action plans, is not a bar or practically insuperable hurdle to the grant of planning permission"

58. The relevant planning policy at the material time was set out in the Planning System: General Principles. Paragraphs 17 to 19 are material. They read:

> "17. In some circumstances, it may be justifiable to refuse planning permission on grounds of prematurity where a DPD is being prepared or is under review, but it has

not yet been adopted. This may be appropriate where a proposed development is so substantial, or where the cumulative effect would be so significant, that granting permission could prejudice the DPD by predetermining decisions about the scale, location or phasing of new development which are being addressed in the policy of the DPD. A proposal for development which has an impact on only a small area would rarely come into this category. Where there is a phasing policy, it may be necessary to refuse planning permission on grounds of prematurity if the policy is to have that effect.

18. Otherwise, refusal of planning permission on grounds of prematurity will not usually be justified. Planning applications should continue to be considered in the light of current policies. However, account can also be taken of policies in emerging DPDs. The weight to be attached to such policies depends upon the stage of preparation or review, increasing as successive stages are reached. For example:

- Where a DPD is at consultation stage, with no early prospect of submission for examination, then refusal on prematurity grounds would seldom be justified because of the delay which this would impose in determining the future use of the land in question.

- Where a PDP has been submitted for examination but no representations have been made in respect of relevant policies, then considerable weight may be attached to those policies because of a string possibility that they will be adopted. The converse may apply if there have been representations which oppose the policy. However, much will depend upon the nature of those representations and whether there are representations in support of particular policies.

19. Where planning permission is refused on the grounds of prematurity, the planning authority will need to demonstrate clearly how the grant of permission for the development concerned would prejudice the outcome of the DPD process."

Argument

59. The claimant submits that the size, scale and nature of the development are such that a grant of planning permission would put at risk or would impinge upon the local plan process. The claimant refers to the second committee report where it deals with the issue. It says:

> "5.3 For an application to be considered premature there is a burden of proof required that the proposal would prejudice due to scale or strategic direction, future options for growth that are at an advanced stage of community involvement.
>
> 5.4 If considered to be contrary to the emerging Core Strategy, there would need to be a specific designation in the strategy which would be compromised by the proposal. I can see no such conflict within the emerging Core Strategy upon which to base any argument for prematurity. Nor is the strategy particularly advanced, being by the most optimistic estimates still a year from adoption. In addition, due to its strategic nature the Core Strategy is unlikely to contain any site allocations fro Truro and Kenwym.
>
> 5.5 Similarly, with the Neighbourhood Plan, the Plan would need to be sufficiently advanced to demonstrate how the development would be in conflict with it. Notwithstanding that CC are supportive of the neighbourhood plan process the plan is not at a stage advanced enough and subject to substantive community involvement that the plan can be considered as expressing a definite community aspiration for or against any particular site. It is understood the Neighbourhood Plan Steering Panel has agreed a list of sites that they support. There is currently no information available in the public domain regarding the suitability, availability and deliverability of those sites. CC is unable to currently demonstrate a deliverable 5 years supply of housing needs in respect of the Truro area as required in both PPS3 and the emerging NPPF. As yet through the Neighbourhood Plan process there is no evidence of any engagement of the community, landowners, developers and infrastructure providers to assist in the development of a land supply that would be suitable, viable and deliverable. In the absence of such it would not be possible to demonstrate what aspects of the Neighbourhood Plan the proposal would be in conflict with and little material weight can be attributed to an emerging Neighbourhood Plan for which, despite having a suggested timetable for completion by the

end of this year, there is nothing yet in the public domain for consideration."

60. The claimant submits that those paragraphs demonstrate a manifest misunderstanding of the policy on prematurity. The claimant further submits that the present case is a paradigm of where prospects of local plan allocations might be prejudiced. The fact that the emerging policy documents are not well advanced is not to the point. The officers here have confused prematurity with materiality of an emerging Development Plan. Once it is clear that policies are outdated the absence of others does not mean that the local planning authority can proceed without reference to other policies that might emerge. There is a possibility of pre-empting subsequent land allocations. That was something which was not addressed in the committee reports.

61. For the defendant three propositions were made, namely,

i) Prematurity was capable of being a material consideration;

ii) Absent perversity it was a matter of discretion for the decision-maker and the weight to be given to it would depend on the circumstances of each case;

iii) Provided the decision-maker had regard to relevant circumstances it was a matter for the discretion of the decision-maker. The relevant circumstances may include

- The scale and nature and location of the development proposal
- The stage of the preparation of the local plan
- The need to progress the application
- Whether the emerging plan contained policies and allocations that might be affected by the application.

62. At all material times the Core Strategy and Neighbourhood Plan were embryonic. There were no Neighbourhood Plan documents at any stage. The published Core Strategy document relied upon by the Claimant was a pre-submission stage document published in March 2013. Prior to that the Core Strategy had been out for consultation only on, firstly, options and, secondly, the nature of growth. It was not a case where the retail impact was significant. The housing numbers would not prejudge the scale and location of housing allocations and the need for and suitability of the site for Park & Ride and as a household waste recycling site was not in dispute. The topic of prematurity was given specific consideration in each report and was a matter upon which members had wanted further information.

Discussion

63. It is quite impossible to divorce the issue of prematurity from the local plan process: after all, the impugned decision is premature to what?. The essence of a successful claim of prematurity is that the development proposed predetermines and pre-empts a decision which ought to be taken in the Development Plan process by reason of its scale, location and/or nature or that there is real risk that it might do so. Whether the

proposed development will actually do so is something which should therefore be addressed.

64. Here the two elements of the emerging Development Plan were at a very early stage. The Core Strategy was considering options for growth and development patterns. It had been out to consultation on both by the time of the grant of planning permission. The second round of consultation took place between the 11th March 2012 and 22nd April 2012. Responses to that exercise were considered on the 7th November 2012, after planning permission was granted. However, the Core Strategy was not a document that made site allocations. It is difficult to see, therefore, how it could be said that the development proposed pre-empted its process which, in any event, had a considerable way to go.

65. The Truro and Kenwyn Neighbourhood Plan was even earlier in the process. Nothing had emerged at all. Whilst the issue of prematurity needed to be considered it was not one to which much weight could attach.

66. What is clear from the first and second reports to committee is that the residential development was not strategically significant in overall housing supply terms. That was a matter of planning judgment to which the officers and members were entitled to come in the light of the current policies and not one which could be said to be perverse.

67. The transportation benefits that flowed from the siting of an eastern Park & Ride at the confluence of the A39 and A390 completed the East/West link Park & Ride scheme for Truro. The results of traffic modelling demonstrated that Truro's roads would benefit from the proposals such that the infrastructure improvements would be a key asset to the city, contributing positively to Truro's future and providing a key role in the economy. They implemented also part of the local transport plan. The first committee report considered it unlikely that the greater benefits of the provision of the eastern Park & Ride would be achieved in the future unless the scheme was considered as a whole package (see first report, paragraph 1.13). Again, that was something that the officers were entitled to point out to members as part of the need for the application before them.

68. The second report gave further guidance pointing out that both the Core Strategy and the Neighbourhood Plan were at an early stage in their development. The claimant submitted that there was no consideration of how the application might pre-empt the forthcoming Development Plan process. Paragraph 5.4 of the second report considered the issue of forthcoming specific designations and concluded that there were none in the Core Strategy. Likewise with the Neighbourhood Plan which, although it might in the future contain allocations, was at an even more embryonic stage. Further, the Neighbourhood Plan required endorsement by the local community through the undertaking of a referendum which had yet to take, and has still to take, place. It follows that little weight could attach to each of the future limbs of the Development Plan. At the material time neither had early prospects for submission. Neither had published proposed allocations. The subsequent update note of October 2012 concluded that the early emerging status of the Neighbourhood Plan meant little if any weight could be attributed to it and that it could have little if any bearing on the most recent resolution on the application.

69. The fact that there was an identified need for a household waste facility and retail capacity had been demonstrated for the retail element of the development proposal added to the need to progress the planning application. Only through so doing could the development benefits which were regarded as tangible be realised .

70. In the circumstances, the defendant did not err in the way that it approached the issue of prematurity. Rather, it followed the guidance set out in The Planning System General Principles set out above. The defendant considered the existing and emergent Development Plan position and concluded that little weight could attach to either. Nothing could be identified in any emerging document which would or could be pre-empted by the development proposals. The alternative would have been to await an uncertain timetable and uncertain outcome of the Development Plan process. The defendant then considered the need for the application, took account of the benefits that flowed from it and considered those to be overriding factors. There was nothing irrational or in error in the way that the defendant proceeded. This ground fails.

Ground Four

Whether the defendant failed to have regard to material considerations that had arisen since the resolution of the 8th of March 2012 to grant consent ?

Legal Position

71. *R (on the Application of Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1374 considered the nature and extent of the duty on a planning authority under section 70(2) of the 1990 Act and the requirement on an officer delegated to sign a decision notice to refer the application back to committee for further consideration. Lord Justice Parker said (at paragraph 125):

> " On the other hand, where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of statutory duty."

Argument

72. The claimant submits that that is the position here. There were three new material considerations which made it incumbent on the officer writing the update note to refer the matter back to committee, namely,

i) progress that had been made in the Local Plan and Neighbourhood Plan

ii) progress that had been made on a site known as Langarth Farm

iii) progress that had been made on the affordable housing DPD

73. Cumulatively, the movement in the local authority decision-making meant that the application should have been referred back.

74. The defendant points out that the claimant did not seek to persuade the defendant to take the application back to committee at the time even though it was a very active participant in the decision-making process and was not reticent with its written comments.

Discussion

75. I deal with each of the three points in the order set out above.

Progress in the Local Plan

76. I have set out what had occurred between March and October 2012 with the Core Strategy and Neighbourhood Plan above under issue three.

77. It is submitted by the claimant that the members needed an update and there was nothing in the October update note. I can see no merit in this submission. As at October 2012 there had been no material progress on the Development Plan since March 2012 to report to members that would affect the decision-making process.

Langarth Farm

78. On the 3rd May 2012 the claimant submits that the defendant resolved to grant planning permission for a development which included a 1,000 square metre supermarket. It is submitted that there was a material change of circumstance that required a re-evaluation of the retail impact on Truro city centre. Even if there was a restriction proposed on the size of the food unit at Langarth Farm the application should still have been taken back.

79. The witness statement of Tim Marsh, principal development officer with the defendant for the central planning area in which the application site is located, sets out that the council had passed a resolution on the 3rd of May 2012 to conditionally approve an outline planning application for a major mixed use development including 1,500 houses at Langarth Farm. Permission was dependent upon the execution of a section 106 agreement which had not been signed by the 26th October 2012 and the finalisation of a Design Code and Parameter Plan. Although the proposed development included a total of 1,120 square metres of A1 retail floor space an agreed condition restricted the largest retail unit to a maximum of 400 square metres. Furthermore, the development was subject to a phasing plan with a build programme over 10-15 years such that with an anticipated start date of 2014 the proposed retail provision was unlikely to be completed much before 2020.

80. In fact, in the second report, the trading impact of the retail units at Langarth Farm was taken into account as part of the reworked retail analysis. As a result the committee were aware of the cumulative impact of the proposed development with that of Langarth Farm should planning permission be granted there.

81. There is nothing, therefore, in the claimant's submission. All matters of concern to it had in fact either been taken into account or were not of any material substance

Affordable Housing Policy

82. Despite the claimants submission that this did amount to a material change it is clear from the witness statement of Mr Marsh that the Cornwall Balancing Housing Policy DPD was abandoned in early 2011. It was thus never a material consideration in the determination of the application.

83. It follows that individually and cumulatively the factors pointed to by the claimant did not warrant taking the application back to committee.

Ground Five

Whether the council misdirected itself

i) as to the availability of a sequentially superior site at Pydar Street in Truro ;

ii) on the issue of disaggregation of the development

Pydar Street

84. Pydar Street is a town centre site in Truro, it is jointly owned by Cornwall Council and Stanhope LaSalle. Within the saved policies of the Carrick Local Plan it is identified as a potential redevelopment site. Paragraph 7.7.2(ii) the plan reads:

> "ii) Land to the rear of Pydar Street & St. Austell Street
>
> This site, which includes the District Council Offices and many of the surrounding buildings offers potential for redevelopment for mixed uses including office/residential (the Council will seek 50 residential units as part of any mixed development) and retail. Any redevelopment of this site would be dependant upon the relocation of the Council Offices to an alternative site."

Mr Gazard, the clerk to Truro City Council, in his witness statement says that he received a letter from Stanhope's agent, Mr Seaton Burridge, the day before the strategic planning committee meeting. Paragraph 11 of his witness statement reads:

> "11. On 7 March 2012, I received a letter from Stanhope's agent, Mr. Seaton-Burridge. In that letter Mr Seaton-Burridge sets out the situation at that time (i.e. the day before the strategic planning committee meeting) in relation to his client's land Mr Seaton-Burridge states:
>
> > Our clients… are currently in the process of discussing the future of the site with Cornwall Council with a view to promoting an independent scheme or merging their interest with the council and undertaking a larger development. The site is currently occupied by a variety of individuals and companies on short leases, al of which contain a development break clause enabling vacant possession to be gained

> with no more than three months' notice. The site is therefore not only earmarked for comprehensive development but is also being actively promoted by a major developer for a mixed commercial use.
>
> My client's site extends to approximately 2.5 acres and could easily accommodate both a new Waitrose store… with ancillary car parking and indeed the local produce market, if required. My clients have in fact contacted Waitrose advising them of the site's availability and have indicated that they would be keen for them to be accommodated within their development proposals.
>
> The conclusion of the sequential test relating to this site are completely inaccurate and I would therefore be obliged if you would relay the fact that the site is available to whomsoever you think appropriate. Whilst writing I also enclose a Planning policy Brief Note prepared by Montagu Evans, together with Cabinet Report and Minutes, from which it can clearly be seen that the site is ideally suited for food store use."

His statement then proceeded as follows:

> "15. The strategic planning committee meeting was available on a webcast. During the meeting Jonathan Banham of Waitrose was asked if 2.5 acres in Truro was a big enough site, to which he replied that he "believed so". Councillor Nolan then commented that the Pydar site excluding Cornwall Council's part extends to 2.5 acres and that there were 3 month breaks on leases. Councillor Nolan then asked Mr Banham again if 2.5 acres was big enough and again Mr Banham confirmed that it was though adding that "any redevelopment of Pydar Street would be dependant upon relocation of Council offices to an alternative site.
>
> 16. Councillor Nolan sought clarification of this by asking if the only obstruction was Cornwall council in its capacity as the owner of the other parcel of land comprising the Pydar. Mr Banham responded saying 'potentially' though adding that potentially the site was not viable for Waitrose without explaining why."

As a consequence the claimants submit that when Pydar Street was presented to the committee it was mischaracterised in a material way so that the advice given to the

committee was in error. As the committee was reliant on a planning officer who was not producing an accurate position of how things were on the ground there was a material error of law. Further, there was a material omission in that not a word was said about the letter from Mr Seaton-Burridge: the committee needed to be informed of its existence, it was then a matter for them whether they believed it or not.

85. The defendant submits on Pydar Street that the local plan policy is to develop the whole site. The whole site was not and is still not available. The Council offices remain on the Council-owned land, and there is no resolution to dispose of the site. The letter from Mr Seaton-Burridge relied upon by the Claimant was in fact one of two letters from him. The second letter made it clear that the original letter was written in a personal capacity and without referral or sanction from the site owners. In addition, by reference to a letter dated the 14th March 2014 from Stanhope it was made clear that Scott Burridge were not advising Stanhope on their development proposals. Their appointed advisors were another firm, Montagu Evans. The letter of the 14 March continued:

> "As you know, it is early days in our regeneration proposals but Stanhope is committed to taking forward an exciting and substantial regeneration project which we hope will include Council land at the rear of the site owned by LaSalle. By combining the two sites we believe we can deliver a project of real significance and quality. Our proposals are to bring forward a comprehensive retail led scheme providing predominantly comparison shops, to improve the fashion content and choice of shops in the city centre. We also hope we can engage a number of exciting new restaurant operators to open in the city on this site.
>
> At this point in time we have not had reason to engage with Waitrose and there have been no discussions progressed with them at any time in connection with this letter.
>
> I have asked Nick Seaton-Burridge to confirm that he wrote this letter unilaterally without any consultation with us or LaSalle."

The defendant submitted that the timescale on Pydar Street was too uncertain for it to be a sequentially preferable site.

86. The claimant submits that the first report cast doubt on the issue of disaggregation. The applicant had claimed that the Cornish Food Hall was dependant on the adjacent Waitrose food store yet the development on a site at Kingsley Village cast doubt upon the applicants claim as there the food hall was anchored by other forms of commercial development. The second report provided further evidence by way of financial information about the dependency of the Taste of Cornwall on Waitrose but that was inconsistent with what had been said previously.

87. The defendant submitted that they had taken advice from their independent retail consultants on the further work carried out by the applicants which in turn had been reviewed by their officers. They had, therefore, acted reasonably in their advice to

committee which had provided all the relevant information to the Committee on which to take the decision as to whether to grant planning permission.

Discussion

88. The meeting of the strategic planning committee on the 8th of March 2012 was the subject of a webcast. As a result the full transcript is before the court.

89. That shows that there was some considerable discussion on both Pydar Street and the topic of disaggregation.

90. On Pydar Street members were advised about the two ownerships and the outcome of further work that had been carried out since the earlier meeting in December 2011. The officer is recorded as saying :

> "We are very, very clearly being told that the Pydar Street site is currently not available, the council are in very early stages of discussion with the joint owners but there is no cabinet decision to dispose of that land, there's not yet a decision taken as regards the office accommodation, substantial office accommodation is on the Council owned part of the site."

That was tested by Councillor Nolan who is recorded as saying:

> "…there is still enough space on the remainder of the land to develop that site and there's a willingness on behalf of the agent to do it. I'll move on, the buffer zone, it's a hedge and you've admitted it, its about as much use as Belgium's buffer zones go and it offers no protection and it will stop development down the valley road and down the main Road and there is nothing we can do about that. Is that your position?"

Councillor Plummer later raised the issue of the current status of the Pydar Street site and whether it had been declared surplus to the requirements of the Council. He was told by officers it had not.

91. Mr Jonathan Banham, employed by Waitrose, addressed the committee. He confirmed that his company had viewed the city centre sites in Truro and there were none that could accommodate a Waitrose either on its own or with the Taste of Cornwall. All of the sites had been thoroughly tested for their availability, suitability and viability as required by the sequential test. No site could meet all three requirements although there were many that could meet one or two of them. He was asked by Councillor Nolan:

> "242. Nolan- Well I'll ask that one again then. The Pydar Street site excluding the county council element is 2.5 acres with people on three month breaks in their lease can be available fairly quickly, is that big enough for you?

243. Banham- It is, but actually it will be contrary to the local plan policy 7.7.2 which actually states 'any redevelopment of the Pydar Street site would be dependant upon the relocation of the Council offices to an alternative site'.

244. Nolan- so the only obstruction is Cornwall Council?

25. Banham- That's potentially one. I mean the sites not viable for us."

Later on Councillor Bull said:

"254. I mean presumably were Pydar Street information to be different in say a year or two years, you're saying that Waitrose would rule Truro out forever.

255. Banham- As I think I mentioned, we've been working on this for 10 years. Pydar Street was also in the local 1998 plan identified as redevelopment. This is the only available opportunity at this moment"

92. What is apparent from that review is that although Mr Seaton-Burridge's letter does not appear to have been brought to the attention of the members, they were clearly aware of the various permutations at Pydar Street both on the local plan site as a whole, and on the smaller Stanhope ownership where Councillor Nolan expressly advised his colleagues that there was willingness on behalf of the agent to develop it. In my judgment, the Councillors were aware of the position on the Pydar Street site and their decision was taken in the full knowledge of all the relevant factors. If it was an oversight on behalf of the planning officer to fail to bring the first Seaton-Burridge letter to the attention of the committee it had in fact no material consequence. It cannot be said, therefore, to be a material error of law.

93. On disaggregation, the further information provided by the consultants for the applicant was reviewed by GVA Grimley on behalf of the defendant and then further reviewed by the defendants' own officers. That process suggested that only through co-location of Waitrose with Taste of Cornwall could a turnover of more than 4 million pounds per annum be reached for the Taste of Cornwall. That level of turnover was necessary to make the Taste of Cornwall retail unit viable. Its requirement, therefore, was to be on a site next to a main food shopping destination. There were no such sites available in Truro. In the face of the advice which was given after the additional analysis flowing from the further work presented on the 8th March 2013, it was open to the committee to reject the Pydar site as sequentially preferable and to come to a conclusion that retail disaggregation was not a realistic possibility on the facts of the case before them. As a result ground five fails.

Ground Six

Whether the defendant misdirected itself as to the meaning of its affordable housing policy ?

94. In the Balancing Housing Markets DPD of February 2008 policy BHM2 applied in the urban areas of Truro, Falmouth and Penryn. Where 15 or more dwellings were proposed the amount of affordable housing was typically expected to be 35%. In the rural area policy BHM4 applied with a typical expectation of 50% affordable housing. The relevant part of that policy reads:

> "POLICY: BHM4
>
> IN THE RURAL VILLAGES (THOSE OUTSIDE THE URBAN AREAS OF TRURO, FALMOUTH AND PENRYN), ON SITES WITHIN DEFINED SETTLEMENT BOUNDARIES OF 0.1 HECTARES OR WHERE TWO OR MORE DWELLINGS ARE BEING PROVIDED, THE COUNCIL WILL SEEK AN ELEMENT OF AFFORDABLE HOUSING."

Argument

95. The claimant submits that the reports are clear. The area is rural in character, outside, but adjacent to the urban area of Truro. To treat the site as an urban site and seek only 35% affordable housing is a misunderstanding of the policy. Even if it were to be the case of identifying which of the two policies was a closer fit for the application site that should have been set out so that the committee could determine which was the more appropriate.

96. The defendant submits that BHM4 applies only to rural villages on sites within a defined settlement boundary. This site was not within that description. It was not capable of supporting the needs of a rural community. As the site adjoined the urban area it was a question of judgment as to which policy should apply. The decision that BHM2 was the appropriate policy was within the band of reasonable decisions that could apply.

Discussion

97. It is clear that the application site was not within a rural village and not within any defined settlement boundary which applied to such a village. It was not, therefore, perverse or unreasonable on behalf of the defendant to conclude that policy BHM4 was not of direct application.

98. Whilst it is a matter of record that the site was described as being rural in character in the committee report that does not mean, given the wording of the policy, that BHM4 applied to the application site. The only other affordable housing policy was BHM2. As the site was adjacent to the urban area and was not within a rural village it was not unreasonable for the officer to conclude that policy BHM2 was the more appropriate for the application site. Mr Marsh, in his witness statement, explained the officer approach,

> "The site does however adjoin the City of Truro and would help to meet Truro's urban housing needs and therefore policy BHM2 is the relevant policy in the Carrick BHM DPD applicable to the site."

99. It was submitted by the claimant that if it was a question of identifying which policy was the closer fit that should have been set out together with the reasons why the site was regarded as appropriately governed by BHM2. That presupposes that BHM4 is a contender with BHM2 for being a close fit. In my judgment it is not. The plain and ordinary meaning of BHM4 is that it is of application to rural villages with defined settlement boundaries only, as opposed to areas of urban fringe that happen to have a rural character As a result there was no obligation on behalf of the officer to put both policies before the committee members so that they could choose between the two and determine which was the more appropriate policy. Far from being perverse or irrational in my judgement it was a reasonable exercise of planning judgment to apply policy BHM2 to the application site. It follows that ground six fails also.

# R. (ON THE APPLICATION OF THAKEHAM VILLAGE ACTION LTD) v HORSHAM DC

Queen's Bench Division (Administrative Court)

Lindblom J.: 29 January, 2014

[2014] EWHC 67 (Admin); [2014] Env. L.R. 21

Enabling development; Environmental impact assessments; Planning authorities' powers and duties; Planning permission; Residential development; Screening opinions; Section 106 agreements; Villages

H1 *Environmental Impact Assessment—EIA screening opinion—whether EIA required—whether local planning authority had sufficient information to determine whether EIA required—development plan—whether priority given to development plan in granting planning permission—"enabling development"—whether there was a clear connection between two related development*

H2 In July 2010, the first interested party (AD) submitted two planning applications in the area of the defendant local planning authority (HDC). The two applications related to two sites which were being occupied and used for a business cultivating mushrooms. The first application related to a general housing development (Site A). The second application related to the erection of new compost bunkers and other new buildings related to the cultivation of mushrooms (Site B). The development on Site B represented a consolidation of the existing business. Prior to the submission of the applications AD had submitted two requests for screening opinions to HDC in relation to the need for an Environmental Impact Assessment for both developments. HDC subsequently concluded that an EIA was not required for either development.

H3 In April 2011, HDC resolved to grant planning permission for both proposals notwithstanding that fact that the development at Site A was contrary to the development plan, because the financial contribution to the proposed redevelopment of Site B would make that proposal viable and because it would bring other benefits to the local community. In August 2011, before HDC had formally granted planning permission for either proposal, the original business went into administration and the new purchasers of the business did not want to pursue the approved proposal for Site B. Consequently the new owner withdrew the application for Site B. In March 2012, AD requested a further screening opinion for a revised proposal on Site B. Once again HDC decided that an EIA was not necessary. A further application for Site B was submitted and in September and October 2012 both proposals were considered by HDC's planning committee which resolved to grant planning permission for both applications subject to the signing of a s.106 agreement which dealt with a cross-subsidy and a payment from AD to the owners of the

mushroom business to facilitate the development of Site B. Consequently the s.106 agreement was signed and planning permission were issued for both sites in April 2013.

H4 The claimant (TVA) sought to challenge the grant of the planning permission, arguing:

(1) HDC's screening opinion that an EIA for the development on Site A was not required was unlawful given the nature, size and location of the proposed development. No reasonable planning authority could have taken the view that the proposed development of Site A was not likely to have significant effects on the environment.

(2) HDC failed to comply with the requirement to give priority to the development plan as provided for in the Planning and Compulsory Purchase Act 2004, s.38(6). The report which went to HDC's planning committee did not acknowledge that the proposal was contrary to the development plan and therefore the decision to grant permission was unlawful.

(3) HDC had acted unlawfully in relying on the proposed development at Site A as enabling development at Site B. There was no clear connection between the two proposals and they should have been considered separately.

H5 Held, in refusing the renewed application for permission to apply for judicial review and the claim itself:

(1) The essential purpose of the screening process under the EIA regime was to enable an authority to judge whether a proposed development required EIA in addition to the normal process of assessment under the statutory provisions for development control. The screening judgment was usually made at an early stage in the authority's consideration of the project, before the application for planning permission was submitted and long before it decided whether planning permission should be granted. Often it was a judgment made on the basis of less information than was available to the authority when it decided whether the development should be approved. In a case like the instant case, where a local planning authority's screening opinion was criticized in a challenge to its grant of planning permission, it was important to keep in mind that Parliament had entrusted the screening judgment to the authority. Both the question of likelihood and the question of significance were matters of judgment, susceptible to differences of view within the range of a judgment that was not unreasonable in the *Wednesbury* sense. HDC's screening opinion had to be considered in the context of the letter that requested it. It was difficult to believe that the relevant planning officer was unfamiliar with the two sites, their use, the buildings on them and their relationship to each other and to the settlement of Thakeham. Whilst the relevant officer and HDC were not bound to accept the views expressed in the screening request when deciding whether an EIA was required, they were given enough information about the development and the potential effects on the environment to be able to exercise a planning judgment soundly.

(2) There was no basis to the argument that HDC failed to understand, or failed to follow the approach under s.38(6) of the 2004 Act. At no stage could the planning committee have misunderstood the task they faced in deciding

whether or not planning permission should be granted for each of the two proposals before them. Both HDC's officers and its committee knew perfectly well what s.38(6) required. All three of the officer's reports embodied the plan-led approach. Both he and the members had well in mind that each of the applications must be determined in accordance with the development plan unless material considerations indicated otherwise. The committee members knew that the plan had priority. But they were entitled to conclude, when determining the proposal for Site A, that other material considerations were strong enough to justify a decision that was not in accordance with the plan.

(3) The approach taken by HDC to the Site A proposal as "enabling development" was appropriate and lawful. The two proposals were mutually dependent. They were, in effect, a comprehensive scheme for the redevelopment of both sites. The connection between them was a matter of economic reality. The proposed redevelopment of Site B depended on the financial contribution from the redevelopment of Site A. The latter would only go ahead once the works it was funding on Site B had been completed. The whole operation, including the activity previously undertaken on Site A, could then be located on Site B and would be able to continue in a viable form. HDC could reasonably conclude, and did, that the s.106 agreement was an adequate and effective means not only of securing the financial contribution from the development of Site A but also attracting the further investment on Site B.

H6 **Legislation referred to:**

Town and Country Planning Act 1990 ss.70(2), 106, Sch. 2 para.10
Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) regs 2(1), 3(2), 4, 5(1)(2), 61(1)Sch 1, 2, 3, 13
Planning and Compulsory Purchase Act 2004 ss.3, 6, 7, 838(6)
Community Infrastructure Levy Regulations 2010 (SI 2010/948) reg.122(2)
Localism Act 2011

H7 **Cases referred to:**

*R. (Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157
*R. (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114; [2013] J.P.L. 1027
*R. (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869; [2013] Env. L.R. 7
*R. (Derwent Holdings Ltd) v Trafford BC* [2011] EWCA Civ 832
*R. (Mageean) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 863; [2012] Env. L.R. 3
*R. (Wye Valley Action Association Ltd) v Herefordshire Council* [2011] EWCA Civ 20; [2011] Env. L.R. 20
*R. (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20; [2011] 1 A.C. 437
*R. (Wye Valley Action Association Ltd) v Herefordshire Council* [2009] EWHC 3428 (Admin); [2010] Env. L.R. 18

*Commission of the European Communities v United Kingdom* (C-508/03) [2006] E.C.R. I-3969; [2007] Env. L.R. 1
*R. (Jones) v Mansfield DC* [2003] EWCA Civ 1408; [2004] Env. L.R. 21
*British Telecommunications Plc v Gloucester City Council* [2001] EWHC Admin 1001; [2002] Env. L.R. D10
*Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603; [2001] Env. L.R. 16
*Edinburgh City Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447; [1998] 1 All E.R. 174
*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636
*R. v Westminster City Council; Ex p. Monahan* [1990] 1 Q.B. 87; [1989] 3 W.L.R. 408; *Bradford City Council v Secretary of State for the Environment* (1987) 53 P. & C.R.55
*Stringer v Minister for Housing and Local Government* [1970] 1 W.L.R. 1281; [1971] 1 All E.R. 65

H8 *Mr R. Fooke*, instructed by Fortune Green Legal Practice, appeared on behalf of the claimants
*Mr R. Taylor*, instructed by Horsham District Council, appeared on behalf of the defendant
*Mr R. Warren QC*, instructed by Pittmans LLP, appeared on behalf of the first interested party

**JUDGMENT**

**LINDBLOM J.:**

**Introduction**

1 For many years a large mushroom growing enterprise flourished on two large nurseries in Thakeham, a village near Horsham in West Sussex. In 2010 that enterprise was failing. Proposals for the re-development of both nurseries came forward and were eventually permitted in April 2013. One was for the demolition of the existing nursery buildings and the construction of 146 houses; the other was for new buildings in which mushroom production could continue. The claimant in this claim for judicial review, Thakeham Village Action Ltd ("Thakeham Village Action"), challenges the planning permission granted by the defendant, Horsham District Council ("the Council") for the housing development. It does not attack the permission granted on the same day for the other proposal.

2 The two sites are known locally as the Abingworth Nursery and the Chesswood Nursery. Throughout the Council's handling of the proposals for their re-development, however, they have been referred to respectively as Site A and Site B.

3 The claim makes two main allegations of unlawfulness. The first relates to the process in which the Council screened the proposal for residential development on Site A under the regime for environmental impact assessment ("EIA"), concluding that an EIA for that development was not required. The second concerns the process by which the Council decided to approve the proposed housing, despite

its being in conflict with relevant policy in the development plan and it would enable the redevelopment of the other site for mushroom production.

4 The applicant for planning permission was the first interested party, Abingworth Developments Ltd ("Abingworth"). Abingworth and the second interested party, Monaghan Mushrooms Ltd ("Monaghan Mushrooms") have taken an active part in the proceedings. The third and fourth interested parties, Beamsync Ltd ("Beamsync") and Rydon Homes Ltd ("Rydon Homes"), have not.

**The issues for the court**

5 Permission to apply for judicial review on four of the five pleaded grounds was granted on the papers by Lewis J. on 29 July 2013. Lewis J. refused permission on ground 2, which alleges a failure by the Council to comply with its duty in s.38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") to determine the application for planning permission unless material considerations indicate otherwise. The claimant renewed its application for permission on that ground. And with the agreement of all parties, I dealt with it at the hearing.

6 There are, therefore, three main issues for the court:

(1) whether the Council's screening opinion for the housing development was lawful and, if not, whether the planning permission granted for that development should therefore be quashed (ground 1 of the claim);
(2) whether the Council failed to comply with the requirements of s.38(6) of the 2004 Act (ground 2); and
(3) whether, in deciding to grant planning permission for the proposed housing, the Council acted unlawfully in relying on that proposal as enabling development for the proposed redevelopment of Site B (grounds 3, 4 and 5).

**Background**

7 Thakeham Village Action was incorporated in 2013. Its aims are "the preservation, protection and enhancement of the character of the Parish of Thakeham and its surrounding area".

8 Until 2010 both sites were occupied and used for mushroom growing by a company called Sussex Mushrooms Ltd ("Sussex Mushrooms"). When its business was struggling to survive, Sussex Mushrooms agreed with Abingworth and Beamsync, which owned Site A, that Abingworth would carry out the comprehensive redevelopment of both sites: Site A for housing, once Abingworth had exercised its option to purchase the site, Site B for a new mushroom production facility, in which Sussex Mushrooms would consolidate its operation. The development on Site B was to be partly funded by a financial contribution from the development of Site A, secured by an obligation under s.106 of the Town and Country Planning Act 1990 ("the 1990 Act").

9 In February 2010 the Council received from Boyer Planning Ltd ("Boyer Planning"), on behalf of Abingworth, two requests for a screening opinion, one for each proposal. The Council issued two screening opinions: for the Site A development in a letter dated 11 March 2010, and for the Site B development in a letter dated 19 March 2010. In both it concluded that an EIA was not required.

10 On 23 July 2010 Abingworth made two applications for planning permission. On Site A it sought full planning permission for a development described in the application (DC/10/1314) as:

> "… the demolition of existing buildings and redevelopment of the Abingworth Nursery site for 146 dwellings, comprising of open market dwellings, 51 dwellings for the 55+ age group, 12 affordable dwellings, 20 key-worker dwellings, village hall building (including shop and doctor's surgery), Thakeham pre-school facility, community workshops/studio (957.5 sq.m.), sports pitches and changing rooms, cricket pitch and pavilion, children's play area, access roads, open space and landscaped areas (including footpaths)."

The application for planning permission on Site B (DC/10/1316) proposed the erection of new compost bunkers, and other buildings and structures for the cultivation of mushrooms.

11 On 19 April 2011, the Council's Development Control (South) Committee, following the advice of the Head of Planning and Environmental Services, resolved in principle to approve both proposals. The committee was advised that the residential development proposed for Site A was contrary to the development plan, but should be approved because its financial contribution of £2.7 million to the proposed redevelopment of Site B would make that proposal viable, and because it would bring other benefits to the community.

12 In August 2011, before the Council had granted planning permission for either proposal, the mushroom operation was acquired by Monaghan Mushrooms. Sussex Mushrooms went into administration. Monaghan Mushrooms did not want to pursue the approved proposal for Site B. The application for that proposal was withdrawn.

13 On 30 March 2012 Boyer Planning requested a screening opinion for a revised proposal. The Council issued a further screening opinion on 16 April 2012. Once again, it decided that an EIA was not required.

14 The second application (DC/12/0841) for planning permission for the redevelopment of Site B was submitted by Abingworth on 22 June 2012. It proposed a development described as:

> "Demolition of existing growing rooms and surrounding ancillary buildings totalling 20,789.50 sq. metres. Removal of compost production on site. Erection of new growing rooms, referred to as farms (20,820 sq. metres) required for the cultivation of mushrooms, a replacement office building (553 sq. metres), staff cafeteria, pack house building ([3,003] sq. metres), ancillary plant structures and provision of open space and landscaped areas (including redirected footpaths). Other works include the refurbishing and extension of existing production and package buildings including alterations to the entrance of the site and provision of two dwellings for site management. …."

15 This proposal was accompanied by a document entitled "Capital Project Summary & Budget for Enabling Works", dated April 2012. The Council obtained from Ernst & Young LLP ("Ernst & Young") an independent review of that document, dated 31 July 2012.

16 On 4 September 2012 the Council's committee considered the new proposal for Site B, together with the proposal for Site A, which was unchanged. The members were told by the officer that Ernst & Young had advised that the proposed

redevelopment of Site B, even if carried out by Monaghan Mushrooms, would require a subsidy of £3.75 million. The committee resolved to approve both proposals.

17 On 16 October 2012 the committee received a further report from the officer, advising it about the sequence of works envisaged on the two sites. It confirmed its resolution to grant planning permission for both developments, subject to an appropriate obligation.

18 On 19 April 2013 Abingworth and Monaghan Mushrooms as developers, Beamsync and Rydon Homes as landowners and several other parties entered into a s.106 agreement with the Council. Schedule 2 to the s.106 agreement prevents the planning permission for the redevelopment of Site A being implemented until specified works have been carried out on Site B, the sum of £3.75 million for those works paid by Abingworth to Monaghan Mushrooms, and the freehold ownership of Site B transferred.

19 The two planning permissions were issued on that day.

**Issue (1): EIA screening – ground 1 of the claim**

*The EIA regime*

20 The Town and Country Planning (Environmental Impact Assessment) (England) Regulations 2011, which came into effect on 24 August 2011, applied to the screening and determination of the second proposal for Site B. They did not apply to the screening and determination of the proposal for Site A. The relevant regulations for that proposal were in the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations ("the 1999 EIA regulations"), which transposed into domestic law the EIA directive (Directive 1997/11, as amended by Directive 2003/35 and Directive 2009/31).

21 Regulation 3(2) of the 1999 EIA regulations prohibits the granting of planning permission for EIA development unless the "environmental information" has first been considered by the decision-maker. "EIA development" is defined in regulation 2(1) as either Sch.1 development or "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location". Regulation 4 provides, in effect, that a "screening opinion" adopted by a local planning authority will determine whether or not development is EIA development. Regulation 2(1) defines a screening opinion as "a written statement of the opinion of the relevant planning authority as to whether development is EIA development". Regulation 4(5) provides that where a local planning authority has to decide whether Sch.2 development is EIA development it "shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development". Regulation 5(2) requires that a request for a screening opinion be accompanied by "a plan sufficient to identify the land" and "a brief description of the nature and purpose of the development and of its possible effects on the environment".

22 Schedule 2 to the 1999 EIA Regulations refers to several types of development, including, in para.10 b) "urban development projects".

23 Schedule 3 to the 1999 EIA Regulations contains the selection criteria for screening Sch.2 development, namely "1. Characteristics of development", "2.

Location of development" and "3. Characteristics of the potential impact". It provides:

> **"Characteristics of development**
> 1. The characteristics of development must be considered having regard, in particular, to –
> (a) the size of the development;
> (b) the cumulation with other developments;
> (c) the use of natural resources
> …
> **Location of development**
> 2. The environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard, in particular, to –
> (a) the existing land use;
> (b) the relative abundance, quality and regenerative capacity of natural resources in the area;
> (c) the absorption capacity of the natural environment …
> …
> (vii) densely populated areas;
> (viii) landscapes of historical, cultural or archaeological significance.
> **Characteristics of the potential impact**
> 3. The potential significant effects of development must be considered in relation to criteria set out under [1] and [2] above, and having regard to –
> (a) the extent of the impact (geographical area and size of the affected population);
> …
> (c) the magnitude and complexity of the impact;
> (d) the probability of the impact;
> (e) the duration, frequency and reversibility of the impact."

24 Regulation 20(2) requires an authority that has adopted a screening opinion to "take steps to secure that a copy of the [screening] opinion … is made available for public inspection at all reasonable hours at the place where the appropriate register (or relevant section of that register) is kept".

*Domestic jurisprudence on screening*

25 In *R. (on the application of Loader) v Secretary of State* [2013] Env. L.R. 7 Pill L.J., with whom Toulson and Sullivan L.JJ. agreed, said (in [43] of his judgment) that the test for an authority to apply when screening a proposal is whether the development is "likely to have significant effects on the environment". Judgment has to be exercised "focusing on the circumstances of the particular case" (ibid.). Only when there has been a "manifest error of assessment" will the Court of Justice of the *European Communities intervene (see Commission v United Kingdom* [2006] E.C.R. I-3969) (ibid.). Pill L.J. endorsed (in [44] of his judgment) the proposition in the Government's advice on EIA in para.34 of Circular 02/99 that EIA developments will be only "a very small proportion of the total number of [Schedule] 2 developments".

26 In *R. (on the application of Jones) v Mansfield District Council* [2003] EWCA Civ 1408 Dyson L.J. said (in [17] of his judgment) that the question of whether a

development is likely to have significant effects on the environment is "not a question of hard fact to which there can only be one possible correct answer in any given case". The role of the court should be limited to "review on *Wednesbury* grounds". Dyson L.J. made these observations against the background of the relevant provisions of the EIA directive, including its recitals, one of which referred to EIA "supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment". Carnwath L.J., as he then was, emphasized (in [58] of his judgment) that "the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle-race", and that "it does not detract from the authority's ordinary duty, in the case of any planning application, to inform itself of all relevant matters, and take them properly into account in deciding the case". He went on to say (at [61]) that because the word "significant" does not lay down a precise legal test but "requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases", the function is one for which "the courts are ill-equipped".

27 In *Loader* Pill L.J. said (in [31]) said that there was now "ample authority that the conventional *Wednesbury* approach applies to the court's adjudication of issues such as these". That principle is firmly established (see, for example, [22] of Beatson L.J.'s judgment in *R. (on the application of Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114).

28 An authority does not have to set out at length in its screening opinion the considerations it has taken into account, but the essence of its reasoning must be plain (see, for example, the judgment of Richards L.J. in *R. (on the application of Wye Valley Action Association Ltd) v Herefordshire County Council* [2011] EWCA Civ 20, at [47]). In *R. (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 Moore-Bick L.J. said (in [21] of his judgment) that, in the light of the decision of the European Court of Justice in *R. (on the application of Mellor) v Secretary of State for Communities and Local Government* [2010] Env. L.R. 18, an authority adopting a screening opinion "must provide sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision". He accepted (at [22]) that a screening opinion is to be read in the context of the request made for it.

29 An authority is not bound to require an EIA if there is some uncertainty about the likely effects of the development. In *Jones* Dyson L.J. said (at [39]) that "the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect". However, it is "possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken" (ibid.). This would depend on "the circumstances of the individual case" (ibid.). As Pill L.J. said in *Loader* (at [40]), if an authority "came to the belief during the course of making the decision that the proposed development might have significant effects on the environment, it would be open to [it] to require an environmental statement at that stage (*R. (on the application of Mageean) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 863 …, per Sullivan L.J.)" (see also *Horton v*

*Secretary of State for Communities and Local Government* [2011] EWHC 3583 (Admin) and [2012] EWCA Civ 1210).

30 In *Loader* the Court of Appeal rejected the submission that a significant effect on the environment is one that has a real prospect of influencing the outcome of the application for planning permission (see [21] of Pill L.J.'s judgment). Pill L.J. said (at [45] and [46]):

> "45 … Establishing that the environmental effect will influence a particular development consent decision may well be a necessary requirement for a decision that development is EIA development but it is not determinative of whether the effects are likely to be significant and "ought to be considered".
>
> 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. …."

31 In *Bateman* Moore-Bick L.J. said (at [20]) that it was important to bear in mind "the nature of what is involved in giving a screening opinion". A screening opinion, he said, "is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an assessment of environmental factors, among others". What is involved in a screening process is "only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all". The court should not, therefore, impose too high a burden on planning authorities in what is simply "a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment …". *In Zeb v Birmingham City Council* [2009] EWHC 3597 Admin Beatson J., as he then was, said (in [25] of his judgment) that "what is required is an initial assessment of an intended proposal".

*Circular 02/99*

32 Paragraphs 33 and 34 of Circular 02/99, under the heading "The need for EIA for Schedule 2 development – General considerations" state:

> "33. … In the light of [the selection criteria in Schedule 3 to the 1999 EIA regulations], the Secretary of State's view is that, in general. EIA will be needed for Schedule 2 developments in three main types of case:
>
> a. for major developments which are of more than local importance (paragraph 35);
>
> b. for developments which are proposed for particularly environmentally sensitive or vulnerable locations (paragraphs 36-40); and
>
> c. for developments with unusually complex and potentially hazardous environmental effects (paragraphs 41-42).

> 34. The number of cases of such development will be a very small proportion of the total number of Schedule 2 developments. It is emphasised that the basic test of the need for EIA in a particular case is the likelihood of significant effects on the environment. It should not be assumed, for example, that conformity with the development plan rules out the need for EIA. Nor is the amount of opposition or controversy to which a development gives rise relevant to this determination, unless the substance of opponents' arguments reveals that there are likely to be significant effects on the environment."

33 Paragraph 35 of the circular, under the heading "Major development of more than local importance" states:

> "In some cases, the scale of a development can be sufficient for it to have wide-ranging environmental effects that would justify EIA. There will be some overlap between the circumstances in which EIA is required because of the scale of the development proposed and those in which the Secretary of State may wish to exercise his power to "call in" an application for his own determination. However, there is no presumption that all called-in applications require EIA, nor that all EIA applications will be called in."

34 Paragraph 43 of the circular, under the heading "Indicative criteria and thresholds" says that the question of whether a Sch.2 development is likely to have significant effects on the environment "must be considered on a case-by-case basis". Paragraph 44 says that "[the] fundamental test to be applied in each case is whether *that* particular type of development and its specific impacts are likely, in *that* particular location, to result in significant effects on the environment".

35 In its advice on urban development projects within para.10 b) of Sch.2, Annex A to the circular states:

> "A18 . In addition to the physical scale of such developments, particular consideration should be given to the potential increase in traffic, emissions and noise. EIA is unlikely to be required for the redevelopment of land unless the new development is on a significantly greater scale than the previous use, or the types of impact are of a markedly different nature or there is a high level of contamination ….
>
> A19 . Development proposed for sites which have not previously been intensively developed are more likely to require EIA if:
>
> - the site area of the scheme is more than 5 hectares; or
> - it would provide a total of more than 10,000 m2 of new commercial floorspace; or
> - the development would have significant urbanising effects in a previously non-urbanised area (e.g. a new development of more than 1,000 dwellings)."

The circular acknowledges, in the opening paragraph of Annex A, that "[the] more environmentally sensitive the location, the lower will be the threshold at which the significant effects will be likely"

*The screening requests of 26 February 2010*

36 The two screening requests submitted by Boyer Planning on 26 February 2010 were made under regulation 5(1) of the 1999 EIA regulations.

37 The screening request for the Site A said that a "comprehensive solution" for the two sites was proposed, and that two "associated planning applications" would be submitted.

38 Under the heading "The Site and Existing Uses" the screening request referred to the area of Site A ("33.78 ha"), its location and its existing use. It said the site was "generally surrounded by agricultural land". It described the site in this way:

> "The main site includes mushroom production buildings of a similar appearance to the Chesswood site and the use is (like Chesswood) about as far removed from an agricultural use as … is possible. It is far closer to a mixed agricultural and industrial use, and therefore does not fall into any use class."

39 Under the heading "The Proposed Development" the screening request described the proposal for Site A. The layout was shown in the accompanying "Site Phasing Plan" (drawing AB01 00.012). It explained that the proposal for 146 houses would comprise "open market dwellings, dwellings limited to the 55+ age group, affordable dwellings, key-worker dwellings and some replacement dwellings". The "market housing" would occupy 4.71 hectares. The housing for people aged over 55 would take up 2.62 hectares, the affordable housing 0.32 hectares, and the housing for key workers 0.52 hectares. Thus "the total proposed development would occupy 8.17 ha of the total available 33.78 ha". All of the existing buildings and hardstanding on the site would be removed, except for a barn. The intention was to allocate a "proportion of the proceeds" of the development of Site A to Sussex Mushrooms "on the proviso" that it would make a "capital investment" on Site B, which would lead to the consolidation of mushroom production on that site.

40 The screening request then turned to a series of potential effects of the proposed development of Site A. On "Traffic" it said that the "most significant change in vehicular movement" would be "the reduced trips" between Site A and Site B. It predicted that "up to 120 trips, normally undertaken between the two sites, would cease" if the development went ahead. It added that a "complete traffic survey would accompany the planning application". On "Sustainability" it said that the consolidation of the two nurseries "would allow for a greater reduction in vehicular movements, therefore restricting movement to [Site B]". On "Footpaths and amenity" it said that the development of Site A "would contribute to enhancing the local setting …". An existing footpath would be extended, and recreational facilities would be provided with the development. On "Ecology and Biodiversity" it said that a Phase 1 Habitat Survey had been undertaken and had shown that "no protected species of fauna or flora other than bats" were on the site. Opportunities for "enhancing biodiversity" would be "disclosed in the reports to be submitted with the application".

41 The screening request next dealt with "Planning Issues and History". It referred to Policy CP15 – "Rural Strategy" of the Horsham District Core Strategy adopted in December 2007, and said that both proposals were intended to comply with its criteria for development in the countryside.

42 Under the heading "The Proposed Planning Application" it said that the application for planning permission would be accompanied by a number of documents, including a Design and Access Statement, a Flood Risk Assessment, a Transport Assessment, an Ecological Survey Statement, a Landscape Assessment, a Sustainability Statement and a Community Involvement Statement.

43 The penultimate section of the screening request was headed "Need for an Environmental Impact Assessment". It contended that the proposal for Site A did not require an EIA:

> "… Under Schedule 2 *"urban development projects, ..."* may require an EIA where the area of the development exceeds 0.5 ha. However an EIA would only be required if the project is likely to have a significant effect on the environment. It is our submission that the proposal would not have a significant effect on the environment. …."

The screening request then referred to the advice in para.A19 of the Annex to Circular 02/99 and went on to say:

> "These thresholds should only be lowered if the location is particularly sensitive such as an SSSI or AONB, of which the site is neither. The proposals relate to a site which is significantly below the 1,000 dwelling threshold and the residential element is below 5 ha.
>
> In any event, all of the potential environmental effects that have been identified in association with the development (both individually and cumulatively with the [proposal for Site B]) will be, or already have been, the subject of detailed studies and reports (as listed above)."

44 The "Conclusions" of the screening request stated:

> "The proposed development, the subject of this Screening Opinion request, would not have a significant effect on the environment. Furthermore the proposals will be refined in close consultation with the Council and the planning submission accompanied by a detailed series of reports which will comprehensively address the environmental issues, such that an Environmental Statement should not be required."

45 The screening request for the Site B development, submitted on the same day, was in a similar format. It described the 30.9 hectare site comprising 30 buildings and hardstanding areas, and the location—"generally surrounded by agricultural land". It also described the proposed development, which was shown on a plan (drawing AB02 09.004). Again, the relationship between the two proposals was emphasized. The "consolidated development" would involve "removing all of the structures" from Site A and constructing new buildings on Site B to accommodate the activities currently undertaken on Site A. The potential effects on the environment were described in a similar level of detail to the screening request for the Site A proposal. On the relationship of the proposal with the development plan the same contention was made as in the screening request for the development of Site A. The screening request said that the application for planning permission would be supported by various documents, which it listed. On the question of the need for EIA it said that the "use of the site and the proposed replacement of some of the buildings on site are not listed under Sch.2 and therefore fall outside the scope of the regulations". But it added that, irrespective of this "… there would be

no significant adverse effect on the environment", and that "all of the potential environmental effects" would be or had already been "the subject of detailed studies and reports". The "Conclusions" were in similar terms.

*The screening opinion for the Site A development dated 11 March 2010*

46 The Council's screening opinion of 11 March 2010 for the Site A development referred to the screening request in Boyer Planning's letter of 26 February 2010. It identified the relevant statutory provision, regulation 5 of the 1999 EIA regulations. It said that there would be a separate screening opinion for the Site B proposal, but that "to ensure that no cumulative issues are overlooked, the associated impacts of each of the applications have been considered jointly".

47 After its introductory paragraph the screening opinion was divided under four main headings: "Classification", "Assessment of Likely Effects", "Further Consideration of Impacts" and "Conclusion".

48 Under the heading "Classification" the officer responsible for preparing the screening opinion on behalf of the Council said this:

> "After having considered the information provided, I am of the shared opinion that the development falls within Schedule 2 of the EIA Regulations and as such should be considered under Item 10(b) *Urban Development Projects*. The threshold for determining whether an EIA may be required under this item is whether the development area exceeds 0.5 hectares. The proposed area of works is circa 33.7 hectares which clearly exceeds the 0.5ha threshold; therefore a formal screening opinion is required to determine whether or not the development is likely to have a significant effect on the environment."

49 The next part of the screening opinion, under the heading "Assessment of Likely Effects", referred to the selection criteria in Sch.3 to the 1999 EIA regulations, and to the Government's advice on EIA in Circular 02/99. It referred to the selection criteria in Sch.3 relating to "the general characteristics of the development, the environmental sensitivity of its location and the characteristics of its potential impact". The screening opinion stated that there were "no landscape designations within the surrounding area"; that the location was "not considered to be environmentally sensitive"; and that "the most relevant" of the Sch.3 selection criteria in this case were "the size of the development and its potential urbanising effect".

50 The screening opinion then referred to the advice in Circular 02/99 that an EIA is more likely to be required for "major developments which are of more than local importance" or for "unusually complex developments". This was clearly a reference to para.33 of the circular (see [32] above). In the light of that advice the screening opinion said that in the Council's opinion "the provision of 146 new dwellings is not wide ranging enough to be considered of more than local importance and although linked with the modernisation of the mushroom production plant on [Site B]", this redevelopment of Site A was not "unduly complex or likely to have potentially hazardous environmental effects". The final paragraph in this part of the screening opinion stated:

> "On these grounds it is considered that the proposals are unlikely to have a significant effect on the environment and that an EIA is not necessary."

51 The screening opinion went on, under the heading "Further Consideration of Impacts", to consider eight specific matters.

52 On "Landscape Sensitivity", the Council accepted that the development involved putting "circa 150 dwellings on a site which currently comprises agricultural land in a rural setting", and that this would be a "permanent loss", which meant that there "could be implications for landscape character". It welcomed Abingworth's intention to submit a Landscape Assessment, which, it said, should demonstrate "how the proposed development will not detract from the surrounding landscape setting, also considering the cumulative impact of the modernisation of Chesswood Nursery".

53 On "Ecology", the Council noted that the Phase 1 Habitat Survey had found bats on the site. It therefore recommended that a bat survey be undertaken to show "how bats and their roosts will be safeguarded [on the site] once development begins". The results of the bat survey "should inform any further work and be submitted in support of the planning application".

54 On "Archaeology", the Council acknowledged that the site was "not within a designated area of archaeological importance and there is little evidence to suggest that there are any archaeological remains [on the site] of national importance". However, it recommended that the County Archaeologist should be consulted "to ascertain whether further investigation should be undertaken".

55 On "Flood Risk", the Council said that the site was "within Flood Zone 1 with only a small water course running through the centre", and accepted that the submission of a Flood Risk Assessment with the planning application would be sufficient to show "how [Abingworth] will prevent flood risk as a result of the proposed development".

56 The paragraph headed "Transport/Highways Infrastructure" stated:

> "Although the volume of vehicle movements associated with the proposed development is not considered to be of a scale sufficient enough [sic] to require EIA, the principal impact of the proposed development is that of increased traffic on the local highway network. As such the submission of a Transport Assessment is welcomed, however HDC would also like to see this accompanied by a detailed Travel Plan demonstrating how private car use will minimised [and] more sustainable forms of transport promoted. The Transport Assessment must also demonstrate how the existing infrastructure has sufficient capacity to accommodate the anticipated rise in traffic generated from the proposed growth."

57 On "Noise" the screening opinion said this:

> "Due to the potentially urbanising nature of the proposed development and the associated transport impacts, [the Council recommends] a Noise survey be undertaken to demonstrate how proposed development will not have an adverse impact on the surrounding residents and local species and wildlife. The results of such a survey should accompany the planning application."

58 On "Ground Contamination" the Council referred to the "previously industrialized nature of a major portion of the site", and the "potential for ground contamination to exist which should be investigated further prior to an application being submitted".

59 Finally, the Council said it hoped that the "Sustainability Statement" would demonstrate "the efficient use of natural resources including water and renewable energy".

60 The "Conclusion" of the screening opinion said this:

> "In conclusion, after giving careful consideration to the size and characteristics of the development, and the advice contained in Circular [02/99], [the Council feels] that the proposals are not considered likely to give rise to significant detrimental environmental effects by virtue of their size, nature or location. As such we are of the opinion that an Environmental Impact Assessment is not necessary and any non-significant environmental impacts associated with the provision of the new homes could be dealt with through the normal planning application process. Notwithstanding this, it is expected that the following documentation be submitted in support of any planning application[:] …."

The list of the documents required with the application for planning permission included those referred to in the previous part of the screening opinion.

*The screening opinion for the Site B development dated 19 March 2010*

61 The screening opinion for the Site B development showed a similar approach and took a similar form to that for the Site A proposal. It acknowledged that the Site B development would be "delivered in conjunction" with the development of 146 dwellings on Site A, and said that "to ensure that no cumulative issues are overlooked", the "associated impacts" of the two developments had been "considered jointly". It said that the proposal for Site B was "best considered" under para.7(b) of Sch.2 as a development for the "Packaging of vegetable products"; that the relevant threshold was an operational development area of more than 10 hectares; that since the "overall footprint of the operational area of the mushroom site, including the newly constructed buildings will only cover circa 3.47 ha, the site is not considered of a sufficient scale to have wide ranging environmental effects which would warrant a full EIA". It added that "the proposed alterations to the site are likely to have a beneficial effect on the existing environmental issues, through the implementation of odour control measures and the reduced number of vehicle trips between the two sites". Like the screening opinion for the Site A development it set out a "Further Consideration of Impacts" under several headings. Its "Conclusion" was in the similar terms as that in the screening opinion for the Site A development. It said that the proposals were "not likely to give rise to significant detrimental environmental effects by virtue of [its] size, nature or location". An EIA was therefore not necessary.

*The memorandum of the Council's Spatial Planning Manager, Strategic Planning, dated 8 April 2011*

62 Before the proposals were taken to the meeting of the Council's committee on 19 April 2011 the Council's Spatial Planning Manager, Strategic Planning was consulted on them. He prepared a memorandum, dated 8 April 2011. In that memorandum he considered, among other things, the "Planning Policy Context". He referred to several policies of the adopted core strategy, including Policy CP5, and to the supplementary planning document "Facilitating Appropriate

Development". He said that, under Policy CP5, "Thakeham (The Street & High Bar Lane)" was one of the "Category 2 settlements". These are "villages with a more limited level of services which should accommodate only small-scale development or minor extensions that address specific local needs".

63 The Spatial Planning Manager considered the "Scale of Development". He said that "it would not normally be expected that development in such a location (adjoining a Category 2 settlement) would extend to 146 new dwellings or expand the existing community by the extent involved". He then said this:

> "However, … the physical context for the sites with their current use and scale of buildings is itself a material consideration and it is important in the context of the proposals as a whole not to be too focussed on the actual number of houses involved; it is rather a question of the amount of development necessary to make the overall scheme viable … and the environmental enhancement which will result from the removal of existing large scale/poor quality buildings and associated hardstanding areas, which in practice detract from the rural setting far more than appropriate residential development will do. The residential development off High Bar Lane in recent decades has itself been assimilated into the community and there is no reason why the 146 new homes proposed cannot equally complement, rather than threaten, the structure and rural setting of the village, provided the quality of development is appropriate, which is capable of being the case …. On this basis, the scale of residential development involved can be considered acceptable and need not be an overriding reason for rejection of the proposals.
> … There is no inherent reason in planning policy terms to oppose either the scale or location of the new buildings proposed, provided they meet with the necessary environmental standards and requirements from the Environmental Health Officers' point of view. Indeed, Policy CP15 supports exactly such an approach. …."

*The meeting of the Development Management Committee (South) on 19 April 2011*

64 When the two proposals came before the committee on 19 April 2011 the Council's Head of Planning & Environmental Services presented a lengthy report, in which he recommended that both proposals be "delegated for approval", subject to a suitable s.106 obligation.

65 The officer told the members (in para.1.6 of his report) that before the applications for planning permission had been submitted, both proposals "were the subject of screening opinions and it was confirmed by the Council that a formal [EIA] would not be required for development at either Site A or Site B".

66 The memorandum of the Spatial Planning Manager was incorporated into the report. Other consultation responses were also reported. These included:

(1) the Council's Design & Conservation Advisor's comments that "[as] this is a predominantly rural location, with a countryside edge and views of the South Downs, this suggests the layout is not appropriate for this location" (para.3.44), and that "in [her] professional opinion, the main aspects of urban design, still do not meet the criteria in [the] Council's design policies …" (para.3.58);

(2) the comment of the Council's Engineering Section that the Council's "Strategic Flood Risk Assessment … is not referred to in either the [Flood Risk Assessment] or the Design and Access Statement submitted with this application" (para.3.60);
(3) the Council's Landscape Architect's comment, concurring with the County Council's Landscape Architect, that "[at] the moment without some significant revisions [he] would have to record an objection to the scheme on landscape grounds, [albeit] it none of the issues are necessarily irresolvable and in principle there is an opportunity through the development to enhance the landscape of the site" (para.3.62);
(4) the Council's Public Health & Licensing Officer's observation that "[given] the … likely impact of the scheme on the Storrington AQMA, Public Health and Licensing would resist a development of this scale on air quality grounds", but that "if there are significant overriding factors associated with the proposal and the development is permitted, then Public Health and Licensing would strongly recommend [a] condition to help to mitigate the air quality impacts of the development" (para.3.73), and that "it does not appear that an appropriate mitigation strategy is achievable in the time frame set by the applicant" and the suggestion, therefore, that "an offset is incorporated into the [section] 106 agreement" (para.3.75);
(5) Thakeham Village Action's objection, contending that the proposed development "would increase the size of the existing settlement (the Thakeham High Bar Lane settlement) by 59%", and was "on so large a scale that it would change the landscape from a rural countryside character into an urban/suburban area" (para.4.20); and
(6) the West Sussex County Council's conclusion that "in highway safety and capacity terms" the development "would not result in any detriment" but that "significant concerns remained in relation to the unsustainable location of the site in transport terms" (para.4.33).

67 The officer had these and other consultation responses in mind when he assessed the proposals in s.6 of his report. He advised (at para.6.17):

> "… Certainly the local community as a whole does not view the current proposals as being acceptable to the local environment …. However, … the potential for an exceptional approach to be taken to development proposals outside the normal context of the planning policies was recognised in the Core Strategy, in Policy CP8. The policy states that development beyond that provided for in the Site Specific Allocations of Land DPD may "… exceptionally be granted where additional local, social or economic needs arise or where development would result in substantial environmental enhancement compatible with the character of the location."

68 The officer considered the "Sustainability" of Site A for housing development (in para.6.29). He acknowledged that Thakeham "can be considered an unsustainable location as it lacks a full range of facilities". However, "the provision and retention of community facilities as a result of the proposed development could be said to reduce such unsustainability to a certain degree".

69 Further work was required to resolve doubts about the possibility of land contamination and the consequences of the development for air quality and nature conservation (paras 6.44 to 6.48, 6.49 to 6.56, and 6.58 to 6.60).

70 In his "Overall Conclusion" the officer said this (at para.6.64):

> "The proposals for residential development do … represent a significant departure from the development plan and the developments as a whole would, of course, have a significant impact upon Thakeham and to a lesser extent, Storrington. These effects when balanced against the economic benefits outlined above need not be considered wholly negative. Indeed, the proposals offer a rare opportunity to meet the local needs of both an important rural business and those of residents. To achieve this … requires a development of extremely high quality; whilst initially there were some important matters to be addressed, the issues previously identified in this context have now largely been resolved. In conclusion, therefore, it is considered that the recommendation on both applications, after a number of months of very careful consideration, is that they should be supported in principle, but delegated to resolve satisfactorily the outstanding issues in relation to both contaminated land and nature conservation matters and to complete the necessary legal agreement …."

71 As the minutes of its meeting record, the committee accepted the officer's recommendation, found the proposals "acceptable in principle", subject to the satisfactory resolution of the "outstanding issues" and the completion of the necessary planning agreement, resolved to delegate the determination of the applications to the officer "in consultation with the local Ward Members and the Chairman of the Committee", and came to the "preliminary view" that planning permissions, with appropriate conditions, should be granted. The three ""outstanding issues" were:

> "• the provision of detailed site specific information to determine the presence, nature and extent of any contamination at the site and any remediation measures deemed necessary;
> • the provision of … suitable mitigation measures to offset the impact of the development upon the Storrington Air Quality Management Area; and
> • the submission of required details and the receipt of satisfactory comments from consultees in respect of nature conservation."

*The screening request of 30 March 2012*

72 The screening request for the revised proposal for Site B was made on behalf of Abingworth on 30 March 2012. Like the previous two screening requests, this one emphasized the "comprehensive solution" sought for the two sites. Only the revised proposal for Site B was the subject of this request. The screening request described the site and its existing use, and the revised proposal for it. As in the two previous screening requests, the potential effects of the development were considered, under a series of headings. On "Traffic" the screening request said that the "cumulative effects of the proposals" for the two sites had been assessed in the Transport Assessment prepared in support of both applications, and were found to

have "a negligible effect" on the capacity of the local road network. The development now proposed would not have "any demonstrable harm upon the free … flow of traffic or road safety levels on Storrington Road". Under the heading "Need for Environmental Impact Assessment" the same observations were made as in the previous screening request for development on Site B, and the "Conclusions" too were the same.

*The screening opinion of 16 April 2012*

73 The Council's screening opinion for the revised proposal for Site B took a similar approach to its screening opinion for the previous one. The Council considered that the proposal came within para.7 b) of Sch.2. Because of the increase in the footprint of development on the site, it was necessary to consider whether the development would be likely to have significant effects on the environment. In deciding this question the Council had taken into account the provisions of Sch.3. The proposal was "for the redevelopment of a site currently used for the production of mushrooms". There were "no landscape or ecological designations on the site". The "key environmental problems" that could arise were "odour, or reduced air quality arising from altered traffic flows, particularly in the Storrington area". But the screening request had indicated that "odour would be reduced, and traffic flows lowered from the current baseline". The screening opinion therefore concluded that "… the potential impacts associated with the proposed development are not so significant that they need to be dealt with outside … the normal planning application process" and that "… a formal [EIA] is not necessary". The Council "[reserved] the right to re-visit this decision in the light of further information relating to the environmental impacts becoming available". It added that "[relevant] environmental information will also need to be submitted as part of the normal planning application process".

74 The schedule attached to the screening opinion set out the Council's assessment for each of the applicable selection thresholds and criteria in Sch.3 to the 1999 EIA regulations. It said that "[any] development of this site must be considered in cumulation with the impacts of any housing development" on Site A. As for the effect on any "densely populated areas", it said that the "existing population of Thakeham (1,086 in 2001) would be affected by the proposed development, as would any new residents" on Site A, but that the "impacts would be similar to those currently on the site (and may improve with reduced odour)". It said that there "may be a risk from increased traffic in Thakeham Conservation Area, depending on the route of vehicles accessing the site (particularly if there is cumulation with [the proposed development on Site A])", but that Abingworth expected the development to "result in lower levels of traffic accessing the site". On "the extent of the impact" the schedule said that although Site B was "relatively large" and "close to an existing population", the proposal was "to update the current use, rather than a new development on greenfield land". And on "the magnitude and complexity of the impact" it said the impacts "would therefore be a continuation from the current use rather than new", and that "[the] risk of many impacts may be lower than existing levels".

*The meeting of the Development Management Committee (South) on 4 September 2012*

75 When the Council's committee met on 4 September 2012 to consider the Site A proposal again and the new proposal for Site B, it received another long report from the Head of Planning & Environmental Services. The previous committee report was appended. The officer's recommendation, as in April 2011, was that both proposals be approved.

76 In para.1.21 of his report the officer referred to the screening process, in which the Council had concluded "that as the potential impacts associated with the proposed development are not so significant that they need to be dealt with outside … the normal planning application process, … a formal [EIA] was not necessary".

77 One of the purposes of the officer's report was to explain to the members what had been done about the issues left outstanding on the last occasion—land contamination, air quality and nature conservation. All of these issues had now been satisfactorily resolved (paras 1.10 to 1.15 and 7.26 to 7.30 of the report). A Contaminated Land Assessment had been submitted in July 2012. The further information required in the light of that assessment could be made the subject of appropriate conditions (para.7.27). Abingworth had agreed to make a financial contribution for the mitigation of the additional impact of traffic from the development on the Air Quality Management Area in Storrington (paras 7.28 and 7.29). This contribution, which in the end was £75,000, was later secured in the s.106 agreement. Information had now been provided to satisfy the concerns of the Environment Agency, Natural England and the County Ecologist on nature conservation, including a further bat survey for Site B. Neither Natural England nor the County Ecologist had raised any objections (para.7.30).

78 The proposals were considered in the light of government policy in the National Planning Policy Framework ("the NPPF"), which had been published in March 2012.

79 In s.3 of the committee report the views of the Council's Strategic Planning Officer were set out. In the light of policy in the NPPF relating to economic growth, he had said that the "continued operation of an important rural enterprise is an appropriate justification" for the proposals (para.3.24), and that the development "would continue to result in substantial environmental enhancement by virtue of the redevelopment of the extensive and unsightly [Site] A as well as improvements to [Site] B" (ibid.). He had also acknowledged the "scale of [the proposed] residential development in a relatively unsustainable location" (para.3.28). But he had concluded that "the adverse impacts of this scale of residential development in this location are not so great as to demonstrably outweigh the benefits of the overall scheme in economic, social and environmental terms" (para.3.32).

80 The Head of Planning & Environmental Services set out his own views and advice on the planning merits of the proposals in s.7 of his report. He said (in para.7.6) that "[without] development it is highly unlikely that a solution would be found for the current dereliction of much of [Site A] and the further dereliction that would follow the end of mushroom production on both sites". He considered the relationship between the two proposals and the role of the proposal for Site A in enabling the investment in and redevelopment of Site B. He took into account the benefits of the Site A development in helping to meet the five-year supply of housing land in Horsham District, in the facilities it would produce for Thakeham,

and "in tidying up the southern part of the site where there are many derelict buildings and growing tunnels …". And in his "Overall Conclusions" he said this (at para.7.52):

> "As previously, it is accepted that the developments as a whole will have a significant impact on Thakeham and to a lesser extent Storrington, but they will also resolve a number of longstanding, current and potential future issues. The effects of the developments particularly when balanced against the clear economic benefits outlined above need not, therefore, be considered wholly negative. Indeed, it is considered that the proposals can be viewed as offering a rare opportunity to meet economic development and environmental enhancement objectives, which will be of long term benefit to the local and wider community. …"

He therefore recommended approval of both applications "so as to ensure the future of the mushroom growing operation in Thakeham and the local employment opportunities it creates".

81 The committee accepted the officer's advice and recommendation. Once again, its "preliminary view" was that planning permission should be granted for both proposals. The minutes of the meeting record the discussion of the proposed development. They state that "[with] regard to the outstanding issues in respect of [the proposal for Site A], information had now been submitted regarding contamination; mitigation of the additional impacts of the development upon the Air Quality Management Area in Storrington; and nature conservation". They also refer to the EIA screening process:

> "A Screening Opinion had also been submitted and it was considered that, as the potential impacts associated with the proposed development were not so significant that they needed to be dealt with outside the normal planning application process, a formal [EIA] was not required."

The last two paragraphs of the minutes before the resolution were in similar terms to the officer's advice in para.7.52 of his report.

*The meeting of the Council's Development Management Committee (South) on 16 October 2012*

82 The committee met again on 16 October 2012 to consider a short report from the Head of Planning & Environmental Services on "the sequence of development across the two sites" (para.6.1). The previous committee reports were appended. In view of the arrangements proposed by Abingworth the officer recommended that both proposals be approved, subject to a legal agreement. The committee accepted that recommendation. The applications did not come back before the committee again before the Council granted planning permission for both proposals on 19 April 2013.

*The Council's planning register*

83 In her first witness statement, dated 20 June 2013, the Council's Senior Environmental Officer, Ms Catherine Howe, explains (at para.7.0) how the Council complied with the requirement in regulation 20(2) of the 1999 EIA regulations:

"The completed Screening Opinions were placed on the Council's public Planning Register on their completion (i.e. 11th March 2010 and 16th April 2012) and are available to view by any member of the public at any time. We also provide these opinions electronically on request."

*Submissions*

84 For Thakeham Village Action Mr Robert Fookes submitted:

(1) It is important to keep in mind the overarching principle that the EIA directive has a wide scope and a broad purpose (see *Aannemersbedrijf P.K. Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* [1996] E.C.R. I-0503).

(2) The Council is wrong to say that the scheme as a whole was screened both in March 2010 and in April 2012. The proposal for Site A was screened only once, in March 2010. But in any event the screening opinion of 26 April 2012 for the revised Site B proposal could not have corrected errors in the screening opinion issued more than two years earlier for the Site A proposal.

(3) When deciding that the proposal for Site A was not EIA development the Council erred in failing to take into account the scale of the proposed residential development in this particular location. No facts about the nature, size and location of the development were set out in the screening opinion, apart from the area of the site and the number of new houses proposed. The "lack of public transport and the unsustainable nature of the site for residential development" was not dealt with.

(4) Given the nature, size and location of the housing proposed for Site A, no reasonable planning authority would have taken the view, on the information available in March 2010, that the proposed development of Site A was not likely to have significant effects on the environment.

(5) The Council took its decision not to require an EIA without obtaining enough information for a proper screening assessment. Requiring such information to be produced only later was wrong in principle, because it precluded a valid screening process. If the Council saw no need to assess such information, it would have been "illogical and irrational" to request it. Relying on documents submitted with the application for planning permission was inappropriate, and liable to generate a "paper trail", such as was deprecated in *Berkeley v Secretary of State for the Environment* [2001] 2 A.C. 603. Deferring consideration of potentially significant effects on the environment was an error of law.

(6) No reasonable planning authority would have failed to reconsider whether an EIA was required when the scale of the development and the significant impact it would have in this location were acknowledged by the Council's officers in April 2011, and again in September and October 2012. A development of 146 houses was clearly wrong in this rural location, and contrary to Policy CP5. It would greatly increase the size of the settlement, and it would change the landscape. There were other shortcomings in the proposal, to which the officers referred. As the committee was told, and appears to have accepted, both in April 2011 and in September and October

2012, the development was a "significant departure" from the development plan and would have a "significant impact" on both Thakeham and Storrington.

(7) An EIA was necessary not only because the information provided with the planning application showed how harmful the development would be but also because of the doubts that remained about the effects it would have. The Council should have required an EIA, rather than deferring the determination of the application until the likely effects of the development had been considered further.

(8) The Council was therefore prevented by regulation 3(2) of the 1999 EIA regulations from granting planning permission for the proposed development of Site A.

85 For the Council Mr Reuben Taylor, and for Abingworth Mr Rupert Warren QC submitted:

(1) From the outset the Council approached the screening process knowing that it had to consider the cumulative effects of the redevelopment of these two sites. And it did this twice—first in March 2010 and then again in April 2012, concluding on both occasions that an EIA was not required.

(2) The Council's screening decision on the Site A development was not in any respect unlawful. It was not beyond the scope of a reasonable screening judgment, informed by the relevant material. The Council was well aware of the nature, size and location of the proposed development. It asked itself the right question: whether the development was likely to have significant effects on the environment. It referred to the selection criteria in Sch.3 to the 1999 EIA regulations. It had regard to the relevant advice in Circular 02/99. It noted that there were no designations protecting the landscape in this part of its area. It judged that the location was not environmentally sensitive. It focused specifically on "the size of the development and its potential urbanising effect". And it found that the development of 146 dwellings to replace the existing development on Site A, in combination with the redevelopment of Site B for mushroom production, would not have effects wide-ranging enough to be of more than local importance, was unlikely to have any significant effect on the environment, and therefore did not require an EIA. It also went on to consider the main potential impacts one by one, and found none of them likely to be significant. This is a legally impeccable screening opinion.

(3) The Council had the information it needed on which to base its screening opinion, and was not obliged to ask for more. But it was entitled to indicate, as it did in its screening opinions for both proposals, the further surveys, analysis and other information it would require when considering the applications for planning permission. All of this material had been provided and considered by the time the committee resolved in October 2012 that the proposals should be approved. There was no "paper trail". The Council's decision to grant planning permission for both proposals was, of course, based on the fuller information it had received by then. But none of the further material made it necessary for the Council to reconsider its decision that an EIA was not required.

(4) The conflict of the proposal for Site A with relevant policy in the development plan did not compel the Council to require an EIA. The suggestion that it did is clearly inconsistent with the Court of Appeal's decision in *Loader*. Assessing the planning merits of a proposal is not the same exercise as screening it under the regime for EIA. The officer's advice to the committee that the development would have a "significant impact" on Thakeham and Storrington did not invalidate the screening opinion for the Site A.

(5) All requirements of the 1999 EIA regulations were complied with, including the requirement in regulation 20(2) that the screening opinion be published in the Council's planning register.

*Discussion*

86 I cannot accept Mr Fookes' submissions on this issue. Those made by Mr Taylor and Mr Warren are in my view correct.

87 The relevant jurisprudence is settled, and not contentious. I have already referred to the relevant principles (see [25] to [31] above). When those principles are applied to the facts of this case, it is clear that the Council's screening opinion for the Site A proposal was lawful. The same applies to the two screening opinions for the Site B development.

88 The essential purpose of the screening process under the EIA regime is to enable an authority to judge whether proposed development requires EIA in addition to the normal process of assessment under the statutory provisions for development control. The screening judgment is usually made at an early stage in the authority's consideration of the project, before the application for planning permission is submitted and long before it decides whether planning permission should be granted. Often—as in this case—it is a judgment made on the basis of less information than is available to the authority when it decides whether the development should be approved (see, for example, the judgment of Moore-Bick L.J. in *Bateman*, at [20]).

89 In a case such as this, where a local planning authority's screening opinion is criticized in a challenge to its grant of planning permission, one must keep in mind that Parliament has entrusted the screening judgment to the authority. The court's supervisory jurisdiction does not allow it to substitute its own view for the authority's on the question of whether EIA was required, but only to review the authority's decision on *Wednesbury* principles. There is ample Court of Appeal authority for this (see [26] and [27] above).

90 Both the question of likelihood and the question of significance are matters of judgment, susceptible to differences of view within the range of a judgment that is not unreasonable in the *Wednesbury* sense (see [26] above). An authority that has taken account of the relevant matters may be held to have reached a legally unimpeachable screening decision even though the court may think that other authorities might have come to a different view had the task been theirs.

91 In this case I find it impossible to conclude that the Council's screening opinion for the proposed redevelopment of Site A breached any relevant principle of law.

92 This was, from the outset, a scheme of two linked proposals. They were, in effect, a single project of redevelopment for two sites that had for many years been owned and operated as a single commercial concern. That is how they were presented to the Council. And that is how the Council approached them, both in

the screening process and when determining the applications for planning permission. Though they were submitted in separate applications the Council clearly treated them as connected, in two ways. First, the redevelopment of Site A for housing was intended to enable the redevelopment of Site B for mushroom production. And secondly, as the Council always recognized, the two developments would have cumulative as well as individual effects.

93 Thus, before the planning permission challenged in this claim was granted—on 19 April 2013—the two proposed developments had both been screened, albeit in separate screening opinions, on the basis that together they formed a comprehensive scheme. This seems to me to have been an entirely realistic approach. Indeed, any other approach would have been wrong.

94 I cannot accept that the Council was unable reasonably to conclude, when it issued its screening opinion for the Site A proposal in March 2010, that there were not likely to be any significant effects on the environment.

95 One must read the Council's screening opinion in the light of the letter that requested it. Boyer Planning's letter of 26 February 2010 requesting the screening opinion for the Site A proposal identified the site of the proposed development, its area (33.78 hectares), its location and its existing use (see [38] above). I do not think the description of the site and its location was less than was required in a screening request. In my view it would have been sufficient even if the officer responsible for preparing the screening opinion was not already well aware of the site and its surroundings. But I cannot believe that the officer was unfamiliar with these two sites, their use in the commercial production of mushrooms, the buildings and structures on them, and their relationship to each other and to the settlement of Thakeham.

96 Regulation 5(2) required that the Council be given with the screening request "a plan sufficient to indentify the land" and a "brief description" of the nature and purpose of the development and of its possible effects on the environment. Both were provided (see [38] to [45] above). The screening request made it clear that the housing development would replace most of the existing buildings on the site. And it specified the areas of each type of housing proposed. In my view the description it gave of the development was enough for the screening process.

97 Boyer Planning acknowledged that the proposed development was an "urban development project" within para.10 b) of Sch.2.

98 In my view, therefore, there can be no doubt that the Council was able to screen the Site A proposal with a proper understanding of the nature, the size and the location of the development.

99 The summary of the potential effects of the development, set out under a series of headings in the screening request, was also, in my view, adequate. Boyer Planning offered their views on the likely effects. Some they saw as beneficial, including the reduction in traffic between the two sites, the proposed recreation facilities and a possible gain in biodiversity. In their comments on the relationship of the proposal to Policy CP15 of the core strategy they argued that the local environment would be improved, and the impact of development on the countryside reduced (see [41] above).

100 Boyer Planning drew the Council's attention to the advice in para.A19 in the Annex to Circular 02/99, including what is said there about the kind of development that would be "more likely" to require EIA if proposed "on sites which have not previously been intensively developed", such as development on sites of more than

5 hectares and development that "would have significant urbanising effects in a previously non-urbanised area (e.g. a new development of more that 1,000 dwellings)" (see [43] above). They also pointed out that the location was not a "particularly environmentally sensitive or vulnerable" one, such as a Site of Special Scientific Interest or an Area of Outstanding Natural Beauty. And they said that the development was "significantly below the 1,000 dwelling threshold". They were right about all of that. Where they clearly went wrong was in saying that the "residential element is below 5 ha". Although the number of houses proposed—146—was well below 1,000, the area of the "residential element" was not below 5 hectares. The area of the market housing, which was 4.71 hectares, was less than that, but the total area of residential development, including the housing for people aged over 55, the affordable housing and the housing for key workers, was to be more than 8 hectares.

101 The statement in the screening request that all of the potential environmental effects, both individual and cumulative, "will be, or already have been, the subject of detailed studies and reports …" does not, in my view, imply that an EIA was unnecessary because those studies and reports were going to be prepared. It assured the Council that the effects of the proposed development would in any event be addressed in the application documents. But it did not suggest that significant effects on the environment were likely but could be assessed later in those documents. If that was what Boyer Planning had meant, the "Conclusions" in their screening request would have had to be different. The first sentence of those "Conclusions" stated that the development "would not have a significant effect on the environment".

102 Of course, the Council was not bound to accept the views expressed in the screening request when deciding whether an EIA was required. In my view, however, it was given enough information about the development and the potential effects on the environment to be able to exercise its own judgment soundly.

103 There can be no doubt that the Council undertook the screening process for the Site A proposal with the relevant statutory provisions in mind. The officer who compiled the screening opinion referred, under the heading "Classification", to the relevant category of development in the 1999 EIA regulations—an urban development project within para.10 b) of Sch.2. She referred to the relevant threshold, which was 0.5 hectares. She did not repeat or adopt the error Boyer Planning had made about the area of the residential development. She referred to the total area of the site on which the development was proposed, which was 33.7 hectares. But, as she obviously knew, the size of the site did not in itself oblige the Council to call for an EIA.

104 It cannot be said that in making its screening judgment the Council ignored either the relevant considerations in Sch.3 or the relevant guidance in Circular 02/99. The officer plainly had those considerations and that guidance in mind. In her assessment of the likely effects of the development on the environment she referred to the three broad selection criteria in Sch.3, which embraced, as she put it, "the general characteristics of the development, the environmental sensitivity of its location and the characteristics of its potential impact". She also referred to the Government's advice in the circular (see [49] above).

105 The location in which the development was proposed and its size and nature were all properly considered (see [49] to [60] above).

106 In the section of the screening opinion headed "Assessment of Likely Effects" the Council noted that there were "no landscape designations within the surrounding area". This was a matter of fact. It said that the location was "not considered to be environmentally sensitive". This was a matter of both fact and judgment. And it acknowledged that "the most relevant" considerations arising from the selection criteria in this case were "the size of the development and its potential urbanising effect". This was a matter of judgment. In my view, none of these findings and conclusions is in any sense vulnerable in law.

107 The same section of the screening opinion referred to the advice in Circular 02/99—that "an EIA is more likely to be required for 'major developments which are of more than local importance' or for 'unusually complex developments'"—was referred to (see [50] above). The screening opinion then expressed a clear judgment on the effect of housing development, of the scale proposed, in this particular location. The Council's "opinion" was said to be that the development of 146 new dwellings was "not wide ranging enough to be considered of more than local importance", and that the project as a whole, including the proposed mushroom production plant on Site B, was not "unduly complex or likely to have potentially hazardous environmental effects". This shows that the Council had in mind the advice in paras 33 and 35 of the circular. Following the comment made in the previous paragraph of the screening opinion about the need to consider "the size of the development and its potential urbanising effect", this was plainly the conclusion the Council had reached about the potential effects of this particular development on this particular site next to areas of housing in the rural settlement of Thakeham. It is unreal to suggest that the Council was looking at the proposal in an abstract way without thinking about the particular effects that the development might have on the local environment and on the living conditions of local residents. And the conclusions to which it came on these matters were not in any way bad in law.

108 The crucial conclusion in the last paragraph of this section of the screening opinion that "[on] these grounds" the development was "unlikely to have a significant effect on the environment", and therefore that "an EIA [was] not necessary", is as clear as one could wish. And in my view it was not an unreasonable conclusion in the circumstances. The idea that only the opposite conclusion could reasonably be reached is, I believe, untenable.

109 The next section of the screening opinion, which set out the "Further Consideration of Impacts", did not say that in any of those particular respects the Council thought a significant effect on the environment was or might be likely. It did not say that the Council's opinion that an EIA was unnecessary was merely provisional or uncertain because it depended on work yet to be done. Nor do I think that this can be inferred. On a fair reading, this part of the screening opinion did two things. First, it added some detail to the conclusion that this was not a case in which an EIA was required. And secondly, it confirmed that although there was no need for an environmental statement to be prepared, the Council wanted a number of matters to be considered in the planning application documents to which Boyer Planning had referred in the screening request. It also identified, in broad terms, the nature and scope of that further work.

110 None of the paragraphs in this part of the screening opinion suggests that the further work required was necessary before the screening judgment could be made. In some respects it was necessary to show "how", rather than "whether", a particular

concern would be addressed (see [51] to [59] above). But one would have to read into those paragraphs words that are not there to see them as contradicting the basic judgment, which both precedes and follows them, that this was not a development for which EIA was required.

111 The Council was entitled to conclude that none of the specific impacts to which it referred was likely to be significant. And its requirement for further work to be done at the application stage did not negate its opinion that an EIA was unnecessary. For example, the paragraph dealing with what the Council considered would be the "principal impact of the proposed development", namely traffic, began by saying that the traffic associated with the development was "not considered to be of a scale sufficient … to require an EIA …". But it went on to say that the submission of a Transport Assessment and "a detailed Travel Plan" would be welcomed, to show how "sustainable forms of transport" would be promoted. This was not at odds with the Council's screening judgment. The Council recognized that the decision on the planning application would need to be informed by material that it did not require in the screening process. This was both lawful and normal. It is also clear from this part of the screening opinion that the Council did not ignore what Mr Fookes referred to as the "lack of public transport and the unsustainable nature of the site for residential development".

112 In my view the Council's screening judgment was made on the basis of sufficient information about the likely effects of the development. Such uncertainties as there were at that stage did not make it impossible to conclude that there was no likelihood of any significant effects on the environment. The Council's screening opinion for the Site A development does not offend the principle that at the screening stage the authority must know enough about the impact of the project "to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment", as Dyson L.J. put it in [39] of his judgment in *Jones* (see [29] above).

113 The "Conclusion" of the screening opinion leaves no room for doubt. It shows that the Council did not believe the redevelopment of Site A for housing required an EIA, because the development was "not considered likely to give rise to significant detrimental environmental effects by virtue of their size, nature or location". Again, therefore, one sees that it was not merely the size and nature of the development that had been considered but also its location. The "Conclusion" referred to possible "non-significant environmental impacts", which it said could be dealt with in the "normal planning application process", without the aid of an EIA. But the Council emphasized that the planning application would need to be supported by the appropriate documents, which it listed. The reference to "non-significant environmental effects" demonstrates that the Council was conscious of the distinction between such effects and those that might be significant.

114 The outcome of the screening process for the Site A proposal was not contrary to *Wednesbury* principles. Focusing on the relevant criteria in Sch.3, with the relevant advice in mind and taking account of the nature, size and location of this particular development, the Council asked itself and answered the right question: whether it was likely that there would be significant effects on the environment. And its answer was unequivocally "No". This was not a conclusion beyond the bounds of reasonable judgment.

115 No complaint is made about the screening process undertaken for the development on Site B, either in March 2010 or in April 2102. By the time the last of the three screening opinions was prepared the application for the Site A

development, with all the accompanying documents, had been with the Council for more than a year, had been before the committee, and had been found acceptable in principle. However, planning permission for that development had not yet been granted. Had it been necessary to do so, therefore, the Council could have revisited its screening opinion of 11 March 2010. But it saw no need to do so. When it screened the new proposal for Site B, including again an assessment of possible cumulative effects, it did not find any reason to change its view that an EIA was not required for the Site A development.

116 The analysis thus far leads to the conclusion that Mr Fookes' submissions attacking the screening process for the Site A proposal must be rejected. The Council's screening opinion does not offend any relevant principle of law. The approach it adopted was right. Its conclusion was not irrational. The reasons for its opinion that an EIA was not required were clear. It did not neglect any consideration relevant to its screening judgment at the time when that judgment had to be made. It did not ignore or misunderstand the nature, the size or the location of the proposed development. It did not lack any of the information it needed for a solid screening assessment. It did not defer any aspect of that assessment to the process in which it determined the application for planning permission. It did not start what Mr Fookes, echoing Lord Hoffmann's phrase in *Berkeley*, called a "paper trail" of information that ought to have been gathered and considered at the screening stage. It does not need to rely on the reports submitted with the applications for planning permission to overcome some deficiency in its screening of the Site A proposal. I see no such deficiency.

117 Did anything happen after the Council had issued its screening opinion on 11 March 2010 to call into question the view it had reached, or to make it necessary for an environmental statement to be prepared before the application for planning permission was determined? I do not believe so. I do not accept that any of the advice given by the Council's officers when the planning applications came in front of the committee or any information that emerged during the planning decision process required the Council to think again about the need for an EIA for the Site A proposal.

118 The conflict of that proposal with relevant policy in the development plan, which was accepted by the Council's officers in their committee reports, did not compel the Council to require an EIA. No support for that idea is to be found either in the case law or in relevant policy and guidance. The submission made by Mr Taylor and Mr Warren that the screening process under the regime for EIA is different from the planning decision process is valid, and important. The difference between the two processes has been acknowledged by the Court of Appeal, for example in [20] of Moore-Bick L.J.'s judgment in *Bateman* and in [45] and [46] of Pill L.J.'s, with the agreement of Sullivan and Toulson L.JJ. in *Loader* (see [30] and [31] above). It is also implicit in government policy, in paras 34 and 35 of Circular 02/99. A proposal may be in conflict with one provision or another of the development plan, and the conflict may be a significant one. But it does not follow that the development in question must therefore be regarded as likely to have significant effects on the environment.

119 In his submissions Mr Fookes referred to several passages in the committee reports, all of which I have quoted (see [66] to [70] above). He focused in particular on the passage in para.6.64 of the report for the committee meeting on 19 April 2011 where the officer said that the Site A development would be a "significant

departure" from the development plan and that "the developments as a whole" would have a "significant impact" upon Thakeham and, to a lesser extent, Storrington, and the similar passage in para.7.52 of the committee report for the meeting on 4 September 2012 (see [80] above).

120 What the officer said in those two passages, and in particular his use of the adjective "significant", should not be misconstrued. The advice he was giving must be seen in its proper context, which was not the same as the context in which the Council had concluded that neither development was likely to have significant effects on the environment. The context for the comments made by the officer in those two paragraphs in his reports was his assessment of all the factors relevant to the grant or refusal of planning permission, within the statutory framework for a development control decision.

121 This is not to say that considerations relevant to a screening process cannot also be relevant in the context of a development control decision, and vice versa, as Pill L.J accepted in *Loader* (at [45]). But the making of the planning decision was not the same exercise as the preliminary process, at the screening stage, of deciding whether the additional assessment entailed in an EIA was going to be required.

122 In my view none of the passages on which Mr Fookes relied in the committee reports is incompatible with the Council's screening opinion for the Site A proposal, or should be read in that way.

123 In this case the relevant provisions of the development plan included Policy CP5 of the core strategy, which provides for a hierarchy of settlements. Thakeham is a Category 2 settlement, where housing development on the scale proposed for Site A is contrary to the policy. In its objection to the proposal Thakeham Village Action was arguing, in effect, that the enlargement of the existing settlement was significant and, in the light of Policy CP5, unacceptable. The officer reported that objection (see [66(5)] above). He accepted—and so, it seems, did the members—that the departure from the development plan and the impact on Thakeham, and also on Storrington, would be significant.

124 But the concept of a significant impact on those two settlements as a material consideration in the planning decision did not mean that the officer, or the members, had come to the view, or should have done, that the Council's screening decision was wrong. It does not undermine the Council's conclusion, in the screening process, when it applied the relevant statutory selection criteria in the light of the relevant government advice, that the proposed residential development on Site A was of no more than local importance and that the potential effects on the environment were unlikely to be significant. Nor did it oblige the Council to reconsider its screening decision before granting planning permission. In short, it does not establish any error of law in the Council's decision at the screening stage that an EIA for the Site A proposal was not required.

125 The two passages on which Mr Fookes especially relied are in the concluding paragraphs of the April 2011 and September 2012 reports, where the officer summarized his planning assessment of the two proposals. They do not reflect any suggestion within that assessment that the environmental effects of the Site A development were likely to be significant, or that an EIA was required. Nowhere in the officer's advice to the committee for its meetings on 19 April 2011, 4 September 2012 and 16 October 2012 did he suggest that the Council's screening opinion for the Site A proposal could not now stand because a particular effect, such as noise or additional traffic or odour, might be significant. The officer clearly

had that screening opinion in mind, because he referred to it (see [65] and [76] above). However, his planning assessment did not lead him to advise, or the committee to conclude, that a different view might now be reached on the question of whether the development was likely to have significant effects on the environment. He did not advise, nor did the committee conclude, that an EIA might now be required because the further work that had been done in the preparation of the planning application documents, or subsequently, had revealed some potential impact not foreseen and considered at the screening stage (see [81] and [82] above).

126 When, on 19 April 2011, the committee resolved in principle to support the proposed development of both sites there were three matters on which further work was still to be done. These were the possibility of contamination on Site A, the mitigation measures to offset any impact on the Storrington Air Quality Management Area, and the effect of the development on nature conservation. When the committee met again in September 2012 to consider the scheme in its revised form, those three matters had been satisfactorily dealt with (see [77] above). Neither in April 2011 nor in September 2012 did the officers suggest that the further work sought by the Council involved the kind of assessment that ought to have been carried out in the preparation of an environmental statement, rather than in the normal way in the development control process itself, in the light of information provided during that process. The officer's reports did not tell the members that in any of those three particular respects, or in any other respect, there was likely to be a significant effect on the environment, calling for assessment under the regime for EIA. And I do not accept that any of the information that had been submitted to the Council by the time the committee met in September 2012 indicated that an EIA was required, or that the Council ought then to have reviewed its screening opinion. Thus the Council was not prevented from lawfully granting planning permission for the Site A development by regulation 3(2) of the 1999 EIA regulations.

127 In my view, therefore, none of Mr Fookes' submissions on this issue demonstrates any legal error either in the Council's screening process itself or in the process by which it considered the applications for planning permission.

128 There are two other things I should mention before leaving this issue.

129 First, Mr Fookes abandoned his submission that in the screening opinion of 11 March 2010, the Council confined its assessment to "significant detrimental environmental effects" without considering whether there were likely to be significant beneficial effects (see *British Telecommunications v Gloucester City Council* [2002] 2 P. & C.R. 33). He was right to do so. The Council did not limit its screening assessment to potentially harmful effects on the environment. It concluded that the development was "unlikely to have a significant effect on the environment"—not merely that it was unlikely to have a significant harmful effect. And it said twice that an EIA "is not necessary".

130 Secondly, Mr Fookes did not maintain the submission that the Council failed to comply with regulation 20(2) of the 1999 EIA regulations, because it did not post the screening opinion on its on-line planning application file. As Ms Howe says in her first witness statement, the statutory requirement was met. Copies of the screening opinions were put on the Council's planning register (see [83] above).

131 It follows that ground 1 of the claim fails.

**Issue (2): section 38(6) – ground 2 of the claim**

*Relevant law and policy*

132 Section 70(2) of the 1990 Act requires a local planning authority, when dealing with an application for planning permission, to have regard to the provisions of the development plan, so far as material to the application, and any other material consideration.

133 Section 38(6) of the 2004 Act provides:

> "If regard is to be had to the development plan 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."

That is the essential principle in the "plan-led" system of development control.

134 The way in which the plan-led system operates has been considered by the court several times. The basic jurisprudence relating to it is to be found in the decision of the House of Lords in *Edinburgh City Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447. Four propositions emerge from that decision. They are not controversial. First, both the relevant provisions of the development plan and other material considerations must be taken into account by the decision-maker (see the speech of Lord Clyde at p.1457F-H). Secondly, the development plan has "priority" in the determination of planning applications (see Lord Clyde's speech at p.1458B). Thirdly, this "priority" is not to be equated to a "mere mechanical preference". There remains "a valuable element of flexibility". If there are considerations indicating the plan should not be followed, a decision contrary to its provisions can properly be made (see Lord Clyde's speech at p.1458F). And fourthly, s.38(6) leaves to the decision-maker the assessment of the facts and the weighing of the considerations material to the decision (see Lord Clyde's speech at p.1458G-H and Lord Hope's at p.1450B-H). It is for the decision-maker to assess the relative weight to be given to all material considerations, including the policies of the development plan. Whether there are considerations of sufficient weight to indicate that the development plan should not be accorded the priority given to it by statute is a question for the decision-maker, not the court (see Lord Clyde's speech at p.1459D-H, and Lord Hope's at p.1450B-D).

135 The NPPF stresses the primacy of the development plan. It says in para.12 that it "does not change the statutory status of the development plan as the starting point for decision making", and that "[proposed] development that accords with an up-to-date Local Plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise". In para.14 it highlights the "presumption in favour of sustainable development", which, it says, "should be seen as a golden thread running through both plan-making and decision-taking". It makes plain that, for decision-taking, this means "approving development proposals that accord with the development plan without delay …". The first of the "core planning principles" listed in para.17 is that decision-taking "should be genuinely plan-led".

*The committee's consideration of the proposals*

136 In the "Conclusion" of his memorandum of 8 April 2011 the Council's Spatial Planning Manager said it was clear that the proposal for residential development on Site A was "not in accordance with the development plan and that it must therefore be justified by material considerations of sufficient weight to indicate that a determination otherwise [than] in accordance with the development plan is appropriate"; that "the planning applications are capable of being acceptable in principle"; and that "on balance … there is sufficient justification to indicate that a determination of the planning applications otherwise than in accordance with the development plan is likely to be appropriate and that the proposals could be supported as being in the best long-term interests of the local community and the District as a whole".

137 In para.2.1 of the report presented by the Council's Head of Planning & Environmental Services to the Council's committee when it met on 19 April 2011 he reminded the members of the statutory context in which they were making their decision. He said this:

> "The Council has a duty to determine the applications in accordance with the development plan unless material considerations indication otherwise (section 38(6) of the Planning and Compulsory Purchase 2004). The development plan currently comprises the South East Plan and the Local Development Framework Development Plan Documents."

138 The officer drew the committee's attention to the relevant provisions of the South East Plan (in paras 2.2 to 2.5 of his report), and of the core strategy (paras 2.6 and 2.7). Throughout the report he referred to the policies of the development plan bearing on each of the matters he considered. As I have said, he quoted the Spatial Planning Manager's memorandum in full. In his own assessment of the planning merits of the proposals, in s.6 of the report, he began by noting the "clear distinction between the two planning applications with regard to their compliance with the development plan, if they are considered on an individual basis" (para.6.1). He referred to the conflict of the proposal for Site A proposal with Policy CP5 of the core strategy (ibid.). But he urged the members to look at the two proposals together (ibid.).

139 In para.6.13 of his report the officer said this:

> "It must be expressly recognised that the proposed residential development is not in accordance with the development plan and as such, if the two planning applications are to be considered jointly as is indicated, any positive determination needs to be justified by material considerations of sufficient weight to indicate such a determination other than in accordance with the development plan is appropriate. As indicated in the Spatial Planning Manager's comments set out above, there are a number of factors that need to be considered and weighed in the balance to establish whether or not such a justification exists in this case. The key considerations are as follows …."

He then identified and assessed the "key considerations" under five main headings: "Economic Development", "Enabling Development", "Viability of Residential Development", "Sustainability", and "Assessment of Material Considerations", including "Design and Layout …", "Affordable Housing", "Contamination", "Air

Quality", "Odour Emissions", "Nature Conservation", "Foul Drainage", and "Highways" (paras 6.14 to 6.62). I have referred already to some parts of this assessment, and the officer's "Overall Conclusion" (see [66] to [70] above). In para.6.33, in his "Assessment of Material Considerations" the officer said this:

> "As a result of the above assessment, therefore, it is considered that, notwithstanding that the residential development planning application … is not in accordance with the development plan, there are in considering the applications jointly relevant material considerations of sufficient weight to justify a determination otherwise than in accordance with the development plan. …."

140 As the minutes of the meeting show, the officer's assessment was accepted by the members.

141 When the committee met again in September 2012, the officer gave similar advice on the proposals as they then were. As I have said, the report that had been before the members in April 2011 was appended to the new one. Once again, the officer reminded members of the Council's duty under s.38(6) (in para.2.1 of his report). His assessment of the material considerations now took account of the Government's policy in the NPPF, including the presumption in favour of sustainable development (in para.2.6 of his report). He also referred to the emerging policy in "the consultation document on the amount of housing required in the District (February 2012) which is a response to the Localism Act and the early stages of the Core Strategy Review" (para.2.17).

142 The officer reported the views of the Council's Strategic Planning Officer: that the proposal for Site A was still "contrary to the provisions of the development plan" (paras 3.14); that it was "possible to argue" that it involved a "significant departure" from the plan "and that there are not sufficient material circumstances to override such conflict" (para.3.28); that "[it] remains clear that the residential development planning application … in isolation is not in accordance with the development plan and it must therefore be justified by material considerations of sufficient weight to indicate that a determination otherwise than in accordance with the development plan is appropriate" (para.3.34); that the new proposal for Site B was "in principle in accordance with the development plan" (ibid.); that the two proposals needed to be considered together "because of the linkages …" (ibid.); that "on balance, … there continues to be sufficient justification to indicate that a determination of the planning applications otherwise than in accordance with the development plan is likely to be appropriate …" (para.3.36); and that "a fresh view … can now be taken of the merits of the proposals and the compliance with the objectives and principles of the Core Strategy as a whole and the NPPF, so that there is a clear basis for a positive way forward which will provide the opportunity for enhancement and long term benefits, and avoid the possibility of far less appropriate form of re-use or development on the sites in the future" (para.3.37).

143 The officer's assessment in s.7 of this report was similar to that in s.6 of the April 2011 report. I have already quoted the final paragraph of it—para.7.52 (see [80] above). The officer again distinguished between the two proposals "with regard to their compliance with the development plan, if they were to be considered on an individual basis" (para.7.14). And he went on to say this (in para.7.31):

"As a result of the above renewed assessment, examining and reviewing the previous conclusions in the light of the current proposals and circumstances, it is considered that, notwithstanding that the residential development planning application … is not in itself in accordance with the development plan, there are in considering the two applications jointly still relevant material considerations of sufficient weight to justify a determination otherwise than in accordance with the development plan. …."

144 Once again, it is clear from the minutes that the committee accepted the officer's assessment. I have referred to the last two paragraphs of the minutes before the resolution (in [81] above). The preceding discussion included the following passages:

"…
Whilst there remained a clear distinction between the two current planning applications with regard to their compliance with the development plan, if they were to be considered on an individual basis, it was neither intended nor appropriate that the planning applications should be dealt with separately.
…
It was considered that, notwithstanding that the residential development planning application … was not in itself in accordance with the development plan, there were in considering the two applications jointly still relevant material considerations of sufficient weight to justify a determination otherwise than in accordance with the development plan. It was, therefore, considered appropriate to support the applications in principle given

- That the resultant investment and improvements at the mushroom growing site would remove the odour problems; retain and create jobs; and provide a long term future for the site;
- The environmental enhancement through the removal of existing buildings and the consolidation of the business on to an improved single site;
- The provision of new or enhanced community facilities; and
- The provision of housing meeting local needs in terms of affordable housing; that there would be local worker housing and dwellings for occupation by over 55s, which was a sector in need of additional housing provision, and the provision of some open market housing (given that, at present, the authority remained in a difficult position in relation to housing land supply)."

145 As I have said, when the proposals came before the committee on the third and final occasion, on 16 October 2012, the officer appended his two previous reports to the one he had now prepared (see [82] above). He told the members that the statutory background—a clear reference to s.38(6)—remained the same (para.2.1), as did the relevant provisions of national and local policy (paras 2.2 and 2.3 of his further report). He did not change the planning assessment he had set out in his report for the September 2012 meeting (para.6.1). In s.8 of his report he set out the reasons for his recommendation that both proposals be approved:

**"Application DC/12/0841 (site B):**
Having regard to the individual circumstances of this proposal, its form and location as a redevelopment of a site already in mushroom production, the

potential benefits to the local economy and the environmental advantages of ceasing composting and of landscaping, the proposal is considered to represent an acceptable form of development in accordance with the development plan.
**Application DC/10/1314 (site A):**
It is considered that a decision not in accordance with the development plan is justified by material considerations of sufficient weight, namely that the proposals are in the long [term] interests of the community and the District as a whole; by taking a proactive approach it is possible to seek to ensure that a significant local business modernises its operations with the anticipated reduction in odour, together with the protection of existing and future employment opportunities. In this way it is possible to support the local economy as well as to provide a form of residential development that enables these provisions to be made and also meets local requirements in respect of over-55s accommodation, affordable housing and key worker accommodation and ensures the provision of additional and enhanced community facilities."

146 Again, as is plain from the minutes, the members accepted the officer's assessment.

*The Council's decision notices*

147 In the Council's decision notices of 19 April 2013 the summary reasons for the granting of the permission on Site A permission were in the same terms as had been recommended by the officer and accepted by the committee at its meeting on 16 October 2012.

*Submissions*

148 Mr Fookes submitted:

(1) In determining the proposal for housing development on Site A the Council failed to give priority to the development plan.
(2) The officer's report for the committee meeting on 4 September 2012 did not give priority to the plan. Though the officer mentioned the conflict between the Site A proposal and the plan, both he and the members seem to have thought that their task was "merely a matter of balance", taking the two applications together, looking at the development as a whole, and weighing harm against benefit. As the minutes of the meeting show, the committee did not recognize, as it should have done, that the plan had priority in each of the two decisions it had to take.
(3) The officer's report to the committee for its meeting on 16 October 2012 also failed give priority to the plan. It did not acknowledge that the proposal was contrary to the development plan, or discuss its merits in the light of that conflict. This defect in the assessment was not overcome either by the officer's recommendation in s.8 of the report or by the Council's summary reasons for granting planning permission.
(4) The Council's decision to grant planning permission for the Site A proposal was therefore unlawful. In making that decision it had failed to give the development plan the priority and weight that s.38(6) requires (see the judgment of H.H. Judge Mackie QC, sitting as a deputy judge of the High Court in *South Northamptonshire Council v Secretary off State for*

*Communities and Local Government* [2013] EWHC 11 (Admin), at [20] and [69]).

149 Mr Taylor and Mr Warren submitted:

(1) The Council did not fail to do what s.38(6) of the 2004 Act obliged it to do. It is clear from all three committee reports, from the minutes of all three committee meetings, and from the reasons for granting planning permission stated in the decision notices that the Council was well aware of the priority to be given to the development plan. The provisions of s.38(6) were referred to in both the April 2011 and September 2012 committee reports. Each of the two proposals was properly dealt with, in accordance with the approach required.

(2) The committee was consistently told that the proposal for Site A was in conflict with the development plan. But it was also told that there were material considerations of sufficient weight to justify a decision that was not in accordance with the plan. The officer advised, and the members accepted, that the development would produce a number of benefits, including investment in the redevelopment of Site B to sustain a local business that would otherwise fail. This and the other advantages referred to by the officers were material considerations to which the Council was entitled to give, and did give, considerable weight—enough weight to overcome the priority due to the plan.

*Discussion*

150 I see no force in Mr Fookes' submissions on this ground of the claim.

151 There is, in my view, no basis for the argument that the Council failed to understand, or failed to follow, the approach mandated by s.38(6) of the 2004 Act.

152 At no stage can the members have misunderstood the task they faced in deciding whether or not planning permission should be granted for each of the two proposals before them. Both the Council's officers and its committee knew perfectly well what s.38(6) required. All three of the officer's reports embodied the plan-led approach. Both he and the members had well in mind that each of the applications must be determined in accordance with the development plan unless material considerations indicated otherwise. He specifically referred to s.38(6) and spelled out its requirements in his committee reports both in April 2011 and in September 2012 (see [137] and [141] above). He did not have to do this again in his report for the October 2012 meeting. He would not have needed to do so even if he had not appended his two previous reports, which he did. And this final report also included, in s.8, a summary of his advice on the relationship of each proposal to the development plan—the Site A proposal in conflict with it, the Site B proposal compliant—and, for the proposed development of Site A, the essential justification for a decision that was not in accordance with the plan (see [70], [75] to [81], [82] and [145] above). As the minutes and the summary reasons in the decision notices show, the members accepted that advice.

153 I cannot see how it can be suggested that the committee failed to give the relevant provisions of the development plan the priority that s.38(6) requires. On all three occasions when the proposals were before the committee it was provided with the officer's explanation of the relevant policies and the proposals' relationship to

them, including the officer's advice illuminating such conflict as there was between the proposals and the plan, and in particular the conflict between the proposal for Site A and Policy CP5 of the core strategy. The whole assessment of the planning merits presented by the officers was predicated on the priority due to the plan.

154 The reports presented to the committee and the minutes of its meetings show two things about the approach adopted by both officers and members: first, that a separate decision was made, as it had to be, on each of the two applications, even though they could not sensibly be divorced from each other in the planning assessment; and secondly, that in the assessment of each proposal the presumption in favour of the development plan was applied. The Council's approach cannot be faulted.

155 If the Council was going to approve the proposal for Site A the priority given to the plan by s.38(6) would have to be outweighed by material considerations powerful enough to do so. The officer knew this. And so did the members. Appropriate weight had to be given both to the relevant provisions of the plan and to the other material considerations. This was not, however, a simple balance between benefit and harm, between all the considerations weighing in favour of the proposal and all those weighing against. To give appropriate weight to the relevant provisions of the plan the Council had to heed the statutory presumption that a decision consistent with those provisions would be made. Rebutting that presumption was not impossible. But it would require, as Lord Clyde said in *Edinburgh City Council* (at p.1459F-H), considerations "of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it".

156 I reject the submission that the officer and the members saw their remit as "merely a matter of balance", in which the priority of the development plan was given inadequate weight, or no weight at all. It is, in my view, absolutely clear from the committee reports, from the minutes, and also from the Council's summary reasons in its decision notices, that it grasped the priority to be accorded to the plan. And, no less clearly, the decisions it made were faithful to that priority.

157 The reasons given for the grant of planning permission for the Site A development begin by acknowledging that the decision was not in accordance with the development plan, but go on to explain why, in the Council's view, such a decision was "justified by material considerations of sufficient weight", which it then described in summary form. By contrast, the reasons given for granting permission for the development on Site B make plain that, because of the "individual circumstances" of that proposed development and its benefits and advantages, it was considered to be acceptable and "in accordance with the development plan".

158 The members knew that the plan had priority. But they were entitled to conclude, when determining the proposal for Site A, that other material considerations were strong enough to justify a decision that was not in accordance with the plan. Mr Fookes could not submit that the court should upset the Council's judgment on the weight those other considerations should have. He could not submit that the Council lapsed into perversity when making that judgment. He did submit that the considerations relating to enabling development, which plainly featured in the Council's decision to grant planning permission for the Site A proposal, were not material considerations at all. But that is a different point. It arises under the next issue I have to consider. The question here is whether the Council failed to follow the approach required by s.38(6). In my view it is quite impossible to conclude

that the Council erred in that way. This case comes nowhere near the circumstances in which such a submission will succeed—a case where, as the deputy judge put it in *South Northamptonshire Council* (at [69]), one can "detect no identification of the priority to be given to the plan".

159 Lewis J. found this ground of the claim unarguable. I agree with him.

**Issue (3): enabling development – grounds 3, 4 and 5 of the claim**

*Relevant law and policy*

160 Section 106 of the 1990 Act provides:

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section … as "a planning obligation") … –
>
> (a) restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way; or
>
> (d) requiring a sum or sums to be paid to the authority … on a specified date or dates or periodically.
>
> …."

161 Paragraph 204 of the NPPF says that planning obligations should only be sought where they meet all of three tests: first, that they are "necessary to make the development acceptable in planning terms", secondly, that they are "directly related to the development", and thirdly, that they are "fairly and reasonably related in scale and kind to the development".

162 For decisions made on or after 6 April 2010 that result in planning permission being granted, regulation 122(2) of the Community Infrastructure Levy Regulations 2010 provides:

> "A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is –
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and kind to the development."

163 Any consideration relating to the use and development of land is capable of being a material consideration (see the judgment of Cooke J. in *Stringer v Minister of Housing and Local Government* [1971] 1 All E.R. 65, at p.77).

164 In several cases the courts have held that the economic benefit in a development that has been funded by another proposal was a material consideration when the decision on the latter was made (see, for example, *London Borough of Islington Council v Secretary of State for Communities and Local Government* [2012] EWHC 1716 (Admin)).

165 It is axiomatic that planning permission may not be bought or sold (see the judgment of Lloyd L.J. in *Bradford City Metropolitan Council v Secretary of State for the Environment* [1986] 1 E.G.L.R. 199, at p.202G). However, a financial contribution may be a material consideration if there is a sufficient connection

between the development proposed and the purpose of the contribution (see the decision of the Supreme Court in *R. (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2011] 1 A.C. 437). Such a contribution may justify the granting of planning permission for a proposal that is otherwise objectionable.

166 In *R. v Westminster City Council, ex parte Monahan* [1989] J.P.L. 107 the Court of Appeal held that, provided the decision on a planning application was based on planning grounds and not on some ulterior motive, and was not irrational, financial considerations fairly and reasonably related to the development were capable of being material considerations in that decision. In that case the local planning authority was held to have been entitled to grant planning permission for an office development contrary to the development plan because improvements to the Royal Opera House in Covent Garden would not be financially viable if permission for the offices were not granted and the financial contribution promised by the development were foregone. The court found, on the facts, a relevant and sufficient connection between the two developments.

167 Kerr L.J., said (at p.111):

> "Financial constraints on the economic viability of a desirable planning development are unavoidable facts of life in an imperfect world. It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations which may properly be regarded as material in determining planning applications. Where they are shown to exist they may call for compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest. Virtually all planning decisions involve some kind of balancing exercise. A commonplace illustration is the problem of having to decide whether or not to accept compromises or sacrifices in granting permission for developments which could, or would in practice, otherwise not be carried out for financial reasons. Another, no doubt rarer, illustration would be a similar balancing exercise concerning composite or related developments, i.e., related in the sense that they can and should properly be considered in combination, where the realisation of the main objective may depend on the financial implications or consequences of others. However, provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation."

(see also the judgment of Nicholls L.J. at p.121, and the judgment of Staughton L.J. at p.122).

168 In *Sainsbury's Supermarkets*, it was held that the relationship between a superstore proposed by *Tesco* on the outskirts of Wolverhampton and the site in the city centre where it was offering to provide regenerative benefits was not close enough for the benefits to be taken into account as a justification for the compulsory purchase order. Lord Collins of Mapesbury said (in [58] of his judgment) that "[the] ratio of the decision in … *Monahan* is that where there are composite or related developments (related in the sense that they can and should properly be considered in combination), the local authority may balance the desirable financial consequences for one part of the scheme against the undesirable aspects of another

part". He cited the observation made by Lord Keith of Kinkell in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.770, that "[an] offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, would plainly not be a material consideration and could be regarded only as an attempt to buy planning permission". He went on to say this (at [70]):

> "What can be derived from the decisions in the planning context, and in particular the *Tesco* case, can be stated shortly. First, the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision-maker. Second, financial viability may be material if it relates to the development. Third, financial dependency of part of a composite development on another part may be a relevant consideration, in the sense that the fact that the proposed development will finance other relevant planning benefits may be material. Fourth, off-site benefits which are related to or are connected with the development will be material. These principles provide the answer to the questions raised in *Ex P Monahan* … about the development in Victoria or the swimming pool on the other side of the city. They do not, as Kerr LJ thought, raise questions of fact and degree. There must be a real connection between the benefits and the development."

(see also the judgment of Lord Mance, at [98], and the judgment of Lord Phillips of Worth Matravers, at [137]).

169 In *Derwent Holdings Ltd v Trafford Borough Council and others* [2011] EWCA Civ 832 the Court of Appeal applied those principles to a scheme, in a single planning application for a superstore and improvements to the Old Trafford cricket ground (see, in particular, [18] and [19] in the judgment of Carnwath L.J., as he then was, with which Tomlinson and Sullivan L.JJ. agreed). When considering submissions that had been made by counsel alleging an "inherent inconsistency" in the advice a planning officer had given in that case, Carnwath L.J. said (at [15] of his judgment) that the committee "would have been aware that the proposal was being put forward as not merely acceptable, but as carrying with it significant regeneration benefits, including the improvement of the cricket ground". He went on to say (ibid.) that there was "nothing objectionable in principle in a council and a developer entering into an agreement to secure objectives which are regarded as desirable for the area, whether or not they are necessary to strengthen the planning case for a particular development". In that case, as in *Monahan*, there was a "direct relationship" between the two elements of the proposals. They were "in close proximity and physically linked", and had been "reasonably included in a single application". Even if, as counsel had argued, some of the members thought they could take account of the overall benefits of the two elements, it was "not clear … why that would have been legally objectionable" ([19] of Carnwath L.J.'s judgment).

*The committee meeting of 19 April 2011*

170 In the officer's report for the meeting of the committee on 19 April 2011 the members were told that the two applications had been put forward as "a comprehensive solution" for the two sites, "through the submission of two

associated planning applications for Site A and Site B respectively" (para.1.2 of the report); that the two applications involved the consolidation of the existing use on Site A with the use on Site B "to provide one modernised production plant on [Site B] …" (para.1.3); and that "an 'enabling' planning application is also made for a residential development on [Site A] to replace the existing Sussex Mushroom Limited production facilities currently sited there and therefore providing the financial injection needed for the upgrading of the buildings for [Site B]" (ibid.).

171 The memorandum prepared by the Council's Spatial Planning Manager discussed the "Viability Considerations". He referred to the independent assessment of Abingworth's Management Plan and Viability Study by a firm of accountants, Saffery Champness (see paras 3.13 to 3.17 of the officer's report to committee). In the light of the conclusions reached by Saffery Champness the Spatial Planning Manager said that "without any additional funding for the necessary improvements, it is clear that the business will fold due to its inability to meet the requirements for such a business …" (para.3.17). He said there was "clearly an argument that the economic needs which arise in terms of the retention of 473 (currently) jobs and the continued operation of an important rural enterprise is an appropriate justification in the terms of [Policy CP8 of the core strategy]" (para.3.19). In his "Conclusions" he said there were "undoubted risks involved in supporting an 'enabling development' which cannot in itself guarantee the long term future of the mushroom growing business, but equally there would be continued and greater uncertainty about the future of the sites if the development package were not to be agreed" (para.3.36). The report prepared by Saffery Champness was provided to the members, and its conclusions were summarized in the committee report (see paras 4.1 and 4.2).

172 Thakeham Village Action's objection that "the provision of financial assistance to a company is not a valid reason for permitting unacceptable planning development" was reported to the committee (in para.4.20 of the officer's report).

173 In his planning assessment the officer advised that it was "neither intended nor appropriate that the planning applications should be dealt with in [a] 'detached' way …" (para.6.1). In paras 6.19 to 6.27 of his report he assessed the considerations relating to "Enabling Development" in detail. He said there could be "no certainty that a viable business will be guaranteed as a result of the 'enabling development'" (para.6.20), and that the legal agreement envisaged by Abingworth and the Council "cannot … of course, ultimately, guarantee the future survival of the business" (para.6.23). But he accepted that "without the funding and enabling development the business will fail" (ibid.). He explained to the members the relevant provisions of the Community Infrastructure Levy Regulations 2010, and advised that the proposed s.106 agreement was consistent with the relevant principles (para.6.27).

174 In his "Overall Conclusions" the officer told the members that "[to] refuse the proposals would certainly result in the demise of the Company, the consequent loss of jobs and a significant impact on the local economy, together with issues relating to the subsequent future of the sites"; and that "there would be the loss of potential future jobs were the company to expand successfully as well as those associated with the construction of the development and the new facilities" (para.6.63).

175 It is clear from the minutes that the committee accepted the officer's advice on enabling development. The minutes record that the Council's Chief Executive "reported that advice had been sought from a QC in response to the legal opinion

provided to Thakeham Village Action and that the QC's advice had informed the report now before the Committee".

*The Capital Project Summary of 30 March 2012*

176 In support of the revised proposal for Site B Abingworth submitted a Capital Project Summary, dated 30 March 2012, in which the investment Monaghan Mushrooms were prepared to make in Site B was described. Under the heading "Overview of capital project" this document said that the site was "strategically important to the Monaghan Mushrooms group" for several reasons, and that "[in] the period to the end of December 2011 Monaghan Mushrooms Ltd have invested a total of £2.7 million to maintain production and employment on the site. …". The "Funding proposal" was also explained. In 2012 and 2013, the document said, "the total investment on site will amount to £6.3 million with a further investment of £6 million at the Tunnel Tech site to replace the obsolete compost facility". The proposed funding arrangements were outlined:

> "Monaghan Mushrooms anticipates the investment being funded from the group's existing banking facilities subject to an enabling investment of £3.75 million from Abingworth Developments. The commercial viability of the project is predicated on the funding from Abingworth which in turn is dependent on its securing planning permission for residential development on part of the site. Without the enabling funding the Internal rate of return is 6.7% therefore the project cannot proceed. With enabling funding Internal rate of return reaches 10.8%. This is at the lower end of economic viability for an investment with a significant level of risk but given the strategic value of the site the Group is prepared to proceed at this level."

*Ernst & Young's report of 31 July 2012*

177 After the revised proposal was submitted for the development of Site B the Council engaged Ernst & Young "to provide an independent review of the reasonableness of assumptions used in the Capital Summary [submitted with the planning] and the investment calculations made within it" (Ernst & Young's letter of 31 July 2012 to the Council's Director of Corporate Resources). In their report (in subs.1.2) Ernst & Young said it was outside the scope of the review "to consider whether the proposed level of enabling investment at £3.75m is appropriate, realistic or affordable in relation to any proceeds from the development of the site". In para.3.3.10 of their report they said their work broadly confirmed what had been said by Monaghan Mushrooms. The internal rate of return for the "enabling funds" they had calculated was "very similar to the 10.8% included in the analysis provided to support the Capital Summary", which Monaghan Mushrooms had said was at the lower end of what it would accept for this type of investment.

*The committee meeting of 4 September 2012*

178 When the revised scheme came before the committee on 4 September 2012 the officer told the members that a "comprehensive solution" for the two sites was still being promoted (para.1.25 of the report). The officer referred to the financial appraisal that had been submitted with the new application for Site B, the "Capital

Project Summary & Budget for Enabling Works" dated April 2012 (paras 1.27 to 1.31). He included the passage that I have quoted from the "Funding proposal" in the Capital Project Summary (para.1.31).

179 The officer reported the Strategic Planning Officer's comments on enabling development, in which he accepted that "without the freehold interest in site B and the enabling payment (now £3.75 million) the proposed investment will not take place and the operation will cease with the consequent redundancy of the sites" (para.3.18). The Strategic Planning Officer referred to the conclusions of Ernst & Young (paras 3.20 and 3.21). He also referred to the District Valuer's advice that the residential development proposed on Site A was capable of being viable if the enabling payment of £3.75 million was made (para.3.22). He recognized that the circumstances were now "somewhat different … in that, at least theoretically, Monaghan Mushrooms could potentially afford the full investment required for the improvements in the mushroom growing site" (para.3.29). But Monaghan Mushrooms had made it "clear that this scale of investment without the enabling payment is not acceptable to the company because of the poor rate of return involved and, more particularly, without the freehold interest in the site which is a key part to the package, there is no basis whatsoever for making the necessary investment in the site" (ibid.). He concluded that "without the overall scheme and the freehold transfer/enabling payment, the business has no future and the sites will become redundant as a horticultural operation" (ibid.). The enabling payment and freehold transfer would "trigger considerable investment as well as the cessation of the on-site composting within a year" (para.3.35).

180 The officer reported Thakeham Village Action's contention that the enabling development was not a material planning consideration and was "almost certainly unlawful", and that the Council could not approve an otherwise unacceptable housing development to subsidize "a private business" (para.4.31).

181 In his planning assessment the officer referred to the connection between the two proposals. He advised that the two applications were "legally separate entities and either could be determined without regard to the other" (para.7.2). But he then said this (ibid.):

> "… However, it is logical to consider the two together because they are inextricably linked: [the application for Site A] offers the benefit of funding the improvements to mushroom production in [the application for Site B], which would not have been submitted without the possibility of that funding. The two sites also have a functional link because mushroom production occurs across both, with spent compost being disposed of on [Site A]."

182 The officer referred to the decision of the Court of Appeal in *Monahan* (para.7.3). He added that "security of local employment and the benefits of investment in the local economy are clearly matters of public interest" (ibid.). He said that there had been "significant changes in the enabling arrangement since April 2011"; that the mushroom business was now "run by a very successful mushroom grower, Monaghan Mushrooms, although production inefficiencies intrinsic to the site result in it continuing to make a loss"; and that "what was true in April 2011 is still true today; that a successful mushroom growing business on [Site B] is only possibly with significant capital investment" (para.7.4).

183 So the "central question with these applications", the officer said, was "whether it is appropriate to secure a substantial proportion of that investment from

development on the Abingworth site that might otherwise be unacceptable" (ibid.). He then tackled the financial and economic aspects of this question, and the relevant objections (paras 7.5 to 7.25 and 7.31 to 7.42). Referring to the advice the Council had received from leading counsel, he rejected the view of Thakeham Village Action that this was not lawful enabling development (para.7.21). He considered the proposed s.106 obligation (in paras 7.44 to 7.50). He said that the "most significant change" was that the "new mushroom farm" on Site B "would be development in a single phase before commencement of development on the enabling [Site A]" (para.7.46). This, he said, was "a welcome change, given that the acceptability of the development on site A is dependent on it facilitating development on site B" (ibid.).

184 Again, as the minutes show, the members clearly accepted the officer's approach and advice on enabling development. They include these two paragraphs:

> "Whilst the two applications were legally separate entities and either could be determined without regard to the other, it was deemed logical to consider the two together as they were inextricably linked. Application DC/10/1314 offered the benefit funding the improvements to mushroom production proposed in application DC/12/0841, which would not have been submitted without the possibility of that funding. The two sites also had a functional link because mushroom production occurred across both, with spent compost being disposed of on the Abingworth site.
>
> It was noted, however, that there had been significant changes in the enabling arrangements since April 2011. At that time, the aim had been to provide a lifeline to a failing business, whereas now the site was run by a successful mushroom grower, although production inefficiencies intrinsic to the site resulted in it continuing to make a loss. In April 2011, the Committee had accepted that development of the Abingworth site was acceptable as a means of securing the continuation of employment and what was true then was still true today: that a successful mushroom growing business on the Chesswood site was only possible with significant capital investment. The central question with the current applications was whether it was appropriate to secure a substantial proportion of that investment from residential development on [Site A], which might otherwise be unacceptable."

The committee's answer to that "central question" appears in the final paragraph of the minutes, where it was stated that "on balance" members considered that both proposals should be supported "so as to ensure the future of the mushroom growing operation in Thakeham and the local employment opportunities it created" (see [80] above).

*The committee meeting of 16 October 2012*

185 In his report to the committee for its meeting on 16 October 2012 the officer considered "the sequence of development across the two sites" (para.6.1). He referred to his advice in para.7.46 of the report he had prepared for the previous meeting, in which he had told the members that the planning obligation now in draft would prevent the development on Site A being implemented until the development on Site B had been completed (para.6.2 of the report). He clarified the meaning of "Enabling Development" as discussed in the previous report, which

he said was "development that funds something else" as in *Monahan* (para.6.5). It was still "a critical objective … to ensure that the housing development, which would otherwise be refused permission, does not proceed until the work it would enable on [Site B] has been carried out. …" (para.6.15). This was because "[the] entire principle of enabling is to secure existing jobs, which would be achieved through the enabling works …" (ibid.). In view of the evidence that Monaghan Mushroom's total investment on Site B would far exceed the £3.75 million provided by the development on Site A, the officer said it would be "more appropriate to tie the commencement of the housing to the completion of the enabling works on [Site B] that it will fund" (para.6.16). He advised the committee that the transfer of the freehold interest in Site B and the payment of the £3.75 million "enabling contribution" following the transfer "are private matters between the parties and cannot be controlled or regulated through the planning process" (para.6.20). There was no power "to enforce commencement of the enabling works" (ibid.). But it had been made clear that Monaghan Mushrooms would not invest and carry out the enabling works until the transfer and the payment of the "enabling contribution" had taken place, and the s.106 agreement would prevent the housing development on Site A being begun until the enabling works on Site B were complete (ibid.).

*The section 106 agreement*

186 Recital D to the s.106 agreement of 19 April 2013 states that Monaghan Mushrooms has contracted to buy Site B, and Abingworth is required to sell Site B to it, "forthwith" on completion of Abingworth's purchase of both sites under an option agreement entered into in May 2010.

187 Schedule 2 to the agreement, under the heading "Timing of developments", contains the following covenants by Beamsync, Rydon Homes and Abingworth:

> "1. Not to Implement or cause or allow to be Implemented the [planning permission for the Site A development] unless and until:
>
> 1.1 [the defined works on Site B] have been completed to the written satisfaction of [the Council] AND
>
> 1.2 [Beamsync] and/or [Abingworth] and/or [Rydon Homes] and/or [Monaghan Mushrooms] shall have produced written evidence to the reasonable satisfaction of [the Council]:
>
> 1.2.1 from a properly qualified independent quantity surveyor who has certified that all stages of [the defined works on Site B] have been in his opinion satisfactorily completed and
>
> 1.2.2 that [Abingworth] has paid to [Monaghan Mushrooms] the sum of £3.75 million … in respect of [the defined works on Site B] and
>
> 1.2.3 that the freehold of [Site B] has been transferred to [Monaghan Mushrooms] pursuant to the contract referred to a recital D hereof and such transferee has been registered as the freehold owner at the Land Registry and
>
> …
>
> 1.2.5 [the Council] has certified in writing that it is satisfied that this paragraph … has been complied with

…."

The defined works on Site B, referred to in the agreement as the "Chesswood Farm Works" are the works to which the officer had referred in his report to the committee for its meeting on 16 October 2012, including the "refurbishment of [the] existing growing rooms" and "the site wide restoration works set out in Sch.13 headed "Capital Project Summary and Budget for enabling works dated April 2012".

*Submissions*

188 On ground 3 of the claim Mr Fookes submitted:

(1) The two applications for planning permission ought to have been considered separately. But they were not. The ostensible link between the two proposals was that both applications were the subject of a single s.106 obligation, in which the developer of Site A committed itself to subsidizing the business of the company that was going to occupy Site B. The proposed residential development on Site A is contrary to the development plan. It was to overcome this objection that the payment of £3.75 million was offered, and the offer was crucial in the Council's decision to grant planning permission for the Site A development.

(2) The offer of £3.75 million was an attempt to buy planning permission. It was an immaterial consideration. It had nothing to do with the proposal for housing on Site A apart from the fact that it was offered by the developer. But the Council took it into account. The decision to grant planning permission was therefore unlawful.

(3) The requirement in the s.106 agreement that £3.75 million be paid and land transferred to facilitate another development was contrary both to the provisions of s.106 of the 1990 Act and government policy in para.204 of the NPPF, and to regulation 122 of the Community Infrastructure Levy Regulations 2010.

189 On ground 4 Mr Fookes submitted:

(1) The only purpose of Abingworth's so-called "enabling development" was to subsidize another company, without any control over the conduct of that company in the future or the decisions it might make about jobs. The funding of a "private company" in this way is not a proper planning purpose. This was not the kind of enabling development that the courts have regarded as lawful, such as proposals funding the protection or improvement of heritage assets or sports facilities (see, for example, *Monahan* and *R. (on the application of Hampson) v Wigan Metropolitan Borough Council* [2005] EWHC 1656 (Admin)). It may be acceptable for one proposal that complies with the development plan to fund another development also consistent with the plan. But to permit development simply because it would fund the development of other land for the benefit of a "private company" is wrong in principle.

(2) In this case the financial contribution created by the housing development on Site A and the transfer of the land were directed to supporting a successful mushroom producing company, which could have funded the development

itself but said it would not. The Council's decision to grant planning permission in these circumstances was improper and unlawful.

190 On ground 5 Mr Fookes submitted:

(1) When the land on Site B is transferred to Monaghan Mushrooms and the works funded by the contribution of £3.75 million have been completed, the housing development can be undertaken on Site A but there is nothing in the agreement to require Monaghan Mushrooms to remain on Site B, or to operate a business there.
(2) The s.106 agreement does not, therefore, guarantee the future of mushroom production on Site B and the jobs involved in it.

191 On ground 3 Mr Taylor and Mr Warren submitted:

(1) There was a clear connection between the two proposals. The two sites are adjacent to each other. They had for a long time been used together as part of a single mushroom growing operation. It was appropriate for the Council to consider the future of both sites together. Indeed, it would have been inappropriate not to take that approach. The two proposals constituted a single, comprehensive scheme for the redevelopment of both sites.
(2) However, as the Council was always aware, it had two applications before it and it had to reach a decision on each, in accordance with the statutory requirements. The financial contribution offered in the proposal for Site A was a material consideration in the determination of that application, to which the Council was entitled to give the weight that it did. It approached this question in the light of its officers' advice and the independent view of Ernst & Young.
(3) The circumstances here are within the principles applied by the Court of Appeal in *Monahan* and the Supreme Court in *Sainsbury's Supermarkets*. This is a case of lawful enabling development.

192 On ground 4 Mr Taylor and Mr Warren submitted:

(1) There is no reason why the concept of enabling development should be confined to schemes that would protect or improve heritage assets or facilities serving or accessible to the public. Financial considerations can be material in any case where a development will produce funds that will be put to use in the public interest—such as securing the future of a company and the jobs it provides—as long as there is a real connection between the two developments.
(2) In deciding to grant planning permission for the development of Site A the Council did not give weight to the provision of funding to a "private company". It gave weight to the fact that the funds generated by the housing development on one of the two sites previously used for mushroom production would be used to secure benefits in the public interest, namely economic activity and employment on the other site. There was nothing unlawful in this.

193 On ground 5 Mr Taylor and Mr Warren submitted:

(1) The absence of a requirement in the s.106 agreement compelling the owner or occupier of Site B to carry on a mushroom business on that site does not betray any error of law.
(2) The agreement requires work to be undertaken on Site B, at considerable cost, before the housing development on Site A can proceed. Site B would then be owned by a successful mushroom producing company, which would have been obliged to invest in specified improvements to that site. In these circumstances the Council could reasonably conclude that the s.106 agreement was adequate and effective, and should be given due weight in its decision on the Site A application.

*Discussion*

194 These three grounds of the claim obviously relate to each other and are best discussed together. I cannot accept Mr Fookes' argument on any of them. Once again, it seems to me that the submissions made by Mr Taylor and Mr Warren are well founded.

195 There are the three basic propositions to be considered here.

196 The first proposition, advanced in ground 3 of the claim, is that it was unlawful for the Council, in determining the proposal for Site A, to take into account the payment of £3.75 million generated by that proposal and tied to the proposed development of Site B by the s.106 agreement. This, it is said, was an immaterial consideration because the only connection between the obligation and the housing development on Site A was that the money was offered by Abingworth as the developer.

197 The second proposition, in ground 4 of the claim, is that the principles of lawful "enabling development" do not extend to the commitment by an applicant for planning permission on one site to fund a commercial operation in the hands of a "private company" on another. This, it is said, is not a proper planning purpose, or at least is not a proper planning purpose unless the public is to benefit in some way from the enterprise that gets the funding.

198 The third proposition, in ground 5, is that the s.106 obligation does not, in fact, require Monaghan Mushrooms either to carry out the development proposed on Site B or to operate a mushroom business on that site if the development is carried out, and thus fails to secure the provision of employment on which the Council relied as a significant benefit in approving the development of Site A.

199 The first and second propositions may not be identical, but they can both be tested with the principles in the jurisprudence on enabling development to which I have referred (see [163] to [169] above).

200 The range of matters that may qualify as material considerations in the making of a planning decision is very broad, an essential principle being that they are considerations both relevant to the use or development of land and relevant to the development being considered. The underlying assumption is that planning decisions must always be made in the public interest, and not merely to further the private interests of a developer or landowner.

201 Economic benefits of various kinds can be material considerations. A financial contribution whose purpose is to enable other development to proceed may be material, so long as there is a sufficient connection between the proposal and that other development.

202 The weight to be given to a material consideration is always for the decision-maker to judge, subject to review by the court on *Wednesbury* grounds. A financial contribution, if it is a material consideration, may therefore prove to be the decisive factor in a planning decision. And this may be so if the purpose of the contribution is to enable some other desirable development to proceed, just as it might be if the aim were to fund the provision of infrastructure or some other planning benefit. Together with other considerations, or even on its own, it may outweigh factors telling against the grant of planning permission, including conflict with relevant policy in the development plan. It may justify the granting of permission when otherwise such a decision could not have been made. That is what happened in *Monahan*.

203 In this case I think the approach taken by the Council to the Site A proposal as "enabling development" was appropriate and lawful. The decision to grant planning permission for that development was on its face a rational decision. There can be no dispute about that. So the crucial questions for the court are whether the decision was made on planning grounds and not for some ulterior purpose, and whether the financial considerations taken into account by the Council were relevant to the proposal. I think the answer to both of these questions is "Yes".

204 I do not accept that the Council made any error of law when it took into account the payment of £3.75 million that the development on Site A would yield as a subsidy for the development on Site B. This was not, in my view, an immaterial consideration. It was, as a matter of law, material in the sense to which the majority in the Supreme Court in *Sainsbury's Supermarkets* referred (see [168] above).

205 I reject Mr Fookes' submission that the only connection between the commitment to the subsidy in the s.106 agreement and the housing development on Site A was that the money was being offered by Abingworth as developer. That contention is not supported by the facts. There was in fact a strong connection, both between the two sites and between the two proposals.

206 As Mr Taylor and Mr Warren submitted, the connection between the two sites was not simply a matter of geography—in that they are adjacent to each other and separated only by a road. It was also a matter of their history—in their combined use over many years as the two parts of a single mushroom growing operation, which had been owned and run by one company, as if on a single site, until the operation began to fail.

207 The two proposals were mutually dependent. They were, in effect, a comprehensive scheme for the redevelopment of both sites. The connection between them was a matter of economic reality. The consolidation of the mushroom operation on Site B would not be achieved unless the development proposed on Site A was permitted. This was so when the original proposals were submitted in July 2010. And it was still so after Monaghan Mushrooms had become involved as the operator intending to run the business on Site B once it was redeveloped to accommodate all of the plant. The Council knew that Monaghan Mushrooms was a profitable company, and was prepared to invest in Site B provided the subsidy promised by the development of Site A was released. It knew that there was no prospect of mushroom production continuing in Thakeham unless Monaghan Mushrooms was prepared to make that investment. And it knew that there was no other likely source of the funds required.

208 The proposals were also directly linked to each other in a practical way. The proposed redevelopment of Site B depended on the financial contribution from the

redevelopment of Site A. The latter would only go ahead once the works it was funding on Site B had been completed. The whole operation, including the activity previously undertaken on Site A, could then be located on Site B and would be able to continue in a viable form.

209 When the revised scheme for the two sites was being considered in September and October 2012, before the s.106 agreement was completed, the Council had to consider whether the contribution of £3.75 million now being offered was necessary to ensure that the Site B development would proceed. In the light of the independent advice it had from Ernst & Young, it satisfied itself that *Monahan* Mushrooms' business plan was sound and that a contribution at that level was required.

210 This is the kind of situation contemplated by the Court of Appeal in *Monahan*, as described by Kerr L.J. in the second of the two paragraphs I have quoted from his judgment (see [167] above). This is a case of "composite or related developments". The relationship between the two proposals was such that they could and should "properly be considered in combination". The aim of securing mushroom production in Thakeham and the jobs involved in it was a proper planning purpose. Achieving it depended on the injection of capital that would flow from the redevelopment of one of the two sites originally used for mushroom production into the regeneration of the other as a mushroom nursery. This was not a case of unlawful enabling development, or of planning permission being bought or sold. The commitment to funding in the s.106 agreement was not an obligation unconnected with the proposal for housing on Site A apart from its being put forward by Abingworth as developer. It was not an immaterial consideration. The Council was right to take it into account. To have failed to do so would have been to ignore a factor relevant to its decision on the Site A proposal.

211 I do not accept that the Council failed to consider each of the two proposals on its own merits. As I have said (in [150] to [159], and [184] above), it is clear from the committee reports, from the minutes, and from the summary reasons in the two decision notices that the Council did consider each application on its individual merits, whilst recognizing that the merits of the proposal for Site A included its ability to support the redevelopment of Site B.

212 I reject Mr Fookes' submission that the Council's approach went against any principle in the jurisprudence, and in particular in the decision of the Court of Appeal in *Derwent Holdings*. In that case the Court of Appeal applied the principles endorsed by the Supreme Court in *Sainsbury's Supermarkets*. The Court of Appeal did not say that the submission of a single application was a prerequisite to those principles being satisfied. It did not say that one part of a composite scheme could only be regarded as financially dependent on another if they were combined in a single proposal. It did not say that the requirement for there to be "a real connection between the benefits and the development", as Lord Collins put it in his judgment in *Sainsbury's Supermarkets*, could only be met in that way. In this case the connection was undoubtedly real, regardless of there being one application not two.

213 I do not believe that the principles of enabling development are limited to ventures that would protect a heritage asset or a facility that serves or is accessible to the public. And I also reject the submission that those principles do not extend to a financial contribution that would support development undertaken by another company on another site. The jurisprudence does not support either of those concepts.

214 The scope for enabling development is wide. There are many ways in which it may serve a proper planning purpose. It may fund works of repair or improvement to a listed building. It may fund the protection of a particular habitat. It may fund the provision of a swimming pool for public use, or some other public facility. But that is far from being an exhaustive list of the benefits it may help to provide.

215 This case may be an example of what Kerr L.J. in his judgment in *Monahan* described as "compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest". This can happen in cases of many kinds. It can happen when jobs in a long-established local business will only be saved, or new jobs and investment secured, if a proposal that makes this possible is granted permission though normally it would be turned away. The fact that the business is run by a "private company" does not mean that the jobs and the investment cannot be seen as beneficial in the public interest. Nor does it mean that the enabling development is tainted by an irrelevant or unlawful purpose, or that the economic benefit it will produce should not bear on the planning decision.

216 On each of these two applications the Council had to ask itself whether, in the public interest, planning permission should be granted. The aim of safeguarding in Thakeham an industry that had been there for a very long time and the jobs associated with it was, in the Council's view, a legitimate planning objective. It was right about that. The fact that the land and buildings on Site B were going to be owned and used by a company engaged in a commercial enterprise for profit was no bar to the Council taking into account the financial contribution as a material consideration in determining the proposal for Site A.

217 Finally, I reject the suggestion that the s.106 agreement was either unlawful or inadequate.

218 The provisions of Sch.2 to the agreement do not exceed the power to enter into a planning obligation provided by s.106 of the 1990 Act (see [187] above). They restrict the development of relevant land in a specified way (s.106(1)(a)).

219 The agreement also satisfies the requirements in regulation 122(2) of the Community Infrastructure Levy Regulations 2010 for a planning obligation to be regarded as "a reason for granting planning permission". In my view, for the reasons I have already given, the Council could conclude, and effectively did, that the commitments in Sch.2 to the agreement were "necessary to make the development [of Site A] acceptable in planning terms", were "directly related to the development", and were "fairly and reasonably related in scale and kind to the development" (see [162] above). For the same reasons, therefore, the Council could conclude that the corresponding requirements in government policy in para.204 of the NPPF were satisfied (see [161] above).

220 The agreement is not inadequate as a mechanism for the enabling development that the Council took into account. As Mr Taylor and Mr Warren submitted, Sch.2 to the agreement requires three things. Not only does it require the payment of the financial contribution; it also requires the freehold interest in Site B to be transferred to Monaghan Mushrooms, and the specified works on Site B to be completed. It does not stipulate merely the payment of money. It restricts the development on Site A so as to ensure that the defined works on Site B are carried out in a timely way.

221 The Council's committee was not misled about the likely commitments in the s.106 agreement. The members were not told that the funding generated by the development on Site A could or would oblige Monaghan Mushrooms to stay on

Site B, or to carry on a mushroom business on that site for the foreseeable future or, therefore, that the jobs involved in that business would always be there. The advice given by the officer in his report for the meeting of the committee on 19 April 2011 was that the s.106 agreement could not guarantee the survival of the mushroom business on Site B, but that without the funding from the redevelopment of Site A the business would fail (see [171] and [173] above).

222 When the revised proposal for Site B was submitted the Council was reassured by Monaghan Mushrooms that its investment in Site B was commercially worthwhile. This was made plain in the "Overview of capital project" in the Capital Project Summary of 30 March 2012 (see [176] above). In the report for the meeting in September 2012 the officer advised the members that granting planning permission for the Site A development with the financial contribution to the development on Site B would, in his view, stimulate a substantial investment by Monaghan Mushrooms (see [179] above). I do not think that in the circumstances this was unreasonable advice.

223 I therefore accept the submissions made by Mr Taylor and Mr Warren on ground 5 of the claim. In particular, I accept their submission that the Council could reasonably conclude, and did, that the s.106 agreement was an adequate and effective means not only of securing the financial contribution from the development of Site A but also attracting the further investment Monaghan Mushrooms were intending to make on Site B. It is not a valid criticism of the agreement that its requirements might have been more onerous than they were. I think the Council took a realistic view of the commitments that could be obtained. It understood those commitments. And it could reasonably give them the weight that it did.

224 Grounds 3, 4 and 5 of the claim all therefore fail.

**Conclusion**

I refuse the renewed application for permission to apply for judicial review on ground 2 of the claim, and dismiss the claim itself.

# R. (ON THE APPLICATION OF LEE VALLEY REGIONAL PARK AUTHORITY) v EPPING FOREST DC

Court of Appeal (Civil Division)

Treacy, Underhill and Lindblom LJJ: 22 April 2016

[2016] EWCA Civ 404; [2016] Env. L.R. 30

Agricultural buildings; Appropriate assessments; Green belt; Inappropriate development; Natural England; Planning authorities' powers and duties; Planning permission; Planning policy; Special Protection Areas

H1 *Town and Country Planning—nature conservation—need for "appropriate assessment"—development in vicinity of Special Protection Area protected under Habitats Directive—Natural England advising that proposal having potential to adversely affect integrity of SPA—advice that with proposed mitigation effects would not be significant—Inspector not satisfied that similar scheme would not adversely affect integrity of SPA—whether planning authority lawfully determining question of significant effect on integrity—whether decision delegated to or dictated by Natural England—whether reasons required for departure from Inspector's decision—whether decision one that no reasonable authority would have made on the evidence*

H2 The appellant (L) had brought a claim for judicial review of the planning permission granted by the respondent (E) for development extending a nursery by the construction of a very large glasshouse. The site was less than 1km from the Lee Valley Special Protection Area ("SPA") and Ramsar site. Part of the proposed development lay over a water body used by wild foul forming part of the nature conservation interest for which the SPA had been designated. The grounds on appeal were that the judge had been wrong to: (1) conclude that E had not misinterpreted and misapplied relevant national and local policy; (2) reject the argument that E had failed to determine the application in accordance with s.38(6) of the Planning and Compulsory Purchase Act 2004, and also misunderstood and misapplied national policy for the "presumption in favour of sustainable development"; and (3) conclude that E had properly discharged its duty, under art.6 of the Habitats Directive and reg.61 of the Conservation of Habitats and Species Regulations 2010, to consider whether it was necessary to undertake an "appropriate assessment" of the implications of the development for the SPA. An initial application in 2011 had been supported by ecological material but that did not include an up to date winter survey of the birds using the water body. When Natural England was consulted on the application under reg.61 its view was that, in the absence of mitigation, the proposal had the potential to adversely affect the

integrity of the SPA, but that the measures proposed would, if adequately implemented and maintained, be sufficient to prevent the proposal having a significant effect upon the site. Natural England responded to consultation on a second application in terms similar to their response on the first. On appeal against refusal of the first application, the Inspector noted Natural England's lack of objection, but was not satisfied that the scheme would not adversely affect the integrity of the SPA. A third application was then submitted, all applications being in material respects similar. Natural England's response to consultation on this referred to its earlier views. L submitted that E had not lawfully determined the question of whether the development was likely to have a significant effect on the integrity of the SPA, as it had delegated the decision to Natural England, or allowed Natural England to dictate to it what the decision should be without considering the matter for itself. No reasons were given for departing from the decision of the Inspector, as "competent authority", on a proposal very similar to this. It was also argued that E's decision was one that no reasonable authority would have made on the evidence before it.

H3 **Held**, in dismissing the appeal:

H4 (1) The judge had been correct and E had not in any respect misinterpreted relevant national and local policy, or applied it unlawfully.

H5 (2) The second ground was also rejected.

H6 (3) The judge had been right to conclude that E had lawfully discharged its duties under the Habitats Directive and the regulations, and had properly concluded that there was no need for an "appropriate assessment" to be undertaken. Judging whether an appropriate assessment was required in a particular case was the responsibility not of the court but of the local planning authority, subject to review only on conventional *Wednesbury* grounds. E's decision on the need for appropriate assessment could not be said to be in any way vulnerable on that standard of review. The context for consideration was important: the site of the proposed development was not in, or adjoining, a European site, but some distance from it; the proposed mitigation measures were not novel or complicated; and the proposed works were clearly mitigation, not compensation. When consulted on the proposal, Natural England maintained the position taken throughout: that, with the proposed mitigation in place, there would be no "significant effect" on the SPA and the Ramsar site. That advice had been informed by the further material before them when consulted on the third application and, again, that had been wholly unambiguous. There was nothing in the submission as to simple delegation of decision. The conclusion reached by Natural England, and accepted by the respondent was nothing other than soundly based on the information before them by that stage. It did not fall short of what the "preventative and precautionary approach" required under the Habitats Directive and certainly could not be said to be unreasonable or unlawful.

H7 (4) The Inspector had not expressed any view of her own, let alone a clearly reasoned view, about the likely efficacy of the proposed mitigation measures, that had been the crucial consideration in Natural England's judgment. When the time came for Natural England and E to consider the third proposal, there had been material before them that had not been before her when considering the first. Conscious of the Inspector's doubt, Natural England, when consulted again, had adhered to its previous conclusion. It had not been required to explain why those misgivings were not shared, even though expressed in the role of "competent authority" at the time. The divergence of her view had been highlighted in the

planning officer's report and adequate guidance given to the members on the matters E needed to consider as "competent authority" under reg.61. The Inspector's doubts and L's objection had been set against Natural England's considered and expert view that, with the proposed mitigation, the development was not likely to have a "significant effect", and the officer's own conclusion that the latter's expert view should again be accepted. When consulted under reg.61, the view of Natural England would generally merit the weight one would expect to be given to the opinion of such a body, with the responsibilities it had for nature conservation and the expertise available to it. A local planning authority, as "authority", had to make the decisions for which it was responsible under reg.61. But when it had consulted Natural England as the "appropriate nature conservation body" it would need to have convincing reasons for departing from their view on the likelihood of development having a significant effect on a European site. In the present case E concluded that there was no good reason to disagree with the view Natural England had expressed. That was a conclusion well within the bounds of a lawfully made decision under reg.61, and in compliance with the duties under art.6 of the Habitats Directive.

H8 **Cases referred to:**

*Doncaster MBC v Secretary of State for the Environment, Transport and the Regions* [2002] EWHC 808 (Admin); [2002] J.P.L. 1509; [2002] 16 E.G. 181 (C.S.)

*Edinburgh City Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447; [1998] 1 All E.R. 174; 1998 S.C. (H.L.) 33; 1998 S.L.T. 120

*Europa Oil and Gas v Secretary of State for Communities and Local Government* [2013] EWHC 2643 (Admin); [2014] 1 P. & C.R. 3; [2014] J.P.L. 21

*Europa Oil and Gas v Secretary of State for Communities and Local Government* [2014] EWCA Civ 825; [2014] P.T.S.R. 1471; [2014] J.P.L. 1259

*Fordent Holdings Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 2844 (Admin); [2014] 2 P. & C.R. 12; [2014] J.P.L. 226

*Kemnal Manor Memorial Gardens Ltd v First Secretary of State* [2005] EWCA Civ 835; [2006] 1 P. & C.R. 10; [2005] J.P.L. 1568

*Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) [2004] E.C.R. I-7405; [2005] 2 C.M.L.R. 31; [2005] Env. L.R. 14

*Nomarchiaki Aftodioikisi Aitoloakarnanias v Ipourgos Perivallontos, Khorotaxias kai Dimosion Ergon* (C-43/10) [2013] Env. L.R. 21

*R. (on the application of Basildon DC) v First Secretary of State* [2004] EWHC 2759 (Admin); [2005] J.P.L. 942

*R. (on the application of Hall Hunter Ltd) v First Secretary of State* [2006] EWHC 3482 (Admin); [2007] 2 P. & C.R. 5; [2007] J.P.L. 1023

*R. (on the application of Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin); [2008] 2 P. & C.R. 16; [2009] J.P.L. 365

*R. (on the application of Heath & Hampstead Society) v Camden LBC* [2007] EWHC 977 (Admin); [2007] 2 P. & C.R. 19; [2007] J.P.L. 1529

*R. (on the application of Lewis) v Redcar and Cleveland BC* [2008] EWCA Civ 746; [2009] 1 W.L.R. 83; [2008] B.L.G.R. 781

*R. (on the application of Lowther) v Durham CC* [2001] EWCA Civ 781; [2002] Env. L.R. 13; [2002] 1 P. & C.R. 22

*R. (on the application of Morge) v Hampshire CC* [2011] UKSC 2; [2011] 1 W.L.R. 268; [2011] Env. L.R. 19
*R. v Secretary of State for the Environment Ex p. Windsor and Maidenhead RBC (No.1)* (1991) 61 P. & C.R. 266; [1990] 3 P.L.R. 66; [1990] J.P.L. 764
*R. v Selby DC Ex p. Oxton Farms* [1997] E.G. 60 (C.S.)
*Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1386; [2015] P.T.S.R. 274; [2015] 1 P. & C.R. 3
*Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174; [2015] P.T.S.R. 1417; [2016] Env. L.R. 7
*Sweetman v An Bord Pleanála* (C-258/11) [2014] P.T.S.R. 1092; [2013] 3 C.M.L.R. 16; [2015] Env. L.R. 18
*Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; [2012] P.T.S.R. 983; 2012 S.C. (U.K.S.C.) 278
*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759; 93 L.G.R. 403; (1995) 70 P. & C.R. 184
*Timmins v Gedling BC* [2014] EWHC 654 (Admin)

H9 **Legislation referred to:**
Town and Country Planning Act 1990 s.106
Directive 92/43 on the conservation of natural habitats and of wild fauna and flora (Habitats) arts 6 & 7
Planning and Compulsory Purchase Act 2004 s.38
Conservation of Habitats and Species Regulations 2010 (SI 2010/490) regs 5, 7 & 61

H10 *Mr G. Jones QC* and *Mr D. Graham*, instructed by Lee Valley Regional Park Authority, appeared on behalf of the appellant.
*Ms M. Thomas*, instructed by Epping Forest District Council, appeared on behalf of the respondent.
*Mr P. Village QC* and *Mr N. Helme*, instructed by Duffield Harrison LLP, appeared on behalf of the interested party.

**JUDGMENT**

**LINDBLOM LJ:**

**Introduction**

1 This appeal requires the court to consider, among other things, the meaning and effect of the Government's planning policy in England for the construction of agricultural buildings in the Green Belt.

2 With permission granted by Laws LJ, the appellant, Lee Valley Regional Park Authority, appeals against the order of Dove J, dated 13 April 2015, dismissing its claim for judicial review of the planning permission granted on 21 August 2014 by the respondent, Epping Forest District Council, for development proposed by the interested party, Valley Grown Nurseries Ltd, next to their nursery at Paynes Lane, Nazeing, in Essex. The proposal was to extend the nursery by the construction of a very large glasshouse—some 92,000 square metres in area—for the growing

of tomatoes and peppers. The site is about 18 hectares of farmland and restored mineral workings in the Metropolitan Green Belt, within the Lee Valley Regional Park, and less than one kilometre (0.98km) from the Lee Valley Special Protection Area ("the Lee Valley SPA") and Ramsar site. The Regional Park Authority objected to the proposal on several grounds, including the harm it said the development would cause to the Green Belt, alleged conflict with policy in the National Planning Policy Framework ("the NPPF") and in the development plan, and the effects the development might have on the SPA. Dove J rejected the claim on all grounds. In this appeal the Regional Park Authority seeks to persuade us that in three respects his decision was wrong.

**The issues in the appeal**

3 The issues in the appeal are these. First, was the judge wrong to conclude that the council had not misinterpreted and misapplied relevant national and local policy, including policies relevant to the "openness" of the Green Belt (Ground 1)? Secondly, was he wrong to reject the argument that the council failed to perform the decision-maker's duty, under s.38(6) of the Planning and Compulsory Purchase Act 2004 ,to determine the application for planning permission in accordance with the development plan unless material considerations indicated otherwise, and that it also misunderstood and misapplied NPPF policy for the "presumption in favour of sustainable development" (Ground 2)? And thirdly, was he wrong to conclude that the council had properly discharged its duty, under art.6 of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") and reg.61 of the Conservation of Habitats and Species Regulations 2010 ("the Habitats regulations"), to consider whether it was necessary to undertake an "appropriate assessment" of the implications of the development for the Lee Valley SPA (Ground 3)?

**The proposal and the council's decision**

4 Valley Grown Nurseries had submitted two previous applications for similar proposals, in June 2011 and in December 2011. The council had refused both, against the recommendation of its officers. Valley Grown Nurseries' appeal to the Secretary of State against the refusal of the first was dismissed by an inspector in a decision letter dated 6 June 2012. The proposal with which we are concerned was submitted to the council on 27 November 2013. The proposed glasshouse would extend partly into Langridge Scrape—a shallow artificial lake at the south-western end of the site, created when the land was restored after being worked for minerals, with a larger lake called Holyfield Lake next to it. These lakes are used by wintering wildfowl, including two species of surface-feeding duck referred to in the designation description for the Lee Valley SPA—the Gadwall (Anas strepera) and the Shoveler (Anas clypeata). Ecological mitigation was proposed; Langridge Scrape was to be reshaped and a new pond created to the north of the site, providing a net increase in habitat for Gadwall and Shoveler. As on the previous two occasions, Natural England, when consulted by the council under reg.61 of the Habitats regulations, did not object to the proposal and recommended the imposition of conditions to secure the ecological mitigation.

5 The application was considered by the council's District Development Control Committee on 20 March 2014, in the light of a report prepared by Ms Jill Shingler,

a Principal Planning Officer. She acknowledged that the proposal was "contrary to the adopted policies of the Local Plan" (para.1 of her report). Having listed many policies in the Epping Forest District Local Plan and Alterations (adopted by the council in 2006), and also several saved polices of the Epping Forest District Local Plan (adopted in 1998), she said the "above policies are broadly consistent with [the NPPF] and are therefore afforded full weight" (para.13). She then identified 11 "main considerations", considered each in turn, and in her "Conclusion" weighed the benefits of the proposed development for the local economy against its conflict with the development plan and the harm it would cause to the Lee Valley Regional Park and to the landscape. She concluded that the proposal should be approved, and recommended that planning permission be granted. The committee accepted that recommendation and resolved to grant conditional planning permission, subject to a planning obligation under s.106 of the Town and Country Planning Act 1990 . The application was then referred to the Secretary of State, who, on 2 May 2014, indicated that he did not wish to intervene. The planning permission granted by the council on 21 August 2014 was subject to 26 conditions. Four of these—conditions 7, 8, 11 and 12—related to the proposed ecological mitigation measures, as did clause 5 of the s.106 Obligation.

**National policy for the Green Belt**

6 In England, the Government's policies for the Green Belt are in paras 79 to 92 of the NPPF, which was published in March 2012. These policies replaced Planning Policy Guidance 2: "Green Belts" of January 1995 ("PPG2").

7 Paragraph 79 of the NPPF says that "[the] fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open", and that "the essential characteristics of Green Belts are their openness and their permanence". The concept of "openness" here means the state of being free from built development, the absence of buildings—as distinct from the absence of visual impact (see, for example, the judgment of Sullivan J, as he then was, in *R. (on the application of Heath and Hampstead Society) v Camden London Borough Council* [2007] EWHC 977 (Admin), at [21], [22], [37] and [38]; and the first instance judgment of Green J in *R. (on the application of Timmins) v Gedling Borough Council* [2014] EWHC 654 (Admin), at [26] and [68]–[75]). Paragraph 80 of the NPPF says the Green Belt serves five purposes, the first of which is "to check the unrestricted sprawl of large built-up areas", the third "to assist in safeguarding the countryside from encroachment". Paragraph 81 says "local planning authorities should plan positively to enhance the beneficial use of the Green Belt, such as looking for opportunities to provide access; to provide opportunities for outdoor sport and recreation; to retain and enhance landscapes, visual amenity and biodiversity; or to improve damaged and derelict land".

8 The following paragraphs contain a series of policies for plan-making and development control. Paragraphs 87 to 92 are largely concerned with the making of decisions on proposals for development in the Green Belt. Paragraphs 87, 88 and 89 state:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.
> 89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:
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> > "• buildings for agriculture and forestry;
> > • provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
> > • the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
> > • the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;
> > • limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or
> > • limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development.""

Paragraph 90 says "[certain] other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt". These are "mineral extraction", "engineering operations", "local transport infrastructure which can demonstrate a requirement for a Green Belt location", "the re-use of buildings provided that the buildings are of permanent and substantial construction", and "development brought forward under a Community Right to Build Order". There is no difference between the concept of development being not "inappropriate" and the concept of its being "appropriate" (see, for example, the judgment of Keene LJ in *Kemnal Manor Memorial Gardens Ltd v First Secretary of State* [2006] 1 P. & C.R. 10, at [24]–[28]; and the judgment of Richards LJ in this court's decision in *Timmins* [2015] P.T.S.R 837, at para.[31]).

9 Policy in PPG2 was expressed rather less succinctly than in the NPPF. Paragraph 3.1 said that "[the] general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them", and that "such development should not be approved, except in very special circumstances". Paragraph 3.2 said:

> "Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate

> development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development."

Paragraph 3.4 said that "[the] construction of new buildings inside a Green Belt" was "inappropriate" unless it was for one of five specified purposes, the first of which was "agriculture and forestry … ". Paragraph 3.15, under the heading "Visual amenity", stated:

> "The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design."

**Local plan policy relevant to the proposal**

10 The policies for the Green Belt in the 2006 local plan were modelled on government policy in PPG2. The supporting text says that "PPG2 makes it clear that the quality of the rural landscape is not a material factor in Green Belt designations or in their continued protection …" (para.5.6a); that "[the] general policies controlling development in the countryside apply with equal force in the Green Belt, but there is, in addition, a general presumption against inappropriate development" (para.5.8a): and that "[the] Guidance also makes it clear that the visual amenities of the Green Belt should not be injured by development either within or conspicuous from the Green Belt" (para.5.9a). Policy GB2A—"Development in the Green Belt" says that "[planning] permission will not be granted for the use of land or the construction of new buildings or the change of use or extension of existing buildings in the Green Belt unless it is appropriate in that it is" in one of eight specified categories. These include "(i) for the purposes of agriculture, horticulture, or forestry", and "(iv) for other uses which preserve the openness of the Green Belt and which do not conflict with the purposes of including land in the Green Belt". Paragraph 5.19a in the supporting text refers to several examples of "inappropriate development" in the Green Belt, and says that "[all] such proposals will need to demonstrate very special circumstances that outweigh the harm to the Green Belt". Under the heading "Conspicuous urban development", Policy GB7A—"Conspicuous Development" states:

> "The council will refuse planning permission for development conspicuous from within or beyond the Green Belt which would have an excessive adverse impact upon the openness, rural character or visual amenities of the Green Belt."

Policy GB10—"Development in the Lee Valley Regional Park" applies "[within] the area of Green Belt which lies in the Lee Valley Regional Park". It supports "uses which are necessary to enhance the function and enjoyment of the park for its users". Policy GB11—"Agricultural Buildings" states:

> "Planning permission will be granted for agricultural buildings provided that the proposals:
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> (i) are demonstrably necessary for the purposes of agriculture within that unit;

(ii) would not be detrimental to the character or appearance of the locality or to the amenities of nearby residents;
(iii) would not have an unacceptable adverse effect on highway safety or, with regard to water quality and supply, any watercourse in the vicinity of the site;
(iv) would not significantly threaten any sites of importance for nature conservation.

11 Policy E13A—"New and Replacement Glasshouses" states:

"Planning permission will be granted for new and replacement horticultural glasshouses within areas identified for this purpose on the Alterations Proposals Map. Glasshouses will not be permitted outside the areas subject to this policy unless the proposed development is either:
(i) a replacement of, or a small-scale extension to, a glasshouse or nursery outside the areas identified on the Alterations Proposals Map; or
(ii) necessary for the modest expansion of a glasshouse or existing horticultural undertaking on a site at the edge of an area identified on the Alterations Proposals Map which is unable to expand because all the available land in that designated area is occupied by viable glasshouse undertakings, and where there is no suitable land (including redundant glasshouse land) in this or the other glasshouse areas identified on the Alterations Proposals Map;
and in all cases the proposal will not have an adverse effect on the open character or appearance of the countryside."

12 Saved policy DBE4 states that "[within] the Green Belt, new buildings will be required to ensure" that "(i) their location respects the wider landscape setting of the site …". Saved policy RST24 states that "[all] developments within or adjacent to the Lee Valley Regional Park should", among other things, "(ii) safeguard the amenity and future development of the park" and "(iii) conserve and, where possible, enhance the landscape of the park or its setting". It adds that "[developments] which are likely to result in a significant adverse impact on the character or function of the park will not be permitted".

**The appeal inspector's approach to the Green Belt issue**

13 In the 2012 appeal the inspector accepted that the proposal before her was not inappropriate development in the Green Belt (para.11 of the decision letter). But she went on to conclude that the "huge volume and bulk" of the proposed development "must diminish the openness of the Green Belt and the purposes of including land within it such as safeguarding the countryside from encroachment", that the proposal "must conflict with national policy as expressed in the NPPF and LP policy", and that this harm should be given "significant weight" (para.14). After the appeal was dismissed Valley Grown Nurseries received advice from Mr Peter Village Q.C. on the inspector's approach. Mr Village's "Note of Advice", dated 4 June 2013, was appended to the "Planning Statement" for the proposal with which we are concerned. Mr Village advised that the inspector's approach was "fundamentally wrong and legally erroneous" because "[in] short, for agricultural development there is no requirement [in para.89 of the NPPF] to demonstrate that

the development preserves the openness of the Green Belt or does not conflict with the purposes of including land within it" (para.6 of the "Note of Advice").

*Ground 1—the "openness" of the Green Belt*

14 Although in argument Mr Gregory Jones QC, for the Regional Park Authority, divided this ground into two parts—"Ground 1(a)" and "Ground 1(b)", I think it is best dealt with as a single ground. It embraces submissions on the council's interpretation and application of national and local policy for the construction of agricultural buildings in the Green Belt, and of local plan policies not specifically related to development in the Green Belt. Mr Jones submitted that the inspector's approach in the 2012 appeal was correct. The expression "any planning application" in the first sentence of para.88 of the NPPF means any application for planning permission for development in the Green Belt, whether "inappropriate" or not, and the words "any harm to the Green Belt" mean every possible kind of harm to the Green Belt, including harm to its "openness" and to the purposes of including land in the Green Belt, even if the development is not "inappropriate". The policies in paras 79, 80 and 81 of the NPPF are relevant in decision-making on proposals for agricultural buildings in the Green Belt, even though such buildings are not "inappropriate" development. Under the NPPF "definitional harm" to the Green Belt is distinct from the "actual harm" caused by a development. Paragraph 88 refers to "harm by reason of inappropriateness and any other harm". Even if there is no "definitional harm"—because the proposed building is in principle appropriate—it does not follow that there is no "actual harm" to the openness of the Green Belt, or to the purposes of including land in it. Under the policy in para.88, such harm should be given "substantial weight". This approach applies to proposals for agricultural buildings, even though they are appropriate development in the Green Belt. It was not, however, the approach adopted by the council in this case.

15 I cannot accept that argument. As Ms Megan Thomas for the council and Mr Village for Valley Grown Nurseries submitted, it does not represent the correct interpretation of the policies in paras 87, 88 and 89 of the NPPF, read properly in their context.

16 The interpretation of planning policy is ultimately the task of the court, not the decision-maker. Policies in a development plan must be construed "objectively in accordance with the language used, read as always in its proper context", and "not … as if they were statutory or contractual provisions" (see the judgment of Lord Reed in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 ,with which the other members of the Supreme Court agreed, at [18] and [19]). The same principles apply also to the interpretation of national policy, including policies in the NPPF (see, for example, the judgment of Richards LJ in *Timmins*, at [24]

17 The first sentence of para.88 of the NPPF must not be read in isolation from the policies that sit alongside it. The correct interpretation of it, I believe, is that a decision-maker dealing with an application for planning permission for development in the Green Belt must give "substantial weight" to "any harm to the Green Belt" properly regarded as such when the policies in paragraphs 79 to 92 are read as a whole (consistent with the approach taken, for example, in the judgment of Sullivan LJ, with whom Tomlinson and Lewison L.JJ agreed, in *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2015] P.T.S.R. 274,

at [18]). Reading these policies together, I think it is quite clear that "buildings for agriculture and forestry", and other development that is not "inappropriate" in the Green Belt, are not to be regarded as harmful either to the openness of the Green Belt or to the purposes of including land in the Green Belt. This understanding of the policy in the first sentence of para.88 does not require one to read into it any additional words. It simply requires the policy to be construed objectively in its full context—the conventional approach to the interpretation of policy, as the Supreme Court confirmed in *Tesco Stores Ltd v Dundee City Council*.

18 A fundamental principle in national policy for the Green Belt, unchanged from PPG2 to the NPPF, is that the construction of new buildings in the Green Belt is "inappropriate" development and should not be approved except in "very special circumstances", unless the proposal is within one of the specified categories of exception in the "closed lists" in paras 89 and 90. There is "no general test that development is appropriate provided it preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt" (see the judgment of Richards LJ in *Timmins*, at [30] and [31]). The distinction between development that is "inappropriate" in the Green Belt and development that is not "inappropriate" (i.e. appropriate) governs the approach a decision-maker must take in determining an application for planning permission. "Inappropriate development" in the Green Belt is development "by definition, harmful" to the Green Belt—harmful because it is there—whereas development in the excepted categories in paras 89 and 90 of the NPPF is not. The difference in approach may be seen in the policy in para.87. It is also apparent in the second sentence of para.88, which amplifies the concept of "very special circumstances" by explaining that these will not exist "unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations". The corresponding development plan policy in this case is Policy GB2A of the local plan.

19 The category of exception in para.89 with which we are concerned, "buildings for agriculture and forestry", is entirely unqualified. All such buildings are, in principle, appropriate development in the Green Belt, regardless of their effect on the openness of the Green Belt and the purposes of including land in the Green Belt, and regardless of their size and location. Each of the other five categories is subject to some proviso, qualification or limit. Two of them—the second, relating to the "provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries", and the sixth, relating to the "limited infilling or the … redevelopment of previously developed sites …"—are qualified by reference both to "the openness of the Green Belt" and to the "purposes of including land within it". The five categories of development specified in para.90 are all subject to the general proviso that "they preserve the openness of the Green Belt and do not conflict with the purposes of including land in the Green Belt".

20 As Dove J said (in [61] of his judgment), the fact that an assessment of openness is "a gateway in some cases to identification of appropriateness" in NPPF policy indicates that "once a particular development is found to be, in principle, appropriate, the question of the impact of the building on openness is no longer an issue". Implicit in the policy in para.89 of the NPPF is a recognition that agriculture and forestry can only be carried on, and buildings for those activities will have to be constructed, in the countryside, including countryside in the Green Belt. Of course, as a matter of fact, the construction of such buildings in the Green Belt will

reduce the amount of Green Belt land without built development upon it. But under NPPF policy, the physical presence of such buildings in the Green Belt is not, in itself, regarded as harmful to the openness of the Green Belt or to the purposes of including land in the Green Belt. This is not a matter of planning judgment. It is simply a matter of policy. Where the development proposed is an agricultural building, neither its status as appropriate development nor the deemed absence of harm to the openness of the Green Belt and to the purposes of including land in the Green Belt depends on the judgment of the decision-maker. Both are inherent in the policy.

21 If the policy in the first sentence of para.88 of the NPPF meant that "substantial weight" must be given to the effect a proposed agricultural building would have on the openness of the Green Belt and on the purposes of including land within the Green Belt, the policy in para.89 categorizing such buildings as appropriate development in the Green Belt, regardless of such effects, would be negated. This cannot have been the Government's intention.

22 It would be, in any event, an important but unheralded change from "previous Green Belt policy" in the third sentence of para.3.2 of PPG2—the equivalent policy in PPG2 to the policy in the first sentence of para.88 of the NPPF. Paragraph 3.2 of PPG2 was quite explicit. In view of the presumption against "inappropriate development" the Secretary of State would, it said, attach "substantial weight to the harm to the Green Belt" when considering proposals for "such development"—i.e. "inappropriate development", as opposed to all development whether "inappropriate" or not. If the Government had meant to abandon that distinction between "inappropriate" and appropriate development, one would have expected so significant a change in national policy for the Green Belt to have been announced. I agree with what Sullivan LJ said to similar effect in *Redhill Aerodrome Ltd* (at [16], [17], [21] and [23] of his judgment, which were noted by Richards LJ in [24] of his judgment in *Timmins*). Leading counsel for the respondent in that case had been right not to submit that there was any material difference between paras 3.1 and 3.2 of PPG2 and paras 87 and 88 of the NPPF. As Sullivan LJ said (in [17]):

> "… The text of the policy has been reorganised …, but all of its essential characteristics – "inappropriate development is, by definition, harmful to the Green Belt", so that it "should not be approved except in very special circumstances", which "will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations", and the "substantial weight" which must be given to "harm to the Green Belt" – remain the same."

23 But I also think that the argument Mr Jones founded on his distinction between "definitional harm" and "actual harm" fails on its own logic. It means that the construction of agricultural buildings in the Green Belt, though always appropriate, must nevertheless always be regarded as harmful both to the openness of the Green Belt and to the purposes of including land within the Green Belt—despite such harm being irrelevant to their appropriateness. And if applied to the second and sixth categories of exception identified in para.89, it would also mean that, for example, a proposed building for outdoor sport or recreation or a proposed redevelopment of a previously developed site could qualify as appropriate development—because it was found to preserve the openness of the Green Belt

and not to conflict with the purposes of including land within the Green Belt—and yet still be regarded as substantially harmful to the Green Belt—because it reduced the openness of the Green Belt and conflicted with the purposes of including land within it. I do not think that can be right.

24 The true position surely is this. Development that is not, in principle, "inappropriate" in the Green Belt is, as Dove J said in para.62 of his judgment, development "appropriate to the Green Belt". On a sensible contextual reading of the policies in paragraph 79 to 92 of the NPPF, development appropriate in—and to—the Green Belt is regarded by the Government as not inimical to the "fundamental aim" of Green Belt policy "to prevent urban sprawl by keeping land permanently open", or to "the essential characteristics of Green Belts", namely "their openness and their permanence" (para.79 of the NPPF), or to the "five purposes" served by the Green Belt (para.80). This is the real significance of a development being appropriate in the Green Belt, and the reason why it does not have to be justified by "very special circumstances".

25 That was the basic analysis underlying the judge's conclusion, with which I agree, "that appropriate development is deemed not harmful to the Green Belt and its [principal] characteristic of openness in particular …". Dove J saw support for this conclusion in the judgment of Ouseley J at first instance in *Europa Oil and Gas v Secretary of State for Communities and Local Government* [2013] EWHC 2643 (Admin) (at [64]–[78]). I think he was right to do so. Ouseley J captured the point well when he said (in para.66 of his judgment) that under the policies in paras 89 and 90 of the NPPF "considerations of appropriateness, preservation of openness and conflict with Green Belt purposes are not exclusively dependent on the size of building or structures but include their purpose", and that "… two materially similar buildings[,] one a house and one a sports pavilion, are treated differently in terms of actual or potential appropriateness". Thus, as Ouseley J said:

> "The Green Belt may not be harmed by one but is harmed necessarily by another. The one it is harmed by because of its effect on openness, and the other it is not harmed by because of its effect on openness. These concepts are to be applied … in the light of a particular type of development."

That reasoning was adopted and applied by HH Judge Pelling Q.C., sitting as a deputy judge of the High Court, in *Fordent Holdings Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 2844 (Admin) (at [33]–[35] of his judgment). An appeal against Ouseley J's decision was later dismissed by this court ([2014] EWCA Civ 825). In that appeal Richards LJ (at [35]–[41] of his judgment, with which Moore-Bick and Kitchin L.JJ agreed) expressly endorsed the "general thrust" of Ouseley J's reasoning in the passage of his judgment referred to by Dove J, including the observations I have quoted from [66] (see, in particular, [37] of Richards LJ's judgment).

26 That is not to say, of course, that proposals for the erection of agricultural buildings in the Green Belt will escape other policies in the NPPF, and in the development plan, including policies directed to the visual effects of development and the protection of the countryside or the character of the landscape. Policies of this kind will bear not only on proposals for development that is inappropriate in the Green Belt but also on proposals for development that is appropriate. When such policies are applied, the size and bulk of the building, and its "siting, materials [and] design" (the factors referred to in para.3.15 of PPG2), are likely to be

important considerations. Establishing the status of a proposed development—inappropriate in the Green Belt or appropriate—remains only the first step for the decision-maker (see, for example, the judgment of Stuart-Smith LJ in *Pehrsson v Secretary of State for the Environment* [1990] 3 P.L.R. 66, at p.72; and Sullivan J's judgment in *Heath and Hampstead Society*, at [33], where he described this as a "threshold question"). As para.88 of the NPPF makes plain, inappropriate development can prove to be acceptable if "very special circumstances" are shown to exist, because "the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations" (see generally the decisions of this court in *Doncaster Metropolitan Borough Council v Secretary of State for the Environment, Transport and the Regions* [2002] J.P.L. 1509, and *R. (on the application of Basildon District Council) v First Secretary of State* [2005] J.P.L. 942). And development that is not inappropriate, because it is within one of the exceptional categories in paragraphs 89 and 90 and thus not potentially harmful to the Green Belt "by reason of inappropriateness", may still be unacceptable for other planning reasons. In this case, however, that was not so.

27 I do not think Mr Jones' argument gains any strength from the Court of Appeal's decision in *Redhill Aerodrome Ltd* or from the judgment of Sullivan J in *R. (on the application of Hall Hunter Ltd) v First Secretary of State* [2007] 2 P. & C.R. 5 (in particular at [46]–[52]). In neither of those cases, nor in any of the others to which counsel on either side referred, was the court faced with the argument now put forward by Mr Jones. In *Redhill Aerodrome Ltd* the development (the construction of a hard runway to replace the existing grass runways at the aerodrome) was "inappropriate" in the Green Belt. The court rejected the argument that, in the case of such development, the concept of "any other harm" in the second sentence of para.88 of the NPPF meant merely "any other harm to the Green Belt". In *Hall Hunter Ltd* Sullivan J had to consider, among other issues, whether an inspector, in an enforcement appeal concerning the erection of polytunnels and the stationing of caravans on land in the Green Belt, and having accepted that the polytunnels were not inappropriate development in the Green Belt, had erred in his application of a number of local plan policies, including one that referred to the openness of the Green Belt, in coming to the conclusion that "… agricultural needs would be far outweighed by the harm to the countryside arising out of the scale and appearance of the polytunnels" (see [46]–[52] of Sullivan J's judgment). That case did not raise the issues on the interpretation of national Green Belt policy with which we are concerned here, nor are we dealing with the same local plan policies.

28 In her report to the council's committee the Principal Planning Officer dealt with the "Green Belt" in paras 16 to 20. She said:

> "16. The proposed development is required for the purposes of horticulture and is therefore "appropriate" in the Green Belt in terms of national guidance and Policy GB2A of the adopted Local Plan and Alterations. The applicant does not therefore need to demonstrate very special circumstances in order to justify the development. The visual impact, and impact on amenity, the environment and on highway safety do however also need to be addressed in accordance with [policies GB7A] and GB11 of the Plan and these matters are considered below.

> 17. In considering the previous appeal the Inspector concluded that the development would be harmful to openness of the Green Belt and the purposes of including land within it. The NPPF however, whilst generally setting retention of openness at the heart of its Green Belt Policy, is strangely worded with regard to agricultural buildings. …"

She then quoted the first sentence of para.89 of the NPPF, and the categories of exception relating to "[buildings] for agriculture and forestry", the "[provision] of appropriate facilities for outdoor recreation and for cemeteries …" and "[the] extension or alteration of a building …", and went on to say:

> "18. This wording clearly implies that unlike other forms of appropriate development, buildings for agriculture and forestry do not have to preserve openness and can conflict with the purposes of including land within it. This is actually quite logical as many agricultural buildings are by their very nature large and intrusive and will have a significantly adverse impact on openness.
> 19. The applicants have submitted with their application Counsel advice with regard to the Inspector's suggestion that despite being appropriate development this does not set aside the fundamental requirement of keeping land permanently open. The Legal Opinion of Peter Village QC is that this is "fundamentally wrong and legally erroneous"[.]
> 20. This is of course only an opinion and Planning case law is full of examples of opinions and legal precedents which provide conflicting views, on almost any issue but it is in [officers'] view a logical interpretation of the wording in the NPPF and despite the fact that the previous appeal inspector placed weight on the openness of the Green Belt, it is not considered that this would be grounds to refuse the application. The Council['s] Policy GB11 relating to agricultural buildings (and is considered to be in accord with the NPPF) does not require that such buildings maintain openness."

29 Mr Jones submitted that those four paragraphs of the officer's report betray a flawed approach. Both NPPF policy for the Green Belt and policy GB7A of the local plan required the committee to give substantial weight to the effect of the proposed development on the openness of the Green Belt, even though it was appropriate development in the Green Belt. Yet the officer clearly treated that consideration as irrelevant.

30 I do not accept that submission. The officer's report shows that she understood both NPPF and local plan policy for development in the Green Belt correctly and applied the relevant policies lawfully. In accepting her advice and recommendation, the members may be taken to have adopted her interpretation and application of the relevant policies. The judge's conclusions to this effect, in [59]–[65] of his judgment, are in my view sound.

31 It is well established that planning officers' reports to committee must be read not in an unduly critical way, but fairly and as a whole. Councillors on planning committees can be expected to be reasonably familiar with local circumstances and with relevant policies at national and local level, and to understand what statute requires of them when determining an application for planning permission. If criticism is directed at an officer's report as a means of attacking an authority's grant of planning permission, the question for the court will always be whether the officer has failed to guide the members sufficiently, or has actually misled them,

on a matter essential to their decision. Where the officer's advice is founded on planning judgment it will be unassailable unless demonstrably bad as a matter of law. There is ample authority to this effect (see, for example, the judgments of Pill LJ and Judge LJ, as he then was, in *Oxton Farms, Samuel Smith's Old Brewery (Tadcaster) v Selby District Council,* 18 April 1997,1997 WL 1106106).

32 No such submission can be made here. It is not in dispute that the officer was right to advise the committee that the proposed development, a building required for horticulture, was appropriate development in the Green Belt, both under national policy and under policy GB2A, and therefore did not have to be justified by "very special circumstances". She was also right to say that policies GB7A and GB11 required the members to consider the likely "visual impact" of the proposed development and the impact it would have on "amenity" and "the environment"—as well as on "highway safety". She said these matters would be considered later in her report, which they were. She did not mention Policy GB10. But that policy did not bear on this proposal because it relates to development "necessary to enhance the function and enjoyment of the Regional Park for its users", which this development was not.

33 Policy GB7A, the policy for "Conspicuous Development", was obviously based on the policy relating to "[the] visual amenities of the Green Belt" in para.3.15 of PPG2. Faithful to national policy in that para.of PPG2 and now in the NPPF, it treats "openness" as a concept distinct from the concepts of "rural character" and "visual amenities". It does not override policy GB2A, which identifies development "for the purposes of agriculture, horticulture, or forestry" as a category of "appropriate" development in the Green Belt entirely unqualified by any reference to the "openness" of the Green Belt. Read in the context of the other Green Belt policies in the local plan, including policies GB2A and GB11, and consistently with government policy in paras 88 and 89 of the NPPF, policy GB7A does not make the impact of a proposed agricultural building "upon the openness … of the Green Belt" a consideration relevant to the status of that development as appropriate development. And if agricultural buildings are in principle appropriate in the Green Belt regardless of their impact on "openness", and are thus not to be regarded as harmful to "openness", their impact on "openness" cannot be an "excessive adverse impact". This does not mean, however, that such buildings cannot have an "excessive adverse impact" upon the "rural character" or upon the "visual amenities" of the Green Belt.

34 In the advice she gave to the committee the officer did not ignore the reference to the "openness" of the Green Belt in policy GB7A. She confronted it, in paras 16 to 20 of her report. She acknowledged what the 2012 appeal inspector had said about the implications of the appeal proposal for the "openness" of the Green Belt and the purposes of including land within it. However, she saw the force of leading counsel's opinion that the inspector's approach had been wrong, and she found the interpretation of NPPF policy put forward by Valley Grown Nurseries "logical". She therefore concluded, in para.20, that the effect of this proposed development on the "openness" of the Green Belt, the development being an agricultural building, was "not … grounds to refuse the application". In her "Conclusion", in para.62, she returned to this matter, advising the committee that Valley Grown Nurseries' argument was a "strong" one. This echoed the advice she had already given in para.20.

35 I see no error there. In my view the officer's advice on the relevance and application of policy GB7A to this proposal for an agricultural building in the Green Belt was legally correct. As she clearly appreciated, a scheme for a form of development that under national and local policy is, in principle, not harmful to the "openness" of the Green Belt, could hardly be turned away as contrary to policy GB7A on the grounds of "an excessive adverse impact on the openness … of the Green Belt". But as she also very clearly acknowledged, in para.16 of her report, the "visual impact" of the development—in policy GB7A, its impact on "rural character" and "visual amenities"—was nevertheless a matter that had to be considered. She dealt with that matter fully in later sections of her report.

36 The advice she gave on policy GB11, the local plan policy for "Agricultural Buildings", was also sound in law. Because it relates specifically to agricultural buildings, this policy was of particular relevance to the proposed development. In para.16 of her report the officer identified the specific considerations that arose under it, including "impact on amenity … and on highway safety". As she did with the issue of "visual impact" under policy GB7A, she considered those matters elsewhere in her report. But as she also observed, in para.20, policy GB11 is "in accord with" government policy for the Green Belt in the NPPF in that it "does not require that [agricultural] buildings maintain openness". Here she plainly had in mind the policy in para.89 of the NPPF. Her understanding of policy GB11 was in my view correct, as was her recognition that it is consistent with national policy for the Green Belt.

37 Mr Jones submitted that Dove J was wrong to hold, in paragraphs 64 and 65 of his judgment, that the officer dealt properly with policy E13A, and also with other policies relevant to the likely visual effects of the development. Again, I disagree. In my view the judge was right to conclude that the officer neither misunderstood nor misapplied policy relating to the effects of the development on the countryside, the visual amenity of the Green Belt and of the Lee Valley Regional Park. I do not think the advice she gave on these matters was in any way deficient or misleading.

38 Her advice in the section of her report headed "Containment of the Glasshouse Industry", where she considered policy E13A, was, I think, perfectly good. She quoted the policy in its entirety (in para.21). She acknowledged (in para.22) that the existing nursery was within an area identified for glasshouse development under policy E13A, but that the site of the proposed development was not. She also very clearly acknowledged that the development could not be described as a "modest extension", and that it would have "an adverse impact on the character of the countryside in this location due to its sheer scale". She said the proposal was "therefore clearly at odds with this policy, although it is open to dispute whether the … requirement not to have an adverse impact on the "open" character is … actually in compliance with the NPPF for the reasons set out in the Green Belt section above". She was focusing here on the final sentence of policy E13A, which applies "in all cases". She asked herself, as the policy requires, whether the development would have "an adverse effect on the open character or appearance of the countryside". She found that it would. It is plain that she recognized this conflict with policy E13A. But was she wrong to add the caveat about "compliance with the NPPF"? I do not believe that she was. The caveat took nothing away from her advice that there would indeed be harm to the "open character" of the countryside. But, as she had already said, on a true understanding of Green Belt policy in the NPPF and in the local plan, the effect of the development on the

"openness" of the Green Belt did not, in itself, weigh against the proposal being approved.

39 The officer went on, in para.23, to point out that the council's policy for glasshouses was based on a study carried out in 2003 and did not address "the current needs of the industry". A report on the future of the glasshouse industry in the district had been completed and adopted in July 2012 as part of the evidence base for the new local plan. Valley Grown Nurseries had "satisfactorily demonstrated that there are no suitable sites available for this development within the current adopted policy E13 areas". If the application were refused on "policy grounds", said the officer, "the consequences may be that the growers will seek to find suitable sites outside the District, leaving the potential problem of a large derelict site" and a loss of existing and potential future jobs. These were "important concerns", and the decision on the application had "the potential for significantly adverse consequences" (para.25). In the absence of a suitable site within "the existing identified glasshouse areas" she did not think the proposal could be rejected "simply because it is outside the scope of policy E13A" (para.26). At the end of her report, in the "Conclusion", she did not reduce the weight she gave to policy E13A because of any conflict between it and government policy for the Green Belt in the NPPF. She reduced its weight because it was no longer an effective policy to provide for further glasshouse development in the district, and was therefore out of date (paragraphs 63 and 66 of the report). None of these planning judgments are vulnerable in a claim for judicial review.

40 The same may be said of the officer's advice on "Landscape Impact" and "Impact on [the] Lee Valley Regional Park". She acknowledged that the proposal did not accord with the requirement of policy DBE4 that, within the Green Belt, development should "[respect] the wider landscape setting", though "given the long tradition of glasshouse development in the area the scheme could be regarded as respecting local character" (para.30). "[Due] to its vast scale", she said, the development would "have an impact on the visual character and amenity of the immediate area …". But the council's "Tree and Landscape Officer" was of the view that the "key landscape character of the area [would] not be compromised" (para.31). The proposal was also "contrary to aims (ii) and (iii) of [policy RST24]—i.e. safeguarding the amenity and conserving the landscape of the [Lee Valley Regional Park]" (para.33). In the Regional Park Authority's view the development "would be significantly harmful to the aims of the Park" and "may set a dangerous precedent if approved for other such development within the [Park] boundaries". The appeal inspector had "placed significant weight on the harm to the character and appearance of the Park" (para.35).

41 These considerations featured again in the balancing exercise in the officer's "Conclusion", where she explicitly gave weight to the "harm to the landscape" (para.69) and "the limited harm to the character and amenity of the area and to the [Lee Valley Regional Park] …" (para.70). Again, I can see no error of law in the advice she gave.

42 Having considered, as she said she would, the likely "visual impact" of the development, which she had identified as a relevant matter under policy GB7A in para.16 of her report, the officer did not find that the effect of the development on the "rural character" of the Green Belt or on its "visual amenities" would be unacceptable. If she had found that there would be, in either of these respects, "an excessive adverse impact" such as to offend policy GB7A, she would have said as

much. On a fair reading of her report as a whole, it cannot be said that she failed to grapple with the considerations arising under that policy. She very clearly did so.

43 In my view, therefore, Mr Jones' argument on ground 1 of the appeal must be rejected. The judge was right. The council did not in any respect misinterpret relevant national and local policy, or apply it unlawfully.

*Ground 2—presumptions*

44 In England the statutory "presumption in favour of the development plan", as it was described by Lord Hope of Craighead in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 (at p.1449F), is now contained in s.38(6) of the 2004 Act. Several paragraphs of the NPPF refer to it. Paragraph 11, in the section of the NPPF headed "The presumption in favour of sustainable development", acknowledges it, as does para.196 in the section headed "Determining applications". Paragraph 12 confirms that the NPPF "does not change the statutory status of the development plan as the starting-point for decision making".

45 However, the NPPF introduced another presumption, a policy presumption—the "presumption in favour of sustainable development". This presumption is to be applied "[in] assessing and determining development proposals" (para.197), except "where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined" (para.119)—which is in dispute here, in ground 3 of the appeal. Paragraph 14 says that the presumption "should be seen as a golden thread running through both plan-making and decision-taking". It explains that "[for] decision-taking" this means "approving development proposals that accord with the development plan without delay", and, "where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless" either "any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against policies in this Framework taken as a whole" or "specific policies in this Framework indicate development should be restricted".

46 One of the "core land-use planning principles" set out in para.17 of the NPPF is that planning should "proactively drive and support sustainable economic development …". In the section headed "Building a strong, competitive economy", para.19 says the Government is "committed to ensuring that the planning system does everything it can to support sustainable economic growth", and that "significant weight should be placed on the need to support economic growth through the planning system". This policy is elaborated in the following paragraphs, including para.20, which says that "local planning authorities should plan proactively to meet the development needs of business and support an economy fit for the 21st century". Paragraph 28, in the section headed "Supporting a prosperous rural economy", says that "[planning] policies should support economic growth in rural areas in order to create jobs and prosperity by taking a positive approach to sustainable new development".

47 No criticism is made of the officer's conclusion, in paras 27 to 29 of her report under the heading "Sustainability", that the proposed development would be "sustainable". Nor is there any complaint about her conclusion, in para.58 under the heading "Employment/Economic Development", to the effect that the

development would assist government policy for "[building] a strong competitive economy"—in particular the policies in paras 20 and 28 of the NPPF, or her conclusion, in para.59, that the new jobs the development would generate—for "a further 40 full time nursery workers, rising to over 50 at peak picking periods" in addition to the existing workforce of between 80 and 100—were "a significant consideration", and that "a development of this scale is a significant local investment that will help to ensure that the existing businesses continue to be competitive in a market that increasingly requires large sites in order to remain competitive".

48 In her "Conclusion" the officer said, in para.62, that it was necessary to "balance a number of competing issues and make a judgement as to which should carry most weight". The 2012 appeal decision was "a material consideration that must be taken into account". But "[countering] this", she said, "the applicant has submitted a strong argument that the weight the Inspector placed on maintaining the openness of the Green Belt was erroneous". She went on to say in para.63:

> "The development is clearly contrary to policy E13A which seeks to contain the glasshouse area, but this policy is outdated and the Council will not have a new policy until a new local plan is adopted, which is still some time away. Whilst the study on the future of the glasshouse industry has provided an evidence base it has not, nor was it intended to set out a way forward, this will need to be part of the local plan process."

In the 2012 appeal the inspector had supported the argument "that to approve the development contrary to the adopted policy could have a significant impact on land use policy and set a dangerous precedent making glasshouses more difficult to resist elsewhere, and changing policy by default rather than through the proper plan process", and had urged the council to resolve "the difficult local balance" (para.64). The officer then said this:

> "65. Now nearly 2 years further on unfortunately despite best efforts, we are still in the same position. This leaves the applicants in a state of complete impasse, with no certainty about how to best ensure the continuation and expansion of their business. Government policy seeks to prevent delay and to push forward suitable sustainable development and the policies of the NPPF are supportive of economic development and the rural economy[. It] is considered that with the passage of time the ability to resist development on the basis of Policy E13 has been undermined.
> 66. On the basis therefore that the openness argument and the [policy] E13 argument are not as strong as they were in 2012 we need to weigh up whether the harm from the development is such as to outweigh the presumption in favour of sustainable economic development."

The officer referred again to the Regional Park Authority's objection, and identified "essentially two related issues", which were "the scale of the development being incompatible with the function of the park and that the glasshouse would adversely affect the landscape setting of the site to the detriment of visitor amenity" (para.67). She said "[the] question is really whether this impact is such that the use of this area of the park for recreation is undermined". The appeal inspector had concluded that the proposal was "contrary to policy RST24" (para.68). The officer accepted that "the development does not enhance the park and that there is harm to the landscape", which was "inescapable for a development of this size". But this was,

she said, "just one of the competing factors that need to be balanced" (para.69). Her final conclusions were these:

> "70 [.]Officers are of the view that even taking account the previous appeal decision and that there are policies that could be used to refuse this application, the potential benefits of the development in terms of economic development, and sustainability outweigh the limited harm to the character and amenity of the area and to the [Lee Valley Regional Park] that would result. It is unlikely that a more suitable location, with less visual impact and impact on wildlife, landscape and residential amenity could be found within the District. If the District is to continue to enable the growth of the Glasshouse industry that has been such an important part of its heritage and not push growers to find sites further afield then development of this nature which provides suitable landscaping, ecological mitigation and transport plans and can not be located within [policy] E13 areas should be considered favourably. It is acknowledged that this could set a precedent for other large horticultural development in the District, but such applications would also need to be considered on their individual merits.
>
> 71. Therefore, particularly in the light of the emphasis in the NPPF that "significant weight should be placed on the need to support economic growth through the planning system", officers again consider that the balance is in favour of the development. The revised application is therefore recommended for approval …".

Because this recommendation was "contrary to the adopted Policies of the Local Plan", the proposal would need to be referred to the Secretary of State "[as] a departure from the plan" (para.72). If the members took a different view, planning permission could be refused "as it is contrary to current adopted policies", but the council "could … face criticism at appeal on the basis that the current plan is not up to date and we have as yet no clear strategy to meet the future needs of the Glasshouse Industry" (para.73).

49 Mr Jones submitted that the balance the officer struck in the "Conclusion" of her report was a false one. It was the balance between the harm the development would cause and "the presumption in favour of sustainable economic development". This was not the "presumption in favour of sustainable development" referred to in the NPPF, but a "presumption" of the officer's own creation. In any event, as the proposal was contrary to several policies in the local plan, including policy for the Green Belt, and those policies were not "out-of-date", the "presumption in favour of sustainable development" did not apply to it. And the presumption in section 38(6), reinforced by the policies in paragraphs 11 and 12 of the NPPF, was against planning permission being granted. Yet the officer never brought her mind to that statutory presumption. In particular, she failed to ask herself whether there were considerations sufficient to outweigh the manifest conflict of the proposal with policy relating to the "openness" of the Green Belt in the development plan.

50 I cannot accept that argument. In [69] of his judgment Dove J referred to Mr Jones' submissions on this ground as "essentially an impermissible over-reading of the contents of the officers' report". That, I think, is right.

51 Given the conclusion in para.63 of her report that policy E13A—the policy of the local plan specifically relevant to glasshouse development—was now an "outdated" policy, I think the officer would have been entitled to apply the

"presumption in favour of sustainable development" in the way that para.14 of the NPPF says it should be applied where "relevant policies" of the development plan are "out-of-date". She did not do that. Instead, as Dove J said in para.69 of his judgment, she undertook a balancing exercise consistent with the requirements of section 38(6). She acknowledged the conflict with the development plan in that the proposal was contrary to policies E13A and RST24 (paras 63, 68, 69 and 72 of the report), and that there would be "harm to the landscape" (para.69) and "limited harm to the character and amenity of the area and to the [Lee Valley Regional Park]" (para.70). But she concluded that these considerations were outbalanced by "the potential benefits of the development in terms of economic development, and sustainability", and the unlikelihood of finding a "more suitable location, with less visual impact and impact on wildlife, landscape and residential amenity" in the district (also para.70). This was a straightforward application of the decision-maker's duty under s.38(6). In my view there is nothing legally wrong with it.

52 It was in the course of this exercise that the officer said what she did about the "presumption in favour of sustainable economic development" (para.66). She was not attributing to the NPPF a presumption it does not contain—or, as Dove J put it in [69] of his judgment, reinventing the "presumption in favour of sustainable development". But the "presumption in favour of sustainable development" can operate in favour of "sustainable economic development"—strongly promoted in para.17 of the NPPF—just as it applies to other kinds of sustainable development. And the officer's reference to a "presumption in favour of sustainable economic development" makes good sense in its context. It followed from what she said about government policy seeking "to prevent delay and push forward suitable sustainable development", and its support for "economic development and the rural economy" (para.65). This advice reflected what she had already said about the importance of new jobs and economic growth (paras 58 and 59).

53 Taking the officer's "Conclusion" together with the analysis in the preceding sections of her report, one can see how she formed the crucial planning judgment—that despite the proposal's conflict with the local plan and the harm the development would cause, its benefits as "sustainable economic development" were sufficient to justify the grant of planning permission. She gave to each consideration, on either side of the balance, the weight she thought it should have. Weight was a matter for her, and, in the light of her advice, the members (see Lord Hoffmann's speech in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780E–G). The reasons she gave for her conclusions and recommendation are, I think, cogent and clear. As one can see in para.71 of her report, the consideration that carried particular force in her planning judgment was "the emphasis in the NPPF that significant weight should be placed on the need to support economic growth through the planning system"—clearly a reference to the policy in para.19 of the NPPF.

54 In my view, therefore, the officer's use of the phrase "the presumption in favour of sustainable economic development" was, at the worst, infelicitous. It does not expose a wrong or misleading approach. It comes nowhere near being the kind of error that might lead the court to strike down a planning permission granted on the strength of advice given to members in a committee report. The proposal was not given the full benefit of the policy "presumption in favour of sustainable development" in the NPPF, but the officer's advice in her "Conclusion", and

throughout her report, was loyal to the statutory presumption in favour of the development plan in s.38(6).

55 I would therefore reject Ground 2 of the appeal.

**The Habitats Directive and the Habitats regulations**

56 Article 6(3) of the Habitats Directive provides that "[any] plan or project not directly connected with or necessary to the management of the [protected] 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 …". Article 7 of the Habitats Directive applies the protections of art.6 to Council Directive 79/409/EEC on the conservation of wild birds. The Habitats Directive is transposed into domestic law by the Habitats regulations. Regulation 61 provides:

> "(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.
>
> …
>
> (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.
>
> …
>
> (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 …
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given."

Regulation 5(1)(b)(i) defines "the appropriate nature conservation body" for England as Natural England. Regulation 7 defines "competent authority" to include local authorities and other public bodies.

**The consultation of Natural England on the first two proposals**

57 The supporting material for the June 2011 application included the "Phase 1 Habitat and Ecological Scoping Report" dated 21 March 2011, revision C of the "Habitat Enhancement & Landscaping" plan dated 17 May 2011, and the "Wetland Bird Survey" dated July 2011. The scheme for habitat management included measures for protecting and increasing habitat for Gadwall and Shoveler. When consulted by the council under reg.61 of the Habitats regulations, Natural England

did not object to the proposal. In their letter to the council dated 6 July 2011 they noted that the survey on 17 March 2011 had "recorded the presence of 30 Gadwall: which equates to 6.6% of the population of the Lee Valley SPA and Ramsar site at the time of its designation as an SPA and Ramsar site; or 10 per cent of the minimum number required to qualify a site for selection as an SPA". The survey had also recorded the presence of five Shoveler, but this number was "not considered to [be] of particular significance in terms of the population of the SPA and Ramsar site". The application site was, therefore, "undoubtedly of considerable importance as a supporting habitat which is used by the SPA bird interest". And "in the absence of mitigation", they said, the development was "likely to have a significant effect on the European site" and had the potential to "adversely affect the integrity of the European site". However, the proposed mitigation measures, they said, "should be capable of providing an adequate extent and continuity of supporting habitat, in order to ensure that there would not be a detrimental impact upon those bird species which are designated interest features of the Lee Valley SPA and Ramsar site". If "fully implemented and adequately maintained", these mitigation measures would be "sufficient to prevent the proposal having a significant effect on the European and international site". Natural England's conclusion was this:

> "Based on the information provided, Natural England has no objection to the proposed development subject to the inclusion of our recommended conditions and the proposal being carried out in strict accordance with the details of the application. The reason for this view is that subject to the inclusion of our recommended conditions, the proposed development, either alone or in combination with other plans or projects, would not be likely to have a significant effect on the Lee Valley SPA and Ramsar site."

The recommended conditions were then set out. Natural England maintained and amplified that view in further correspondence with the council and with the Royal Society for the Protection of Birds ("the RSPB").

58 When the second application for planning permission was made in December 2011 the same ecological material was relied on, with the addition of a "Phase 1 Habitat Survey Report" dated November 2011, which relied on counts of Gadwall and Shoveler on the site made between May and August 2011. On 6 January 2012 Natural England responded to consultation under reg.61 in terms similar to their response on the first application, again stating that they had no objection to the proposal provided the recommended conditions were imposed on the planning permission.

**The appeal inspector's doubt**

59 In her decision letter dismissing the appeal on the first proposal the inspector referred to the RSPB's view that Langridge Scrape was "functionally linked to the [Lee Valley] SPA since species for which [it] has been designated are dependant on this habitat". It was therefore "necessary to consider the ecological importance of the lake habitat in supporting a proportion of these species" (para.27). She said (in para.28) it was "interesting that these species have taken so readily to the lake and [this] indicates that, all other circumstances being similar, they might take readily to the re-modelled lake". But in this proposal, she said, it was intended "to

bring greater numbers of people right up to the [water's] edge and over it on timber walkways" and to re-route the public footpath "[immediately] adjacent to it", and "the picnic area and glasshouses would be within a few metres". The "re-modelled lake would not be the relatively secluded and distant body of water it is at present and the species associated with the [Lee Valley] SPA may not use it to the same extent". Finally, she said this:

> "While I note that Natural England raised no objection I am not satisfied, on the basis of the evidence I have, that the scheme would not adversely affect the integrity of the European site."

**The consultation of Natural England on this proposal**

60 The ecological reports submitted with the two previous applications were again relied upon in support of the proposal with which we are concerned, together with additional material including an "Ecological Walkover and Update Site Assessment", dated 10 September 2013, an "Outline Landscape Management Plan", and a "Letter of Intention and Specification of Mitigation Works" dated 14 February 2012. A new "Wetland Bird Survey", dated April 2012, had also been prepared, setting out survey results for the period between May 2011 and March 2012. This further survey had been undertaken because the previous one had not included the winter months and so did not show how many over-wintering birds were using Langridge Scrape.

61 The April 2012 "Wetland Bird Survey" was not submitted to the council. But it was referred to in the "Planning Statement", which said that "[the] results indicate that the water bird counts in the gravel pit pond (application area) are considerably lower than counts made on Holyfield Lake", that "[there] is a notable size difference between the two water bodies and the gravel pit pond is therefore of lower habitat value", and that "[Twig Group], the Consultancy who undertook the survey work, is satisfied that the application demonstrates a low impact on optimal habitat for listed species provided that works take place outside the breeding season and the operations do not disturb bird populations utilising key areas of the site" (para.5.24). The proposed "Habitat Enhancement" works were described as including "extensive habitat enhancement measures … for the reconfigured splash, the overall surface area of which will remain the same as existing …" (para.5.26), the creation of "a new island area in the splash …, the banks of the splash … regraded to provide shallow waters suitable for Gadwall", and "[the] rerouted footpath [to] run parallel with the northern and eastern edges of the splash and … separated from the water by a mixture of wetland grass" (para.5.27). The aim of these works was then stated (in para.5.30):

> "With regard to the habitat proposals and in particular the design of the splash area, every effort is being made to enhance the ecology within the area. The overall ambition is to make the area of sufficient interest from a habitat and ecological perspective in order to attract visitors to what is at present, an under used area of the Lee Valley [Regional] Park. …."

62 When Natural England were consulted again under reg.61(3) ,they had available to them all of the documents submitted to the council with the application for planning permission, including the "Planning Statement", to which the appeal

inspector's decision letter was appended. They did not have the April 2012 "Wetland Bird Survey". In their letter to the council dated 3 December 2013, they said they had "no objection". Their reason for not objecting was simply stated:

> "Based upon the information provided, Natural England advises the Council that the proposal is unlikely to affect any statutorily protected sites or landscapes but also refers you to our previous response … issued on 06 January 2012."

*Ground 3—did the council fail to discharge its duties under the Habitats Directive and the Habitats regulations?*

63 The council's planning officer considered the possible effects on biodiversity in a section of her report headed "Wildlife and Conservation". She said the ecological survey reports submitted with the previous applications "all date back to 2011 … and are therefore not up to date". But "a daytime ground based Ecological Walkover and updated site assessment carried out in September 2013" had also been submitted, which "concludes that the phase 1 habitat survey is still accurate and can therefore still be relied upon, and identifies suitable mitigation measures to ensure impacts on wildlife are minimised" (para.47). She recorded Natural England's response to consultation on this proposal (para.48), their view that the proposed development "would not directly impact on the European or Ramsar Site", the reasons why they had not objected (para.49), and their consultation responses on the previous two proposals (paras 50 and 51). She then referred to the concern expressed by the 2012 appeal inspector about the possible consequences of "bringing the public into the site with walkways and picnic areas", so that "the lake would no longer be a distant and secluded feature and that the species associated with the [Lee Valley] SPA may not use it to the same extent", and to her having said she was "not satisfied, on the basis of the evidence [she had] that the scheme would not adversely affect the integrity of the European Site" (para.52). The officer went on to say (in para.53):

> "This leaves us in a difficult position, Natural England is the Statutory Consultee with regard to impact on Statutory Nature Conservation sites and they have concluded from the information provided that there is unlikely to be an adverse impact. The thrust of recent government guidance for dealing with planning applications is to avoid delay in the determination of applications and not to request excessive supporting information. On balance it is considered that despite the concerns raised by the Planning Inspector and the LVRPA with regard to potential impact on wildlife, adequate information has been provided and any likely impact will be suitably mitigated and not so great as to warrant refusal."

She reminded the members that the previous applications were not refused "on grounds of harm to wildlife or habitats" (in para.54). The inspector's decision letter was appended to the report.

64 Mr Jones submitted that Dove J was wrong to conclude that the council had lawfully determined the question of whether the development was likely to have a significant effect on the integrity of the Lee Valley SPA. It was for the council, as competent authority, to decide that question. But it had delegated the decision

to Natural England, or allowed Natural England to dictate to it what the decision should be without considering the matter for itself. No reasons were given for departing from the decision of the inspector, as "competent authority", on a proposal very similar to this. The council's decision was one that no reasonable authority would have made on the evidence before it. Dove J ought to have accepted that the number of Gadwall and Shoveler using the application site was relevant and important. Wetland bird counts for Holyfield Marsh (Holyfield Lake and Langridge Scrape) made by the British Trust for Ornithology on seven days between September 2010 and March 2011 showed that on two occasions there had been more than 30 Gadwall on Langridge Scrape (53 and 62), and on another three, more than five Shoveler (14, 23 and 8). These counts demonstrated that the 2011 survey data—for a single day in March of that year—was out-of-date, insufficient to show the number of Gadwall and Shoveler using Langridge Scrape and the pattern of their activity on the site, and an unreliable basis for judging the adequacy of the proposed replacement habitat. There was no analysis of the likely disturbance of birds by recreational visitors to the site. As the European jurisprudence has emphasized, the Habitats Directive embodies a "preventative and precautionary approach". It "cannot be held that an assessment is appropriate when information and reliable updated data concerning the birds in [the] SPA are lacking" (see the judgment of the Court of Justice of the European Union in *Nomarchiaki Aftodioikisi Aitoloakarnanias and others v Ypourgos Perivallantos, Chorotaxias kai Ergon Dimosion and others* [2013] Env. L.R. 21, at [112]–[115], applying the jurisprudence in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2005] 2 C.M.L.R. 31, at [32], [36], [44] and [59] of the judgment, and in *Sweetman v An Bord Pleanála* [2013] 3 C.M.L.R. 16, at [28]–[33], [41] and [44] of the judgment).

65 I cannot accept those submissions. In my view Dove J was right to conclude, in [74]–[83] of his judgment, that the council had lawfully discharged its duties under the Habitats Directive and the Habitats regulations, and had properly concluded that there was no need for an "appropriate assessment" to be undertaken in this case. It must be remembered, as Sullivan J said in *R. (on the application of Hart District Council) v Secretary of State for Communities and Local Government* [2008] 2 P. & C.R. 16 (in para.[72] of his judgment), that the Habitats Directive is "intended to be an aid to effective environmental decision making, not a legal obstacle course". Judging whether an appropriate assessment is required in a particular case is the responsibility not of the court but of the local planning authority, subject to review by the court only on conventional *Wednesbury* grounds (see the judgment of Sales LJ, with whom Richards and Lewison LJJ agreed, in *R. (on the application of Dianne Smyth) v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, at [78]–[81]). I cannot see how the council's decision on the need for appropriate assessment in this case could be said to be in any way vulnerable on that standard of review.

66 As Ms Thomas and Mr Village submitted, the context in which we have to consider Mr Jones' argument on this ground is important. The site of the proposed development was not in, or adjoining, a European site, but some distance from it. The proposed mitigation measures were not novel or complicated: the re-shaping and enlargement of Langridge Scrape, with no loss of surface water area, and the creation of additional habitat for Gadwall and Shoveler. As the judge said, the "ecological works" proposed were "clearly mitigation, not compensation", having

been "designed to eliminate, avoid or reduce the impact on the protected nature conservation interest in the first place" (paragraphs 79 to 81 of the judgment). When consulted on this proposal, Natural England, as "appropriate nature conservation body", maintained the position they had taken throughout: that, with the proposed mitigation in place, there would be no "significant effect" on the Lee Valley SPA and the Ramsar site. Their advice was accepted by the council as "competent authority". It was now informed by the further material before them when consulted on this application. Once again, it was wholly unambiguous.

67 There is nothing in the submission that the council simply delegated its decision on the question of the need for appropriate assessment to Natural England, or allowed them to tell it what to decide. That is not what happened. Nor did Dove J find that it had. He referred, in [83] of his judgment, to "other cases where, in effect, a local planning authority delegates their decision on such an issue to Natural England, upon whose views, on the recent authorities, they are entitled to rely …". That observation must be read in the light of what the judge had already said about Natural England's statutory remit. He had acknowledged the role of Natural England as "an important consultee" under reg.61(3) of the Habitats Regulations ([58] of the judgment). In doing so, he mentioned relevant authority, including the Supreme Court's decision in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2 (see, in particular, [30] of the judgment of Lord Brown of Eaton-under-Heywood, and [45] of the judgment of Baroness Hale of Richmond). He concluded that the council had "adopted and relied upon the conclusions of Natural England", which it was entitled to do (at [74]). And he found that Natural England had reached their conclusion on the possibility of there being any "significant effect" on the Lee Valley SPA in accordance with the "correct legal tests" (at [75]). I agree.

68 As Dove J concluded (in [77] of his judgment), none of the material before the court on the numbers of Gadwall and Shoveler using Langridge Scrape disproves Natural England's judgment based on the count of 30 Gadwall in the "Phase I Habitat and Ecological Scoping Report". In fact, the April 2012 Wetland Bird Survey lent some support to the earlier data on which Natural England had relied. All of the counts of Gadwall in that document show numbers at 30 or below, the highest numbers recorded being 30, 24 and 22 on days in January, February and March 2012. The counts of Shoveler were all below five, except on two days in December 2011, when eight and six were recorded. And the data put before the court by the Regional Park Authority did not show that the information before Natural England was an inadequate basis for their response to consultation under reg.61. The British Trust for Ornithology counts were generally consistent with the information on which Natural England had relied. In only two of them did the number of Gadwall on Langridge Scrape exceed 30—the average number being 26, and in three there were more than five Shoveler—with an average of seven. As the judge said (in [77] of his judgment), the data showing that the numbers of Gadwall and Shoveler were sometimes higher than the number used by Natural England was "unsurprising given the transitory character of the nature conservation interest concerned and the fact that counts will therefore vary from time to time" and "[did] not come close to rendering the factual basis for Natural England's conclusions unsound".

69 What Natural England had to consider here, as the judge said (at [78]), was not whether there was a "sufficient abundance of [Gadwall and Shoveler] to give rise

to the potential for a likely significant effect", but rather, in view of their conclusion that a significant effect could arise "in the absence of mitigation", whether the mitigation measures proposed were adequate to preclude any such effect. Was this development, with the proposed mitigation measures in place, "likely to have a significant effect on a European site" so that an "appropriate assessment" under the Habitats Directive and the Habitats regulations was required? That was the essential question for Natural England and the council in this case. Natural England's answer to it—and the council's in reliance on their advice—was a clear "No".

70 I do not read Dove J's analysis in this part of his judgment as imposing a burden on the Regional Park Authority to demonstrate that the answer ought to have been "Yes". And, like the judge, I do not accept that the conclusion reached by Natural England, and accepted by the council in making its determination as "competent authority" under reg.61,was other than soundly based on the information before them by this stage, or that it fell short of what the "preventative and precautionary approach" required. It certainly cannot be said to be unreasonable or, in the light of the case law on which Mr Jones relied, unlawful. There was, in my view, sufficient material before Natural England and the council to justify the decision the council made (see [112]–[115] of the court's judgment in *Nomarchiaki*). I reject Mr Jones' submission that it would only have been possible to conclude that there was no likelihood of a "significant effect" on the Lee Valley SPA and Ramsar site if further work had been done to investigate how Langridge Scrape was being used by Gadwall and Shoveler and whether this might be affected by visitors to the site, and to test the adequacy of the proposed replacement habitat. Had Natural England seen any need for further work to be done, they would have asked for it.

71 Lastly on this issue, I come to the submission that the council's decision under reg.61 was vitiated by Natural England's failure to comment, in their response to consultation, on what the 2012 appeal inspector had said in para.28 of her decision letter, and to explain why they disagreed. The judge was not persuaded by this submission. And I think he was right.

72 Because of her doubts about the possible disturbance of birds by recreational activity on the site, the inspector was "not satisfied" that there would be no harm to "the integrity of the European site". She did not, however, express any view of her own, let alone a clearly reasoned view, about the likely efficacy of the proposed mitigation measures, which was, of course, the crucial consideration in Natural England's judgment that there was not likely to be any "significant effect" on the Lee Valley SPA and Ramsar site. That, it should be remembered, was not a contentious matter in the appeal before her. She acknowledged that she had come to her view on the basis of the evidence she had. When the time came for Natural England and the council to consider this third proposal, there was material before them that had not been before her when considering the first.

73 Dove J accepted the submission that Natural England, having considered the inspector's view, was "simply not impressed" by it, and did not need to go further than repeating their own conclusion, which had not changed. It was, he said, "unfortunate that Natural England did not provide reasons for rejecting [her] conclusions, which would have dealt with this point conclusively". In other cases that might have mattered. But in the circumstances of this case, in his view, it was enough to conclude that Natural England "had the inspector's view and … were undeterred by it". He was "satisfied that Natural England had access to the appeal

decision and that it clearly did not in any way impact upon their conclusion that the approach they had taken in respect of the earlier two applications was one which remained legally valid" (para.83 of the judgment).

74 That, in my view, was correct. Conscious of the inspector's doubt, and conscious of the proposed habitat enhancement works and arrangements for attracting visitors to the application site described very clearly in the "Planning Statement" for this application, Natural England, when consulted again as "appropriate nature conservation body", had adhered to the conclusion they had previously stated. It was not incumbent on them to explain why they did not share the inspector's misgivings about the possible effect of the development on "the integrity of the European site", even though she had been the "competent authority" when she had expressed those misgivings. The divergence of her view from theirs was highlighted in the officer's report. The officer's advice was suitably cautious, and clear. She did not spell out the legal test to be applied—and she did not have to (see the judgment of Pill LJ in *R. (on the application of Lewis) v Redcar and Cleveland Borough Council and Persimmon Homes Teesside Ltd* [2009] 1 W.L.R. 83, at paragraphs [84]–[86]). But she did give the members adequate guidance on the matters the council needed to consider as "competent authority" under reg.61 (see the judgment of Pill LJ in *R. (on the application of Lowther) v Durham County Council* [2001] EWCA Civ 781). She reminded them of precisely what the inspector had said in para.28 of her decision letter. And she set against the inspector's doubt, and the Regional Park Authority's objection, Natural England's considered and expert view that, with the proposed mitigation, the development was not likely to have a "significant effect" on the Lee Valley SPA and Ramsar site, and her own conclusion that that expert view should again be accepted.

75 The officer's conclusion and advice on this question were scarcely surprising. The view of Natural England, when consulted under reg.61 of the Habitats regulations, will generally merit the weight one would expect to be given to the opinion of such a body, with the responsibilities it has for nature conservation and the expertise available to it. A local planning authority, as "competent authority", must make the decisions for which it is responsible under reg.61 . But when it has consulted Natural England as the "appropriate nature conservation body" it would need to have convincing reasons for departing from their view on the likelihood of development having a significant effect on a European site (see the judgment of Sullivan J in *Hart*, at [49]). In this case the council concluded that there was no good reason to disagree with the view Natural England had expressed as "appropriate nature conservation body". That was a conclusion well within the bounds of a lawfully made decision under reg.61 .

76 In my view, therefore, the council complied with its duties under art.6 of the Habitats Directive and reg.61 of the Habitats regulations, and it follows that the appeal should not succeed on Ground 3.

**Conclusion**

77 For the reasons I have given, I would dismiss this appeal.

**UNDERHILL LJ**

78 I agree.

**TREACY LJ**

79 I also agree.

# TURNER v SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

COURT OF APPEAL (CIVIL DIVISION)

Arden, Floyd and Sales LJJ: 18 May 2016

[2016] EWCA Civ 466; [2017] 2 P. & C.R. 1

Green belt; Inappropriate development; Interpretation; National Planning Policy Framework; Planning permission; Residential development; Visual impact

H1 *Paragraph 89 of the National Planning Policy Framework—replacement building—inappropriate development—openness*

H2 This was an appeal from the judgment of Lang J dismissing an application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") to quash the decision of an inspector to refuse to grant planning permission for the development of a plot of land which was located in the Green Belt. There was a static single unit mobile home stationed on the site which was used for residential purposes. Adjacent to this was a substantial area of a commercial storage yard which was used for the storage of vehicles. A certificate of lawful existing use had been granted in 2003 for the mobile home and lawful use had been established in respect of the storage yard in a planning appeal decision. The storage yard had capacity to park some 41 lorries as an established lawful use of the site. The application for planning permission was for a proposal to replace the mobile home and storage yard with a three bedroom residential bungalow and associated residential curtilage. Another area adjacent to the site would be retained to continue the existing commercial enterprise.

H3 East Dorset Council ("the Council") refused the application and the appellant appealed. The inspector dismissed the appeal. He found that the proposed redevelopment was inappropriate development in the Green Belt, notwithstanding that it would replace the existing lawful use of the site, and that there were no "very special circumstances" which would justify the grant of permission for the development. Part of the appellant's case before the inspector was his contention that the application fell within the sixth bullet point in para.89 of the National Planning Policy Framework ("the NPPF"), so that the proposed development by building the bungalow would not count as inappropriate development in the Green Belt. The inspector dismissed this contention. He stated that the development would not constitute limited infilling. The issue therefore turned on the question of impact on the openness of the Green Belt.

H4 The inspector stated that no valid comparison could reasonably be made between the volume of moveable chattels such as caravans and vehicles on one hand, and permanent operational development such as a dwelling on the other. While the

retention of the mobile home and vehicles and associated hardstandings would inevitably have their effect on the openness of the Green Belt, this could not properly be judged simply om measured volume which could vary at any time, unlike the new dwelling that would be a permanent feature. The inspector was not persuaded therefore that the volume of the mobile home and the stored/displayed vehicles proposed to be removed should be off-set in terms of the development's overall impact on openness. Accordingly, while the replacement of the current single unit mobile home and vehicles with the new dwelling might only result in a marginal increase in volume, these two things could not be directly compared. The inspector considered that the proposed development would have a considerably greater impact on the openness of the Green Belt and the purpose of including land within it than the existing lawful use of the land. He concluded that the proposal did not meet criterion six of the exceptions set out in para.89 of the NPPF and, therefore would be inappropriate development, which by definition was harmful to the Green Belt.

H5 The appellant challenged the inspector's decision. Lang J dismissed his application. On appeal from Lang J's decision, the appellant submitted that the inspector erred in his interpretation and application of para.89 of the NPPF concerning the circumstances in which development on the Green Belt may not be regarded as inappropriate and in his approach to the concept of "openness" of the Green Belt.

H6 **Held,** dismising the appeal,

1. In so far as it was suggested that the inspector did not address himself to the comparative exercise called for under the sixth bullet point in para.89 of the NPPF, the suggestion was incorrect. The inspector set out that bullet point and proceeded to make an evaluative comparative assessment of the existing lawful use and the proposed redevelopment. The principal matter in issue was whether the inspector adopted an improper approach to the question of openness of the Green Belt when he made that comparison.
2. The concept of "openness of the Green Belt" was not narrowly limited to the volumetric approach suggested by the appellant. The word "openness" was open-textured and a number of factors were capable of being relevant when it came to applying it to the particular facts of a specific case. Prominent among these would be factors relevant to how built up the Green Belt was now and how built up it would be if redevelopment occurred (in the context of which, volumetric matters could be a material concern, but were by no means the only one) and factors relevant to the visual impact on the aspect of openness which the Green Belt presented.
3. The question of visual impact was implicitly part of the concept of "openness of the Green Belt" as a matter of the natural language used in para.89 of the NPPF. This interpretation was reinforced by the general guidance in para.s 79-81 of the NPPF, which introduced s. 9 on the protection of Green Belt. Greenness was a visual quality. Part of the idea of the Green Belt was that the eye and spirit should be relieved from the prospect of unrelenting urban sprawl. Openness of aspect was a characteristic quality of the countryside, and safeguarding the countryside from encroachment included preservation of that quality of openness.

4. Green J in *R. (on the application of Timmins) v Gedling Borough Council* [2014] EWHC 654 (Admin) went too far and erred when he stated that "there is a clear conceptual distinction between openness and visual impact" and "it is therefore wrong in principle to arrive at a specific conclusion as to openness by reference to visual impact". This section of his judgment should not be followed. Green J. did not focus sufficiently on the language of s. 9 of the NPPF, read as part of the coherent and self-contained statement of national planning policy which the NPPF was intended to be. Through his reliance on the case of *R. (on the application of Heath and Hampstead Society) v Camden London Borough Council* [2007] EWHC 977 (Admin), he gave excessive weight to the statement of planning policy in PPG2 for the purposes of interpretation of the NPPF. He did not make proper allowance for the fact that PPG2 was expressed in materially different terms from s.9 of the NPPF. Also, the conclusion that he drew was not in fact supported by the judgment of Sullivan J in the *Heath and Hampstead Society* case.
5. The NPPF was introduced as a new, self-contained statement of national planning policy to replace the various policy guidance documents that had proliferated previously. The NPPF did not simply repeat what was in those documents. It set out national planning policy afresh in terms which were at various points materially different from what went before. The NPPF had to be interpreted objectively in accordance with the language used, read in its proper context. However, the guidance on Green Belt policy in PPG2 remained relevant. In particular, since in promulgating the NPPF the Government made it clear that it strongly supported the Green Belt policy and did not intend to change the central policy that inappropriate development in the Green Belt should not be allowed, s.9 of the NPPF should not be read in such a way as to weaken protection for the Green Belt.
6. There was no error of approach by the inspector in his assessment of the issue of impact on the openness of the Green Belt. He made a legitimate comparison of the existing position regarding use of the site with the proposed redevelopment. This was a matter of evaluative assessment for the inspector in the context of making a planning judgment about relative impact on the openness of the Green Belt. His assessment could not be said to be irrational. It was rational and legitimate for him to assess on the facts of this case that there was a difference between a permanent physical structure in the form of the proposed bungalow and a shifting body of lorries, which would come and go. Even following the narrow volumetric approach urged by the appellant, the inspector was entitled to make the assessment that the two types of use and their impact on the Green Belt could not in the context of this site be "directly compared as proposed by the appellant". The inspector was also entitled to take into account the differences in the visual intrusion on the openness of the Green Belt.

H7 **Cases referred to:**

*Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1386; [2015] P.T.S.R. 274; [2015] 1 P. & C.R. 3

*R. (on the application of Heath and Hampstead Society) v Camden LBC* [2007] EWHC 977 (Admin); [2007] 2 P & C.R. 19; [2007] J.P.L. 1529

*R. (on the application of Timmins) v Gedling BC* [2014] EWHC 654 (Admin);
*R. (on the application of Timmins) v Gedling BC* [2015] EWCA Civ 10; [2015] 2 P. & C.R. 12; [2015] J.P.L. 816

H8 **Legislation referred to:**
Town and Country Planning Act 1990

H9 **Appeal** by the appellant, John Turner, against the decision of Lang J. dismissing the appellant's application under s.288 of the Town and Country Planning Act 1990 to quash the decision of a planning inspector appointed by the first respondent, the Secretary of State for Communities and Local Government to refuse to grant planning permission for development of a plot of land on Barrack Road, West Parley, Ferndown, Dorset. The facts are as stated in the judgment of Sales LJ.

H10 *M Rudd,* instructed by Hawksley's Solicitors, for the Appellant
*R. Kimblin QC*, instructed by the Government Legal Department, for the First Respondent
The Second Respondent did not appear and was not represented.

**JUDGMENT**

**LORD JUSTICE SALES:**

1 This is an appeal from the judgment of Lang J in which she dismissed an application under s.288 of the Town and Country Planning Act 1990 to quash a decision of a Planning Inspector to refuse to grant planning permission for development of a plot of land on Barrack Road, West Parley, Ferndown, Dorset ("the site"). The site is located in the South East Dorset Green Belt. The appellant developer submits that the Inspector erred in his interpretation and application of para.89 of the National Planning Policy Framework ("the NPPF") concerning the circumstances in which development on the Green Belt may not be regarded as inappropriate and in his approach to the concept of the "openness" of the Green Belt.

**Factual background**

2 Barrack Road is characterised by a mix of residential and commercial properties spasmodically placed along the road. The eastern side of the road where the site is located does not have a continuously built up frontage. The site is in open countryside, and not in an urban area or settlement.

3 There is a static single unit mobile home stationed on the site which is used for residential purposes. Adjacent to this is a substantial area of a commercial storage yard which is used for the storage of vehicles; the preparation, repair, valeting and sale of commercial vehicles and cars; the ancillary breaking and dismantling of up to eight vehicles per month; and the ancillary sale and storage of vehicle parts from a workshop on the site. A certificate of lawful existing use was granted in 2003 for the mobile home and lawful use has been established in respect of the storage yard in a planning appeal decision. We were told that the storage yard has capacity to park some 41 lorries as an established lawful use of the site.

4 The appellant's application for planning permission is for a proposal to replace the mobile home and storage yard with a three bedroom residential bungalow and associated residential curtilage. Another area of land adjacent to the site would be retained to continue the existing commercial enterprise. In his application, the appellant compared the proposed redevelopment with the existing lawful use of the land for the mobile home and 11 parked lorries in order to suggest that the volume of the proposed bungalow would be less than the volume of the mobile home and that many lorries and that, accordingly, the proposed redevelopment "would not have a greater impact on the openness of the Green Belt" than the existing lawful use of the site, with the result that it should not be regarded as inappropriate development in the Green Belt (para.89 of the NPPF).

5 The local planning authority refused the application. The Inspector, Mr Philip Willmer, dismissed the appellant's appeal. He found that the proposed redevelopment was inappropriate development in the Green Belt, notwithstanding that it would replace the existing lawful use of the site, and that there were no "very special circumstances" (para.87 of the NPPF) which would justify the grant of permission for the development. The judge dismissed the application to quash his decision.

**The policy framework**

6 This appeal turns on the application of the NPPF, and in particular para.89. Section 9 of the NPPF is headed "Protecting Green Belt land". It starts at paras 79-81 with a statement of some broad principles:

> "79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
>
> 80. Green Belt serves five purposes:
>
> > "* To check the unrestricted sprawl of large built-up areas;
> > * to prevent neighbouring towns merging into one another;
> > * to assist in safeguarding the countryside from encroachment;
> > * to preserve the setting and special character of historic towns; and
> > * to assist in urban regeneration, by encouraging the recycling of derelict and other urban land."
>
> 81. Once Green Belts have been defined, local planning authorities should plan positively to enhance the beneficial use of the Green Belt, such as looking for opportunities to provide access; to provide opportunities for outdoor sport and recreation; to retain and enhance landscapes, visual amenity and biodiversity; or to improve damaged and derelict land."

7 The provisions relating to inappropriate development are at paras 87-90:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt.

'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.
89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:

> "* buildings for agriculture and forestry;
> * provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
> * the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
> * the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;
> * limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or
> * limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development."

90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:

> "* mineral extraction;
> * engineering operations;
> * local transport infrastructure which can demonstrate a requirement for a Green Belt location;
> * the re-use of buildings provided that the buildings are of permanent and substantial construction; and
> * development brought forward under a Community Right to Build Order.""

**The Inspector's decision**

8 An important part of the appellant's case before the Inspector was his contention that his application fell within the sixth bullet point in para.89 of the NPPF, so that the proposed development by building the bungalow would not count as inappropriate development in the Green Belt. The Inspector dismissed this contention in paras 8 to 15 of his decision. At para.8 he set out the sixth bullet point and recorded the appellant's argument and at para.9 he explained that the development would not constitute limited infilling. The issue therefore turned on the question of impact on the openness of the Green Belt. The Inspector dealt with this as follows:

> "10. The appellant contends that if the development were to go ahead then, in addition to the loss of the volume of the mobile home, or potentially a larger replacement double unit, a further volume of some 372.9 cubic metres,

equivalent to eleven commercial vehicles that he has demonstrated could be stored on the appeal site, might also be off set against the volume of the proposed dwelling, thereby limiting the new dwelling's impact on the openness of the Green Belt.

11. Openness is essentially freedom from operational development and relates primarily to the quantum and extent of development and its physical effect on the appeal site. The Certificate of Lawful Existing Use conveys that the use of the land may be for a mobile home rather than a permanent dwelling. In this respect the mobile home may be replaced with another and I have no doubt, if planning permission is not granted for this development, that over time this may well occur. However, the Certificate of Lawful Existing Use is for the use of the land for the siting of a mobile home for residential purposes, which is distinct from the replacement of one dwelling with another.

12. In my view, therefore, no valid comparison can reasonably be made between the volume of moveable chattels such as caravans and vehicles on one hand, and permanent operational development such as a dwelling on the other. While the retention of the mobile home and vehicles, associated hardstandings etc., will inevitably have their effect on the openness of the Green Belt, this cannot properly be judged simply on measured volume which can vary at any time, unlike the new dwelling that would be a permanent feature. I am therefore not persuaded that the volume of the mobile home and the stored/displayed vehicles proposed to be removed should be off-set in terms of the development's overall impact on openness.

13. Accordingly, while the replacement of the current single unit mobile home, or even a replacement double unit and vehicles, with the new dwelling might only result in a marginal or no increase in volume, these two things cannot be directly compared as proposed by the appellant.

14. I noted that existing commercial vehicles were parked on either side of the access road to the site during my site visit. However, as I saw, due to their limited height they do not close off longer views into the site. On the other hand the proposed bungalow, as illustrated, that would in any case be permanent with a dominating symmetrical front façade and high pitch roof, would in my view obstruct views into the site and appear as a dominant feature that would have a harmful impact on openness here.

15. For the reasons set out I consider that the proposed development would have a considerably greater impact on the openness of the Green Belt and the purpose of including land within it than the existing lawful use of the land. I therefore conclude that the proposal does not meet criterion six of the exceptions set out in paragraph 89 of the Framework and, therefore, would be inappropriate development, which by definition is harmful to the Green Belt. I give substantial weight to this harm."

9 It is this part of the Inspector's reasoning which is under challenge. (I should mention that although in paras 11 and 12 of the decision the Inspector referred to "operational development" rather than simply "development", the judge correctly found that this was an immaterial slip and there is no appeal in that regard). Having found that the redevelopment was inappropriate development in the Green Belt, it is unsurprising that the Inspector found that there were not adequate grounds to justify the grant of planning permission.

**The appeal: discussion**

10 On the appellant's s.288 application the appellant had three grounds of challenge to the Inspector's decision, of which two are relevant on this appeal: (i) the Inspector failed to treat the existing development on the site as a relevant material factor to be taken into account in considering whether the sixth bullet point of para.89 was applicable, and (ii) the Inspector wrongly conflated the concept of openness in relation to the Green Belt with the concept of visual impact. The judge rejected all the grounds of challenge and the appellant now appeals to this Court, relying again on these two grounds.

11 In his oral submissions, Mr Rudd developed the first ground somewhat. His submission was that the Inspector was wrong to say that no valid comparison could be made between the volume of moveable chattels (mobile home and lorries) on the site and a permanent structure in the form of the proposed bungalow; on the proper construction of the concept of "openness of the Green Belt" as used in the sixth bullet point in para.89 of the NPPF the sole criterion of openness for the purpose of the comparison required by that bullet point was the volume of structures comprising the existing lawful use of a site compared with that of the structure proposed by way of redevelopment of that site ("the volumetric approach"); a comparison between the volume of existing development on the site in this case in the form of the mobile home and 11 lorries as against the volume of the proposed bungalow showed that there would be a lesser impact on the openness of the Green Belt if the existing development were replaced by the bungalow and the Inspector should so have concluded; and the Inspector erred by having regard to a wider range of considerations apart from the volume of development on the site (including the factor of visual impact) in para.14 of the decision on the way to reaching his conclusion at para.15. This last point overlaps with the second ground of challenge and it is appropriate to address both grounds together, as the judge did.

12 I do not accept these submissions by Mr Rudd. First, in so far as it is suggested that the Inspector did not address himself to the comparative exercise called for under the sixth bullet point in para.89, the suggestion is incorrect. The Inspector set out that bullet point and then proceeded to make an evaluative comparative assessment of the existing lawful use and the proposed redevelopment in paras 10 to 15 of the decision.

13 The principal matter in issue is whether the Inspector adopted an improper approach to the question of openness of the Green Belt when he made that comparison. The question of the true interpretation of the NPPF is a matter for the court. In my judgment, the approach the Inspector adopted was correct and the judge was right so to hold.

14 The concept of "openness of the Green Belt" is not narrowly limited to the volumetric approach suggested by Mr Rudd. The word "openness" is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case. Prominent among these will be factors relevant to how built up the Green Belt is now and how built up it would be if redevelopment occurs (in the context of which, volumetric matters may be a material concern, but are by no means the only one) and factors relevant to the visual impact on the aspect of openness which the Green Belt presents.

15 The question of visual impact is implicitly part of the concept of "openness of the Green Belt" as a matter of the natural meaning of the language used in para.89

of the NPPF. I consider that this interpretation is also reinforced by the general guidance in paras 79-81 of the NPPF, which introduce section 9 on the protection of Green Belt Land. There is an important visual dimension to checking "the unrestricted sprawl of large built-up areas" and the merging of neighbouring towns, as indeed the name "Green Belt" itself implies. Greenness is a visual quality: part of the idea of the Green Belt is that the eye and the spirit should be relieved from the prospect of unrelenting urban sprawl. Openness of aspect is a characteristic quality of the countryside, and "safeguarding the countryside from encroachment" includes preservation of that quality of openness. The preservation of "the setting … of historic towns" obviously refers in a material way to their visual setting, for instance when seen from a distance across open fields. Again, the reference in para.81 to planning positively "to retain and enhance landscapes, visual amenity and biodiversity" in the Green Belt makes it clear that the visual dimension of the Green Belt is an important part of the point of designating land as Green Belt.

16 The visual dimension of the openness of the Green Belt does not exhaust all relevant planning factors relating to visual impact when a proposal for development in the Green Belt comes up for consideration. For example, there may be harm to visual amenity for neighbouring properties arising from the proposed development which needs to be taken into account as well. But it does not follow from the fact that there may be other harms with a visual dimension apart from harm to the openness of the Green Belt that the concept of openness of the Green Belt has no visual dimension itself.

17 Mr Rudd relied upon a section of the judgment of Green J sitting at first instance in *R (Timmins) v Gedling Borough Council* [2014] EWHC 654 (Admin) at [67]-[78], in which the learned judge addressed the question of the relationship between openness of the Green Belt and visual impact. Green J referred to the judgment of Sullivan J in *R (Heath and Hampstead Society) v Camden LBC* [2007] EWHC 977 (Admin); [2007] 2 P&CR 19, which related to previous policy in relation to the Green Belt as set out in Planning Policy Guidance 2 ("PPG 2"), and drew from it the propositions that "there is a clear conceptual distinction between openness and visual impact" and "it is therefore wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impact": para.[78] (Green J's emphasis). The case went on appeal, but this part of Green J's judgment was not in issue on the appeal: [2015] EWCA Civ 10; [2016] 1 All ER 895.

18 In my view, Green J went too far and erred in stating the propositions set out above. This section of his judgment should not be followed. There are three problems with it. First, with respect to Green J, I do not think that he focused sufficiently on the language of section 9 of the NPPF, read as part of the coherent and self-contained statement of national planning policy which the NPPF is intended to be. The learned judge does not consider the points made above. Secondly, through his reliance on the *Heath and Hampstead Society* case Green J has given excessive weight to the statement of planning policy in PPG 2 for the purposes of interpretation of the NPPF. He has not made proper allowance for the fact that PPG 2 is expressed in materially different terms from section 9 of the NPPF. Thirdly, I consider that the conclusion he has drawn is not in fact supported by the judgment of Sullivan J in the *Heath and Hampstead Society* case.

19 The general objective of PPG 2 was to make provision for the protection of Green Belts. Paragraph 3.2 stated that inappropriate development was, by definition, harmful to the Green Belt. Paragraph 3.6 stated:

> "Provided that it does not result in disproportionate additions over and above the size of the original building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, proving the new dwelling is not materially larger than the dwelling it replaces …"

20 It was the application of this provision which was in issue in the *Heath and Hampstead Society* case. It can be seen that this provision broadly corresponds with the fourth bullet point in para.89 of the NPPF and that it has a specific focus on the relative size of an existing building and of the proposed addition or replacement.

21 The NPPF was introduced in 2012 as a new, self-contained statement of national planning policy to replace the various policy guidance documents that had proliferated previously. The NPPF did not simply repeat what was in those documents. It set out national planning policy afresh in terms which are at various points materially different from what went before. This court gave guidance regarding the proper approach to the interpretation of the NPPF in the *Timmins* case at [24]. The NPPF should be interpreted objectively in accordance with the language used, read in its proper context. But the previous guidance—specifically in *Timmins*, as in this case and in *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1386; [2015] 1 P. & C.R. 36 to which the court in *Timmins* referred, the guidance on Green Belt policy in PPG 2—remains relevant. In particular, since in promulgating the NPPF the Government made it clear that it strongly supported the Green Belt and did not intend to change the central policy that inappropriate development in the Green Belt should not be allowed, s.9 of the NPPF should not be read in such a way as to weaken protection for the Green Belt: see the *Redhill Aerodrome* case at [16] per Sullivan LJ, quoted in *Timmins* at [24].

22 The *Heath and Hampstead Society* case concerned a proposal to demolish an existing residential building on Metropolitan Open Land (which was subject to a policy giving it the same level of protection as the Green Belt) and replace it with a new dwelling. Sullivan J rejected the submission that the test in para.3.6 was solely concerned with a mathematical comparison of relevant dimensions: [19]. However, he accepted the alternative submission that the exercise under para.3.6 was primarily an objective one by reference to size, where which particular physical dimension was most relevant would depend on the circumstances of a particular case, albeit with floor space usually being an important criterion: [20]. It was not appropriate to substitute a test such as "providing the new dwelling is not more visually intrusive than the dwelling it replaces" for the test actually stated in para.3.6, namely whether the new dwelling was materially larger or not: [20]. As Sullivan J said, "Paragraph 3.6 is concerned with the size of the replacement dwelling, not with its visual impact": [21]. In that regard, also at [21], he relied in addition on para.3.15 of PPG 2 which made specific provision in relation to visual amenities in the Green Belt. Neither para.3.6 of PPG 2 (with its specific focus on comparative size of the existing and replacement buildings) nor para.3.15 of PPG 2 refer to the concept of the "openness of the Green Belt". They do not correspond with the text of the sixth bullet point in para.89 of the NPPF, and s.9 of the NPPF contains no provision equivalent to para.3.15 of PPG 2. It is therefore not appropriate to treat this part of the judgment in *Heath and Hampstead Society* as

providing authoritative guidance on the interpretation of the sixth bullet point in para.89 of the NPPF. At paras [22] and [36]-[38] Sullivan J emphasised that the relevant issue in the case specifically concerned the application of para.3.6 of PPG 2 and whether the proposed replacement house was materially larger than the existing house.

23 At [22] Sullivan J said, "The loss of openness (i.e. unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective". Since the concept of the openness of the Green Belt has a spatial or physical aspect as well as a visual aspect, that statement is true in the context of the NPPF as well, provided it is not taken to mean that openness is *only* concerned with the spatial issue. Such an interpretation accords with the guidance on interpretation of the NPPF given by this court in the *Timmins* and *Redhill Aerodrome* cases, to the effect that the NPPF is to be interpreted as providing no less protection for the Green Belt than PPG 2. The case before Sullivan J was concerned with a proposed new, larger building which represented a spatial intrusion upon the openness of the Green Belt but which did not intrude visually on that openness, so he was not concerned to explain what might be the position under PPG 2 generally if there had been visual intrusion instead or as well.

24 Sullivan J gives a general reason for the importance of spatial intrusion at [37] of his judgment:

> "The planning officer's approach can be paraphrased as follows:
>
> > "'The footprint of the replacement dwelling will be twice as large as that of the existing dwelling, but the public will not be able to see very much of the increase.'"
>
> It was the difficulty of establishing in many cases that a particular proposed development within the Green Belt would of itself cause 'demonstrable harm' that led to the clear statement of policy in para.3.2 of PPG 2 that inappropriate development is, by definition, harmful to the Green Belt. The approach adopted in the officer's report runs the risk that Green Belt of Metropolitan Open Land will suffer the death of a thousand cuts. While it may not be possible to demonstrate harm by reason of visual intrusion as a result of an individual – possibly very modest – proposal, the cumulative effect of a number of such proposals, each very modest in itself, could be very damaging to the essential quality of openness of the Green Belt and Metropolitan Open Land."

25 This remains relevant guidance in relation to the concept of openness of the Green Belt in the NPPF. The same strict approach to protection of the Green Belt appears from para.87 of the NPPF. The openness of the Green Belt has a spatial aspect as well as a visual aspect, and the absence of visual intrusion does not in itself mean that there is no impact on the openness of the Green Belt as a result of the location of a new or materially larger building there. But, as observed above, it does not follow that openness of the Green Belt has no visual dimension.

26 What is also significant in this paragraph of Sullivan J's judgment for present purposes is the last sentence, from which it appears that Sullivan J considered that a series of modest visual intrusions from new developments would be a way in which the essential quality of the openness of the Green Belt could be damaged, even if it could not be said of each such intrusion that it represented demonstrable harm to the openness of the Green Belt in itself. At any rate, Sullivan J does not

say that the openness of the Green Belt has no visual dimension. Hence I think that Green J erred in *Timmins* in taking the *Heath and Hampstead Society* case to provide authority for the two propositions he sets out at para.[78] of his judgment, to which I have referred above.

27 Turning back to the Inspector's decision in the present case, there is no error of approach by the Inspector in his assessment of the issue of impact on the openness of the Green Belt. In paras 11 to 13 the Inspector made a legitimate comparison of the existing position regarding use of the site with the proposed redevelopment. This was a matter of evaluative assessment for the Inspector in the context of making a planning judgment about relative impact on the openness of the Green Belt. His assessment cannot be said to be irrational. It was rational and legitimate for him to assess on the facts of this case that there is a difference between a permanent physical structure in the form of the proposed bungalow and a shifting body of lorries, which would come and go; and even following the narrow volumetric approach urged by the appellant the Inspector was entitled to make the assessment that the two types of use and their impact on the Green Belt could not in the context of this site be "directly compared as proposed by the appellant" (para.13). The Inspector was also entitled to take into account the difference in the visual intrusion on the openness of the Green Belt as he did in para.14.

**Conclusion**

28 For the reasons given above, I would dismiss this appeal.

**LORD JUSTICE FLOYD:**

29 I agree.

**LADY JUSTICE ARDEN DBE:**

30 I also agree.

Janet Briscoe.

A

Supreme Court

# Regina (Samuel Smith Old Brewery (Tadcaster) and another) *v* North Yorkshire County Council

B

## [2020] UKSC 3

2019 Dec 3;
2020 Feb 5

Lord Carnwath, Lord Hodge, Lord Kitchin, Lord Sales JJSC, Baroness Hale of Richmond

*Planning — Development — Green Belt land — Application for extension of magnesium limestone quarry in Green Belt — Planning officer's report concluding that proposed development would not materially harm character and openness of Green Belt — Local planning authority granting application — Whether planning officer erring in approach to "openness" of Green Belt — Whether visual quality of landscape essential part of "openness" for which Green Belt protected — National Planning Policy Framework (2012), para 90*

C

D

The local planning authority granted planning permission for the extension of a mineral extraction quarry situated on Green Belt land. The claimants, who owned land in the vicinity of the quarry, sought judicial review of the grant of planning permission on the ground that the planning officer's report, which had been considered by the local authority's planning committee, was flawed in that the concept of "openness" in paragraph 90 of the National Planning Policy Framework (2012)[1] had been misapplied so that it had erred in concluding that the development in the Green Belt was "not inappropriate". The judge dismissed the claim for judicial review but the Court of Appeal allowed the claimants' appeal and quashed the grant of planning permission.

E

On appeal by the local planning authority—

*Held*, allowing the appeal, that it was clear from the history and aims of the Green Belt policy that the visual quality of the landscape was not in itself an essential part of the "openness" for which the Green Belt was protected; that the concept of "openness" in paragraph 90 of the National Planning Policy Framework was a broad policy concept which referred back to the underlying aim of Green Belt policy of preventing urban sprawl, that openness was the counterpart of urban sprawl and was not necessarily about the visual qualities of the land, nor did it imply freedom from any form of development; that paragraph 90 showed that some forms of development, including mineral extraction, might be compatible with the concept of openness, and a quarry could, as a barrier to urban sprawl, be regarded as open in Green Belt terms; that the issue which had to be addressed was whether the proposed mineral extraction would preserve the openness of the Green Belt, or otherwise conflict with the purposes of including the land within the Green Belt; that the officer's report specifically identified and addressed those issues and there was no error of law on the face of the report; that paragraph 90 did not expressly or by implication refer to visual impact as a necessary part of the analysis and the matters relevant to openness in any particular case were matters of planning judgement and not law; that the officer had been entitled to take the view in his planning judgement that, in the context of the quarry extension, and taking account of other matters, there was no detraction from openness in Green Belt terms; and that, accordingly, the

F

G

H

[1] National Planning Policy Framework, para 90: see post para 9.

judge's order dismissing the claim for judicial review would be restored (post paras 5, 22, 39–42).

*Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983, SC(Sc), *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* [2014] 1 P & CR 3 and [2014] PTSR 1471, CA, *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623, SC(E) and *Turner v Secretary of State for Communities and Local Government* [2017] 2 P & CR 1, CA considered.

Decision of the Court of Appeal [2018] EWCA Civ 489 reversed.

The following cases are referred to in the judgment of Lord Carnwath JSC:

*Bolton Metropolitan Borough Council v Secretary of State for the Environment* [2017] PTSR 1063; (1990) 61 P & CR 343, CA

*CREEDNZ Inc v Governor General* [1981] 1 NZLR 172

*Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19

*Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* [2013] EWHC (Admin) 2643; [2014] 1 P & CR 3; [2014] EWCA Civ 825; [2014] PTSR 1471, CA

*Findlay, In re* [1985] AC 318; [1984] 3 WLR 1159; [1984] 3 All ER 801, HL(E)

*Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865; [2017] 4 All ER 938, SC(E)

*R (Heath & Hampstead Society) v Camden London Borough Council* [2007] EWHC 977 (Admin); [2007] 2 P & CR 19

*R (Heath & Hampstead Society) v Vlachos* [2008] EWCA Civ 193; [2008] 3 All ER 80, CA

*R (Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] EWCA Civ 404; [2016] Env LR 30, CA

*Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1386; [2015] PTSR 274, CA

*Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] UKSC 13; [2012] PTSR 983, SC(Sc)

*Timmins v Gedling Borough Council* [2014] EWHC 654 (Admin)

*Turner v Secretary of State for Communities and Local Government* [2016] EWCA Civ 466; [2017] 2 P & CR 1, CA

The following additional case was cited in argument:

*R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452, CA

**APPEAL** from the Court of Appeal

On 22 September 2016 the local planning authority, North Yorkshire County Council, granted planning permission to the quarry owner, Darrington Quarries Ltd, to extend the operational face of the Jackdaw Crag Quarry in Tadcaster, a magnesian limestone quarry which lay in Green Belt land. The first claimant, Samuel Smith Old Brewery (Tadcaster), and the second claimant, Oxton Farm, sought judicial review of the decision to grant planning permission, on the ground that the report of the planning officer, which had been considered by the local authority's planning and regulatory functions committee, had misapplied paragraph 90 of the National Planning Policy Framework (2012) ("NPPF"), and that the authority had consequently erred in concluding that the proposed development for mineral extraction was not inappropriate in the Green

A Belt. The quarry owner was made an interested party in the proceedings. On 7 March 2017 Hickinbottom J [2017] EWHC 442 (Admin) dismissed the claimants' application. On 16 March 2018 the Court of Appeal (Lewison and Lindblom LJJ) [2018] EWCA Civ 489 allowed an appeal by the claimants and quashed the planning permission.

Pursuant to permission to appeal granted by the Supreme Court (Baroness Hale of Richmend PSC, Lord Carnwath and Lady Arden JJSC) on
B 5 November 2018, the local planning authority appealed. The issue on the appeal was whether the local authority had misunderstood and/or misapplied paragraph 90 of the NPPF when it concluded that the proposed development was not "inappropriate" in the Green Belt.

The facts are stated in the judgment of Lord Carnwath JSC, post, paras 15–20.

C

*Daniel Kolinsky QC* and *Hannah Gibbs* (instructed by *Solicitor, North Yorkshire County Council, Northallerton*) for the local planning authority.

*Alison Ogley* (instructed by *Walker Morris llp, Leeds*) for the quarry owner.

*Peter Village QC*, *James Strachan QC*, *Ned Helme* and *Ruth Keating*
D (instructed by *Pinsent Mason llp, Leeds*) for the claimants.

**LORD CARNWATH JSC** (with whom **LORD HODGE, LORD KITCHIN** and **LORD SALES JJSC** and **BARONESS HALE OF RICHMOND** agreed) handed down the following judgment.

*Introduction*
E

**1** The short point in this appeal is whether the appellant county council, as local planning authority, correctly understood the meaning of the word "openness" in the national planning policies applying to mineral working in the Green Belt, as expressed in the National Planning Policy Framework (2012) ("NPPF"). The Court of Appeal [2018] EWCA Civ 489, disagreeing
F with Hickinbottom J [2017] EWHC 442 (Admin) in the High Court, held that, in granting planning permission for the extension of a quarry, the council had been misled by defective advice given by their planning officer. In the words of Lindblom LJ, giving the leading judgment:

> "It was defective, at least, in failing to make clear to the members
G that, under government planning policy for mineral extraction in the Green Belt in paragraph 90 of the NPPF, visual impact was a potentially relevant and potentially significant factor in their approach to the effect of the development on the 'openness of the Green Belt' …" (para 49, per Lindblom LJ).

He thought that, having regard to the officer's own assessment, it was "quite
H obviously relevant", and therefore a necessary part of the assessment. The court quashed the permission.

**2** In this court, the council, supported by the quarry operator (the third respondent), argues that the Court of Appeal's reasoning was based on misunderstandings both of the relevant policies and of the officer's report, and that the permission should be reinstated. The first and second

respondents (collectively referred to as "Samuel Smith") seek to uphold the decision and reasoning of the Court of Appeal.

*Green Belt policy*

*History and aims*

**3** Although we are directly concerned with the policies in the NPPF (in its original 2012 version), Green Belt policies have a very long history. It can be traced back to the first national guidance on Green Belts in Circular 42/55 (issued in August 1955). More recently Planning Policy Guidance 2: Green Belts (published in 1995 and amended in 2001) ("PPG2") confirmed the role of Green Belts as "an essential element of planning policy for some four decades"; and noted that the purposes of Green Belt policies and the related development control policies set out in 1955 "remain valid today with remarkably little alteration" (paragraph 1.1). The NPPF itself, as appears from ministerial statements at the time, was designed to consolidate and simplify policy as expressed in a number of ministerial statements and guidance notes, rather than to effect major policy changes (see *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2015] PTSR 274, paras 16 et seq, 22, per Sullivan LJ).

**4** In the NPPF the concept of "openness" first appears in the introduction to section 9 ("Protecting Green Belt land") which gives a statement of the fundamental aim and the purposes of Green Belt policy:

> "79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
>
> "80. Green Belt serves five purposes:
>
> • to check the unrestricted sprawl of large built-up areas;
> • to prevent neighbouring towns merging into one another;
> • to assist in safeguarding the countryside from encroachment;
> • to preserve the setting and special character of historic towns; and
> • to assist in urban regeneration, by encouraging the recycling of derelict and other urban land."

**5** This statement of the "fundamental aim" of the policy and the "five purposes" is unchanged from PPG2. The Planning Policy Guidance included a fuller statement of certain "objectives" for the use of land within defined Green Belts, including (for example) providing opportunities for access to open countryside, and retaining and enhancing attractive landscapes (paragraph 1.6), but adding:

> "The extent to which the use of land fulfils these objectives is however not itself a material factor in the inclusion of land within a Green Belt, or in its continued protection. For example, although Green Belts often contain areas of attractive landscape, the quality of the landscape is not relevant to the inclusion of land within a Green Belt or to its continued protection. The purposes of including land in Green Belts are of paramount importance to their continued protection, and should take precedence over the land use objectives": paragraph 1.7.

A It is clear therefore that the visual quality of the landscape is not in itself an essential part of the "openness" for which the Green Belt is protected.

*Control of development in Green Belts*

**6** Key features of development control in Green Belts are the concepts of "appropriate" and "inappropriate" development, and the need in the B latter case to show "very special circumstances" to justify the grant of planning permission. In *R (Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] Env LR 30 ("the *Lee Valley* case"), Lindblom LJ explained their relationship:

> "18. A fundamental principle in national policy for the Green C Belt, unchanged from PPG2 to the NPPF, is that the construction of new buildings in the Green Belt is 'inappropriate' development and should not be approved except in 'very special circumstances', unless the proposal is within one of the specified categories of exception in the 'closed lists' in paragraphs 89 and 90 … The distinction between development that is 'inappropriate' in the Green Belt and development that is not 'inappropriate' (ie appropriate) governs the D approach a decision-maker must take in determining an application for planning permission. 'Inappropriate development' in the Green Belt is development 'by definition, harmful' to the Green Belt—harmful because it is there—whereas development in the excepted categories in paragraphs 89 and 90 of the NPPF is not."

E **7** These concepts are expressly preserved in the policies for the control of development set out in paragraphs 87 et seq of the NPPF:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> "88. … 'Very special circumstances' will not exist unless the potential F harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

**8** Paragraph 89 indicates that construction of new buildings is to be regarded as "inappropriate" with certain defined exceptions. The exceptions include, for example, "buildings for agriculture and forestry", and (relevant to authorities discussed later in this judgment):

G

> "• provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it …"
>
> "• limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in H continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development."

**9** Paragraph 90, which defines forms of development regarded as "not inappropriate" is directly in issue in the present case:

A "Certain other forms of development are also not inappropriate in Green Belt *provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt*. These are:

- mineral extraction;
- engineering operations;
- local transport infrastructure which can demonstrate a requirement for a Green Belt location;
- the re-use of buildings provided that the buildings are of permanent and substantial construction; and
- development brought forward under a Community Right to Build Order." (Emphasis added. I shall refer to the words so emphasised as "the openness proviso".)

**10** Paragraphs 89–90 replace a rather fuller statement of policy for "Control of Development" in section 3 of PPG2. Paragraphs 3.4–3.6 ("New buildings"), and paragraphs 3.7–3.12 ("Re-use of buildings", and, under a separate heading, "Mining operations, and other development") cover substantially the same ground, respectively, as NPPF paragraphs 89 and 90, but in rather fuller terms. The policy for "Mining operations, and other development" was as follows:

"3.11 Minerals can be worked only where they are found. Their extraction is a temporary activity. Mineral extraction *need not be inappropriate development: it need not conflict with the purposes of including land in Green Belts, provided that high environmental standards are maintained and that the site is well restored*. Mineral and local planning authorities should include appropriate policies in their development plans. Mineral planning authorities should ensure that planning conditions for mineral working sites within Green Belts achieve suitable environmental standards and restoration …

"3.12 The statutory definition of development includes engineering and other operations, and the making of any material change in the use of land. The carrying out of such operations and the making of material changes in the use of land are inappropriate development *unless they maintain openness and do not conflict with the purposes of including land in the Green Belt*." (Emphasis added.)

**11** It will be noted that a possible textual issue arises from the way in which the PPG2 policies have been shortened and recast in the NPPF. In the Planning Policy Guidance the openness proviso is in terms directed to forms of development other than mineral extraction (it also appears in the section on re-use of buildings: paragraph 3.8). By contrast, mineral extraction is not expressly subject to the proviso, but may be regarded as not inappropriate, subject only to "high environmental standards" and the quality of restoration. In the shortened version in the NPPF these categories of potentially appropriate development have been recast in paragraph 90, and brought together under the same proviso, including the requirement to preserve openness.

**12** I do not read this as intended to mark a significant change of approach. If that had been intended, one would have expected it to have been signalled more clearly. To my mind the change is explicable as no more than a convenient means of shortening and simplifying the policies without material

A change. It may also have been thought that, whereas mineral extraction in itself would not normally conflict with the openness proviso, associated building or other development might raise greater problems. A possible example may be seen in *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* [2014] 1 P & CR 3; [2014] PTSR 1471 discussed below (para 26).

B

*Other relevant policies*

**13** *Mineral policies* A later part of the NPPF (section 13, headed "Facilitating the sustainable use of minerals") deals with mineral development generally. It emphasises the importance of ensuring a sufficient supply of minerals to support economic growth (paragraph 142); and gives
C advice on the inclusion of mineral policies in local plans (paragraph 143), and on the determination of planning applications (paragraph 144). The latter includes (inter alia) a requirement to ensure that there are "no unacceptable adverse impacts on the natural and historic environment" and that provision is made for "restoration and aftercare at the earliest opportunity to be carried out to high environmental standards". No issue arises under these policies
D in the present case, but they show that development which is "appropriate" in Green Belt may be found unacceptable by reference to other policy constraints.

**14** *Local plan policies* The proposal was also subject to Green Belt and other policies in the local plan (the Selby District Core Strategy Local Plan). These are summarised by Lindblom LJ (para 9). It is not suggested by either party that these materially affect the legal issues arising in the present appeal.

E

*The application and the officer's report*

**15** The application was for an extension to the operational face of Jackdaw Crag Quarry, a magnesian limestone quarry owned and operated by the third respondent, Darrington Quarries Ltd. The quarry, which extends
F to about 25 hectares, is in the Green Belt, about 1·5 kilometres to the south-west of Tadcaster. It has been operated by Darrington Quarries for many years, planning permission for the extraction of limestone having first been granted in July 1948 and subsequently renewed. The proposed extension is for an area of about six hectares, expected to yield some two million tonnes of crushed rock over a period of seven years.

G **16** The application had received planning permission in January 2013, but that permission was quashed because of failings in the environmental impact assessment. The application came back to the county council's Planning and Regulatory Functions Committee on 9 February 2016, when the committee accepted their officer's recommendation that planning permission be granted. Following completion of a section 106 of the Town and Country Planning Act 1990 agreement planning permission was granted on 22 September
H 2016.

**17** The officer's report, prepared by Vicky Perkin for the Corporate Director, Business and Environmental Services, was an impressively comprehensive and detailed document, running to more than 100 pages, and dealing with a wide range of planning considerations. Under the heading "Landscape impact", the report summarised the views of the council's

Principal Landscape Architect, who had not objected in principle to the proposal, but had drawn attention to the potential landscape impacts and the consequent need to ensure that mitigation measures are maximised (paras 4.118 and 7.42–5).

**18** For present purposes the critical part of the report comes under the heading "Impacts of the Green Belt" (para 7.117 et seq). Having summarised the relevant national and local policies, she referred (para 7.120) to the consultation response from Samuel Smith stating:

> "the application site falling within the Green Belt is critical in the determination of the proposal and added that '*mineral extraction remains inappropriate development in the Green Belt unless it can be demonstrated that the proposal both preserves the openness of the Green Belt and doesn't conflict with the purposes of including land within the Green Belt*'. The objector also stated that one of the aims of the Green Belt, in '*assisting in urban regeneration will be materially harmed by the development*'…" (Emphasis added.)

**19** The officer commented:

> "7.121 When considering applications within the Green Belt, in accordance with the NPPF, it is necessary to consider whether the proposed development will firstly preserve the openness of the Green Belt and secondly ensure that it does not conflict with the purposes of including land within the Green Belt.
>
> "7.122 It is considered that the proposed development preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt. Openness is not defined, but it is commonly taken to be the absence of built development. Although the proposed development would be on existing agricultural land, it is considered that because the application site immediately abuts the existing operational quarry, it would not introduce development into this area of a scale considered to conflict with the aims of preserving the openness of the Green Belt.
>
> "7.123 In terms of whether the proposed development does not conflict with the purposes of including land within the Green Belt, the proposed quarrying operations are not considered to conflict with the purposes of including land within the Green Belt. Equally, it is not considered that the proposed development would undermine the objective of safeguarding the countryside from encroachment as it should be considered that the site is in conjunction with an operational quarry which will be restored. The proposed development is a temporary use of land and would also be restored upon completion of the mining operations through an agreed [restoration plan].
>
> "7.124 The purposes of including land within the Green Belt to prevent the merging of neighbouring towns and impacts upon historic towns are not relevant to this site as it is considered the site is adequately detached from the settlements of Stutton, Towton and Tadcaster. It is also important to note that the A64 road to the north severs the application site from Tadcaster.
>
> "7.125 As mentioned in the response from [Samuel Smith], one of the purposes of the Green Belt is assisting in urban regeneration which the

objector claims will be undermined by the proposed development. Given the situation of the application site, adjacent to an existing operational quarry and its rural nature, and the fact that minerals can only be worked where they are found, it is considered that the site would not, therefore, undermine this aim of the Green Belt.

"7.126 The restoration scheme is to be designed and submitted as part of a section 106 Agreement, it is considered that there are appropriate controls to ensure adequate restoration of the site. Due to the proposed restoration of the temporary quarry and the fact that it is considered the proposal doesn't conflict with the aims of the Green Belt, it is considered that the proposed development would not materially harm the character and openness of the Green Belt, and would, therefore, comply with Policy SP3 and SP13 of the Selby District Core Strategy Local Plan and NPPF."

**20** Section 8 of the report gives the planning officer's conclusion:

"8.4 It is considered that the proposed screening could protect the environment and residential receptors from potential landscape and visual impacts.

"8.5 Due to the proposed restoration of the temporary quarry and the fact that it is considered the proposal doesn't conflict with the aims of the Green Belt, it is considered that the proposed development would not materially harm the character and openness of the Green Belt."

*Legal principles*

**21** Much time was taken up in the judgments below, as in the submissions in this court, on discussion of previous court authorities on the relevance of visual impact under Green Belt policy. The respective roles of the planning authorities and the courts have been fully explored in two recent cases in this court: *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983 and *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623. In the former Lord Reed JSC, while affirming that interpretation of a development plan, as of any other legal document, is ultimately a matter for the court, also made clear the limitations of this process:

"Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse …" (para 19).

In the *Hopkins Homes* case (paras 23–34) I warned against the danger of "over-legalisation" of the planning process. I noted the relatively specific

language of the policy under consideration in the *Tesco* case, contrasting that with policies: "expressed in much broader terms [which] may not require, nor lend themselves to, the same level of legal analysis." A

**22** The concept of "openness" in paragraph 90 of the NPPF seems to me a good example of such a broad policy concept. It is naturally read as referring back to the underlying aim of Green Belt policy, stated at the beginning of this section: "to prevent urban sprawl by keeping land permanently open …" Openness is the counterpart of urban sprawl and is also linked to the purposes to be served by the Green Belt. As PPG2 made clear, it is not necessarily a statement about the visual qualities of the land, though in some cases this may be an aspect of the planning judgement involved in applying this broad policy concept. Nor does it imply freedom from any form of development. Paragraph 90 shows that some forms of development, including mineral extraction, may in principle be appropriate, and compatible with the concept of openness. A large quarry may not be visually attractive while it lasts, but the minerals can only be extracted where they are found, and the impact is temporary and subject to restoration. Further, as a barrier to urban sprawl a quarry may be regarded in Green Belt policy terms as no less effective than a stretch of agricultural land. B C

**23** It seems surprising in retrospect that the relationship between openness and visual impact has sparked such legal controversy. Most of the authorities to which we were referred were concerned with the scope of the exceptions for buildings in paragraph 89 (or its predecessor). In that context it was held, unremarkably, that a building which was otherwise inappropriate in Green Belt terms was not made appropriate by its limited visual impact (see *R (Heath & Hampstead Society) v Camden London Borough Council* [2007] 2 P & CR 19, upheld at *R (Heath & Hampstead Society) v Vlachos* [2008] 3 All ER 80). As Sullivan J said in the High Court: D E

> "The loss of openness (ie unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective. If the replacement dwelling is more visually intrusive there will be further harm in addition to the harm by reason of inappropriateness …" (para 22). F

To similar effect, in the *Lee Valley* case [2016] Env LR 30, Lindblom LJ said: "The concept of 'openness' here means the state of being free from built development, the absence of buildings—as distinct from the absence of visual impact …" (para 7, cited by him in his present judgment at para 19).

**24** Unfortunately, in *Timmins v Gedling Borough Council* [2014] EWHC 654 (Admin) (a case about another familiar Green Belt category—cemeteries and associated buildings), Green J went a stage further holding, not only that there was "a clear conceptual distinction between openness and visual impact", but that it was: "wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impact" (para 78, emphasis in original). G

**25** This was disapproved (rightly in my view) in *Turner v Secretary of State for Communities and Local Government* [2017] 2 P & CR 1, para 18. This concerned an inspector's decision refusing permission for a proposal to replace a mobile home and storage yard with a residential bungalow in the Green Belt. In rejecting the contention that it was within the exception for redevelopment which "would not have a greater impact on the openness of the Green Belt", the inspector had expressly taken account of its visual H

A effect, and that it would "appear as a dominant feature that would have a harmful impact on openness here". The Court of Appeal upheld the decision. Sales LJ said:

> "The concept of 'openness of the Green Belt' is not narrowly limited to the volumetric approach suggested by [counsel]. The word 'openness' is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case. Prominent among these will be factors relevant to how built up the Green Belt is now and how built up it would be if redevelopment occurs … and factors relevant to the visual impact on the aspect of openness which the Green Belt presents." (Para 14.)

C Before us there was no challenge to the correctness of this statement of approach. However, it tells one nothing about how visual effects may or may not be taken into account in other circumstances. That is a matter not of legal principle, but of planning judgement for the planning authority or the inspector.

**26** The only case referred to in argument which was directly concerned with mineral extraction as such was *Europa Oil and Gas Ltd v Secretary of* D *State for Communities and Local Government* [2014] 1 P & CR 3 (upheld at [2014] PTSR 1471). That concerned an application for permission for an exploratory drill site to explore for hydrocarbons in the Green Belt, including plant and buildings. The inspector had considered the potential effect of the development on the Green Belt:

> E "… I consider Green Belt openness in terms of the absence of development. The proposal would require the creation of an extensive compound, with boundary fencing, the installation of a drilling rig of up to 35 metres in heating, a flare pit and related buildings, plant, equipment and vehicle parking on the site. Taking this into account, together with the related HGV and other traffic movements, I consider that the Green Belt openness would be materially diminished for the F duration of the development and that there would be a conflict with Green Belt purposes in respect of encroachment into the countryside over that period." (Quoted by Ouseley J at para 16.)

He refused permission, taking the view that it did not fall within the exception for "mineral extraction", and that there were no very special G circumstances to outweigh the harm to the Green Belt identified in that passage.

**27** It was held that he had erred in failing to treat the proposal as one for mineral extraction, and therefore potentially within the exception in NPPF paragraph 90. Ouseley J noted the special status of mineral extraction under Green Belt policy. As he said:

> H "67. One factor which affects appropriateness, the preservation of openness and conflict with Green Belt purposes, is the duration of development and the reversibility of its effects. Those are of particular importance to the thinking which makes mineral extraction potentially appropriate in the Green Belt. Another is the fact that extraction, including exploration, can only take place where those operations

achieve what is required in relation to the minerals. Minerals can only be extracted where they are found …

"68. Green Belt is not harmed by such a development because the fact that the use has to take place there, and its duration and reversibility are relevant to its appropriateness and to the effect on the Green Belt."

**28** However, he made clear that it remained necessary for the decision-maker to consider the proposal under the proviso to paragraph 90. Affirming his decision in the Court of Appeal, Richards LJ said (para 41):

"The key point, in my judgment, is that the inspector approached the effect on Green Belt openness and purposes on the premise that exploration for hydrocarbons was necessarily inappropriate development since it did not come within any of the exceptions. He was not considering the application of the proviso to paragraph 90 at all: on his analysis, he did not get that far. Had he been assessing the effect on Green Belt openness and purposes from the point of view of the proviso, it would have been on the very different premise that exploration for hydrocarbons on a sufficient scale to require planning permission is nevertheless capable in principle of being appropriate development. His mind-set would have been different, or at least it might well have been different."

Although the decision turned principally on a legal issue as to the meaning of "mineral extraction", it is significant that the impact on the Green Belt identified by the inspector (including a 35 metre drill rig and related buildings) was not thought necessarily sufficient in itself to lead to conflict with the openness proviso. That was a matter for separate planning judgement.

*Material considerations*

**29** Section 70(2) of the Town and Country Planning Act 1990 ("the Act") required the council in determining the application to have regard to the development plan and "any other material consideration". In summary Samuel Smith's argument, upheld by the Court of Appeal, is that the authority erred in failing to treat the visual effects, described by the officer in her assessment of "Landscape impact" (para 17 above) as "material considerations" in its application of the openness proviso under paragraph 90.

**30** The approach of the court in response to such an allegation has been discussed in a number of authorities. I sought to summarise the principles in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19. The issue in that case was whether the authority had been obliged to treat the possibility of alternative sites as a material consideration. I said:

"17. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it.

"18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant

A planning issues is very wide (*Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (*Tesco Stores Ltd v Secretary of State for the Environment and West Oxfordshire District Council* [1995] 1 WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find B some legal principle which compelled him (not merely empowered) him to do so."

**31** I referred to the discussion of this issue in a different context by Cooke J in the New Zealand Court of Appeal, in *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 182 (adopted by Lord Scarman in the House of C Lords in *In re Findlay* [1985] AC 318, 333–334, and in the planning context by Glidewell LJ in *Bolton Metropolitan Borough Council v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority* [2017] PTST 1063, 1071):

"26. [Cooke J] took as a starting point the words of Lord D Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 228: 'If, in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.' He continued: 'What has to be emphasised is that it is only when the statute *expressly or impliedly identifies considerations required to be taken into* E *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 it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision …' (emphasis added).

"27. In approving this passage, Lord Scarman noted that [Cooke J] F had also recognised, that: '… in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act.' (*In re Findlay* at p 334.)

"28. It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made G a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because 'obviously material') requires to be taken into account 'as a matter of legal obligation'."

**32** Mutatis mutandis, similar considerations apply in the present case. H The question therefore is whether under the openness proviso visual impacts, as identified by the inspector, were expressly or impliedly identified in the Act or the policy as considerations required to be taken into account by the authority "as a matter of legal obligation", or alternatively whether, on the facts of the case, they were "so obviously material" as to require direct consideration.

*The reasoning of the courts below*

**33** Hickinbottom J in the High Court held in summary that consideration of visual impact was neither an implicit requirement of the openness proviso, nor obviously relevant on the facts of this case. He said:

> "64. I stress that we are here concerned with differential impact, ie the potential adverse visual impact over and above the adverse spatial impact. On the facts of this case … it is difficult to see what the potential visual impact of the development would be over and above the spatial impact, which, as Mr Village concedes, was taken into account. In any event, even if there were some such impact, that does not mean that openness would be adversely affected; because, in assessing openness, the officers would still have been entitled to take into account factors such as the purpose of the development, its duration and reversibility, and would have been entitled to conclude that, despite the adverse spatial and visual impact, the development would nevertheless not harm but preserve the openness of the Green Belt.
>
> "65. In this case, the potential visual impact of the development falls very far short of being an obvious material factor in respect of this issue. In my judgment, in the circumstances of this case, the report did not err in not taking into consideration any potential visual impact from the development. Indeed, on the facts of this case, I understand why the officers would have come to the view that consideration of visual impact would not have materially added to the overarching consideration of whether the development would adversely impact the openness of the Green Belt."

**34** Lindblom LJ took the opposite view. He summarised the visual impacts described by the officer:

> "42. The proposed development was a substantial extension to a large existing quarry, with a lengthy period of working and restoration. As the Principal Landscape Architect recognised in her response to consultation, and the officer acknowledged without dissent in her report, there would be permanent change to the character of the landscape (paras 4.109 and 4.115 of the report). The 'quality of the Locally Important Landscape Area as a whole would be compromised' (para 7.41). *The exposed face of the extended quarry would be as visible as that of the existing quarry, if not more so* (paras 4.111 and 7.42). *Long distance views could be cut off by the proposed bunding and planting.* Agricultural land would ultimately be replaced by a 'deep lower level landscape' of grassland (para 4.113). The 'character and quality' of the landscape would be 'permanently changed' and the 'impact cannot be described as neutral' (paras 4.115 and 7.44). Concluding her assessment of 'Landscape Impact', the officer was satisfied that the 'proposed screening could protect the environment and residential receptors from potential landscape and visual impacts', and that with the proposed mitigation measures the development would comply with national and local policy (paras 7.47 and 8.4).
>
> "43. That assessment did not deal with the likely effects of the development on the openness of the Green Belt as such, either spatial or visual. *It does show, however, that there would likely be—or at least*

*could be—effects on openness in both respects, including the closing-off of long distance views by the bunding and planting that would screen the working* (para 4.111 of the officer's report). The officer's conclusion overall (in para 7.47) was, in effect, that the proposed screening would be effective mitigation, without which the development would not be acceptable. But this was not followed with any discussion of the harmful effects that the screening measures themselves might have on the openness of the Green Belt." (Emphasis added.)

**35** He then directed particular attention to para 7.122 of the report, which he understood to encapsulate her views on the application of the openness proviso under NPPF paragraph 90:

"45. So it is to para 7.122 that one must look, at least in the first place, to see whether the officer considered the relevance of visual impact to the effect of this development on the openness of the Green Belt. Did she confront this question, and bring the committee's attention to it? I do not think she did. *She neither considered, in substance, the likely visual impact of the development on the openness of the Green Belt nor, it seems, did she ask herself whether this was a case in which an assessment of visual impact was, or might be, relevant to the question of whether the openness of the Green Belt would be preserved.* Indeed, *her observation that openness is 'commonly taken to be the absence of built development' seems deliberately to draw the assessment away from visual impact, and narrow it down to a consideration of spatial impact alone.* And the burden of the assessment, as I read it, is that because the further extraction of limestone would take place next to the existing quarry, the 'scale' of the development would not fail to preserve the openness of the Green Belt. This seems a somewhat surprising conclusion. But what matters here is that it is a consideration only of spatial impact. Of the visual impact of the quarry extension on the openness of the Green Belt, nothing is said at all. *That was, it seems to me, a significant omission, which betrays a misunderstanding of the policy in paragraph 90 of the NPPF.*

"46. One must not divorce para 7.122 from its context. The report must be read fairly as a whole. The question arises, therefore: did the officer address the visual impact of the development on the openness of the Green Belt in the remaining paragraphs of this part of her report, or elsewhere? I do not think she did. *Her consideration of the effects of the development on the 'purposes of including land in the Green Belt', in paras 7.123 to 7.125, is unexceptionable in itself. However, she did not, in these three paragraphs, revisit the question of harm to the openness of the Green Belt, either in spatial or in visual terms.* The conclusion to this part of the report, in para 7.126, is that the 'character and openness of the Green Belt' would not be materially harmed by the development—a conclusion repeated in para 8.5—and that the proposal would therefore comply with Policy SP3 and Policy SP13 of the local plan and the NPPF. But I cannot accept that this conclusion overcomes the lack of consideration of visual impacts on 'openness' in the preceding paragraphs. It seems to treat 'character' as a concept distinct from 'openness'. Even if these two concepts can be seen as related to each other, and however wide the concept of 'character' may be, there is no

suggestion here that the officer was now providing a conclusion different from that in para 7.122, or additional to it.

"47. The same may also be said of the officer's earlier discussion of 'Landscape Impact' in paras 7.41 to 7.47. Her assessment and conclusions in that part of her report are not imported into para 7.122, or cross-referred to as lending support to her conclusion there." (Emphasis added.)

**36** This led to the overall conclusion in para 49 (quoted in part at the beginning of this judgment):

"I can only conclude, therefore, that the advice given to the committee by the officer was defective. It was defective, at least, *in failing to make clear to the members that, under government planning policy for mineral extraction in the Green Belt in paragraph 90 of the NPPF, visual impact was a potentially relevant and potentially significant factor* in their approach to the effect of the development on the 'openness of the Green Belt', and hence to the important question of whether the proposal before them was for 'inappropriate' development in the Green Belt—and, indeed, in implying that the opposite was so … One can go further. *On the officer's own assessment of the likely effects of the development on the landscape, visual impact was quite obviously relevant to its effect on the openness of the Green Belt. So the consideration of this question could not reasonably be confined to spatial impact alone.*" (Emphasis added.)

**37** Although it is necessary to read the discussion in full, I have highlighted what seem to me the critical points in Lindblom LJ's assessment of the failure to take account of visual effects; in summary: (i) In paras 42 and 43, he extracts from the officer's own landscape assessment the observation that "the exposed face of the extended quarry would be as visible as that of the existing quarry, if not more so" and that "long distance views could be cut off by the proposed bunding and planting". This leads to the view that "there would likely be—or at least could be—effects on openness in both respects, including the closing-off of long distance views by the bunding and planting that would screen the working". (ii) In para 7.122, where the officer purported to address the issue of openness, she failed to consider the likely effect of such visual impact nor its relevance to whether the openness of the Green Belt would be preserved. Instead, by in effect equating openness with absence of built development, she tended to narrow the issue down to a consideration of spatial impact alone. That betrayed a misunderstanding of the policy in paragraph 90 of the NPPF. (iii) The subsequent paragraphs dealt with other aspects of the effect on the purposes of the Green Belt, and were unexceptionable in themselves; but they did not revisit the question of visual impact or so make up for the deficiency in para 7.122. (iv) The officer's advice was defective in this respect. Further on her own assessment visual effect was "quite obviously relevant" to the issue of openness, and the committee could not reasonably have thought otherwise.

**38** I hope I will be forgiven for not referring in detail to the arguments of counsel before this court, which substantially reflected the reasoning respectively of the High Court and the Court of Appeal. I note that Mr Peter Village QC for Samuel Smith made a further criticism of para 7.122, not

A adopted by Lindblom LJ, that the officer treated the fact that the site abutted the existing quarry as reducing its impact on openness.

*Discussion*

**39** With respect to Lindblom LJ's great experience in this field, I am unable to accept his analysis. The issue which had to be addressed was whether
B the proposed mineral extraction would preserve the openness of the Green Belt or otherwise conflict with the purposes of including the land within the Green Belt. Those issues were specifically identified and addressed in the report. There was no error of law on the face of the report. Paragraph 90 does not expressly refer to visual impact as a necessary part of the analysis, nor in my view is it made so by implication. As explained in my discussion
C of the authorities, the matters relevant to openness in any particular case are a matter of planning judgement, not law.

**40** Lindblom LJ criticised the officer's comment that openness is "commonly" equated with "absence of built development". I find that a little surprising, since it was very similar to Lindblom LJ's own observation in the *Lee Valley* case (para 23 above). It is also consistent with the contrast drawn by the NPPF between openness and "urban sprawl", and with the distinction
D between buildings, on the one hand, which are "inappropriate" subject only to certain closely defined exceptions, and other categories of development which are potentially appropriate. I do not read the officer as saying that visual impact can never be relevant to openness.

**41** As to the particular impacts picked out by Lindblom LJ, the officer was entitled to take the view that, in the context of a quarry extension
E of six hectares, and taking account of other matters, including the spatial separation noted by her in para 7.124, they did not in themselves detract from openness in Green Belt terms. The whole of paras 7.121 to 7.126 of the officer's report address the openness proviso and should be read together. Some visual effects were given weight, in that the officer referred to the restoration of the site which would be required. Beyond this, I respectfully agree with Hickinbottom J that such relatively limited visual impact which
F the development would have fell far short of being so obviously material a factor that failure to address it expressly was an error of law. For similar reasons, with respect to Mr Village's additional complaint, I see no error in the weight given by the officer to the fact that this was an extension of an existing quarry. That again was a matter of planning judgement not law.

G *Conclusion*

**42** For these reasons, I would allow the appeal and confirm the order of the High Court dismissing the application.

*Appeal allowed.*
*Order of Hickinbottom J restored.*

H

SHIRANIKHA HERBERT, Barrister

Neutral Citation Number: [2020] EWCA Civ 1440

Case No: A2/2019/2802 & A2/2019/2804

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**HHJ KEYSER QC (sitting as a judge of the High Court)**
**[2019] EWHC 2587 (QB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/11/2020

**Before :**

**LORD JUSTICE DAVID RICHARDS**
**LORD JUSTICE SINGH**
and
**LADY JUSTICE NICOLA DAVIES DBE**

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**Between :**

| | |
|---|---|
| **HILLSIDE PARKS LIMITED** | **Appellant** |
| **- and -** | |
| **SNOWDONIA NATIONAL PARK AUTHORITY** | **Respondent** |

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**Mr Robin Green** (instructed by **Aaron & Partners LLP**) for the **Appellant**

**Mr Gwion Lewis** (instructed by **Geldards LLP**) for the **Respondent**

Hearing dates : 7 and 8 October 2020

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# Approved Judgment

**Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 a.m. on Tuesday, 3 November 2020.**

**Lord Justice Singh :**

## Introduction

1. This is an appeal against the order of HHJ Keyser QC (sitting as a judge of the High Court), dismissing the Appellant's claim for certain declarations relating to the current status of a planning permission granted in 1967. The judgment was given on 8 October 2019.

2. Permission to appeal to this Court was granted by Leggatt LJ on 19 December 2019.

## Factual Background

*Events from 1966 to 1987*

3. The case concerns a site comprising 28.89 acres of land at Balkan Hill, Aberdyfi, ("the Site"). Planning permission was applied for on 19 December 1966 by Mr John Madin and was granted by Merioneth County Council, which was at that time the local planning authority, on 10 January 1967 ("the 1967 permission"). The relevant application, which incorporated a plan referred to as the "Master Plan", was for the development of 401 dwellings. The proposed siting for each of the dwellings was shown on the plan along with a proposed internal road network. The Master Plan detailed five key types of dwelling: Type A (3-bedroom semi or terrace); Type B (2-bedroom bungalow); Type C (2-bedroom flat); Type D (3-bedroom and study bedroom); and Type E (2-bedroom and study bedroom). The 1967 permission was granted subject to one condition, that water supply be agreed before work commenced. That condition does not give rise to any issue in the present appeal.

4. Building of the first two houses began on 29 March 1967, but the approved location was found to be the site of an old quarry. Planning permission was applied for the houses as built and granted on 4 April 1967. Further planning permissions for departures from the Master Plan were granted on:

   (1) 14 September 1967 for the addition of a 3-bedroom flat to the two built houses;

   (2) 22 October 1970 for 2 houses and 5 garages which departed from the Master Plan on the Site "as part of development already approved";

   (3) 9 May 1972 for "adjustments to the agreed layout";

   (4) 13 June 1972 for "variation to approved plans for 2 flats with garages beneath";

   (5) 19 October 1972 for the "erection of dwelling houses and garages"; and

   (6) 28 June 1973 for another variation to the layout of the Master Plan.

5. Merioneth County Council was replaced by Gwynedd County Council on 1 April 1974.

6. Landmaster Investments Limited acquired the Site in June 1978.

7. A dispute arose between the parties in January 1985, which led to proceedings being issued in the High Court. Gwynedd County Council denied that the 1967 permission was still valid.

*The action before Drake J in 1987*

8. The action was commenced by writ on 8 May 1985. The statement of claim sought declarations as to the status of the 1967 permission.

9. In the pleaded defence, dated 21 June 1985, issue was taken with the application for the declarations numbered 2, 3 and 4. The two issues that were raised, at paras. 6 and 7 of the defence, were that, first, the development permitted had not begun before 1 April 1974 and therefore could not lawfully be carried out because the permission had expired by operation of law; alternatively, if the development was begun before 1 April 1974, it was alleged to be in breach of the condition attached to the 1967 permission as to an adequate water supply.

10. Drake J gave judgment after a six day trial on 9 July 1987. By the time of the hearing before him the issues had been clarified, as he set out at page 2 of his judgment. It was agreed by the defendant that the 1967 permission was lawful. The defendant's contentions were as follows:

    (1) The condition as to water supply was never fulfilled.

    (2) Certain development on the land was carried out but, as the condition had not been satisfied, such development was unlawful.

    (3) As no lawful development was ever commenced, the 1967 permission lapsed on 1 April 1974 by operation of law as a result of the statutory time limit for implementation of a planning permission.

    (4) Such development as had been carried out was not pursuant to the 1967 permission but was pursuant to subsequent planning permissions granted in response to subsequent applications for certain development on the land.

11. It is clear from the judgment of Drake J that he viewed the subsequent grants of planning permission, for example that granted on 4 April 1967, as "a variation of the Master Plan": see e.g. page 13G of his judgment.

12. It was common ground before us that, strictly speaking as a matter of law, the power to vary a planning permission did not exist at the material time and only exists in limited form even now, since amending legislation was enacted by Parliament in 1987 and subsequently. Nevertheless, what is submitted on behalf of the Appellant is that, as a matter of substance, the judgment of Drake J (and indeed the understanding of the local planning authority at the time) was that the subsequent permissions which were granted were in effect variations of the 1967 permission rather than additional permissions. Certainly this is consistent with the conclusion reached by Drake J at page 20C of his judgment:

> "… Although development has gone on very slowly and with a number of variations, the Master Plan remains in force, and if the development is allowed to progress further it can be completed substantially in accordance with the rest of the Master Plan."

13. Judgment was given by Drake J on 9 July 1987 and an order was made granting four declarations to the following effect. First, the full planning permission of 10 January 1967 was lawfully granted. Secondly, the 1967 permission was a "full permission which could be implemented in its entirety without the need to obtain any further planning permission or planning approval of details". Thirdly, "the development permitted by the January 1967 Permission has begun; and that it may lawfully be completed at any time in the future". The fourth declaration concerned the satisfaction of the condition attached to the 1967 permission. It is the third declaration that is of particular relevance to the present proceedings.

*Events since the judgment of Drake J*

14. Hillside Parks Limited acquired the Site from Landmaster Investments Limited on 6 February 1988. It is the Appellant before this Court.

15. Snowdonia National Park Authority ("the Authority" or "the Respondent") came into existence on 23 November 1995 and became the relevant local planning authority for the Site on 1 April 1996.

16. Departures from the Master Plan were granted by the Authority on:

(1) 27 June 1996 for a single dwelling house as a variation to the 1967 Permission.

(2) 20 June 1997 for "two terraces forming: 1 attached dwelling, six apartment units and 8 garages with apartments over" as a variation to the 1967 permission.

(3) 18 September 2000 for a two-storey detached dwelling house and garage on Plot 5 of the Site.

(4) 24 August 2004 for 5 detached houses and 5 garages as a variation to the 1967 permission.

(5) 4 March 2005 for the erection of a 2-storey dwelling and detached garage on Plot 17 on the Site.

(6) 25 August 2005 for the erection of a detached dwelling at Plot 3 of "Phase 1" on the Site.

(7) 20 May 2009 for the erection of 3 pairs of dwellings.

(8) 5 January 2011 for 1 dwelling at Plot 3 on the Site.

17. On 23 May 2017, the Authority contacted the Appellant, stating that, in its view, the 1967 permission could no longer be implemented because the developments carried out in accordance with the later planning permissions rendered it impossible to implement the original Master Plan. The Authority required that all works at the Site should be stopped until the planning situation had been regularised.

## The present proceedings

18. The present proceedings were commenced by the Appellant as a claim under CPR Part 8. The details of the claim set out the history and the nature of the dispute which had arisen between the parties from 2017. The Appellant sought the following declarations, at para. 17:

    (1) The Respondent is bound by the judgment and declarations of Drake J given on 9 July 1987.

    (2) The planning permission granted on 10 January 1967 by Merioneth County Council with reference number TOW.U/1115/P is a valid and extant permission.

    (3) The said planning permission may be carried on to completion, save insofar as development has been or is carried out pursuant to subsequent planning permissions granted for alternative residential development.

19. It should be noted that there was an application by the Authority to strike out the claim on the ground, among others, that it was an abuse of process because the argument in the claim should have been made under the planning legislation by way of an application for a certificate of lawful development. An application for a certificate of lawfulness of proposed development can be made under section 192 of the Town and Country Planning Act 1990. That application to strike out was dismissed by HHJ Keyser QC on 10 May 2019 and no more need to be said about it in this appeal.

## The judgment of the High Court

20. In his judgment HHJ Keyser QC set out and dealt with two issues as he had identified them to be. These were not the issues as formulated by the parties.

21. The first issue was whether Drake J was wrong in law in his determination that the 1967 permission could be completed at any time in the future. The Judge concluded that Drake J did not err in law and was entitled to make the declarations that he did.

22. The second issue was whether the Authority is still bound by the third declaration in the Order made by Drake J that the 1967 permission "may lawfully be completed at any time in the future". This issue was split by the Judge into two sub-issues:

> "2a) Does the declaration in the 1987 Order bind the Authority according to its terms regardless of whether it was wrongly made?

> "2b) Do events since the 1987 Order mean that the development permitted by the January 1967 Permission may not now be completed lawfully, so that (whether rightly or wrongly made) the declaration can no longer bind according to its terms?"

23. The Judge held that the question that he identified as 2a did not need to be dealt with as he had determined that the 1987 Order was not wrongly made.

24. In relation to the question that he identified as 2b, he determined that the development which has occurred since 1987 now renders the development granted by the 1967 permission a physical impossibility and that future development pursuant to that permission would no longer be lawful.

## Grounds of Appeal

25. **Ground 1:** HHJ Keyser QC erred in his approach to the issue whether Drake J was wrong in law in holding that the 1967 permission could be completed at any time. The Judge did not follow Drake J's interpretation of the 1967 permission, but rather gave his own interpretation of the 1967 Permission.

26. **Ground 2:** The Judge was wrong to conclude that *F. Lucas & Sons Ltd v Dorking and Horley Rural District Council* (1966) 17 P & CR 111 did not apply and therefore that the 1967 permission authorised one single scheme of development.

27. **Ground 3:** The Judge did not correctly construe the Additional Permissions to the 1967 permission.

28. **Ground 4:** The Judge took an inconsistent position in regard to whether developments could be carried out in accordance with different Additional Permissions that had been granted.

29. **Ground 5:** The errors contained within the judgment meant that the Claimant's case was not properly addressed, particularly the arguments in relation to *res judicata*.

## Submissions of the parties

*The Appellant's submissions*

30. On behalf of the Appellant Mr Robin Green submits that the Judge erred in saying that the first issue to be dealt with was whether Drake J was wrong to determine that the 1967 permission could be completed at any time in the future. The Respondent could not provide any legal basis on which it could say that it was not bound by the judgment of Drake J. Unless it could be shown that the Respondent was not bound by the 1987 Order then the question of whether Drake J was correct in law did not arise and should not have been dealt with by the Judge.

31. Mr Green submits that the Authority was bound by Drake J's judgment by virtue of the statutory continuity of functions and the binding effect of a judgment *in rem*.

32. He also submits that the effect of subsequent variations to the 1967 permission is *res judicata* as it was determined by Drake J in 1987. The Authority cannot now raise a defence which was available at the time of the 1987 judgment by reason of the doctrine of issue estoppel and the rule in *Henderson v Henderson* (1843) 3 Hare 100. It would also be an abuse of process for the Authority to pursue the argument that the building work being completed pursuant to the variations of the Master Plan render the 1967 permission no longer capable of completion. The Authority has itself granted such variations of the 1967 permission since it came into existence in 1995.

33. Mr Green submits that there has been no material change in circumstances since the judgment of Drake J in 1987.

34. It is also submitted that the Judge's reasoning was internally inconsistent. He found that the Additional Permissions granted before 1987, and therefore considered by Drake J, were variations of the 1967 Permission with specific modifications but implicitly held that the same was not true of the Additional Permissions granted after 1987. Complaint is made that there is no reasoning given in the judgment to show that the Additional Permissions granted after 1987 should be considered differently from the ones before 1987. If all the Additional Permissions were considered in this way, then the remainder of the Master Plan with the specific modifications which were granted could still be developed.

35. It is further submitted that the Judge was wrong to determine that *Lucas* did not apply to the present case and that the 1967 permission was only for the Master Plan in its entirety and could not be considered as permitting separate acts of development.

36. By way of summary, Mr Green submits that the errors in the judgment below had the effect that the case of the Appellant before the Judge was not properly addressed by him.

*The Respondent's submissions*

37. On the issue of whether the Authority is bound by the judgment of Drake J, it is accepted by Mr Gwion Lewis on behalf of the Respondent that the Judge should have dealt with this issue first in his judgment. However, submits Mr Lewis, the principle of *res judicata* does not compel the court to determine that the judgment of Drake J still binds the parties. The court should make its own determination of whether the 1967 permission is still valid for three reasons:

    (1) The circumstances have changed significantly since the Order of Drake J in 1987.

    (2) The decision of the House of Lords in *Sage v Secretary of State for the Environment* [2003] UKHL 22; [2003] 1 WLR 983 holds that a "holistic approach" should be taken and regard should be had to the totality of the

operations which the grant of a planning permission originally contemplated would be carried out.

(3) Although the line of authority beginning with *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527 was not presented to Drake J, it would not be an abuse of process for the Authority to rely on it in these proceedings. It is entitled to seek to prevent building in a National Park which could be against the public interest.

38. Mr Lewis further submits that the Judge was correct in determining that *Lucas* does not apply to the present case.

## The principles of *res judicata*

39. It was common ground before us that the general principles of *res judicata* were correctly summarised by Lord Sumption JSC in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46; [2014] AC 160, at paras. 17-26. In particular, at para. 17, Lord Sumption said that the phrase *res judicata* is "a portmanteau term which is used to describe a number of different legal principles with different juridical origins." The three particular principles which, it is common ground, potentially arise in the present case are the fourth, fifth and sixth as outlined by Lord Sumption. The fourth was the doctrine of "issue estoppel", that is where some issue which is necessarily common to both disputes has been decided on an earlier occasion and is binding on the parties. The fifth principle was that based on *Henderson*, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier case. Sixthly, Lord Sumption said, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles.

40. In his skeleton argument for the present appeal, Mr Green invoked the sixth principle separately as well as the fourth and fifth principles. At the hearing before us he accepted, on reflection, that in the present case the sixth principle adds nothing of substance to the fifth and made submissions about both principles together.

41. An example of a situation in which there may be "materially altered circumstances" which justify a departure from the *Henderson* principle was given by Lord Sumption in *Virgin Atlantic* at para. 20: the decision of the House of Lords in *Arnold v National Westminster Bank plc* [1991] 2 AC 93. In that case there had been a subsequent development in the law.

42. At para. 24 Lord Sumption quoted Lord Bingham of Cornhill in the decision of the House of Lords in *Johnson v Gore-Wood and Co* [2002] 2 AC 1, at page 31:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. … It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later

> proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

43. In *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 the House of Lords considered whether and to what extent the doctrine of *res judicata* applies in public law proceedings. The main opinion was given by Lord Bridge of Harwich: see in particular page 289. He concluded that in principle that doctrine does apply to adjudications in the field of public law. This is subject to the important public law requirement that a statutory body cannot fetter its own freedom to perform its statutory duties or exercise its statutory powers. As Lord Bridge explained, it is for this reason that there can be no such fetter which arises from an estoppel by representation. I would add, in the light of more recent developments in public law, that there could not be any such fetter arising from the doctrine of legitimate expectation.

## Analysis

44. Although there are five grounds of appeal, the submissions before us were not made separately by reference to those grounds. In similar vein, I will address the substance of the grounds rather than address each one of them separately.

45. Both in the grounds of appeal and in his oral submissions Mr Green complained on behalf of the Appellant about the way in which the Judge dealt with the judgment of Drake J. Particular complaint is made that the Judge failed to deal with the principles of *res judicata*: see e.g. para. 57 of the judgment. To a large extent Mr Lewis on behalf of the Respondent agreed that it would have been preferable for the Judge to address the issue of *res judicata*; indeed that is how the case for the Respondent had been argued before him.

46. Nevertheless, in my view, what is crucial is that the Judge ultimately concluded on what he identified as the first issue before him that Drake J's judgment and the 1987 order made by him were not wrong. In reaching that conclusion he rejected the Respondent's contention that they were wrong: see para. 55 of his judgment. Accordingly, the Judge approached what he identified as the second issue before him (and in particular issue 2b) on the footing that the judgment and order of Drake J in 1987 were to be treated as being correct. He set out his reasoning for deciding that issue in favour of the Respondent and against the Appellant at paras. 56-62 of his judgment.

47. At para. 58 the Judge said that:

> "The third declaration in the 1987 Order obviously does not mean that, regardless of how the facts and the law may change or develop at any time thereafter, the development permitted by the January 1967 Permission would necessarily be capable of lawful completion in perpetuity. Events might occur that would render it physically impossible to complete the development 'substantially in accordance with the rest of the Master Plan'. Or the law might change. The declaration was concerned, as was Drake J in his judgment, with two questions: first, whether the January 1967 Permission had been implemented; second, if it had been implemented, whether completion of the development thereby permitted was possible. The declaration reflects and gives effect to the judge's affirmative answers to both questions. It does not determine whether completion of the development remains possible in the light of the physical alterations that have taken place since 1987."

48. The Judge then said, at para 59:

> "In my judgment, the development permitted by the January 1967 Permission cannot now be completed lawfully in accordance with that permission. This conclusion follows from two matters that have already been mentioned in this judgment, as I shall explain."

49. I hope it will be convenient if I set out the two matters to which he referred in the opposite order to that used by the Judge. The second reason he gave was set out as follows at para. 61:

> "Second, it is physically impossible to complete the development fully in accordance with the January 1967 Permission in the circumstances briefly set out in paragraph 37 above. This is not a matter of minor deviations from the detail in the Master Plan: the state of affairs existing on the ground in the north-west part of the Site means that the remaining development there cannot be carried out and that further development will require new design and fresh permission. Regardless of whether Drake J was right or wrong to conclude in 1987 that the remaining development could be completed in accordance with the January 1967 Permission, it is plain that such a conclusion can no longer be reached. Mr Christopher Madin rightly conceded in his second witness statement that by reason of what had been constructed since 1987 'it [was] not … physically possible to build out the entirety of the scheme of development approved in 1967'."

50. Since the Judge in that passage cross-referred back to para. 37 of his judgment, it is necessary to set out that paragraph here:

> "The first contention concerns the effect of what has already been put on the land on the ability to comply with the January 1967 Permission in the future on the undeveloped parts of the Site. At the time of the hearing before Drake J, only a few houses in the extreme south of the Site had been built, all of them pursuant to Additional Permissions. The evidence shows that the positions of some of those houses conflicts not only with their positions as shown on the Master Plan but also to some extent with the positions of estate roads and a footpath as shown on the Master Plan. More important, perhaps, is what has happened since 1987. This later development is all in the north-west part of the Site and, again, has all been carried out pursuant to Additional Permissions. The easternmost row of terraced houses in this later development has been built across the positions shown on the Master Plan for two distinct rows of houses and an access cul-de-sac between them. To the north-west of these houses, an estate road has been constructed along the line of part of a row of terraced houses shown on the Master Plan; the estate road also runs through the positions of another house and garden shown on the Master Plan. Other examples could be given here and are given in the first statement of Mr Jonathan Cawley (the Authority's director of Planning and Land Management) of the knock-on effect of what has already been done on the ability to develop the rest of the Site in accordance with the January 1967 Permission. The result is that, although there are large parts of the development shown on the Master Plan that could be carried out in accordance with the Master Plan, there are other parts, particularly in the north-west of the Site, where further development will necessarily involve departure from what is shown on the Master Plan."

51. I turn to the other reason which the Judge gave, which was in fact his first reason and which he set out as follows at para. 60:

> "First, the facts of this case do not fall within the *Lucas* exception to the general requirement that a development be carried out fully in accordance with the permission said to authorise it. See paragraph 44 above."

52. At para. 62 the Judge then said the following:

> "Hillside did not advance any cogent answer to the problem of physical impossibility, other than reliance on *Lucas*. Mr Lowe said, and I accept, that much of the Site is unaffected by the

> development that has taken place. The conflicts with the provisions of the Master Plan regarding the remainder of the north-west part of the Site remain. Mr Lowe submitted that the issues could be worked out. That may well be right. However, they can only be worked out by a fresh grant of planning permission. The consequence is that, if the *Lucas* exception does not apply, the Authority is correct to say that future development pursuant to the January 1967 Permission would be unlawful."

53. At the hearing before us Mr Green made clear that he does not contend that the third declaration made by Drake J in 1987, when properly construed, could have binding effect in perpetuity regardless of how the facts and the law might develop subsequently. In that regard therefore, what the Judge said at the beginning of para. 58 of his judgment is common ground. In my view, that concession was correctly made. It is inconceivable that, in 1987, Drake J could possibly have intended, certainly as an objective matter, that his declaration should continue to bind the parties regardless of future developments either as a matter of fact or in law. No judge could reasonably be taken to make such an order or declaration.

54. Furthermore, as is plain from the middle of para. 61 of the judgment, HHJ Keyser QC approached his task on the basis that, regardless of whether Drake J was right or wrong to conclude in 1987 that the remaining development could be completed in accordance with the 1967 permission, it was now plain that such a conclusion could no longer be reached. The correctness of the decision of Drake J therefore was not material to the way in which the Judge disposed of this case. For that reason, in my view, much of the argument about *res judicata* (although interesting) is not to the point.

55. There can certainly be no question of issue estoppel in relation to this part of the Judge's reasoning. The issue with which he was dealing concerned developments since 1987. He was not deciding anything which had already been decided by Drake J in 1987 on the basis of the facts as they were up to that date.

56. That said, the Judge's reasoning at para. 61 does call for some consideration by this Court of whether the principle in *Henderson*/Abuse of Process has the consequence that the Judge was wrong to reason as he did in that passage.

57. What Mr Green submits is that the Respondent's predecessor (in whose shoes it stands) had the opportunity to raise an argument before Drake J based on *Pilkington*, which had been decided in 1973, but did not do so for whatever reason. He submits that it would be an abuse of process for the Respondent now to argue that point.

58. In *Pilkington*, at page 1531, Lord Widgery CJ said that a landowner is entitled to make any number of applications for planning permission which his fancy dictates, even though the development referred to is quite different when one compares one application to another. It is open to a landowner to test the market by putting in a number of applications and seeing what the attitude of the planning authority is to his proposals.

59. Where there are arguably inconsistent planning permissions in respect of the same land, Lord Widgery CJ said, at page 1532:

> "One looks first of all to see the full scope of that which is being done or can be done pursuant to the permission which has been implemented. One then looks at the development which was permitted in the second permission, now sought to be implemented, and one asks oneself whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented."

60. *Pilkington* was subsequently approved by the Court of Appeal in *Hoveringham Gravels Limited v Chiltern District Council* (1978) 35 P & CR 295.

61. In *Pioneer Aggregates (UK) Limited v Secretary of State for the Environment and Others* [1985] AC 132, *Pilkington* was approved in the opinion of Lord Scarman at pages 144-145.

62. At page 145 Lord Scarman said:

> "The *Pilkington* problem is not dealt with in the planning legislation. It was, therefore, necessary for the courts to formulate a rule which would strengthen and support the planning control imposed by the legislation. And this is exactly what the Divisional Court achieved. There is, or need be, no uncertainty arising from the application of the rule. Both planning permissions will be on a public register: examination of their terms combined with an inspection of the land will suffice to reveal whether development has been carried out which renders one or other of the planning permissions incapable of implementation."

63. I do not accept Mr Green's submissions in this regard. In my view, the doctrine in *Henderson*/Abuse of Process does not prevent the Respondent from arguing the *Pilkington* point in this case now even though its predecessor did not do so before Drake J in 1987.

64. It is clear from *Johnson v Gore-Wood*, in the passage from the opinion of Lord Bingham which I have cited earlier, that that would be too "dogmatic" an approach to take. The principle in *Henderson*/Abuse of Process is not an absolute one. It requires a merits-based assessment of all the facts, including the public and private interests concerned. In this context, there are undoubtedly important private interests, including the commercial interests of the Appellant. However, there are also important public interests at stake, including the public interest in not permitting development which would be inappropriate in a National Park.

65. Furthermore, I would accept the submission made by Mr Lewis on behalf of the Respondent that there have been significant legal developments since the decision of Drake J in 1987. In particular, the decision of the House of Lords in *Sage* has placed greater emphasis on the need for a planning permission to be construed as a whole. It has now become clearer than it was before 2003 that a planning permission needs to be implemented in full. A "holistic approach" is required.

66. In *Sage* the main opinion was given by Lord Hobhouse of Woodborough, although there was also a concurring opinion by Lord Hope of Craighead. Mr Green emphasised that, on the facts of that case, what Lord Hobhouse was considering in terms was a planning permission for "a single operation": see e.g. para. 23. It was in that context, submits Mr Green, that the House of Lords held that a planning permission must be implemented "fully" and that a "holistic approach" must be taken. Mr Lewis observed that, at para. 6, Lord Hope used the word "totality of the operations" (plural rather than singular). In my view, the important point of principle which arises cannot be determined according to semantic differences between the different opinions in the House of Lords. I would accept Mr Lewis's fundamental submission that the decision in *Sage* made it clearer than it had previously been that a planning permission should be construed "holistically."

67. As a matter of principle, I would endorse the approach taken by Hickinbottom J in *Singh v Secretary of State for Communities and Local Government and Another* [2010] EWHC 1621 (Admin), in particular at paras. 19-20, where *Sage* was cited. Hickinbottom J was of the view that, reflecting the holistic structure of the planning regime, for a development to be lawful it must be carried out "fully in accordance with any *final* permission under which it is done" (emphasis in original). He continued:

> "That means that if a development for which permission has been granted cannot be completed because of the impact of other operations under another permission, that subsequent development as a whole will be unlawful."

68. At the hearing before us there was an interesting debate about a point which ultimately this Court does not need to resolve on this appeal. That issue is whether, in the circumstances envisaged by Hickinbottom J, all the development which has already taken place, apparently in accordance with the first grant of permission, is rendered unlawful simply by virtue of the fact that subsequent operations take place pursuant to another permission which is inconsistent with the first. The phrase used by Hickinbottom J ("subsequent development") might suggest that it is only the later development which would fall to be regarded as unlawful. Mr Lewis contended that as a matter of principle it must be the whole of the development, including any development that has already taken place. That would have the consequence that there could be enforcement action, and potentially criminal liability, in relation to the development that has already taken place, even though it was at the time apparently in accordance with a valid planning permission. Mr Lewis submitted that in such circumstances it would be unlikely that enforcement action would be taken in practice. Even if that is right, that would mean that whether or not enforcement action is taken would be a matter of discretion rather than law. These are potentially

important questions on which we did not receive full argument because they do not need to be decided on this appeal. I would therefore prefer to express no view on them.

69. Returning to the present case, in my view, Mr Lewis was correct in his submission that, as a matter of fact and degree, the Judge was perfectly entitled to reach the conclusion that it is no longer possible to implement the 1967 Permission in the light of factual developments since the judgment of Drake J in 1987. For that purpose it is necessary to turn to the evidence that was before the Judge, at least briefly.

*The evidence*

70. In the second witness statement of Mr Madin, at para. 3, as the Judge noted, it was accepted that what has been constructed since 1987 on the Site does not accord with the approved Master Plan and it is not therefore physically possible to build out the entirety of the scheme of development approved in 1967. However, Mr Green pointed out that, at para. 4 of his statement, Mr Madin had gone on to say:

> "… While I accept that it is no longer possible to create the whole development layout as shown on the Master Plan, there is no physical impediment to completing the remainder of the Master Plan scheme as shown on my 2019 plan."

71. Although we have been assisted by a number of plans, including one which shows the original permitted development on the Site together with what has happened subsequently by way of actual development, it has to be noted that these plans will not be on the public register. As Lord Scarman observed in *Pioneer Aggregates*, it is important that the public, including potential purchasers of land and neighbours who may be affected by development, should be able to ascertain with reasonable certainty what is or is not permitted development by reference to what is available on a public register. This is important not least because a planning permission runs with the land.

72. At the hearing before us we were taken in some detail through the various plans and shown what has been developed on the Site since 1987. It is unnecessary to go into those matters in detail for present purposes, since this is an appellate court and it is not our function to redetermine questions of fact. Nevertheless, what is clear to us is that the development which has taken place consists not only of a different type of housing, with different alignment, but has included the construction of roads on the estate which would be clearly incompatible with the road layout as depicted on the Master Plan. This does not necessarily mean that the Appellant is wrong to say that some at least of the individual units shown in the original Master Plan could still be erected on those parts of the Site which are not affected by the actual development which has taken place. What it does tend to show, in my view, is that the Judge was entitled, having all the evidence before him, to reach the conclusion that events since 1987 have made it impossible now for the original planning permission of 1967 to be implemented.

73. That indeed was the expert view of Mr Jonathan Cawley, in his first witness statement filed in these proceedings, at paras. 12-13, where he set out in detail the development which has taken place since 1987, including the roads which have been constructed on the Site, and concluded that:

> "The development carried out on Site since 1987 is accordingly entirely incompatible with the 1967 Permission."

74. Mr Green complains on behalf of the Appellant that the Authority itself has changed its view since around 2017. Before that time the Authority itself took the view that the 1967 permission could still be implemented on those parts of the Site where there had not been subsequent development pursuant to a variation: see e.g. a letter from the Director of Planning and Cultural Heritage at the Authority dated 10 October 2008.

75. In my view, while the stance which the Authority took between 1995 and 2017 is a relevant factor to be taken into account, it is certainly not conclusive that it has acted in a way which leads to an abuse of process because it is now arguing the contrary in these proceedings.

76. In view of the factual and legal developments which have taken place since the judgment of Drake J in 1987 and after balancing the public and private interests at stake in this case, I conclude that it was not an abuse of process for the Authority to seek to argue the points which it has. Further, I conclude on this part of the appeal that the Judge was entitled to reach the conclusion which he did at para. 61 on the evidence before him.

77. What that then leaves is the reliance placed by the Appellant before this Court, as it was before the trial Judge, on the decision of the High Court in *Lucas*.

*The argument based on* Lucas

78. *Lucas* was decided by Winn J in 1964. In that case, in 1952, planning permission was granted to develop a plot of land by the erection of 28 houses in a cul-de-sac layout. Later the plaintiffs applied for permission to develop the same plot by building six detached houses, each on a plot fronting the main road. Permission for this later development was granted in 1957 and two houses were built in accordance with it. Later, however, the plaintiffs proposed to proceed in reliance on the earlier permission from 1952 by building the cul-de-sac and the 14 houses on the southern side of it. That land was still undeveloped at that time. The plaintiffs sought a declaration that the earlier permission was still effective and entitled them to carry out the proposed development on that part of the site where it could still take place. Winn J concluded that the 1952 permission was not to be regarded in law as a permission to develop the plot as a whole but as a permission for any of the development comprised within it. Accordingly, it did authorise the "partial" development proposed by the plaintiffs.

79. At page 116 Winn J said:

> "… Whilst a planning authority may well have as its object in granting planning permission for a contemplated housing estate upon a lay-out, considered by the planners, the achievement of a whole, it does not follow as a matter of law that development conforming with that lay-out is only permitted if the whole lay-out is completed and conditionally upon its completion."

80. At page 117 he continued:

> "… I think that it is right to approach this problem on the basis of an assumption that Parliament cannot have intended to leave individual owners of separate plots comprised in the contemplated total housing scheme dependent upon completion of the whole of the scheme by the original developer, or by some purchaser from him, so that they would be vulnerable, were the whole scheme not completed, separately to enforcement procedure which might deprive them of their houses and of the money which they would have invested in those houses, whether or not they built them themselves."

81. Later on the same page he said:

> "Were it right to say that the grantee of such a planning permission as this 1952 planning permission was only enabled thereby to develop the area of land conditional upon his completing the whole contemplated development, it would be very difficult at any given moment to say whether (assuming that some houses had been built but that not all the sites included in the scheme had been filled) the development already achieved was permitted development or development without permission, insofar as it could possibly in those circumstances be said to depend upon the intention of the developer … I think that the right view is that this planning permission in 1952 permitted each and every item comprised in the application made and granted."

82. *Lucas* was considered by the Divisional Court in *Pilkington*. At page 1533 Lord Widgery CJ described it as "a rather exceptional case". He said that Winn J had in that case construed the first planning permission as authorising the carrying out of a number of independent acts of development, and taking that view it naturally followed that the implementation of the second permission did not prevent the owner of the rest of the land from carrying out the independent acts of development authorised on such part of the site as remained under his control.

83. In *Hoveringham*, at page 302, Roskill LJ also considered the decision in *Lucas* and noted that it was subsequently treated by the Divisional Court in *Pilkington* as a rather exceptional case (he thought "rightly").

84. Although *Lucas* does not appear to have been cited to the House of Lords in *Pioneer Aggregates*, both *Pilkington* and *Hoveringham* were cited and they did refer to *Lucas*.

85. In my view, this is not a *Lucas* case.

86. This issue does squarely raise a potential question of issue estoppel. This is because Mr Green submits that it was implicitly decided by Drake J in 1987 that the present case did indeed fall within the *Lucas* exception to the general requirement that a development must be carried out fully in accordance with the permission granted for it. There are two difficulties with that submission.

87. First, it is difficult to see how Drake J can be said to have decided this issue at all. *Lucas* was certainly not mentioned in his judgment and it does not appear to have been raised before him. It did not feature in the pleaded case between the parties before him nor, so far as one can now tell, in the way in which the case was argued before him at a six day trial.

88. Secondly, *Lucas* was a highly exceptional case. It has never been approved by an appellate court. It has never been followed or applied, so far as counsel have been able to show us, by any court since. Furthermore, it was described as being an exceptional case by Lord Widgery CJ (a judge with immense experience in the field of planning law) in *Pilkington*. Both this Court and the House of Lords have had the opportunity in the many decades since *Lucas* to consider whether it should be regarded as setting out a general principle or not.

89. In my view, it would not be appropriate for this Court now to overrule *Lucas*. In order to do so we would have to be satisfied that it was wrongly decided on its particular facts. It is not possible to be satisfied of that, not least because we do not have the advantage of seeing the precise terms of the planning permission which was granted in that case. It suffices to say that the case should be regarded as having been decided on its own facts.

90. As Hickinbottom J observed in the case of *Singh*, at para. 25, it is conceivable that, on its proper construction, a particular planning permission does indeed grant permission for the development to take place in a series of independent acts, each of which is separately permitted by it. I would merely add that, in my respectful view, that is unlikely to be the correct construction of a typical modern planning permission for the development of a large estate such as a housing estate. Typically there would be not only many different residential units to be constructed in accordance with that scheme, there may well be other requirements concerning highways, landscaping, possibly even employment or educational uses, which are all stipulated as being an integral part of the overall scheme which is being permitted. I doubt very much in those circumstances whether a developer could lawfully "pick and choose" different parts of the development to be implemented.

## Conclusion

91. For those reasons I consider that the Judge was entitled to reach the conclusions which he did. I would therefore dismiss this appeal.

**Lady Justice Nicola Davies :**

92. I agree.

**Lord Justice David Richards :**

93. I also agree.

Neutral Citation Number: [2020] EWHC 1509 (Admin)

Case No: CO/3741/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2020

**Before** :

**MR JUSTICE DOVE**

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**The Queen on the application of**

| | |
|---|---|
| **Holborn Studios Limited** | **Claimant** |
| **- and -** | |
| **London Borough of Hackney** | **Defendant** |
| **-and-** | |
| **GHL (Eagle Wharf Road) Limited** | **Interested Party** |

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**Richard Harwood QC** (instructed by **Harrison Grant**) for the **Claimant**
**Andrew Fraser-Urquhart QC** (instructed by **The London Borough of Hackney**) for the **Defendant**

Hearing dates: 17th March 2020

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# Approved Judgment

**Judgment Approved by the court for handing down.**

**Mr Justice Dove:**

Introduction

1. The claimant is the leaseholder of 49-50 Eagle Wharf Road where they run one of the largest photographic studio complexes in Europe. Other media enterprises are licensed to use parts of the building on the site. The interested party have aspirations to redevelop the site for employment and residential purposes. An application for planning permission was initially made on 17 July 2015, and when permission was granted for that application on 19 December 2016 it was the subject of an applications for judicial review by the claimant and a local resident. Those applications for judicial review was granted, leading to the quashing of the planning permission following the judgment of Mr John Howell QC reported as *R (Holborn Studios) v London Borough of Hackney* [2017] EWHC 2823; [2018] PTSR 997. In the present case by the time the matter was heard the interested party (identified above for the sake of completeness) had withdrawn from the proceedings.

2. The interested party made a fresh planning application on the site which was validated on 10 October 2017, describing the proposed development in the following terms:

> "Partial demolition of existing buildings, retention of 3 storey building and former industrial chimney and redevelopment of the site to provide a mixed use scheme comprising blocks of 2 to 7 storeys and accommodating 5644 sq. m, of commercial floorspace at basement, ground, part first, second, third, fourth and fifth floor level, 50 residential units at part first, part second, third, fourth, fifth and sixth floor levels (23 X 1 bed, 17 X 2 bed, 8 X 3 bed, 2 X 4 bed) as well as 127 sq. m. café floorspace (A3) at ground floor level, landscaped communal gardens, pedestrian link route to the Regents Canal and other associated works."

3. The detail relating to the consideration of the planning application is set out below so far as relevant to this judgment. Planning permission was granted for the proposed development on 9 August 2019. The claimant challenges the granting of that planning permission by way of this application for judicial review which is brought on three grounds. Ground one is a sequence of legal contentions related to the information provided in respect of the viability assessment for the proposed development which informed the contributions which were sought from the interested party, in particular in relation to affordable housing. It is said by the claimant that the defendant's approach to this issue failed to comply with national planning policy in relation to the provision of information in respect of viability assessments; that the defendant's approach was in breach of a legitimate expectation in respect of the disclosure of viability information and, finally, that as a matter of law the viability information provided was in breach of the defendant's duties in relation to the publication of background papers to the committee report. Ground two is the allegation that the defendant's guidance for the members of its planning committee were unlawful in so far as they precluded members from reading lobbying material submitted to them by consultees and required that instead this material was passed to officers unread.

Ground three is the contention that the defendant's officers failed in the committee report to properly interpret development plan policies in relation to the retention of the existing use as an important component of the creative industries in this part of the defendant's administrative area.

4. This judgment is structured as follows. Firstly, the history of the consideration of the planning application will be set out. Secondly, the judgment will consider further evidence which was provided by the defendant following the grant of permission to apply for judicial review. Thirdly, the judgment will consider the relevant planning policy relating to the submissions made by the claimant in this case. Fourthly, the defendant's guidance to the members of its planning committee will be examined. Fifthly, the relevant legal principles will be rehearsed. Finally, the grounds will be examined and conclusions reached in relation to their validity.

The history of the planning application

5. Given the nature of the grounds which have been identified in this case, the narrative of events relating to the planning application focuses in particular upon, firstly, the material which was provided in relation to development viability and, secondly, the consultation process and the consideration of the application by members.

6. The application was submitted accompanied by a range of documentation addressing the various considerations bearing upon the question of whether or not planning permission should be granted. The Planning Statement, which was part of the application documentation, noted at paragraph 1.16 that a Viability Assessment Report had been prepared to support the application and had been submitted separately "on a private and confidential basis". This report was, in the form submitted to the defendant, subject to heavy redaction. It was posted on the defendant's website in the redacted version, albeit that the defendant asked the interested party to produce an unredacted version for publication. There is no dispute but that it is not possible to understand the viability of the proposed development from the redacted version, since none of the figures relevant to the calculation of viability are contained within the document.

7. It appears that the defendant did not press for the unredacted version of the Viability Assessment Report on the basis that it had become apparent that there would be a need for a revised version of this assessment prior to the application being determined. On 10 May 2018 the claimant wrote to the defendant setting out a number of matters upon which it relied to object to the proposed planning application. In particular the letter of objection noted that at that stage the interested party was offering no affordable housing, and the claimant objected on the basis that both national planning policy and the defendant's own guidance contained an expectation that information on viability would be provided on an "open book" basis. The claimant complained of a lack of transparency in the material produced with the application so as to justify the interested party's position that no affordable housing contribution should be comprised within the application.

8. As anticipated by the defendant, in September 2018 further material was provided by the interested party bearing upon the question of viability. On 12 September 2018 the

consultants acting on behalf of the interested party wrote in relation to a number of issues providing additional information and clarification in respect of the application. In particular, in relation to viability the letter records the following as being provided as part of the planning obligations required in support of the application, which the consultants explained were justified by an updated viability appraisal enclosed with the correspondence:

> "Viability
>
> Please find attached (Enclosure 3) the updated FVA (dated September 2018) which was originally produced in April 2018 pursuant to viability discussions with the Council and their advisors. The FVA has been updated to reflect further discussions with officers and increase the agreed CIL and S106 financial contributions arising from the development to a figure of £2million from £1.983. The FVA and Summary Report is provided in an unredacted format and can be disclosed to the public.
>
> The FVA demonstrates that the maximum economically feasible amount of employment floorspace has been accommodated within the development.
>
> Affordable Housing Contribution
>
> Pursuant to further discussions with the Council, the Applicant has agreed that the £40,708 S106 contribution previously identified (under the November 2016 consent) for affordable workspace can be reallocated towards the provision of off site affordable housing given that the scheme already comprises 24% affordable workspace.
>
> The redistribution of this contribution results in a minimum S106 affordable housing contribution of £206,797. However, subject to further analysis of the CIL liability of the development, the affordable housing contribution could rise to £805,000."

9. An element of the additional viability information which was submitted in September 2018 was what is described as a "Summary Appraisal". For completeness this document is produced as Appendix 1 to this judgment. The document shows a revenue from residential sales of £33,855,000, together with a valuation of the commercial elements of the development in the sum of £27,130,882. The appraisal identifies a number of elements of cost to be incurred in order to realise the development value. The first of these costs was identified as acquisition costs, described in particular as "Residualised Price" in the sum of £12,298,787. Construction costs and a contingency are identified. Other costs which are specified in the document include Mayoral and Borough CIL in the sum of £1,412,644 together with section 106 contributions of £421,267 and "additional contributions" of £166,089. After these and other costs were taken into account various performance measures are set out in the document, demonstrating profit on cost at 20.53%.

10. A further document produced by the interested party's consultant was entitled "Viability Assessment Summary". This document records that the initial viability assessment concluded that zero affordable housing could be provided as part of the project. A review undertaken by the defendant's consultants identified increased capacity in the form of a surplus within the project's viability of £1.5 million. The outcome of what appears to have been further discussions and negotiations between the defendant and the consultants engaged by both the interested party and the defendant is described in the document in the following terms:

> "The table below provides the summary of the key differences in the appraisals between the respective assessors.

| **Assumption** | **Savills** | **Strettons / Tuner Morum** |
|---|---|---|
| Residential Sales Value | £35,295,000 | £33,855,000 |
| Commercial GDV | £24,227,429 | £26,925,000 |
| Costs | £28,743,884 | £25,837,747 |
| Benchmark | £12.84 | £12 |
| Profit on GVD | 16.64% | 16.90% |
| Professional Fees | 10% | 10% |
| Planning Contributions | £1,421,100 | £1,421,100 |
| Finance Rate | 7% | 6.75% |

> The largest areas of difference between Savills and BNPP were:
>
> - Benchmark Land Value;
> - Construction Costs;
> - Sales Values;
> - Commercial Values; and

- Finance.

Following this analysis, the Applicant's team provided further information in respect of the proposed scheme, particularly in respect of the affordable commercial space to correct the appraisal provided by Turner Morum.

The Applicant then, despite disagreeing with the conclusions of (sic) provided by Strettons and Turner Morum, agreed to accept their remaining appraisal parameters on a without prejudice basis in order to progress the application."

11. The consequence of these calculations in relation to the planning contributions which could be expected from the proposed development were set out in the "Viability Assessment Summary" in the following terms:

"3.1 Whilst the Applicant they disagreed with the evidence provided by Strettons and Turner Morum, confirmed they would accept these assumptions (sic). This produced the following viable level of planning obligations:

- S106 Costs at £421,267 comprising:

o Highways - £100,130;

o Employment and Training - £226,504;

o Travel Plan - £3500;

o Tow Path Upgrade - £35,000;

o S106 Monitoring - £15,425

- Mayoral and Borough CIL of between £814,773.83 and £1,412,644;

- Additional Contributions of £206,797 which might be provided towards affordable housing.

3.2 The total contributions then equate to £2,000,000 of which between £814,773 and £1,412,644 will be Mayoral and Local CIL costs. If the CIL saving is apparent at the point this scheme is delivered, the total Planning Contributions (in addition to affordable workspace) of £2m would be maintained.

…

3.4 Savills then tested the ability to provide affordable housing on site with the contribution of £206,797. We have determined that this would not allow for even one unit of affordable housing on-site and as such would revert to a financial contribution.

3.5 We have also tested the ability for affordable housing on site in the event that the CIL saving is secured (i.e. an extra circa £598K totalling circa £805K). We have determined that between 3 and 4 units of Shared Ownership could be provided on site. We understand from discussions with local Registered Providers that this is an insufficient number of homes to deliver efficient management for their residents and as such a financial contribution is agreed.

…

Viability

Please find attached (Enclosure 3) the updated FVA (dated September 2018) which was originally produced in April 2018 pursuant to viability discussions within the Council and their advisors. The FVA has been updated to reflect further discussions with officers and increased the agreed CIL and S106 financial contributions arising from the development to a figure of £2million from £1.983million. The FVA and Summary Report is provided in an unredacted format and can be disclosed to the public.

The FVA demonstrates that the maximum economically feasible amount of employment floorspace has been accompanied within the development.

Affordable Housing Contribution

Pursuant to further discussions with the Council, the Applicant has agreed that the £40,708 S106 contribution previously identified (under the November 2016 consent) for affordable workspace can be reallocated towards the provision of off site affordable housing given that the scheme already comprises 24% affordable workspace.

The redistribution of this contribution results in a minimum S106 affordable housing contribution of £206,797. However, subject to further analysis of the CIL liability of the development, the affordable housing contribution could rise to £805,000."

12. Another piece of documentary evidence accompanying the application and submitted at the outset was entitled "Viability Report relating to Employment Floorspace" dated 3 August 2017. The purpose of this document was to examine the supply of, and demand for, commercial floorspace in the immediate area of the site, and examine whether it would be viable for the buildings currently on the site to remain, or whether they could be substantially refurbished for a B1 office use. At paragraphs 3.3 and 3.4 of this report the buildings on site are described as "mainly unattractive and basic and comprise a maze of small and larger spaces" which required investment both structurally and internally. The author of the report expresses the opinion that "massive refurbishment to bring it up to a modern specification" would be required to make it attractive to modern office occupiers. In relation to the current condition of the buildings it was stated that "it would be almost impossible to find an occupier to take occupation of the two buildings for a B1 or similar use". Having considered the potential cost of refurbishment to an appropriate specification, the author of the report concludes that refurbishment would not be financially viable. Indeed, the ultimate conclusion of this aspect of the report was that "even a refurbishment would not be viable with the existing buildings and would only work if a new build could be considered".

13. On the 21 December 2018 the defendant published the report which had been prepared by officers to assist members in the task of determining the planning application at their committee meeting to be held on 9 January 2019. On 27 December 2018 the claimant's managing director Mr McCartney wrote to Councillor Stops (the chair of the committee) pointing out what he regarded as flaws in the officers' report. Shortly after receiving this email, Councillor Stops wrote back to Mr McCartney in the following terms:

> "Planning members are advised to resist being lobbied by either applicant or objectors. As such I have passed your note onto officers and ask them to take account of and report to members as appropriate."

14. On 7 January 2019 the claimant's solicitors wrote to the defendant's Head of Planning copying in all members of the planning committee, ward councillors, the mayor and relevant planning officers. The letter pointed out concerns and objections in relation to the published committee report, and in particular expressed concern in relation to the way in which the committee report had addressed the question of viability and financial contributions to affordable housing. On 8 January 2019 Councillor Snell (a member of the committee) responded to the claimant's solicitors letter with an email in the following terms:

> "Dear Ms Ring
>
> Planning decisions are "quasi-judicial" meaning that Councillors who determine their outcome have to do so based on evidence provided through formal channels so we are advised we cannot allow ourselves to be lobbied. I have sought

> legal clarification on this and paraphrase their advice as follow:-
>
> Members must determine planning applications before them with an open, impartial mind and all applications must be assessed on their planning merits alone. Any other matters that are not material to planning issues should be disregarded and members should not pre-determine their position on any application. The number of objections or representations received on a planning application is not a material planning consideration and therefore not relevant when determining an application.
>
> To avoid the perception that Members have been influenced they should forward any lobbying letters to Governance Services and refrain from reading them. Objectors or supporters of any Planning Application should make their views known by;
>
> - Writing to the Council's Planning Service
>
> - Contacting Governance Services and ask to speak to the relevant Sub-Committee meeting
>
> - Contact Councillors who are not on the Committee to see if they will make representations
>
> In the light of this advice I have not read your email but passed it on to the Governance Services Officer who will ensure the evidence presented to the relevant Planning Committee is complete."

15. The committee report covered a wide variety of considerations bearing upon the question as to whether or not planning permission should be granted. In particular, in relation to employment, the committee report noted that the site was located within the Wenlock Priority Employment Area ("PEA") and also the Core Growth Area of the City Fringe Opportunity Area ("CFOA"). The committee report described the policy implications of these designations, from the core strategy and the London Plan respectively, in the following paragraphs of its analysis:

> "5.3.2 The London Plan identifies that the CFOA as having an indicative employment capacity of 70,000 jobs and a minimum of 8,700 new homes.
>
> 5.3.3 The Core Strategy sets out that the main purpose of the PEAs is to protect and promote business locations in the borough, especially in areas where clusters are well established. As a reflection of this they are exempt from permitted development rights allowing a change from office to residential uses.

> 5.3.4 Policies CS17, CS18, and DM17 confirm that residential uses (C3) may be acceptable in PEA's, as long as such uses are auxiliary to business and do not undermine the primary and long-term function of PEA's as employment areas. There is no specific ratio given in any policy as an acceptable split in employment to residential uses. There is no specific preference given to a single employment use class. Specifically for Wenlock PEA, policy DM17 states that development must result in an increase of office floorspace compared to the existing amount.
>
> …
>
> 5.3.6 5.3.6 Consequently, it is concluded that the primary function of sites within these designations is to support and promote commercial opportunities, but there may be opportunities to supplement this with other uses including residential
>
> 5.3.7 Policy DM14 of the DMLP sets out a prescriptive set of criteria that proposals for the redevelopment of sites containing employment land and floorspace, and where the loss of employment land and floorspace must meet to be considered compliant. DM17 states that applicants must first consider the commercial opportunities and potential of that land and floorspace and demonstrate in the first instance that the maximum economically feasible amount of employment land and floorspace is provided. New A Class and residential (C3) uses may be acceptable in PEAs, as long as auxiliary to business, and where not considered to draw trade away from existing identified retail centres to the detriment of their vitality and viability."

16. Against the backdrop of this policy the committee report went on to consider, amongst other employment use related issues, the question of whether or not the existing use of the site by the claimant was in any way protected by development plan policy. The conclusions of the officers in respect of this issue were set out as follows:

> "5.3.36 On assessment of the proposed space, in the basement and throughout, it is considered by Officers that the specific operational needs of Holborn Studios, as set out in their consultation comments, would not be accommodated. It is therefore logical to assume that if the proposed development is approved, this user may likely vacate the site as it could no longer operate from this space. Beyond this, Holborn Studios have also stated that the studio space proposed would be unsuitable for any "photographic and moving image studio" and "in their professional opinion would be unviable". Officers do not contend this opinion and consider that it may not be useable for the quality of work which is presently carried out there, but Officers consider that the proposed development is

> capable of providing for a wide range of occupiers within the B1 use being applied for, including those within the photographic studio trade.
>
> 5.3.37 Other businesses operating under licence from Holborn Studios in the existing buildings have also commented that they would be forced to vacate the space if the application was approved. Based on visual inspection of the existing buildings and space in which they operate. Officers believe that this is not due to their operational needs and more the relationship they have with Holborn Studios and requirement to vacate during construction. On this assessment, it is considered that the proposed floorspace could meet their operational needs.
>
> 5.3.38 Policy DM14 does not seek to protect specific types of employment floorspace, merely the quantum. Further to this, CS Policy 18 and DM15 seek to provide flexible employment floorspace, suitable for various users and no specific or existing use.
>
> 5.3.39 In strictly policy terms, the development provides the maximum economically feasible amount of employment floorspace, which is an uplift against the existing provision in line with DM14.
>
> 5.3.40. Overall, there is a clear policy objective for new business floorspace to be designated to respond to changing economic conditions and support economic growth. The space is considered to meet modern standards, be flexible, suitable for a range of sizes, suitable for a range of uses within B1 in line with CS Policy 18 and DM15.
>
> 5.3.41 The proposed development may lead to the loss of Holborn Studios. Given the number of consultation comments in support of its retention the loss of Holborn Studios of regrettable, however it is considered that there is no Development Plan policy requirement to retain the specific type of floorspace that Holborn Studios desire within the broader B1 use class."

17. The committee report then went on to set out the considerations in respect of viability and affordable housing. It appears from the committee report that matters had moved on following the receipt of the additional information in September 2018. In particular, the interested party now proposed a contribution of £757,076 towards the delivery of affordable housing. The committee report provided as follows in relation to both the viability information and also the contribution proposed towards affordable housing:

> "Housing Affordability

5.3.58 In reflection of London Plan policies, Hackney Core Strategy policy 20 sets a target of 50% of new residential development to be affordable within developments of 10 or more units, with a tenure split of 60% affordable/social rent and 40% intermediate, subject to site characteristics, location and scheme viability. CS Policy 20 sets out a sequence that affordable housing should be delivered on-site in the first instance, where off-site provision and in-lieu contributions may only be considered in exceptional circumstances. Policy DM21 sets out the requirement to comply with CS Policy 20, and outlines criteria to which on site provision of affordable housing will apply to, subject to the content of supporting paragraphs 5.3.5, 5.3.6 and 5.3.7 of the DMLP.

5.3.59 The content of the policies' supporting paragraphs details the instances where in lieu contributions are acceptable, and how such should be ring fenced for the delivery of affordable housing.

5.3.60 The application proposes no on site affordable housing. The application was supported by a viability assessment that outlined it would be unviable to provide any affordable housing.

5.3.61 It is acknowledged that the proposal reflects that of application reference 2015/2596. This proposal also did not provide any affordable housing offer. However, since this 2015 application the context and date upon which viability assessments are undertaken has changed.

5.3.62 The table below provides the summary of the key differences in the appraisals between the respective assessors:

| **Assumption** | **Applicant's Agent** | **Independent Assessors** |
|---|---|---|
| Residential Sales Value | £35,295,000 | £33,855,000 |
| Commercial GDV | £24,227,429 | £26,925,000 |
| Costs | £28,743,884 | £25,837,747 |
| Benchmark Land Value | £12,840,000 | £12,000,000 |

| | | |
|---|---|---|
| Profit on GDV | 16.64% | 16.90% |
| Professional Fees | 10% | 10% |
| Planning Contributions | £1,421,100 | £1,421,100 |
| Finance Rate | 7% | 6.75% |

5.3.63 The largest areas of difference between the Applicant's Agent and Independent Assessors were:

- Benchmark Land Value;

- Construction Costs;

- Sales Values;

- Commercial Values; and

- Finance.

5.3.64 Through negotiations with Officers the conclusions provided by independent assessors were accepted by the applicant. Consequently, the applicant agreed to the provision of £757,076 beyond that of other financial contributions and non-financial obligations to satisfy policy requirements.

5.3.65 As discussed, there is a policy emphasis on maximising employment led development on this site in the first instance. The proposed development is considered to be acceptable with regards to these policies, specifically the affordable workspace offer. On this basis, it was considered that the £757,076 viability surplus should be attributed towards meeting or mitigating a further policy issue or material concern. It was concluded by Officers that housing delivery, and specifically affordable housing delivery is a primary strategic issue in the wider borough, (and it was raised during consultation), therefore on this basis the surplus should be provided towards this matter, in line with affordable housing policy.

5.3.66 Officers therefore consider that the affordable housing provision represents the maximum reasonable amount once other policies have been fully satisfied.

> 5.3.67 The affordable housing provision is offered as a financial contribution, and consequently, there is therefore a contribution in lieu of affordable housing provision on site or on an alternative site within the vicinity.
>
> 5.3.68 The provisions of affordable housing of site reflecting £757,076 was assessed internally. There is an identified borough wide need for social rented units, and the most pressing need in the borough within this tenure is for 3 bed social rented units. Given land values it is considered unlikely that the surplus amount would secure more than two of such units of site. This level of provision alone is not preferred by Registered Providers (RPs) in general, and it could be difficult to secure an RP to a manage them in isolation. Further to this, layout design changes to accommodate the units and access, are considered to undermine the delivery of the maximum feasible amount of employment and affordable housing workspace, and the maximum reasonable amount of affordable housing.
>
> 5.3.69 In comparison, the off-site contributions could be secured, ring fenced and used within the Council's affordable housing supply programme, which would ensure the delivery of the maximum amount of affordable housing within the borough, in more predominantly residential areas that can better support family housing.
>
> 5.3.70 Overall, the contribution of £757,076 towards affordable housing delivery does not undermine the policy compliant employment element and its benefits, represents a betterment against the previous application reference 2015/2596 and will ensure the delivery of the maximum amount of affordable delivery for this amount."

18. As a consequence of this material the section of the committee report which dealt with planning obligations noted that, amongst other financial contributions which would be made to accompany the planning permission if approved, there was a proposed financial contribution for affordable housing amounting to £757,076 as part of the total financial contributions of £1,185,226. This sum, taken with the total CIL liability which was assumed to be £814,774, meant that the total amount of financial contributions and CIL liability for the proposed development was £2 million. In the committee report the officers recommended that planning permission should be granted subject to conditions and the completion of a legal agreement to reflect matters such as the financial contributions which were envisaged.

19. Having set out the relevant statutory basis for decision-taking in relation to planning applications the officers drew together their conclusions in the following paragraphs:

> "6.2 The proposed development is considered to be employment led and offer the most economically feasible amount of such floorspace of employment space which is considered to be of a modern standard, cater for and sustain a

> wider range of B1 uses in line with policy designations and their supporting evidence base, generating possibly more employment opportunities; secure the provision of 1,355m2 (24%) affordable workspace with a defined rent, quantum and fair process that exceeds policy requirements; provide further uses with additional benefits of their own, which will support the employment use, whilst not undermining the wider operation of the PEA, and secure the viable delivery of the employment element; all of which is considered to support and sustain the PEA and is in line with pertinent employment policy.
>
> 6.3 The residential element of the proposed development will deliver 50 units deemed to be of a high standard of accommodation, supporting the borough in meeting its housing targets, and offers the contribution of £757,076 to the provision of affordable housing.
>
> 6.4 The proposed development adopts an approach to heritage conservation which is considered on balance, acceptable. This is achieved through the retention of the most significant elements of the sit, removing later adhoc structures, careful massing, vernacular design and high quality materials. Impacts have been assessed in line with the pertinent policy, legislation and considerations, and are considered to be, on balance, acceptable.
>
> 6.5 The likely loss of Holborn Studios and the impacts of this as a result of the proposed development have been considered, and on balance this is considered to be acceptable when assessed against all Development Plan policies.
>
> 6.6 Overall, the proposal is considered to comply with the pertinent policies in the development plan for the reasons set out above, there would be compliance with the adopted development plan viewed as a whole and other material considerations do not indicate that the plan should not be followed. Accordingly the application for full planning permission reference 2017/3511 is recommended for approval, subject, to conditions and the completion of a legal agreement."

20. Following the receipt of the letter from the claimant's solicitors the officers prepared an addendum to the committee report addressing the various points which had been made in their correspondence. Dealing firstly with the contention of the claimant's solicitor that the availability of information in relation to affordable housing was unlawful the addendum report concluded as follows:

> "Information outlining an agreed appraisal and a viability summary explaining the agreed viability assessment, the assumptions adopted by the council and their independent advisors Strettons and Turner Morum, the final agreed viability

> assumptions and planning obligations provisions was made publicly available on 14th September 2018. This information has been formally consulted upon twice. Overall the Council consider that the publicly available information provided to be proportionate and in line with national guidance on this matter."

21. The addendum went on to contend that the background papers which had been identified in the committee report were appropriate. The only background papers which were identified by the committee report were the Hackney Development Plan (2015) and the London Plan (2016). The addendum report observed that this was in line with all reports to committee on planning applications, and that drawings, supporting documents and development plan policies were referred to in the committee report itself and were publicly available. The addendum report engaged with the concern expressed in the claimant's solicitors letter that the warning that committee members received against reading anything other than the committee report was unlawful. The addendum report recorded as follows:

> "Committee Members are not warned against reading anything other than the report and, for instance, they are entirely free to look at all the application documents that are published on our website the viewing by anyone that is interested. Members are warned about viewing lobbying material as this can be considered to be prejudicial to their consideration of the application. Members are free to inspect any site from the highway and an officer is only required when the site is entered as this usually involves the applicant or an objector to the application."

22. Paragraph 5.3.62 of the committee report was corrected in order to provide a corrected table in relation to the viability assessment which was as follows:

> "Paragraph 5.3.62 should read:

| **Assumption** | **Applicant's Agent** | **Independent Assessors** |
|---|---|---|
| Residential Sales Value | £35,295,000 | £33,855,000 |
| Commercial GDV | £24,227,429 | £26,925,000 |
| Costs | £28,743,884 | £25,837,747 |
| Benchmark Land Value | £12,840,000 | £12,305,000 |

| | | |
|---|---|---|
| Profit on GDV | 16.64% | 16.90% |
| Professional Fees | 10% | 10% |
| Planning Contributions | £1,421,100 | £1,421,100 |
| Finance Rate | 7% | 6.75% |

> The first column of figures was the position of the applicant's agent. The second column of figures is that of the Council's independent assessor, to which the applicant agreed to which informed the viability assessment."

23. At the defendant's planning committee meeting the claimant was represented by, amongst others, Mr Richard Harwood QC, who also represents them in relation to this application for judicial review. During the course of his representations to the committee Mr Harwood pointed out the claimant's concern that the material on viability in the public domain appeared to demonstrate that the interested party's consultants had undertaken the exercise on the basis of a residualised value, rather than taking an existing use value plus approach which was what was required by policy (as set out below). This concern was taken up by Councillor Snell. Mr Robert Carney, who had been one of the defendant's officers and who had been involved with the consideration and negotiation of the viability of the development (albeit that by the time he attended the committee meeting he was working for a consultancy) was called upon to address these concerns, and in particular whether or not a residualised value approach had been taken to the viability exercise. His observations in respect of this issue, as recorded on the transcript contained within the court's papers, were as follows:

> "Perhaps I'll deal with the specifics of the, the values of where- of where they have been reported and Stuart will want to talk about, uh, the transparency of the information in the public domain. So I just want to clarify, we've used an existing use value plus approach in accordance with all guidance and the- what that approach- that approach forms was known as benchmark land value, that's referred to in the table at 5.3.62. Uh, you have the applicant's proposed benchmark land value and then the independent assessor's benchmark land value. And what you do is you, uh, look at the residual land value and the appraisal, basically, given them the residual land value, show them the appraisal equals or is more than the benchmark- benchmark land value, the scheme is viable. Because what that means is that a hypothetical, uh, developer can purchase the site at a figure above the benchmark land value. And we see in appraisal it's just shy of that benchmark land value. But

> basically, um, through our negotiations we accepted that the scheme had maximised, uh, it's viability with the, um, agreed contributions."

24. He subsequently reconfirmed his view that the exercise had been one based on existing use value plus. In addition to this issue, the transcript discloses that the oral presentation to the committee made by Mr Harwood, both at the outset of the meeting and in response to members' questions, covered the other objections raised by the claimant, including the issues related to employment land policy and the impact on the claimant's use. At the conclusion of the debate members voted, and the officers' recommendation contained in the committee report was accepted. Following the resolution to grant planning permission, negotiations were undertaken for the production of a planning obligation which led to the grant of conditional planning permission which is the subject of these proceedings on 9 August 2019.

Evidence following the grant of permission

25. Following the grant of permission to apply for judicial review the defendant lodged further evidence from two witnesses. Firstly, evidence was lodged from Mr Robert Brew dealing with the planning policy issues, the submission of viability evidence as part of the application and the identification of the Planning Code of Practice for Members ("the defendant's Code") which was in force at the time when the decision was taken by members on 9 January 2019. The questions associated with the evidence related to the defendant's Code are dealt with further shortly. Secondly, evidence was lodged from Mr Carney dealing with the viability assessment and the information which was provided by the interested party in connection with that issue together with the investigation of the matter by the defendant. His evidence commences with the discussions about viability which occurred in connection with the first and earlier planning application. It appears that in those discussions the interested party did not adopt an existing use value plus approach, but one based on an acquisition price derived from neighbouring market values. The defendant's consultants negotiated the benchmark land value down on an existing use value plus approach to £12.84 million in the first application, which then formed the starting point of the September 2017 viability report in respect of the planning permission under review. The defendant commissioned its own work in relation to that which is described by Mr Carney in his evidence as follows:

> "19. Again, the September 2017 Savills FVA was outsourced to be reviewed by Hackney's appointed consultants. Strettons were appointed in conjunction with Turner Morum to review the submitted FVA on behalf of Hackney, while the build costs were reviewed separately by WT Partnership Cost Consultants. Due to the commercially sensitive nature of this information, it was not made public.
>
> 20. As part of a separate instruction, WT Partnership reviewed the proposed costs in the September 2017 Savills FVA and prepared a report dated October 2017, which concluded the proposed costs in the FVA had been overestimated by £3,420,434 or 11.90%, and their estimated build costs for the scheme were £25,323,450.

21. As instructed, Strettons and Turner Morum then reviewed the FVA, and using WT Partnership's proposed build costs identified above, they concluded in their joint December 2017 reports, that the scheme was actually viable, by approximately £1.5 million.

22. The main reasons for the improved viability position were as follows:

- An increase in commercial values to £28,235,000 from £24,870,000.

- Reduced estimate of building costs by WT Partnership.

- The proposed BLV was reduced from £12.84 million to £12.3 million. (Based upon an EUV of £10.7 million, with a 15% landowner premium applied to it, reduced from the 20% premium applied in the first application by Deloitte Real Estate).

23. Strettons reported two separate Existing Use Values. These were £7,820,000 and £10,700,000. The reason two separate vales were reported, was the first assumed that the existing tenants remained in occupation and any tenants' improvements which had been made to the property could not be rentalised. The second higher value of £10,700,000 assumed vacant possession of the property, and after 6 month letting period, it assumed the property re-let at a higher rental than the existing tenants were paying.

24. The December 2017 Turner Morum report based on the BLV off the higher EUV of £10,700,000 and applied a 15% premium to this, though his report highlights in section 3.6 that "the Council may well want to seek assurances as to the realistic prospect of vacant possession being obtained on the site".

25. The ability to achieve vacant possession was considered by officers. My understanding was that the developer had confirmed its ability to determine the leases to the planning officers working on the case. Furthermore, the supporting planning documents such as the September 2017 Savills FVA highlighted that the applicant as landlord of the property had a break option in its lease from June 2018 with 12 months' notice. The December 2017 Strettons valuation report also confirmed that the lease could not be broken on any date after June 2018 with 12 months' notice.

26. Ultimately, it appeared reasonable to assume that vacant possession of the site could be achieved, as not only did the lease enable the landlord to do so, but the applicant maintained

> it had the ability to do so. The fact that the applicant was progressing with the planning application, appeared testament to its belief it would be able to do so.
>
> 27. Furthermore, it did not appear realistic to expect a landowner to release a site for development at a value which was considerably less than it could achieve in accordance with other potential options which were available to it. It therefore, appeared unreasonable to expect a site to come forward for development at a benchmark, land value which was based off the lower £7,820,000 EUV."

26. Mr Carney then goes on to describe how there was further negotiation leading to agreement on proposed build costs which led to a reduction in the profits generated by the development, reducing them to £633,000. He records that whilst there was greater clarity in relation to some items requiring off-site contributions that the interested party's viability consultants had suggested a higher estimate of the required CIL of £1,412,267, an increase on earlier estimates of that requirement. A further issue which emerged was a government proposal from December 2017 proposing to cut ground rents on new developments to zero. The uncertainty created by this proposal and the impact which it had on the viability discussions and the emergence of the figure of financial contributions is described in Mr Carney's evidence as follows:

> "37. The September 2017 Savills FVA had placed a value of £500,000 on the proposed ground rents, and the December 2017 Turner Morum report had valued them at £484,000. However, following the Department's comments, Savills in an email dated 21 February 2018, suggested 3 different approaches on how they could potentially now be considered in the appraisal:
>
> 1. Maintain them at £484,000
>
> 2. Remove them entirely and place no value for them
>
> 3. Include them at a higher yield of 10% to reflect the increased uncertainty, reflecting a revised value of £175,000.
>
> 38. Having tabled the three scenarios outlined above, Savills then proposed differing levels of further contributions:

| | **Ground rent proposed options** | **Maximum payment in lieu** |
|---|---|---|
| 1. | Maintained at £484,000 | £350,000 |
| 2. | Removed ground rents (no value) | £14,000 |

| | | |
|---|---|---|
| 3. | Apply a yield of 10% in line with GLA approach | £150,000 |

39. The September 2017 Savills FVA had originally included a figure of £250,000 as an offsite contribution, though no allowance had been made for the s106 costs identified in paragraph 32 above. Meaning that only option 1 above, based on maintaining the ground rents at their original proposed value, would lead to a further planning gain contribution of £100,000.

40. To place significant value against ground rents in the appraisal was highly subjective, as the industry at the time was either placing a reduced value, or no value at all on ground rents, following the proposed government changes. However, the applicant's consultant stated the applicant recognised the need to maintain and/or try to improve upon the contributions within the scheme, and highlighted the applicant was prepared to consider an improved offer of a further £100,000, which was on the assumption that the ground rents would generate a profit for the applicant.

41. Following this revised proposal from the applicant, officers sought to determine the full extent of the CIL liabilities. Based off the highest CIL estimate (assuming no relief) of £1,833,911, myself and the case officer pushed for a further £350,000 contribution to account for the surplus profit if ground rents could be fully reflected in the appraisal at a value of £484,000. This would have equated to a total planning contribution "pot" of £2,183,911.

42. Ultimately, the applicant pushed back against this level of contribution, and a meeting was arranged on 16 April 2018 between the applicant and their consultants, and myself and the planning case officers. In this meeting each side stated the reasons for their position, but despite multiple attempts to negotiate a higher figure with the applicant, their final offer was for a total "pot" of £2,000,000 which effectively assumed a yield of 8.5% was applied to the ground rents, reflecting a gross value of £205,882.

43. The applicant's position was based on the fact they did not fully agree with the findings of Stretton's and Turner Morum in their December 2017 reports, and also due to the continued uncertainty which by this point surrounded ground rents and the ability for them to generate a value.

…

> 45. My understanding is that further work was undertaken by the case officer to determine the exact CIL liabilities and therefore the extent of the relief which could be used to improve the policy compliance of the scheme. After the CIL liability was determined, the viability position was agreed to reflect a total planning gain contribution of £2 million, which was aggregated of the various s106 costs and CIL estimates, as set out in section 3: "Agreed Planning contributions" of the Savills Viability Assessment Summary and in the committee report."

27. Mr Carney then proceeds in his evidence to deal with a description of the figures presented in the committee report in the following terms:

> "48. The final agreed position was set out in the appraisal prepared by Savills and dated the 12 September 2018 and labelled as "Agreed Appraisal", which was available as part of the application documents for Planning Application 2017/3511 on the Council's website.
>
> 49. I understand that it has previously been suggested that due to the fact the agreed appraisal refers to a "residualised price" of £12,298,787, that the Benchmark Land Value (BLV) for the application was not based on the recommended Established Use Value plus premium (EUV+) approach. However, the reason it is referred to as "residualised price" is because the appraisal has been prepared using Argus Developer, which is a development software package widely used by the property industry, and this is how the model reports the land value. It is not possible, as far as I am aware, to alter the appraisal in Argus to refer to BLV.
>
> 50. I understand that the Claimant has previously highlighted discrepancies in some of the viability numbers in the committee report and supporting documents on the Hackney planning portal. In particular, the committee report referred to two separate benchmark land values, the "applicant's agent" BLV of £12,840,000 and the "Independent assessors" BLV of £12,000,000.
>
> 51. The reported £12,000,000 independent assessors figure was a typing mistake copied from the table in section 2.4 of the Savills Viability Assessment Summary report. It should have read £12,305,000, as this was the Council's proposed BLV, based on the findings of December 2017 Turner Morum/ Strettons report.
>
> 52. The addendum on the night identified this mistake, and it was clarified and changed to £12,305,000. As I have set out above, this BLV has been calculated using an EUV plus methodology, and I confirmed this on the night of the committee to the Councillors when questioned on this matter,

> and reiterated that Hackney had for many years sought to use this approach when assessing site viability.
>
> 53. I understand that the claimant has also queried how the £757,076 contribution to offside affordable housing identified in the Planning Sub-Committee report has been calculated. I can confirm, that based on a total agreed contribution of £2 million, the £757,076 figure if what is left after the known s106 and CIL costs have been accounted for."

Relevant planning policy

28. The first area of planning policy to be considered in relation to this case is that pertaining to affordable housing. Paragraph 5.3.58 of the committee report set out the development plan policies requiring the provision of affordable housing (and a target tenure split) and identified that affordable housing should be delivered on site and contributions towards affordable housing only considered in exceptional circumstances. It was against the background of that policy framework for affordable housing that the interested party produced a viability exercise to demonstrate that it was not possible for the proposed development to meet the policy requirements. Arguments of this kind are not unusual, and therefore further policy exists in order to determine the validity of viability assessments in this context.

29. The starting point for considering policy associated with viability assessments is that which is provided in the National Planning Policy Framework ("the Framework"). At paragraph 57 the Framework which was operational at the time of decision-taking provided as follows:

> "57. Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any chance in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available."

30. It will be noted that the policy refers to the need to reflect the approach set out in the Planning Policy Guidance ("PPG") relevant to the question of viability assessments. The PPG (current at the time of decision-taking) reiterates the starting point that planning applications are assumed to be viable against the backdrop of contributions set out in up-to-date planning policies. It goes on to consider how a viability exercise should be undertaken and, in particular, provides the following detail in relation to undertaking an assessment of viability, including the specification of the approach to be taken in respect of defining the cost of land for the purposes of the exercise and the

manner in which the viability assessment should be presented and published in order to ensure accountability. It is necessary, in the circumstances of the present case, to set out these passages at some length.

> "Standardised inputs to viability assessment
>
> What are the principles for carrying out a viability assessment?
>
> Viability assessment is a process of assessing whether a site is financially viable, by looking at whether the value generated by a development is more than the cost of developing it. This includes looking at the key elements of gross development value, costs, land value, landowner premium, and developer return.
>
> This National Planning Guidance sets out the government's recommended approach to viability assessment for planning. The approach supports accountability for communities by enabling them to understand the key inputs to and outcomes of viability assessment.
>
> Any viability assessment should be supported by appropriate evidence by engagement with developers, landowners, and infrastructure and affordable housing providers. Any viability assessment should follow the government's recommended approach to assessing viability as set out in this National Planning Guidance and be proportionate, simple, transparent and publicly available. Improving transparency of data associated with viability assessment will, over time, improve the data available for future assessment as well as provide more accountability regarding how viability informs decision making.
>
> …
>
> How should land value be defined for the purpose of viability assessment?
>
> To define land value for any viability assessment, a benchmark land value should be established on the basis of the existing use value (EUV) of the land, plus a premium for the land owner. The premium for the landowner should reflect the minimum return at which it is considered a reasonable landowner would be willing to sell their land. The premium should provide a reasonable incentive, in comparison with other options available, for the landowner to sell land for a development while allowing a sufficient contribution to comply with policy requirements. This approach is often called 'existing use value plus' (EUV+).

In order to establish benchmark value, plan makers, landowners, developers, infrastructure and affordable housing providers should engage and provide evidence to inform this iterative and collaborative process.

…

What factors should be considered to establish benchmark land value?

Benchmark land value should:

- Be based upon existing use value

- Allow for a premium to landowners (including equity resulting from those building their own homes)

- Reflect the implications of abnormal costs; site-specific infrastructure costs; and professional site fees and

- Be informed by market evidence including current uses, costs and values wherever possible. Where recent market evidence is used to inform assessment of benchmark land value this evidence should be based on developments which are compliant with policies, including for affordable housing. Where this evidence is not available plan makers and applicants should identify and evidence any adjustments to reflect the costs of policy compliance. This is so that historic benchmark land values of non-policy compliant developments are not used to inflate values over time.

  …

  What is meant by existing use value in viability assessment?

  Existing use value (EUV) is the first component of calculating benchmark land value. EUV is the value of the land in its existing use together with the right to implement any development for which there are policy compliant extant planning consents, including realistic deemed consents, but without regards to alternative uses. Existing use value is not the price paid and should disregard hope value. Existing use values will vary depending on the type of site and development types.

  …

  How should the premium to the landowner be defined for viability assessment?

The premium (or the 'plus' in EUV) is the second component of benchmark land value. It is the amount above existing use value (EUV) that goes to the landowner. The premium should provide a reasonable incentive for a land owner to bring forward land for development while allowing a sufficient contribution to comply with policy requirements.

Plan makers should establish a reasonable premium to the landowner for the purpose of ensuring the viability of their plan. This will be an iterative process informed by professional judgement and must be based upon the best available evidence informed by cross sector collaboration. For any viability assessment data sources to inform the establishment the landowner premium should include market evidence and can include benchmark land values from other viability assessments. Any data used should reasonably identify any adjustments necessary to reflect the cost of policy compliance (including affordable housing), or differences in the quality of the land, site scale, market performance of different building use types and reasonable expectations of local landowners. Local authorities can request data on the price paid for land (or the price expected to be paid through an option agreement).

…

Accountability

How should a viability assessment be presented and published to ensure accountability?

Complexity and variance is inherent in viability assessment. In order to improve clarity and accountability it is an expectation that any viability assessment is prepared with professional integrity by a suitably qualified practitioner and presented in accordance with this National Planning Guidance. Practitioners should ensure that the findings of a viability assessment are presented clearly. An executive summary should be used to set out key findings of a viability assessment in a clear way.

The inputs and findings of any viability assessment should be set out in a way that aids clear interpretation and interrogation by decision makers. Reports and findings should clearly state what assumptions have been made about costs and values (including gross development value, benchmark land values including the landowner premium, developer's return and costs). At the decision making stage, any deviation from the figures used in the viability

> assessment of the plan should be explained and supported by evidence.
>
> …
>
> Should a viability assessment be publicly available?
>
> Any viability assessment should be prepared on the basis that it will be made publicly available other than in exceptional circumstances. Even in those circumstances an executive summary should be made publicly available. Information used in viability assessment is not usually specific to that developer and thereby need not contain commercially sensitive data. In circumstances where it is deemed that specific details of an assessment are commercially sensitive, the information should be aggregated in published viability assessments and executive summaries, and included as part of total costs figures. Where an exemption from publication is sought, the planning authority must be satisfied that the information to be excluded is commercially sensitive. This might include information relating to negotiations, such as ongoing negotiations over land purchase, and information relating to compensation that may be due to individuals, such as right to light compensation. The aggregated information should be clearly set out to the satisfaction of the decision maker. Any sensitive personal information should not be made public.
>
> An executive summary prepared in accordance with data standards published by government and in line with the template (template to be published in autumn 2018) will present the data and findings of a viability assessment more clearly so that the process and findings are accessible to affected communities. As a minimum, the government recommends that the executive summary sets out the gross development value, benchmark land value including landowner premium, costs, as set out in this guidance where applicable, and return to developer. Where a viability assessment is submitted to accompany a planning application, the executive summary should refer back to the viability assessment that informed the plan and summarise what has changed since then. It should also set out the proposed developer contributions and how this compares with policy requirements."

31. The defendant produced its own guidance in relation to viability assessments in a document entitled "Development Viability Guidance Note". This document identified the defendant's preferred approach to benchmark land value as being a value derived using an existing use value plus approach to the identification of the relevant land

value. The document also described the defendant's expectations in relation to openness and transparency at paragraph 3.6 of the document in the following terms:

> "Openness and Transparency
>
> 3.6 Information relevant to the plan-making and planning application process is publicly available. This is consistent with the NPPF which places a requirement on councils to facilitate community involvement in planning decisions. Planning Policy Guidance states that transparency of viability evidence is encouraged wherever possible. The Environmental Information Regulations (2004) recognise the benefits of public participation and include a presumption in favour of disclosure. To ensure transparency and public participation:
>
> - The Council will expect information to be provided on an 'open book' basis and that this information can be made available to the public, including on the Council's website, alongside other planning application documents. In submitting development viability information, applicants do so in the knowledge that this may be publicly available, alongside other planning application documents. Where an applicant requests that a redacted version of the development viability appraisal only be made public, the Council will require justification for the components of the report to be redacted and the period of time for which they should redacted. As such a planning application will not be registered (made valid) unless it is accompanied by an 'open book' development viability assessment, and a redacted development viability appraisal, including justification (in line with paragraph 3.1-3.3);
>
> - The Council may make information available to planning sub-committee members or any other member who has legitimate interest in seeing it; and
>
> - The Council may make information available to a third party where another body has a role in determining an application or providing public subsidy and when fulfilling their duties under the Environmental Information Regulations and freedom of information legislation."

32. Turning from the issues associated with the interested party's viability assessment to those related to the claimant's use of the site, a variety of policies are said by the claimant to justify the conclusion that there are policies protecting its existing use and seeking to secure its retention. This policy is contained in a number of documents starting with the Mayor of London's City Fringe Opportunity Area Planning Framework and the site of the proposed application falls within the operational area of this policy. Within the document it is noted at paragraph 1.60, identified as Strategy One, that there are strategic policies in development plans including that of the defendant in relation to this area, and the document aims to give guidance on how those policies can be applied in order to best deliver their agreed vision and objectives

and ensure a consistent and coordinated approach. The document notes particular conditions encouraging clustering in the City Fringe and amongst those conditions is said to be "Location and creative vibe", it being said that "the area is centrally located and has for decades attracted small businesses and artists who were also attracted by the availability of cheap space". One of the five objectives to achieve the document's vision is "supporting the mix of uses that makes the city fringe special". Against the background of these observations the document provides as follows:

> "Creative Character
>
> 4.3 In the decades before the proliferation of digital technology this area experienced an influx of artists as well as small businesses, attracted by the availability of cheap space.
>
> 4.4 As already mentioned, the creative character of the area has made it more attractive as a business and residential location. It is important that these positive characteristics persist as the business cluster expands and consolidates. The growth of the parallel cluster and associated retail, leisure, café, cultural and night-time economy are all important here. There is also a potentially important role for temporary or "pop-up" uses."

33. Turning to the defendant's Core Strategy, in the chapter associated with economic development the claimant draws attention to the fact that one of the overarching principles in relation to the policies in that chapter is the support for a creative economy, and the ambition "to continue to attract the creative sector into the borough and to use this investment as part of the overall regeneration of the borough". Within the chapter Core Strategy Policies 17 and 18 provide as follows:

> "Core Strategy Policy 17
>
> Economic Development
>
> The Council will encourage economic development, growth and promotion of effective use of land through the identification and regeneration of sites for employment generating uses, the promotion of employment clusters and the encouragement of mixed use development with a strong viable employment component that meets the identified needs of the area, as set out in the Delivering Sustainable Growth chapter of this document. The Council expects to be able to deliver approximately 407,000sqm of employment floorspace to meet future demand.
>
> The Council will encourage economic diversity, support existing businesses and business development by facilitating the location of micro, small and medium companies in the borough.
>
> …

> Core Strategy Policy 18
>
> Promoting Employment Land
>
> The Council will protect employment land and floorspace last used for employment purposes anywhere in the borough.
>
> Redevelopment of existing employment land and floorspace may be allowed, as provided for in Policy 17 (Economic Development), when it will clearly contribute to: addressing worklessness; improvising business function and attractiveness; enhancing the specification of business premises; improving the immediate area; increasing the take-up of existing employment floorspace; and meeting the identified up-to-date needs of businesses located, or wishing to locate, in the borough."

34. The final element of policy in this connection is the Development Management Local Plan adopted in July 2015. In the chapter of that document dedicated to "A Dynamic and Creative Economy", policy DM 16 makes provision for affordable workspace and is explained by paragraph 4.1.3 of the explanatory text as follows:

> "4.1.3 Employment land (generally 'B' class use) is dispersed across the Borough, but some key concentrations are in Hackney Wick, the south around Shoreditch/Hoxton/Haggerston, and in the centre of the Borough around Dalston and Hackney Central. The Core Strategy designates a number of 'employment areas' within the Borough, with different typologies (Core Strategy policy 17). To reflect the changing nature of the local economy from a heavier industrial, manufacturing and distribution base to a need to provide higher grade, more modern and less 'heavy' commercial uses, the Priority Employment Areas (PEAs) and Other Industrial Area designations allow for mixed use development where appropriate. However, there is still a need to ensure land supply for these 'heavier' type industries, while providing land and floorspace for new types of businesses, particularly knowledge-based economy and the creative and cultural sector of which the Borough is at the 'forefront' of the Government's; 'Tech City' initiative and also new typologies of commercial floorspace will come through within the Olympic Park in Hackney Wick over time. Given this, and the release of employment land in recent years, the Core Strategy's position is to protect employment land and floorspace last used for employment use anywhere in the Borough."

35. It will be recalled that the site with which the application was concerned fell within a PEA. The Development Management Local Plan addressed the purpose of such areas in the following terms:

> "Policy DM16 – Affordable Workspace

> The Council will seek 10% of the new floorspace within major commercial development schemes in the Borough, and within new major mixed-use schemes in the Borough's designated employment areas, to be affordable workspace, subject to scheme viability.
>
> The applicant should submit evidence of agreement to lease the workspace preferably in association with a Council registered workspace provider. Under this preferred option the commercial terms to be agreed between the applicant and Council registered workspace provider are to be secured via legal agreement.
>
> If on-site provision is not possible, financial contributions for equivalent off-site provision will be sought.
>
> In addition, proposals for the redevelopment of existing low value employment floorspace reliant on less than market-level rent should reprovide such floorspace suitable, in terms of design, rents and service charges, for these existing uses, subject to scheme viability, current lease arrangements and the desire of existing businesses to remain on-site.
>
> …
>
> .10.4 The key purpose of PEAs, as set out in the Hackney Employment Growth Options Study 2006, is that they "should resemble the core portfolio of existing employment land assets that should be safeguarded for employment use, and in Atkins 2010 that the promotion of other uses should, "…seek to retain the primary function of these areas as employment (B use) locations. In considering proposals, particular emphasis should be given to the need not to compromise the ongoing operations of existing businesses in the area. Furthermore, proposals should not be encouraged where they are likely to limit or prevent investment opportunities for B use businesses in the area. If the proposal is likely to undermine the long-term functioning of the area as an employment (B use) location, such proposals should be discouraged." Atkins also recommended that B2 and B8 uses would be acceptable in PEAs.

The defendant's Planning Code for Councillors

36. In accordance with good practice, the defendant adopted and published a Planning Code for Councillors to guide members of its planning committee in relation to the conduct and discharge of their duties in dealing with planning matters. An issue emerged during the course of the proceedings as to which version of this Code was operational at the time when the application which is the subject of this judicial review was being considered. As part of the evidence at the initiation of these proceedings, and indeed at the time of the oral application for permission, it was

accepted that the Code in force contained the following provisions under the rubric "How to avoid a conflict of interest and still assist your constituents":

> "1.4. Where Members receive lobbying material through the post or by email they should forward it to the Committee Clerks unread, it can then be re-directed in accordance with the Council's guidelines. If a Member is approached by an individual or an organisation in relation to a particular planning application on the agenda of an upcoming meeting, the Member should explain that they are unable to personally comment on the application but that the person or organisation may:
>
> - Where the application is not yet on the agenda, write to the Planning Officer responsible for the particular application/enforcement action who will take into account any material planning considerations raised in the representations when preparing the report for Committee.
>
> - Contact the Committee Clerk to request to speak at the committee meeting;
>
> - Contact an alternative Councillor who is not a member or substitute member of the Planning Committees.
>
> 1.5 If a Committee Member does decide to become involved in organising the support of or opposition to a planning application, or has allowed themselves to be lobbied, then that Member should accordingly declare an interest at the beginning of the committee meeting (see 'When to…Declare an Interest' below) and remove themselves from the room when the Planning Sub-committee is determining the item in question. By becoming involved in a planning application prior to the committee meeting other than to read the Planning Officer's report and to attend Site Visit accompanied the Planning Officers, the Member risks forfeiting his or her right to take part in the discussion or vote on that particular item."

37. It was maintained at the hearing by the claimant that this version of the Code ("the claimant's Code") was the one which was operative at the material time. In support of this contention the claimant made the following observations. Firstly, attention is drawn to a leaflet published by the defendant dated February 2016 and entitled "How to have your say at the Planning Sub- Committee", in which the following is stated:

> "All Planning Sub-Committee members will keep an open mind on applications and it is advised that you don't contact any of the councillors before a meeting. The meetings are necessarily formal because the Chair and members want to listen to everyone and have the chance to ask questions so that they can fully understand the issues."

38. The claimant also drew attention to a letter of notification which was sent out in respect of the planning application, which in turn drew attention to the fact that the committee report had been published and which itself enclosed the leaflet "How to have your say at the Planning Sub- Committee". The same text as is set out above was repeated in the leaflet which came with that correspondence. Additionally, the claimant drew attention to the observation of members set out above when the claimant wrote to them prior to the meeting of the committee. Each of these matters, it is submitted, is consistent with the continuing operation of the claimant's Code.

39. As set out above, one of the matters covered in the evidence lodged by the defendant was whether or not the claimant's Code was the one which was operative at the time when the committee reached their decision. In the witness statement of Mr Brew he states that the relevant code which applied the time of the planning committee meeting was not the claimant's Code, which had been superseded many years prior to the meeting. He indicated in his evidence that in 2011 the defendant's Constitution was reviewed and rewritten, and that part of that exercise was the revision of what is known as the "Planning Code of Practice for Members", i.e. the defendant's Code. He stated that, apart from minor changes, it is the 2011 version of the Code which had been in place since then, and he attached to his witness statement an early version of the defendant's Code which was in place in September 2013. Mr Brew also produced a version of this code dated July 2018 which would have been the operational version at the time when the committee reached its decision. In his witness statement Mr Brew drew attention to significant differences between the claimant's Code and the defendant's Code. In particular the section under the rubric "How to avoid a conflict-of-interest and still assist your constituents" has the following guidance set out:

> "2.1 Planning Sub-Committee Members have to retain an open mind on any application as they are a part of the decision making process and cannot be seen to side with either the applicant or those who are making representations at the meeting at which the application would be determined. Adhering to the following rules will also ensure that public confidence in the Sub-Committee is maintained and serve to minimise the prospect of non-planning related matters and affecting the judgment of Sub-Committee Members.
>
> …
>
> 2.3 Where Sub-Committee Members receive lobbying material through the post or by email about an application coming before the Planning Sub-Committee they should forward it to Governance Services as soon as they realise it is lobbying material. If a Sub-Committee Member is approached by an individual or an organisation in relation to a particular application on the agenda of an upcoming meeting, the Sub-Committee Member should advise the person or organisation that it is not appropriate for them to personally comment on the application by that the person or organisation may:

> - write to the Planning Service concerning the particular application who will then response and update the person or organisation accordingly.
>
> - contact Governance Services to requests to speak at the Sub-Committee meeting. Such representation must be received by 4pm on the day prior to a Sub-Committee meeting. Any request to speak may be refused if the representation is not received by the deadline;
>
> - contact an alternative Member of the Council who is not to be part of the Sub-Committee meeting at which the application will be heard.
>
> 2.4 Council Members should represent the best interests of residents. Sometimes they may find themselves in a difficult situation where they are sent lobbying material. If a Council Member finds themselves in such a situation they need to decide whether they wish to sit on the Sub-Committee and hear the application or represent the interests of their residents."

40. In support of the contention that this version is a more contemporaneous one, and certainly one drafted after 2011, Mr Brew drew attention to the section dealing with "Predetermination or bias", which reflects the provisions of the Localism Act 2011 that had clarified that the predisposition of a member of the committee did not necessarily amount to an unlawful predetermination. It is the defendant's position that there was nothing in the defendant's Code from July 2018 which was either unlawful in terms of the proper procedure for determining planning applications by members of a committee, nor was there anything in it which was inconsistent with the material set out in the committee report.

The law

41. When determining an application for planning permission the decision-taker is required by section 70 (2) of the Town and Country Planning Act 1990 to have regard to the provisions of the development plan so far as is material to that application. Section 38 (6) of the Planning and Compulsory Purchase Act 2004 requires that a determination in relation to an application for planning permission "must be made in accordance with the plan unless material considerations indicate otherwise".

42. When the question of interpretation of a planning policy arises, it is a question of law for the court to determine: see *Tesco Stores v Dundee City Council* [2012] PTSR 983. It needs to be borne in mind that not all questions associated with planning policies are matters of law for the court to determine. Some issues arising in connection with planning policy are, in truth, questions of the application of a policy rather than its interpretation. Some elements of planning policy are not suitable for legal interpretation on the basis that they are in reality questions of planning judgement. These themes are explored and explained in the judgements of Lord Carnwath in *Hopkins Homes v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865 at paragraphs 23 to 26, and in *Samuel Smith Old Brewery (Tadcaster) v*

*North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221 at paragraphs 21 to 28 and 39.

43. Where a question of interpretation of planning policy does genuinely arise for the court, in approaching that question the court must bear in mind that the policy is not a statute or other formal legal instrument, but is intended to be a practical aid to decision-taking. These documents are statements of policy and their purpose and intended audience (being both professionals and the wider public) must be taken into account in assessing any question of interpretation which arises. The policy should be read and interpreted in a straightforward manner, taking into account the context in which it arises. This approach to the interpretation of policy is now well-established from cases such as *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] PTSR 81 (see paragraph 23) and *Monkhill Limited v Secretary of State for Housing Communities and Local Government* [2019] EWHC 1993, with both of these authorities and the recent decision of Holgate J in *Gladman v Secretary of State for Housing Communities and Local Government* [2020] EWHC 518 synthesising the earlier authorities that are referred to in the judgments.

44. Part of the complaint of the claimant under ground 1 is the contention that, unlawfully, the defendant failed to comply with the requirements under the Local Government Act 1972 to provide background papers in relation to the committee report. Specific provision is made in the 1972 Act in relation to background papers within section 100 D in the following terms:

> "100D- Inspection of background papers.
>
> (1) Subject, in the case of section 100C(1), to subsequent (2) below, if and so long as copies of the whole part of a report for a meeting of a principle council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public-
>
> (a) those copies shall each include a copy of s list, compiled by the proper officer, of the background papers for the report or the part of the report, and
>
> (b) at least one copy of each of the documents included in that list shall also be open to inspection at the officers of the council.
>
> …
>
> (4) Nothing in this section-
>
> (a) requires any document which discloses exempt information to be included in the list referred to in subsection (1) above; or
>
> …

> (5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which-
>
> (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
>
> (b) have, in his opinion, been relied on to a material extent in preparing the report,"

45. The question of what is "exempt information" is dealt with in section 100 I of the 1972 Act, which cross refers to part 1 of schedule 12A to the 1972 Act. For the purposes of the present case the important paragraphs of schedule 12 A are paragraphs 3 and 10 which provide as follows:

> "3. Information relating to the financial or business affairs of any particular person (including the authority holding that information).
>
> …
>
> 10.
>
> Information which-
>
> (a) falls within any of paragraphs 1 to 7 above; and
>
> (b) is not prevented from being exempt by virtue of paragraph 8 or 9 above,
>
> is exempt information if and so long, as in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

46. In connection with these legal provisions the claimant places reliance upon the case of *R(Joicey) v Northumberland County Council* [2014] EWHC 3657; [2015] PTSR 622. This case concerned an application for planning permission for a wind turbine. A noise report in relation to the impact of the proposed development was prepared and submitted as part of the planning application. Within that report the assessment applied higher noise levels in accordance with good practice to both the residence on the farm and also tenants living in cottages on the farmland on the basis that all of these individuals were "financially involved" in the project. The noise report was not placed on the defendant's website until the day before the committee meeting, and was not identified as a background paper to the committee report which had been prepared. The claimant in that case contended that there had been a breach of the legislative requirements in relation to background papers. The defendant's response to the claimant's submissions and the conclusions of Cranston J were as follows:

> "46. For the Council Mr White QC advanced three main arguments, all subsumed in a sense in his contention that the claimant was not prejudiced by the statutory breaches or the

denial of the claimant's legitimate expectation. First, he submitted, the councillors had the WSP noise assessment report before them on the day of the planning committee. The claimant himself had access to it, for some 36 hours before the meeting. Not only was he able to make the point about its late availability in his 5 minute presentation, but he was also able to lay before the committee the main points of his critique of the noise assessment report and where the applicant's consultants had gone wrong. In Mr White's submission the claimant's line that the report was flawed could not have been clearer. His presentation to the committee was a clear, cogent and powerful case about the noise issues. The points about the WSP noise assessment, which he made in his email on 8 November to the Council, and in his email on 10 November to Cllr Kelly he made in his presentation to the planning committee. Even now we have not been told what would have been in the detailed submissions which the claimant contends with more time he would have made. If the committee meeting of 5 November had been postponed for several months the claimant's submissions would have remained the same.

47. If this is an argument that the Council complied with its legal obligations to publish, it is not one I accept. Right to know provisions relevant to the taking of a decision such as those in the 1972 Act and the Council's Statement of Community Involvement require timely publication. Information must be published by the public authority in good time for members of the public to be able to digest it and make intelligent representations: cf. R. v North and East Devon Health Authority Ex p. Coughlan [2001] QB 213, [108]; R (on the application of Moseley) (in substitution of Stirling Deceased) v Haringey LBC [2014] UKSC 56, [25]. The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making. In practice whether the publication of the information is timely will turn on factors such as its character (easily digested/technical), the audience (sophisticated/ ordinary members of the public) and its bearing on the decision (tangential/ central).

48. In my view publication was not effected in a timely manner in this case. The WSP noise assessment was a 74 page technical document. It was directed to ordinary members of the public who might wish to make representations on the planning application. As to the claimant, he has some background in wind turbines and was able to make a few effective points about what he conceived as the flaws in the assessment in his presentation to the committee. But this was only one of a number of points he had to deal with in what, after all, was a

> very short period of 5 minutes. In light of the statement in the officer's report of "no planning history", he dealt with that, as well as the officer's failure to mention the Renewable Energy guidance. So the claimant's exposure of what he contended were the flaws in the assessment report was necessarily brief. With more time than 36 hours I have no doubt that he could have done more. Given the history of the matter, noise went to the heart of the committee's decision and not tangential."

47. Mr Andrew Fraser-Urquhart QC, who appeared on behalf of the defendant, placed reliance in response to these submissions upon the case of *R(Perry) v Hackney LBC* [2014] EWHC 3499; [2015] JPL 454, a decision of Patterson J in relation to 2 planning applications for mixed-use development. In connection with both of the applications a viability assessment was submitted to the defendant in support of the contention that a non-compliant offer of affordable housing should be accepted as a departure from the relevant planning policy. In both cases the viability assessment was submitted in confidence and was never made available in anything other than a redacted form. The claimant submitted that on a number of grounds the viability report ought to have been in the public domain and in particular, available to objectors to the applications and the members of the planning committee. In respect of the submission that there was a common law right of access to this information for the members of the planning committee Patterson J concluded that the information was clearly confidential as it contained information in relation to build and sales costs and residential values which were "of the utmost commercial sensitivity". She concluded that there was no common law right for members of the committee to be provided with the report in the following terms:

> "70. When the members took the decision they knew that the applicant's claims had been tested and reviewed by an appropriately qualified and independent firm of chartered surveyors as well as by their officers. They knew also that the claimant and Stokey Local were challenging the adequacy of the affordable housing provision. They heard the claimant saying that the redacted version of the FVA which he had received was written in a language that was incomprehensible if one was not a chartered surveyor. The claimant was suggesting that the members refused the planning application or say they wanted a higher level of inspection. Members, therefore, had a choice, whether to go along with the officer advice, seek further information or to accede to the Claimant' submission which were unsubstantiated by evidence. On each occasion, in my judgment, members had sufficient to enable them to be able to make an informed judgment. In the case of JR2 there was a further safeguard of a provision within the s.106 that enabled a review of the vulnerability exercise if the development had not started within 12 months of the grant of permission."

48. The claimant further submitted that the members of the planning committee had a statutory right to see the viability assessments by virtue of the provisions of the 1972

Act. The defendant contended that the material was exempt information, on the basis that the material related to the financial and business affairs of the applicant. Having set out the statutory framework, and in particular the language of paragraph 3 of Schedule 12 A in respect of information which "relates to" financial and business affairs or negotiations for a contract, Patterson J set out her conclusions as follows:

> "77. The claimant submits that circumstances here do not mean that the information "relates to" any terms to be proposed within any contract. A narrow interpretation should be given to the words as in *Durant v Financial Service Authority (Disclosure)* [2003] EWCA Civ 1746. I reject that submission. The words have to be seen in their own statutory context. The fact that a narrow interpretation was given in the context of the Data Protection Act 1998 dealing with access to personal data is of no assistance in constructing the Local Government Act dealing with local government administration. In this context the statutory provisions are dealing with two very different worlds.
>
> 78. In the context if the relevant amendments to the Local Government Act 1972, in my judgment, it is right to give the words "relates to" a broad meaning. The object of s.100F(2A) is to give the parties the freedom to negotiate, without restriction, terms of a contract. To allow the information contained within the FVA and its review into the public domain would frustrate that statutory purpose. Accordingly, the exemption for financial business affairs remains in the circumstances of this case.
>
> 79. The claimant contends that because there was no decision on balancing the public interest under para.10 of sch. 12A the defendant's reliance on the exemption is otiose. That is a wholly unrealistic submission it is self-evident from the way the defendant treated the documents that its view was that the public interest in maintaining the exemption outweighed the public interest in disclosing it. Paragraph 10 of sch. 12A does not require a formal decision to that effect."

49. Finally, in relation to the rights of the claimant as an objector to have sight of the viability documents on the basis that the documents were background papers covered by the provisions of the 1972 Act, Patterson J stated as follows:

> "89. From what I have set out above it is clear that in my judgment the FVA and its reviews were exempt information. Paragraph 4(a) does not require those documents to, therefore, be included in the list of background documents. It follows that there is nothing in that part of this ground."

50. On the basis of this authority it is contended by Mr Fraser-Urquhart that the defendant was entitled to only provide to the public the material which they did and, that the

approach which was taken in the committee report to the listing of background papers was entirely legitimate.

51. Turning to ground 2, the claimant contended that the approach taken both in the claimant's Code, and also by members in response to the receipt of representations from the claimant, was unlawful. The claimant draws attention to the provisions of Article 10 of the ECHR safeguarding everyone's right to freedom of expression including the freedom to hold opinions, and receive and impart information and ideas, without interference by a public authority. Article 10 provides as follows:

> "**Freedom of expression**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

52. The claimant relies upon the case of *R(Lord Carlisle of Berriew) v Secretary of State for the Home Department* [2015] AC 95 which concerned a decision of the Home Secretary to exclude from the United Kingdom a dissident Iranian politician on the basis that her presence in the United Kingdom "would not be conducive to the public good for reasons of foreign policy and in the light of the need to take a firm stance against terrorism". The claimant and other parliamentarians wished the exclusion to be lifted to enable the Iranian politician to address meetings in Parliament on issues associated with Iran. The Home Secretary reviewed her decision but declined to change it. One of the issues with which the case was concerned was the claimant's contention, on the basis that Article 10 was engaged, that the decision amounted to a breach of those rights. In the event, the Supreme Court were unpersuaded that there was any legal error in the decision that the Home Secretary had reached. However, in the course of her judgement Baroness Hale observed the following as to whether or not the rights under article 10 had been impeded:

> "94 The Secretary of State originally argued that there was no interference with the art 10 right by refusing Mrs Rajavi permission to come here to meet the parliamentarians. They could always go to Paris to meet her. Or they could exchange views by audio or video conferencing methods (which these days are so effective that they are regularly used in court

> proceedings). But it was soon accepted that to prevent them from meeting face-to-face in the Houses of Parliament is indeed an interference with their rights. It would be much harder for the numbers of parliamentarians who wish to meet Mrs Rajavi to do so in any other way. There is also the important symbolic value of a meeting in the Houses of Parliament. On the other hand, it must also be accepted that, as there are other ways in which the parliamentarians could communicate with Mrs Rajavi, the interference is not as serious as it would be if they were banned from all forms of communication with her."

53. The observations of Lord Steyn in the case of *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115 are also relied upon by the claimant in support of its contention that the approach taken in the claimant's Code, and by the members of the planning committee who responded to the claimant's representations, were unlawful. Lord Steyn observed at page 126 F to G as follows:

> "Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market:" *Abrams v United States (1919) 250 U.S. 616, 630, per* Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of the democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country."

54. In short, the claimant submitted that there was no reason in law by the members of the planning committee should not receive representations from objectors to an application that they were considering. Indeed, the receipt and consideration of such representations were a positive feature of the democratic function that they were performing in determining the planning application.

Submissions and conclusions

55. As set out above, the claimant's ground one has a number of strands to it. As presented by Mr Harwood in his oral submissions, the first strand of argument is the failure of the defendant to make information in relation to viability available, in particular having regard to the legal requirements to furnish background papers with the committee report, and further in the light of the planning policy bearing upon viability assessments which has been set out above. The second strand of argument is the claimant's contention that the material which was produced and placed in the

public domain by the defendant was incomplete, inconsistent and, in effect, incomprehensible. The third strand of argument is that, in so far as it is relevant, the evidence of Mr Carney raises points which the claimant would have wished to have commented upon had that material about which he now provides evidence been put in the public domain prior to the decision being taken.

56. In developing the first strand of argument under ground one, Mr Harwood submitted that the committee report was in breach of the requirements under the 1972 Act set out above to list relevant background papers as part of the report. He submits that it is clear that there was documentation in existence and relied upon by officers in preparing the report and its recommendations, in particular bearing upon the question of the viability of development, which was not included in the list of background papers within the committee report. Whilst the defendant had sought to suggest that this material was exempt information, based on the case of *Perry* and the fact that it bore upon the financial affairs of the interested party, this was not a tenable proposition bearing in mind that the clear purpose and intention of national planning policy was that information about the viability of a development should be transparent, coherent and in the public domain. In that connection, and in so far as the defendant had concluded that planning policy did not require the disclosure of further information to explain how the contribution in relation to affordable housing had been arrived at, they had plainly misunderstood and misinterpreted the relevant planning policy. Further, in the light of the contents of the defendant's own policy in relation to viability assessments, and the terms of its Statement of Community Involvement, there was a legitimate expectation that all of the material in relation to the viability of the development would be placed into the public domain as part of the consultation on the planning application.

57. In respect of the second strand of argument, Mr Harwood contended that the material that was placed in the public domain about the development's viability could not be reconciled and was incomprehensible. The figures contained within paragraph 2.4 of the viability assessment (and set out in that paragraph's table) cannot be reconciled with the figures appearing in the summary appraisal attached as Appendix 1 to this judgment. Further, the figure which purports to be the benchmark land value within Appendix 1 is described as a "Residualised Price", and both this language and the structure of the appraisal itself support the contention that in fact it is the figure left over after costs and profit have been identified, rather than a figure representing an analysis of existing use value plus of the kind required by the relevant policy. The observations of Mr Carney indicating that there was a fixed figure of £2 million included for planning gain further supported this contention. The figure of £12,305,000 from the revised paragraph 5.3.62 in the addendum report was the first mention of a benchmark land value, and the report provides no explanation of what the existing use value was or how any premium had been calculated.

58. So far as the third strand of the argument is concerned, Mr Harwood observes that reliance upon this evidence could only arise if the court were being expected to have resort to the jurisdiction under section 31(2A) of the Senior Courts Act 1981 (a point which had not been pleaded), and encouraged to form the view that the decision would not have been substantially different if the illegality complained of had not taken place. In truth, Mr Carney's evidence created its own difficulties for the defendant. Within his skeleton argument Mr Harwood pointed out that the clear and

obvious implication of Mr Carney's evidence is that there is a substantial amount of material which has not been disclosed, but which pre-existed the committee report and the decision, and which ought to have been in the public domain. This material includes, for example, the reports of costs consultants and the joint report prepared for the council in December 2017; the discussion and documentation surrounding ground rents and their capital value; and the documentation leading to the resolution that the affordable housing contribution figure should be £757,075, bearing in mind that it had varied over the course of the life of the application.

59. Secondly, Mr Carney's evidence indicated that there were differences in the course of the negotiation related to the ground rents which might have been derived from the existing use, and the influence that those ground rental values might have upon the existing use value. However, that was material which the claimant would have wished to comment upon based on the fact that, as the tenant of the interested party, it was particularly well-placed to investigate and contend the assumptions behind the higher rental values that were being assumed in the valuation work. Furthermore, the assumptions of higher ground rent for the existing use appears contrary to the conclusions of the Viability Report relating to Employment Floorspace which are set out above. This is a further matter upon which the claimant would have wished to comment. Thus, far from saving the defendant from the conclusion that its approach to viability was unlawful, in fact Mr Carney's evidence makes their case significantly worse.

60. In response to the submissions Mr Fraser-Urquhart, on behalf of the defendant, contended as follows. Firstly, he relied upon the decision of this court in *Perry*, in similar circumstances, that there was no obligation on the council to place confidential information bearing upon the question of viability into the public domain. He contends that the key question for the court's consideration is whether or not such material as has been placed into the public domain is sufficient to enable a member of the public to make a sensible contribution to the consultation on the application. The satisfaction of that requirement does not require every single document bearing upon viability to be disclosed. In reality, the summary appraisal document provided a good deal of detail which could have been investigated by anyone interested in the issue of viability. At the committee, both members and those interested public participants who were present were reassured that it was an existing use value plus approach which was taken in the decision. Both in his skeleton argument and also in his oral submissions Mr Fraser-Urquhart conceded that it was "correct that the process of internal assessment by the defendant, and ongoing negotiation with the interested party was not disclosed in full, such that it is not always possible to reconcile the published information", but he went on to contend that the defendant was entitled to conclude that sufficient viability information had been provided for an interested person to make informed representations about whether or not the affordable housing contribution was appropriate. In respect of legitimate expectation Mr Fraser-Urquhart submitted there was no unequivocal promise made by the defendant in any of the documents relied upon to the effect that all viability information will be placed into the public domain. So far as the relevant policies are concerned Mr Fraser-Urquhart observed that the duty within the policy was placed upon the developer in relation to providing information about viability and that the breadth of the duty contended for by the claimant was not supported by the policy documents which were relied upon.

61. My conclusions in relation to ground 1 are as follows. The first point raised is whether or not the defendant complied with its obligations under the 1972 Act in relation to the provision and listing of background papers. In short, I have no doubt that the defendant failed to comply with its obligations under section 100 D of the 1972 Act, not simply in relation to listing background papers but also in failing to provide them for inspection. It is clear from the evidence which has been set out above, including in particular the evidence of Mr Carney, that there was a significant quantity of documentation bearing upon the viability issues generated both before and especially after those documents that were published in relation to viability on the defendant's website. It appears clear from Mr Carney's evidence that, after the material from September 2018 which the defendant published, there was a significant volume of further technical work addressing ground rents and their impact on existing use value, the derivation of figures for the planning obligations and CIL and also the identification of a benchmark land value. Whilst not all of this material needed to be produced and listed it is simply inconceivable that none of this material would have qualified under section 100 D (5) of the 1972 Act. Clearly the contents of the committee report dealing with the viability exercise and its ultimate conclusions as to the affordable housing contribution which could legitimately be required, depended upon the contents of this material. There was, therefore, information which should have been listed and of which copies should have been provided for inspection.

62. In fact, during the course of argument, Mr Fraser-Urquhart conceded on behalf of the defendant that there had been a breach of section 100 D of the 1972 Act in relation to the provision of background information. However, he submitted that there had in reality been substantial compliance with the requirements on the basis, firstly, that reliant upon the case of *Perry*, a significant quantity of the missing documentation was exempt information and therefore did not need to be listed or available for inspection, and, secondly, that the material which had been published was sufficient to enable an interested person to formulate their objection in relation to the application. In my view, the answer to the first submission in relation to exempt information is related to the contentions in respect of planning policy made in the case, and the answer to the second is related to the second strand of Mr Harwood's argument, related to the question of whether or not the information published was coherent and comprehensible.

63. In my view there are some clear principles set out in the Framework and the PPG to which it refers. Firstly, in accordance with the Framework viability assessments (where they are justified) should reflect the approach set out in PPG, and be made publicly available. Secondly, and in following the approach recommended in the Framework and the PPG, standardised inputs should be used including, for the purpose of land value, a benchmark land value based upon existing use value plus as described in the PPG. Thirdly, as set out in the PPG, the inputs and findings of a viability assessment should be set out "in a way that aids clear interpretation and interrogation by decision-makers" and be made publicly available save in exceptional circumstances. As the PPG makes clear, the preparation of a viability assessment "is not usually specific to that developer and thereby need not contain commercially sensitive data". Even if some elements of the assessment are commercially sensitive, as the PPG points out, they can be aggregated in a published viability assessment so as to avoid disclosure of sensitive material.

64. As Mr Harwood pointed out in his submissions, there is an exception to the definition of exempt information contained in paragraph 10 of Schedule 12 to the 1972 Act where "the public interest in maintaining the exemption outweighs the public interest in disclosing the information." In my judgment the existence of the policy contained in the Framework and the guidance contained in the PPG have an important bearing on the consideration of whether or not there is a public interest in disclosing the information contained in a viability assessment (even if it is properly to be characterised as commercially sensitive, bearing in mind the observations in the PPG about the extent to which information in such an assessment would be specific to a particular developer). It is clear from the material in the Framework and the PPG that save in exceptional circumstances the anticipation is that viability assessments, including their standardised inputs, will be placed in the public domain in order to ensure transparency, accountability and access to decision-taking for communities affected by development. The interests which placing viability assessments into the public domain serve are clearly public interests, which in my view support the contention that such assessments are not exempt information unless the exceptional circumstances spoken to by the PPG arise and solely an executive summary should be put in the public domain. It is unclear to me based on the material before the court how, if ever, the defendant ever considered the question of the public interest in relation to this exemption in the context of the relevant national planning policy. I am, therefore, unable to accept the submission advanced on behalf of the defendant that their failure to comply with section 100 D of the 1972 Act was a matter justified by the contention that the material withheld was exempt information.

65. I appreciate that this is a different approach from that taken by Patterson J in the case of *Perry*. However, at the time of her considering the issues in that case neither the Framework nor the PPG existed in the terms in which they do at present, and the judgments which she reached in relation to whether or not the viability assessments in that case were exempt information were arrived at in a materially different context in which the question of the public interest under paragraph 10 of schedule 12 of the 1972 Act was not informed to the extent as now by any relevant policy or guidance framing the question of what the public might expect to be provided with in connection with a planning application where viability was advanced as a reason for exemption from contributions or obligations underpinned by planning policy. The circumstances of this case are therefore significantly different from those which had to be evaluated by Patterson J in *Perry*.

66. The questions which then arise are as to whether the material which was in the public domain was comprehensive and coherent, such that it met the deficiencies in relation to the defendant's obligations under section 100 D of the 1972 Act, and addressed the requirements of the Framework and PPG in relation to the provision of viability assessment. In my view there are critical elements of the material in the public domain in relation to viability, set out in the documentation published on the defendant's website and in the committee report, which are opaque and unexplained.

67. The starting point for this assessment is, as set out above, the concession made on behalf of the defendant that the published information is incapable of being reconciled. A number of different figures are contained within the material in relation, for instance, to benchmark land value which are not consistent with one another and

the discrepancies and indeed the figures themselves are unexplained. The figures which appear in paragraph 5.3.62 (as corrected in the addendum report) are different from the figures which appear in the summary appraisal contained in Appendix 1 to this judgment and also the figures presented in the September 2018 viability appraisal at table 2.4. None of these differences or inconsistencies are explained nor are they capable of being understood.

68. In addition to the inconsistency in the figures there is, in particular, no explanation as to how the components of the benchmark land value in the committee report have been arrived at. Firstly, the figure is asserted globally, and there is no explanation as to the assumption in relation to existing use value and the figure which has been used for the landowner's premium or the "plus" which is the additional component of the benchmark land value. In my view it is clear from the guidance contained in the PPG that both in the case of a viability appraisal (and also in the case of there being exceptional circumstances such that only an executive summary need be placed in the public domain) the material should identify both the existing use value and the landowners premium which has been used to derive the benchmark land value. Nowhere in the material prior to the decision are those elements identified separately, and without that having been done the objective of the PPG for inputs and findings to be set out in a way which enables clear interpretation and interrogation of those figures has been frustrated.

69. The evidence of Mr Carney demonstrates that the derivation of the existing use value, bearing in mind the existence of the claimants leasehold interest and the impact upon establishing the existing use value of both the ability of the site to be re-let in its current condition and the potential to create ground rents if redeveloped, was a subject which had the potential to be both contentious and have a critical bearing on the outcome of the viability assessment. Given the way in which the material was presented it was not possible for an objector to understand what the existing use value was, let alone how it had been derived, so as to engage in the viability case which was being advanced. In my view there is substance in the claimant's submission that the material was opaque and unexplained, and that the defendant's contention that notwithstanding the absence of the listing of the background papers lying behind the figures contained in the committee report (which would have required them to be available for inspection) sufficient was presented such that substantial compliance with the requirements of the 1972 Act was achieved should be rejected.

70. In addition to the points identified above in relation to the lack of transparency in the benchmark land value further points arise in respect of the material provided at Appendix 1. As has been noted above, the claimant drew attention to the figure contained in the summary appraisal for the acquisition of the site in the sum of £12,298,787 is described as a "Residualised Price". It is submitted from both the use of that term and also the presentation of the table that this figure is not, as claimed by the defendant, a figure derived using the existing use value plus methodology, but rather a value derived after all of the other costs and sales values of the development have been taken into account, including the need for the developer to make an appropriate profit. In my view there is considerable force in this point on the basis that, notwithstanding Mr Carney asserting both in his presentation to the planning committee and also in his witness statement that the benchmark land value was derived using an existing use value plus methodology, there is no explanation within

that material as to how the figure in Appendix 1 (or indeed the other various figures contained elsewhere in the committee report and the addendum) were derived using that methodology. In reality, therefore, the only material that was publicly available presented the appraisal in a format which was redolent of the derivation of the cost of the land being derived on a residual basis, and nowhere is it set out how a benchmark land value was derived in accordance with the PPG by concluding upon an existing use value and an appropriate measure for the landowner's premium. Thus, beyond the assertion that an existing use value plus methodology was used, there is nothing to explain how it was used and what values for the existing use value and landowner's premium were deployed. These matters add to the concern in relation to the absence of any of the background papers which would explain and substantiate the viability assessment figures contained in the committee report and the failure to properly interpret the requirements of the Framework and the PPG in respect of a publicly available viability assessment including standardised inputs, in particular the existing use value and the landowner's premium. This failure clearly compromised the opportunity for the public to engage in this issue on an informed basis, understanding the components which it was said made up the benchmark land value.

71. Drawing the threads together, the material contained in the public domain at the time when the decision was taken by the planning committee to resolve to grant planning permission was inconsistent and opaque. It contained figures which differed in relation to, for instance, benchmark land value and the differences between the figures were not explained. No explanation was provided as to how the benchmark land value had been arrived at in terms of establishing an existing use value and identify a landowner's premium as was asserted to have been case. Read against the background of the policy and guidance contained in the Framework and the PPG it was not possible to identify from the material in the public domain standardised inputs of the existing use value and landowner's premium, and the purpose of the policy to secure transparency and accountability in the production of viability assessment was not served. In particular, it was plain from the material available at the time of the decision (in particular in terms of the material inconsistencies in the material produced in September 2018 and the differences from the material in the committee report) that there was substantial additional background material on which the committee report was based which was neither listed nor available for inspection in accordance with the requirements of the 1972 Act. In my view the principles identified in the case of *Joicey* by Cranston J at paragraph 47 are clearly on point, since the purpose of having a legal obligation to confer a right to know in relation to material underpinning a democratic decision-taking process is to enable members of the public to make well-informed observations on the substance of the decision. The failure to provide the background material underpinning the viability assessment in the present case, in circumstances where such material as was in the public domain was opaque and incoherent, was a clear and material legal error in the decision-taking process. In reality, in my judgment, the material with which the public was provided failed Mr Fraser-Urquhart's own test of being adequate to enable the member of the public to make a sensible response to the consultation on the application.

72. In the light of this conclusion the claimant must succeed under ground one of this judicial review, and the decision of the defendant in relation to the interested party's planning application must be quashed. Turning to the potential application of section 31(2A) of the 1981 Act, as is recorded above the reality is that Mr Carney's evidence

is, in any event, of limited utility to the defendant, and certainly does not in my view resolve the concerns in relation to the legality of the defendant's decision. Nor is there any need to deal with the claimant's submissions in relation to legitimate expectation. The flaws in the material available in the public domain and the defaults in relation to the provision of background information are sufficient to establish the validity of the claimant's complaints in relation to ground one.

73. Turning to ground two, Mr Harwood contends that, as set out above, the claimant's Code was operative at the time of the decision based on the responses of members of the planning committee to receiving representations from the claimant, and also the correspondence provided by the defendant when consulting on the committee report. In relation to the dispute as to which Code was operational at the time of the taking of this decision, I have no doubt that Mr Brew is correct in his evidence that it was the defendant's Code which was intended to be operational at the time. It is not suggested by the claimant that there is any legal flaw in the approach taken in the defendant's Code in respect of the treatment of objector's representations, a view with which I concur for the reasons which are set out below. That is not, however, necessarily an end of the matter.

74. It is clear from the correspondence with the two members of the planning committee set out above that it appears that it was their view that they should not be receiving representations from members of the public in relation to planning applications that they were considering, and, in particular, that they ought not to be receiving lobbying material. The leaflet entitled "How to have your say at the Planning Sub-Committee" contained material to similar effect which advised the public not to contact any of the councillors on the committee prior to a meeting in respect of an application that they were considering. This advice was repeated in the letter of notification which the claimant received upon the publication of the defendant's committee report. This approach appears inconsistent with the defendant's Code, in so far as that Code contemplates at paragraph 2.3 that lobbying material may be received by members of the committee, and, in the event that it is, the person or organisation who has sent it should be advised that it would not be appropriate for the member to personally comment on the application and be given information about how to make representations in writing and at the committee, following which the communication should be passed to officers, no doubt for logging and incorporation in the committee report as appropriate. It appears from the evidence which is available that both in the standard correspondence notifying members of the public during the course of the development control process, and also in practice in the way in which at least two members of the planning committee conducted themselves, that lobbying or direct communication with members of the planning committee to seek to influence their opinion was considered to be clearly discouraged or even precluded, notwithstanding the provisions of the defendant's Code.

75. During the course of his submissions Mr Harwood drew attention to a document published by the Local Government Association entitled "Probity in Planning". Within that document at section 7 in the chapter concerned with "Lobbying of and by councillors" the following is recorded:

> "Lobbying is a normal part of the planning process. Those who may be affected by a planning decision, whether through an application, a site allocation in a development plan or an

> emerging policy, will often seek to influence it through an approach to their ward member or a member of the planning committee."

76. Mr Harwood also submitted that it is well-established on the authorities that planning is not a quasi-judicial function. That this is the case is established by the observations of Pill LJ in *R(Lewis) v Redcar and Cleveland Borough Council* [2009] 1WLR 83 at paragraph 69, and Rix LJ at paragraphs 92 and 94. These matters, it is submitted, support the claimant's contention that the approach taken in substance by the defendant of barring lobbying of members of the planning committee was one which was unlawful for the reasons set out above.

77. On behalf of the defendant, Mr Fraser-Urquhart submitted that the approach taken by the defendant in the defendant's Code was entirely lawful, and that the filtering mechanism of dissuading members of the public from lobbying members of the planning committee was one which was reasonable and did not amount to a breach of the requirements of free speech under article 10 of the ECHR (on the basis that it was a proportionate interference with that right), nor the breach of any requirement at common law. Furthermore, he contended that on the facts of this particular case the claimant had a very full opportunity at the meeting of the planning committee to air its views in relation to the development, covering all of the ground which was included within the claimant's letter relating to the committee report. In addition, members had drawn to their attention the points which were being made by the claimant through the preparation of the addendum report which addressed, amongst other matters, the issues which had been raised by the claimant in relation to the committee report.

78. There was in substance no contention before the court but that issues in relation to freedom of expression and the application of Article 10 of the ECHR were engaged in the communication between members of a local authority, and in particular members of a planning committee, and members of the public who they represent and on whose behalf they were making decisions in the public interest. In my view that position is indisputably correct. Similarly, bearing in mind the importance of the decisions which the members of the planning committee are making, and the fact that they are acting in the context of a democratically representative role, the need for the communication of views and opinions between councillors and the public whom they represent must be afforded significant weight. In my view, it would be extremely difficult to justify as proportionate the discouragement, prohibition or prevention of communication between public and the councillors representing them which was otherwise in accordance with the law. Here it was no part of the defendant's case to suggest that the communication which the claimant made in their correspondence in respect of the committee report was anything other than lawful.

79. On behalf of the defendant Mr Fraser-Urquhart submitted that it was proportionate for there to be a requirement that members passed to officers any lobbying material which they received in respect of applications that they were due to consider. That may be, but in my judgment it could not be proportionate for those communications to be passed to officers subject to an injunction that members must not read them. Receiving communications from objectors to an application for planning permission is an important feature of freedom of expression in connection with democratic decision-taking and in undertaking this aspect of local authority business. Whilst it

may make perfect sense after the communication has been read for the member to pass it on to officers (so that for instance its existence can be logged in the file relating to the application, and any issues which need to be addressed in advice to members can be taken up in a committee report), the preclusion or prevention of members reading such material could not be justified as proportionate since it would serve no proper purpose in the decision-taking process. Any concern that members might receive misleading or illegitimate material will be resolved by the passing of that correspondence to officers, so that any such problem of that kind would be rectified. In my view there is an additional issue of fairness which arises if members of the planning committee are prevented from reading lobbying material from objectors and required to pass that information unread to their officers. The position that would leave members in would be that they would be reliant only on material from the applicant placed on the public record as part of the application or the information and opinions summarised and edited in the committee report. It is an important feature of the opportunity of an objector to a planning application to be able to present that objection and the points which they wish to make in the manner which they believe will make them most cogent and persuasive. Of course, it is a matter for the individual councillor in the discharge of his responsibilities to choose what evidence and opinion it is that he or she wishes to study in discharging the responsibility of determining a planning application, but the issue in the present case is having the access to all the material bearing upon the application in order to make that choice. If the choice is curtailed by an instruction not to read any lobbying material from members of the public that has a significant impact on the ability of a member of the public to make a case in relation to a proposed development making the points that they wish to make in the way in which they would wish to make them.

80. The question which then arises is as to whether or not on the facts of the present case there has been any breach of those requirements. As set out above I am satisfied that the defendant's Code was the relevant Code in operation at the time when this decision was reached. It appears to me that the defendant's Code does not discourage or preclude members of the planning committee receiving lobbying material from members of the public and reading it, and that the observations which it makes in relation to passing any communication on to officers and advising the member of the public as to other means available to make their views known to the planning process are entirely sensible administrative measures in the context of the receipt of lobbying material.

81. The difficulty for the defendant is that in my view it does not appear that that approach set out in the defendant's Code was followed by two members of the planning committee or in the defendant's standard correspondence in relation to notification. The standard correspondence clearly advised against members of the public writing directly to members of the committee; there was no warrant for that advice or discouragement and it impeded the freedom of expression of a member of the public who was entitled to write to a member of the planning committee setting out in his or her own terms the points they wish to be considered in respect of an application and expect that the member would have the opportunity to read it. It appears that Councillor Stops was under the impression that he was to resist being lobbied by either an applicant or member of the public, and Councillor Snell had apparently taken legal advice to the effect that he should refrain from reading any lobbying letter and forward it on to officers. Neither of these approaches reflects the

defendant's Code, nor does it reflect the entitlement to freedom of expression in accordance with the legal principles set out above. Indeed, the addendum to the committee report responding to this point fails to reflect the need for members to be open to being lobbied consistent with the legitimate exchange of views and opinion on the merits of an application. Officers observed "members are warned about viewing lobbying material as this can be considered to be prejudicial to their consideration of the application". In truth, there was nothing in the defendant's Code warning members against lobbying material, and in fact the defendant's Code simply contained administrative measures as to the steps to be taken in respect of lobbying material that members of the committee might receive.

82. I am therefore unpersuaded that the defendant's Code was in fact being operated bearing in mind in the way in which this application and in particular the claimant's objections in relation to it were considered. Whilst Mr Fraser-Urquhart contends that the evidence only shows two members of the committee declining to receive and read the claimant's lobbying material, the fact remains that they did, and it is not suggested how the other members of the committee may have approached this issue.

83. The question which then arises is as to whether or not Mr Fraser-Urquhart is entitled to contend that the breaches for which the claimant contends did not give arise or give rise to any material prejudice, in that the claimant was able to make very full representations at the meeting of the planning committee, in particular through the submissions made by Mr Harwood to the committee which covered the ground contained in the claimant's letter.

84. In my view there is considerable force in these submissions. Having reviewed both the claimant's letter of objection and also the transcript of the committee proceedings which is before the court, it is clear to me that Mr Harwood was not only able to, but did in fact, present to the members of the committee all of the principal points set out in the letter and in considerable detail. The submissions made in his oral presentation were referenced to the relevant policies and explained for the benefit of the members the substance of the claimant's concerns, for instance, in relation to the question of viability and the employment policies which are set out above. In all Mr Harwood addressed the committee three times, and each time at some length; in addition to the opportunity to set out the claimant's case, he also responded to the questions raised by the members in respect of the claimant's concerns and was able to elaborate on the points at issue. In short, I am satisfied that through the oral presentation to the committee Mr Harwood was able to convey the objections of the claimant to the committee fully and effectively, and that any interference with Article 10 arising from the treatment of the claimant's letter of objection to the committee report was rectified by through the extensive and detailed oral presentation which was made on the claimant's behalf at the committee meeting. Thus, reviewing the defendant's treatment of the claimant's objections in the process of considering the application overall, I am not satisfied that there was interference with the claimant's Article 10 rights: by the time the decision was reached the claimant had clearly communicated its objections directly to the members of the committee. Further, in so far as the point raised is one of fairness, I am satisfied in the circumstances of this case the claimant suffered no prejudice. As is well established on the authorities (see for instance *Hopkins Homes v SSCLG* [2014] PTSR 1145 at paragraph 49) it is necessary for a

claimant to establish material prejudice before relief could be granted in respect of an allegation of procedural unfairness.

85. Mr Harwood contends that there is a qualitative difference between the claimant being able to rely upon written objections in the form of the letter and oral submissions at the committee meeting. The written submissions were detailed, and contained a draft reason for refusal, and the provision of the letter in advance gave members a chance to give thought to the points raised and reflect upon them before the meeting. He relies upon the decision of *R v Kelly v London Borough of Hounslow* [2010] EWHC 1256 (Admin), in which objectors to an application for planning permission received late notice of an invitation to a committee such that the objectors were deprived of the opportunity to make an oral presentation to the committee. I am not satisfied on the facts of this case, and these matters are obviously fact-sensitive, that the claimant was prejudiced by the treatment of the letter of objection. As I have already observed, in reality the principal issues contained in the letter were all covered in the claimant's presentation to the committee, when they were able to present their objections to the committee. I am unimpressed by the suggestion that the claimant was prejudiced by members not having the claimant's draft of a reason for refusal before them in circumstances where in effect it was very clear what the nature of the claimant's case was and the members of the committee were perfectly capable of formulating their own reason for refusal (if necessary with the assistance of officers) if they were persuaded of the claimant's arguments. The case of *Kelly* was factually different in that, for instance, being deprived of the opportunity to make oral submissions to the committee meant that the claimants in that case were deprived of the opportunity to respond to the officer's analysis of the merits of the case in the committee report, and persuade the committee through their oral presentation to their point of view on the matters of judgment upon which the decision turned. In this case the claimant had that opportunity and took it, having the benefit of Mr Harwood's skills as an advocate to support them.

86. For all of these reasons I am satisfied that the claimant's ground two is not made out and that relief should not be granted in relation to it.

87. I propose to state my conclusions in respect of ground three relatively briefly. It will be recalled that ground three is the complaint that the members were misled by the officers in the committee report when they observed in paragraph 5.3.41 that "it is considered that there is no development plan policy requirement to retain the specific type of floor space that Holborn Studios desire within the broader B1 use class". In support of the contention that this was a misleading observation Mr Harwood relies upon the aspects of planning policy which are set out above bearing upon the creative industries in the area occupied by the site in question, coupled with the policies fostering the protection and development of economic activity. Those policies upon which reliance is placed are set out above.

88. In my view the submissions made on behalf of the defendant in relation to this ground are clearly correct. It is important to place the observation of the officers in context, and in particular in the context of reading the committee report as a whole. The first point to observe is that in the extracts of the committee report set out above, and elsewhere, officers set out and summarised the policy context related to employment development in a manner that is not criticised by the claimant in relation to its coverage. Secondly, and bearing in mind the only question of law for the court could

be whether or not planning policy has been misinterpreted, it is important to observe that nowhere in any of the policies relied upon by the claimant does the need to protect the specific and bespoke use operated by the claimant, and its particular requirements in relation to accommodation, arise. To that extent, therefore, in my view the officer's observation in paragraph 5.3.41 was not misleading, nor did it omit or misinterpret the relevant policies which were rehearsed in the committee report. The officers were not suggesting that there was no policy relevant to the claimant's use of the premises as an employment use, but that there was no policy specific to the claimant's use specifically.

89. Thirdly, that observation must be placed in the context of a wider discussion in the committee report of the requirements of policies such as CS17 and CS18 from the Core Strategy and DM16 in relation to affordable workspace which related to the wider objectives of protecting and enhancing employment provision and economic development, including a diversity of economic activity embracing the creative industries. The application of that raft of policies, and the weight to be attached to its various elements, were all a matter ultimately for the members of the planning committee. The approach which they adopted, and which is reflected in the conclusions of the committee report at paragraphs 6.2 and 6.5, reflected the need to appraise the application against the various policies, including in that appraisal the likely loss of the claimant's use. As recorded in paragraph 6.5 of the committee report the conclusion that was reached by the officers measured against the policies set out above was that the benefits of the proposal in terms of the employment it proposed weighed against the loss of the claimant's use, and rendered the application on balance acceptable. That was a conclusion which was reached based upon the correct interpretation of the policies that there was no policy requirement to retain the specific type of use operated and required by the claimant, but that nonetheless the loss of the claimant's use was relevant to the considerations comprised in the policies related more generally to employment activity. Whilst as a matter of planning merit that balance might be struck in different ways, there was in my judgement nothing unlawful in the way in which the policies were interpreted or the considerations taken into account in the balance set out in the committee report. I do not therefore consider that the claimant's complaints in relation to ground three have been made out on analysis.

90. For all of the reasons which have been set out above I am satisfied that the claimant should succeed in relation to ground one of this judicial review, but that grounds two and three should be dismissed, and that the defendant's decision in relation to the interested party's planning application should be quashed.

**Judgment Approved by the court for handing down.**

Appendix 1:

**Summary Appraisal for Phase 1**

**Currency in £**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| **REVENUE** | | | | | | | |
| **Sales Valuation** | **Units** | **ft²** | **Rate ft²** | **Unit Price** | **Gross Sales** | | |
| Market Sale | 50 | 37,297 | 907.71 | 677,100 | 33,855,000 | | |
| **Rental Area Summary** | | | | | | | |
| | **Units** | **ft²** | **Rate ft²** | **Initial MRV/Unit** | **Net Rent at Sale** | **Initial MRV** | **Net MRV at Sale** |
| Commercial | 1 | 37,329 | 35.00 | 1,306,515 | 1,110,538 | 1,306,515 | 1,110,538 |
| A3 use | 1 | 1,249 | 20.00 | 24,980 | 24,980 | 24,980 | 24,980 |
| Block A Converted | 1 | 11,690 | 28.00 | 327,320 | 278,222 | 327,320 | 278,222 |
| Ground Rents | 50 | | | 350 | 17,500 | 17,500 | 17,500 |
| **Totals** | 53 | 50,268 | | | 1,431,240 | 1,676,315 | 1,431,240 |
| **Investment Valuation** | | | | | | | |
| **Commercial** | | | | | | | |
| Manual Value | | | | | 21,210,000 | | |
| **A3 use** | | | | | | | |
| Manual Value | | | | | 395,000 | | |
| **Block A Converted** | | | | | | | |
| Manual Value | | | | | 5,320,000 | | |
| **Ground Rents** | | | | | | | |
| Current Rent | 17,500 | YP @ | 8.5000% | 11.7647 | 205,882 | | |
| | | | | | **27,130,882** | | |
| **GROSS DEVELOPMENT VALUE** | | | | | **60,985,882** | | |
| | | 6.80% | (1,844,900) | | | | |
| Purchaser's Costs | | | | | (1,844,900) | | |
| **NET DEVELOPMENT VALUE** | | | | | **59,140,982** | | |
| Income from Tenants | | | | | 11,667 | | |
| **Additional Revenue** | | | | | | | |
| 49 Eagle Wharf Road | | | | 705,000 | | | |
| Unit 1, 50 Eagle Wharf Road | | | | 114,000 | | | |
| Unit 2, 50 Eagle Wharf Road | | | | 150,000 | | | |
| Units 3&4, Eagle Wharf Road | | | | 531,000 | | | |
| | | | | | 1,500,000 | | |
| **NET REALISATION** | | | | | **60,652,649** | | |
| **OUTLAY** | | | | | | | |
| **ACQUISITION COSTS** | | | | | | | |
| Residualised Price | | | | 12,298,787 | | | |
| Stamp Duty | | | | 604,439 | | | |
| Agent Fee | | | 1.00% | 122,988 | | | |
| Legal Fee | | | 0.50% | 61,494 | | | |
| | | | | | 13,087,708 | | |
| **CONSTRUCTION COSTS** | | | | | | | |
| **Construction** | **ft²** | **Rate ft²** | | **Cost** | | | |
| Commercial | 46,479 ft² | 234.46 pf² | | 10,897,466 | | | |
| A3 use | 1,367 ft² | 234.46 pf² | | 320,507 | | | |
| Block A Converted | 14,273 ft² | 234.46 pf² | | 3,346,448 | | | |
| Market Sale | 49,557 ft² | 234.46 pf² | | 11,619,134 | | | |
| **Totals** | **111,676 ft²** | | | **26,183,555** | **26,183,555** | | |
| Contingency | | 2.10% | | 549,855 | | | |
| Mayoral and Borough CIL | | | | 1,412,644 | | | |
| Section 106 | | | | 421,267 | | | |
| Additional Contributions | | | | 166,089 | | | |
| | | | | | 2,549,855 | | |
| **PROFESSIONAL FEES** | | | | | | | |
| Professional Fees | | 10.00% | | 2,618,355 | | | |
| | | | | | 2,618,355 | | |
| **MARKETING & LETTING** | | | | | | | |
| Marketing | | 3.00% | | 1,015,650 | | | |
| Letting Agent Fee | | 10.00% | | 143,124 | | | |
| Letting Legal Fee | | 5.00% | | 71,562 | | | |
| | | | | | 1,230,336 | | |

**Judgment Approved by the court for handing down.**

| | | | |
|---|---|---|---|
| **DISPOSAL FEES** | | | |
| Sales Legal Fee | 0.50% | 169,275 | |
| | | | 169,275 |
| **FINANCE** | | | |
| Debit Rate 6.75% Credit Rate 1.00% (Nominal) | | | |
| Total Finance Cost | | | 4,482,557 |
| **TOTAL COSTS** | | | **50,321,641** |
| **PROFIT** | | | |
| | | | **10,331,008** |

| **Performance Measures** | |
|---|---|
| Profit on Cost% | 20.53% |
| Profit on GDV% | 16.94% |
| Profit on NDV% | 17.47% |
| Development Yield% (on Rent) | 2.84% |
| Equivalent Yield% (Nominal) | 5.78% |
| Equivalent Yield% (True) | 5.99% |
| IRR | 18.62% |
| Rent Cover | 7 yrs 3 mths |
| Profit Erosion (finance rate 6.750%) | 2 yrs 9 mths |

A.C.

[HOUSE OF LORDS]

BUSHELL AND ANOTHER . . . . . RESPONDENTS

AND

SECRETARY OF STATE FOR THE ENVIRONMENT . . . . . APPELLANT

1979 Nov. 19, 20, 21, 22, 26, 27, 28;
1980 Feb. 7

Lord Diplock, Viscount Dilhorne, Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Lane

*Highway—Motorway schemes—Public inquiry—Traffic forecasts—Publication on traffic forecasting by Department of Environment put in evidence—Cross-examination by objectors disallowed by inspector—Method of forecasting subsequently altered—Refusal of Secretary of State to reopen inquiry—Whether breaches of natural justice—Government policy—Whether suitable for investigation at local inquiry—Highways Act* 1959 (7 & 8 *Eliz.* 2, *c.* 25), *s.* 11, *Sch.* 1, *para.* 9

The Secretary of State for the Environment in 1972 published two draft schemes under section 11 of the Highways Act 1959 for the construction of motorways and connecting roads. Following objections to the schemes, a public local inquiry was held. The Highways (Inquiries Procedure) Rules 1976 were not in force at the time of the inquiry, though the Secretary of State had announced his willingness to comply with rules in substantially the same terms. At the inquiry, counsel for the Department of the Environment stated that a publication by the department known as "the Red Book" had been used by them as the standard basis for assessing future traffic growth and thus the need for the motorways. Objectors including the applicants, who challenged that need, sought to cross-examine the witnesses who gave evidence on the department's behalf to test the accuracy of the traffic predictions contained in the Red Book, but the inspector ruled that he would not permit the witnesses to be cross-examined as to the need for the motorways or as to the reliability of the Red Book, although he permitted the objectors to call their own evidence as to the need for the motorways. In his report, he recommended that the schemes be made. After the close of the inquiry and before his report was made, the department issued new design flow standards that showed that the existing roads in the area could take considerably more traffic than had previously been estimated and a revised method of predicting traffic growth that resulted in predictions of slower growth than the Red Book method, but the Secretary of State declined a request by the objectors for the inquiry to be reopened for those matters to be investigated, saying that such representations as they wished to make as to the need for the motorways in the light of the new estimates could always be considered by him as part of the continuous consideration of any of the department's proposals. He told the objectors that if the new information led him to disagree with the inspector's recommendations they would be

given an opportunity to comment on it. In his decision letter, he said that the general changes relating to design flow standards and traffic forecasts that had taken place since the inquiry had been fully taken into account by him and that he was satisfied that they did not materially affect the evidence on which the inspector had made his recommendations. He made the schemes. The applicants applied under Schedule 2 to the Act of 1959 for them to be quashed, on the grounds, inter alia, that the inspector had been wrong in law to disallow cross-examination of the department's witnesses on the Red Book and that the Secretary of State had since the inquiry taken into account undisclosed information and evidence going to the fundamental issues thereat, including, in particular, the need for the motorways, those being matters that might reasonably have caused the inspector to reach other conclusions. Sir Douglas Frank Q.C., sitting as a deputy judge of the Queen's Bench Division, dismissed the application, but the Court of Appeal by a majority (Lord Denning M.R. and Shaw L.J., Templeman L.J. dissenting) allowed an appeal by them and quashed the schemes.

On appeal by the Secretary of State: —

*Held*, allowing the appeal (Lord Edmund-Davies dissenting), (1) that in the absence of statutory rules as to the conduct of a local inquiry under the Act of 1959, the procedure to be followed was a matter of discretion for the Secretary of State and the inspector, the only requirement of the Act being that the procedure had to be fair to all concerned, including the general public and supporters of the scheme in question; that what was fair, including whether cross-examination of a witness should be allowed, would depend on the subject matter of the particular inquiry and was to be judged in the light of the practical realities as to the way in which administrative decisions involving judgments based on technical considerations were reached; that the use by the department of the concept of traffic needs in the design year of the motorway assessed by a particular method as the yardstick for determining the order in which particular stretches of the national motorway network should be constructed was a matter of government policy in the sense that it was a topic unsuitable for investigation by individual inspectors at individual local inquiries; and that, accordingly, the inspector's refusal to permit cross-examination of the department's witnesses as to the reliability and statistical validity of the methods of traffic prediction disclosed in the Red Book had not been a breach of the rules of natural justice (post, pp. 93F–G, 94H—95E, 96D–F, 97D–F, 98G–H, 100B–C, G—101A, 102B, 108G—109B, 119A, 121A, G—122E).

Dictum of Lord Greene M.R. in *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395, 399–400, C.A. applied.

(2) That the Secretary of State had not been bound to communicate the departmental advice that he had received after the close of the inquiry to the objectors to give them an opportunity of commenting on it, nor had it been a breach of the rules of natural justice for him to refuse to reopen the inquiry in order to give them an opportunity of criticising the department's revised methods of estimating comparative traffic needs; and that, accordingly, the schemes had been validly made (post, pp. 103D–E, 110D–E, 119A, 123H—124A).

Decision of the Court of Appeal (1979) 78 L.G.R. 10 reversed.

The following cases are referred to in their Lordships' opinions:

*Annamunthodo* v. *Oilfields Workers' Trade Union* [1961] A.C. 945; [1961] 3 W.L.R. 650; [1961] 3 All E.R. 621, P.C.

*Errington* v. *Minister of Health* [1935] 1 K.B. 249, C.A.

*Fairmount Investments Ltd.* v. *Secretary of State for the Environment* [1976] 1 W.L.R. 1255; [1976] 2 All E.R. 865, H.L.(E.).

*General Medical Council* v. *Spackman* [1943] A.C. 627; [1943] 2 All E.R. 337, H.L.(E.).

*Johnson (B.) & Co. (Builders) Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395, C.A.

*Marriott* v. *Minister of Health* (1935) 52 T.L.R. 63.

*Miller* v. *Weymouth and Melcombe Regis Corporation* (1974) 27 P. & C.R. 468.

*Reg.* v. *Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 Q.B. 456; [1965] 2 W.L.R. 89; [1965] 1 All E.R. 81, C.A.

*Wednesbury Corporation* v. *Ministry of Housing and Local Government (No. 2)* [1966] 2 Q.B. 275; [1965] 3 W.L.R. 956; [1965] 3 All E.R. 571, C.A.

The following additional cases were cited in argument:

*Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.N.S. 180.

*Darlassis* v. *Minister of Education* (1954) 4 P. & C.R. 281; 52 L.G.R. 304.

*Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87; [1947] 2 All E.R. 289, H.L.(E.).

*Hopkins* v. *Smethwick Local Board of Health* (1890) 24 Q.B.D. 712, C.A.

*Lake District Special Planning Board* v. *Secretary of State for the Environment* [1975] J.P.L. 220.

*London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2) 1938, In re* [1939] 2 K.B. 515; [1939] 2 All E.R. 464, D.C.

*Lovelock* v. *Secretary of State for Transport* [1979] R.T.R. 250, C.A.

*Nicholson* v. *Secretary of State for Energy* (1977) 76 L.G.R. 693.

APPEAL from the Court of Appeal.

This was an appeal by the Secretary of State for the Environment by leave of the Court of Appeal (Lord Denning M.R., Shaw and Templeman L.JJ.) from their decision on July 30, 1979, by which by a majority (Templeman L.J. dissenting) they allowed an appeal by the applicants, John Bushell and Terence James Brunt, from a decision of Sir Douglas Frank Q.C., sitting as a deputy judge of the Queen's Bench Division, on December 9, 1977 (1977) 76 L.G.R. 460. By that decision, Sir Douglas Frank dismissed an application by the applicants, the owners respectively of Lea End Farm, Alvechurch, Birmingham 48, and leasehold property 27, Alvechurch Highway, Bromsgrove, Worcestershire, for an order quashing the M42 Birmingham-Nottingham Motorway (Catshill and Lydiate Ash to Monkspath Section) and Connecting Roads Scheme 1976 and the M40 London-Oxford-Birmingham Motorway (Umberslade to Warwick Section) and Connecting Roads Scheme 1976. The grounds of their notice of motion, dated September 29, 1976, were that the schemes were not within the powers of the Highways Acts 1959 to 1971

and/or that the requirements of the Acts had not been complied with in that there had been a substantial breach of natural justice in the course of the public inquiry into the proposed schemes or orders and in the manner in which the Secretary of State for the Environment had reached his decisions, in that: (a) in the course of the inquiry the inspector had refused to hear evidence, or any sufficient evidence, of traffic need and the method adopted by the Department of the Environment for projecting traffic need; he had declined to order or require that the department produce evidence of such matters and refused to permit the representatives of the applicants to cross-examine or otherwise challenge witnesses called by the department in those regards; . . . (c) the Secretary of State had, since the inquiry, taken into account undisclosed information and evidence going to the fundamental issues at the inquiries, viz. matters of road capacities and changed criteria for calculating the same, changes in economic circumstances affecting demand and need and changes in actual traffic on relevant existing roads in the Oxford-Birmingham corridor and around the Birmingham conurbation, being matters that might reasonably have caused the inspector to reach other conclusions; alternatively, that the Acts impliedly required that the objections of the applicants should be fairly and properly considered by the Secretary of State and that the Secretary of State should give fair and proper effect to the result of such consideration in deciding whether the schemes should be made and that those implied requirements had not been complied with.

The facts are set out in their Lordships' opinions.

*Geoffrey Rippon Q.C.*, *Konrad Schiemann* and *David Holgate* for the Secretary of State. Traffic forecasts are of their nature uncertain. How often must the Secretary of State reopen the inquiry? [Reference was made to the Highways Act 1959, ss. 7 (2), 11 (4) (5) (6), 279; Sch. 1, Pt. II, paras. 9, 10, Sch. 2, paras. 2, 3.]

This is not a case of failure to comply with the requirements of the Act, but simply of " did they have a fair crack of the whip? " The rules of natural justice apply at the inquiry and to the Secretary of State. They apply all the way through. (There is no power in the Act to quash the Secretary of State's decision on the ground of failure of the inspector to allow cross-examination.) There were at the relevant time no statutory rules applicable to inquiries.

The Secretary of State goes further than paragraph 8 (v) of his printed case: " The [Secretary of State] submits that the duty to act fairly and the rules of natural justice do not go beyond the provisions of the Lord Chancellor's Rules [Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967 (S.I. 1967 No. 720); Highways (Inquiries Procedure) Rules 1976 (S.I. 1976 No. 721)] in respect of the complaints made by the [applicants]." The applicants have had a fair crack of the whip. Natural justice must apply at least up to the point of the decision letter. Rules 15 (2) of the Highways (Inquiries Procedure) Rules 1976 gives a guideline to the application of the rules of natural justice. [Reference was made made to rule 11 (2).] It is difficult to conceive of a case where one could say: " this was manifestly not policy." If the

A inspector was wildly wrong, then one might be able to say that the applicants did not have a fair crack of the whip and that natural justice could apply. It is conceded that the Secretary of State's decision could be interfered with on the ground of natural justice if the applicants were prejudiced, but the Secretary of State urges the consideration that the inspector may not be a lawyer. If in good faith he says that a witness should not be cross-examined, he has done the best he can under the B rules. He must have some discretion as to the conduct of these inquiries. If he exercise it totally unreasonably, that could be bad faith. Rule 6 (2) of the Rules of 1976 appears to give him some discretion; see also rule 9 (3). The rules of 1976 were not applicable to this inquiry. The House has to consider not whether this was a matter of policy but whether the inspector's decision was unfair and whether the applicants were prejudiced.

C [VISCOUNT DILHORNE. Do you accept that the question of the need for the motorway was one of the most important issues at the inquiry?]

One might accept that as a subjective view. Thitherto, the most important matter had been thought to be the line that the motorway was to take. The question of need was not one of the most important issues in the mind of the Secretary of State. His first consideration was D his duty under section 7 (2) of the Act of 1959.

The question whether the Red Book was out of date was not a proper one for the departmental witness. It was for Parliament to complain to the Secretary of State that it was out of date. With hindsight, perhaps the witness could have been asked: " are you competent to answer questions on this? " and he would have said " no." It was not a matter on which he had authority to answer questions. He would not E have been entitled to do so. He might have been able to give evidence, as a traffic engineer, about the forecasts in relation to the present case; it does not follow that he could have answered questions about the Red Book, which is concerned with forecasts on a national basis. One could not have got him to get up and say that he did not agree with it: he would have had to say: " it is my starting-point."

F If one looks at the whole of the inspector's report and of the Secretary of State's decision letter, it cannot be said that the whole inquiry should fall to the ground because of this one error, if it was an error, just to show what is accepted on this relatively minor matter; that the Red Book forecasts are not reliable. It is still a question whether the Secretary of State would have come to a different broad conclusion, having regard to all the other matters involved.

G It was right that need should be considered, but that was a matter for the discretion of the Secretary of State of the time. One may have views different from another. It may be a reasonable thing to allow local objectors to question need: the application of national policy so far as it concerns them; but not to question the national policy for a major trunk road. Sir Douglas Frank was right (1977) 76 L.G.R. 460, H 472–473. The witness could have been asked if he agreed with the Red Book. Its authors were the only people who could really speak as to the basis on which they had prepared it. The witness could perhaps have been asked to explain it, but he could not have been asked to disagree

with it, in the sense that its methodology was the methodology that it was government policy to use as a starting-point. A

On the subject of cross-examination, as Shaw L.J. said (1979) 78 L.G.R. 10, 19, the inspector must deal with matters according to the circumstances: quite apart from what the rules say, he must be given a fairly wide discretion. If the House thinks that the inspector here made a mistake, it should adopt the view that that failure, in the context of the whole inquiry and of the Secretary of State's decision, did not in any B way substantially prejudice the objectors.

As to reopening the inquiry, it is no good doing it in order to re-examine the Red Book. One may get a test of reasonable or fair opportunity from the judgment of Diplock L.J. in *Wednesbury Corporation* v. *Ministry of Housing and Local Government* (*No.* 2) [1966] 2 Q.B. 275, 300, 302.

There has here been compliance with the requirements of the Acts. C There has been no infringement of the rules of natural justice. The applicants were entitled to a fair crack of the whip, and that is what they got.

As to the reopening of the inquiry, the whole question is a matter for the Secretary of State's discretion. Lord Denning M.R. has two tests: 78 L.G.R. 10, 15, 18. The Secretary of State might have some difficulty in D exercising his discretion in the way that Lord Denning suggests. The reopening of the inquiry would be to examine a methodology in the Red Book that has been abandoned. Lord Denning M.R.'s judgment in *Lovelock* v. *Secretary of State for Transport* [1979] R.T.R. 250 is much more to the point than his judgment in the present case.

*Schiemann* following. Suppose that the inspector or the Secretary of State acted wrongly, what would be the consequences? So far as E cross-examination is concerned, the Secretary of State would speculate that the inspector took the view (which he himself is urging) that the government in its motorway programme generally has to make various assumptions regarding traffic many years ahead and that it is its policy to have a uniform set of assumptions as to general traffic growth in the country at large. These will include how traffic will grow; road, rail, etc. F Its policy is one of not allowing the policy of proceeding on those assumptions to be challenged.

It is very difficult in a 100-day inquiry to allow cross-examination. Objectors may not be there all the time: can they come and say that they want to cross-examine on some matter already dealt with? Transcripts are not always available. It is very difficult to devise a method that will be expeditious but foolproof and yet not wildly expensive. G

A failure to permit cross-examination would not necessarily lead to the conclusion that the action of the Secretary of State was not within the powers of the Act. The question whether there has been a refusal of natural justice to such a degree that nullity results or ought to result has to be looked at as at the time of the Secretary of State's decision, not as at the time of the inquiry. There was no prejudice here by any wrongful H refusal of cross-examination on the Red Book, because the Red Book has not been relied on by the Secretary of State. What the objectors sought to achieve they did achieve without cross-examination. [Reference was

made to *Fairmount Investments Ltd.* v. *Secretary of State for the Environment* [1976] 1 W.L.R. 1255.] Whether particular circumstances amount to substantial prejudice will vary from case to case, but see the principles set out by Kerr J. in *Miller* v. *Weymouth and Melcombe Regis Corporation* (1974) 27 P. & C.R. 468. That indicates an analysis of the situation; the Secretary of State does not say that the case is parallel to the present. Kerr J.'s ruling with regard to discretion has been followed in other cases at first instance. There is a generally received dictum at p. 476 that if there is a possibility that the applicant has been prejudiced the court will in general quash the decision, but there is a distinction between the position facing the court and the position facing the Secretary of State, both as regards cross-examination and as regards new evidence. The court cannot know whether the decision would have gone the other way if the evidence had been given, or the cross-examination had been permitted, etc. The Secretary of State knows what weight he would have given to evidence in cross-examination of a traffic engineer, or to the view of the inspector founded on such an answer.

The position as regards natural justice is obscure if one phrases the question in such a general way as "does the Secretary of State accept that natural justice requires cross-examination to be allowed?" In the last analysis, one has to ask oneself, in relation to a particular proceeding, whether Parliament envisaged that there must invariably be cross-examination of a minister's representative. There is no absolute requirement to allow cross-examination, still less a requirement to allow it on every topic. The Secretary of State accepts the Inquiries Procedure Rules, which are not strictly relevant, as embodying the principles that ought to have guided his decision.

As to the happenings since the inquiry, if one asks whether these vitiate the making of the schemes, there are two separate classes of matter arising since the inquiry that are alleged to be relevant: (1) the adoption by the Secretary of State of two different types of national standard: (a) the revised national volume of traffic forecasts (Department of the Environment, Directorate—General Highways, Technical Memorandum H 3/75, "Standard Forecasts of Vehicles and Traffic," February 1975); (b) the change in views as to the amount of traffic that a given design of road can be expected to carry (Technical Memorandum H 6/74, "Design Plans for Motorways and Rural All-Purpose Roads," August 12, 1974). (2) relates to the actual traffic counts for 1974/1975. On (1), the Leitch report (*Report of the Advisory Committee on Trunk Road Assessment*, 1977), which came after the Secretary of State's decision letter, it may possibly inform the court as to the exercise of discretion ("may quash"), but that is the highest that it can be put. [Reference was made to the evidence and analysis prepared by the applicants after August 1976 and presented to the Court of Appeal: see *per* Templeman L.J., 78 L.G.R. 10, 25.] It was recognised at the inquiry that one could go above the design flow standards; it was not said that they were something that could not be exceeded. The effect of the adoption of the revised standards on the decision is shown in the decision letter, paras. 11, 14, 112. It strengthened the objectors' case.

What weakened it was that the design year has been put further into the future, a sensible thing to do. A

On (2), the decision letter does not mention the 1974/1975 traffic counts. The Secretary of State did not take them into account. He cannot rely on a matter that is not in his decision letter, nor can the objectors if the complaint is the other way. The Secretary of State did not regard the results of the 1974/1975 censuses as a matter that should influence his decision. He accepts that he had those figures in B his department. He cannot normally go beyond the decision letter indicating who took a matter into account, at what stage and with what effect. He can rest with saying that the figures were not significant in his mind. He has to rest on the decision letter. It is not right for him to speculate as to whether he thought that they were irrelevant as being of no weight or whether he took them into account but gave them no, or little, weight. There is a whole variety of possible processes that may C have gone on in his mind. It is now for this House to say, from the documents, what he did take into account.

*Lord Gifford* and *Andrew Arden* for the applicants. The test that should be applied to both parts of this case in determining whether there has been a breach of the requirements of natural justice and the considerations to be taken into account have been considered in two recent D cases: *Lake District Special Planning Board* v. *Secretary of State for the Environment* [1975] J.P.L. 220; see transcript, pp. 14–16; *Nicholson* v. *Secretary of State for Energy* (1977) 76 L.G.R. 693 (on which the applicants rely). With regard to the *Lake District* case, substantial prejudice is not a matter that the court has to be satisfied on, but the applicants do not suggest that a mere technical error would necessitate E the Secretary of State's decision being quashed.

The applicants rely on the general test that both Kerr J. and Sir Douglas Frank suggested should apply to such a consideration: whether, viewing the matter as a reasonable man, there could be a risk of unfairness. That test is fully satisfied in the present case. The formulation of principle that the applicants would suggest is: in order to establish that there has been a breach of the requirements of natural justice, the appli- F cants need to show that there has taken place during the course of the procedure (whether at the inquiry or at the post-inquiry stage) something that a reasonable person, viewing the matter objectively and knowing all the facts, would consider had caused a risk of unfairness or injustice as a result.

The applicants accept that matters of general transport policy were not within the ambit of the inquiry in the sense of being matters that G the inspector had to consider in his quasi-judicial capacity. The applicants do not complain of the way in which the inspector dealt with the matter in paragraph 6 (f) (iii) of his report (see *per* Lord Edmund-Davies, post, p. 112F–G), but he put the Red Book into the wrong category: it was not policy at all, either in the dictionary sense or in the Lord Chancellor's Rules sense. There are, therefore, two consequences of the inspector H having ruled as he did that the Red Book forecasts fell into the policy category: (1) the evidence led by the department could not be tested in cross-examination; (2) the evidence and arguments raised on the

matter by the objectors were not accorded any weight by the inspector in his ultimate conclusions. He was regarding the matters put forward by the objectors (their submissions on the Red Book) as going in as a matter of courtesy: he was just letting the objectors blow off steam; it was not, in his view, a matter that fell to be considered.

The inspector in his report, para. 17, sets out certain policy assumptions as to general matters of policy that are outside the scope of the inquiry: that there is no forced restriction in the ownership of vehicles and that means of propulsion for road vehicles will be available in the foreseeable future; they are the current policy of the Secretary of State and it is not for the inspector to say that they are wrong: road use, fuel, rationing, etc.

The applicants do not agree that the purpose of the inquiry is solely or merely to inform the Secretary of State's mind as to the nature of the objections. That was an old view, taken, for example, by the House, of the New Towns Act 1946, in *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87. It is not sufficient today in relation to a motorway inquiry. The purpose of an inquiry under the Act of 1959 (and the position is the same whether it is a scheme of the Secretary of State or of a local authority) is to ensure that, where there has been an objection to a scheme, the facts and arguments relevant to that scheme are to be ascertained and weighed by an independent person in a quasi-judicial manner. Factual matters are matters that only an inquiry can properly test, so, where facts are put forward, as, for example, in the Red Book, they should be examined. The inquiry takes place against a background of national policy, and that cannot be questioned.

The evidence given by the traffic engineer, Mr. Brooks, shows that he had considerable knowledge of the Red Book. The applicants wanted to get from him in cross-examination that the Red Book forecasts were so variable that they were in no way a useful guide. They would have expected to be able to show the inspector that the Red Book was a document on which little or no reliance could be placed. The question is whether he should have placed on it the conclusions that he did. It was the forecasts in this case that were decisive; three passages in the report bear this out: para. 573, dealing with "general environmental objections" (a matter of very fine judgment), para. 567 ("Traffic forecasts") and para. 623 ("Need for the proposals").

Whatever figures one uses, a fundamental is what future growth will be. The whole process of extrapolation (going by the Red Book, subject to very minor adjustments, and taking a percentage nationally as an approach to forecasting) was a process that the objectors wished to attack. They were effectively prevented even from putting forward a positive case because of what the inspector said at the outset of the inquiry. They were told that it would be irrelevant. That has been their case from the outset. The question is whether the inspector (not the Secretary of State) regarded the Red Book as gospel. The objectors had a right to have the matter investigated by an independent person.

There would not have been a denial of natural justice if, Mr. Brooks having disclaimed ability to deal with the Red Book, the Secretary of

State had refused to send someone else. That would, however, have resulted in the inspector putting less weight on the Red Book. A

The substance of the applicants' complaint only becomes apparent when one considers the Leitch report, in which there is a thorough condemnation of the methods used in the Red Book. A government department does not have a monopoly of received wisdom in relation to such matters, and justice cannot, therefore, be done by leaving them to be assessed by the department's own experts. The objectors have the right B to have the matter tested at a public inquiry, and in English law cross-examination is the recognised and proper method of testing disputed evidence of this kind.

Combining those submissions with the facts of the case, there is plainly a risk that injustice has resulted through the loss to the objectors of the chance that the inspector would have concluded that he should not be " generally guided " by the forecasts supplied and that, therefore, C the absolute necessity that could alone, in his view, justify the schemes was not made out. He should have reported that the environmental objections to the schemes were so great that the material before him did not convince him that they should nevertheless be confirmed. The objectors were constructive in the sense that they put forward alternative suggestions. D

There was a serious case to be put forward here and the failure by those who relied on the Red Book to allow it to be tested in cross-examination was a failure that must have resulted in injustice, and in unfairness, which is a linked but slightly different concept.

The exception contained in the Lord Chancellor's Rules to the general rule that cross-examination is permitted (that it should be disallowed if it goes to the merits of government policy) is limited to E matters of general political judgment in which values and opinions determine what is done. It does not cover matters of fact or matters of expert opinion or matters of science or the compilation of statistics: these are for the court to determine. As to the meaning of " policy," see the *Report of the Committee on Administrative Tribunals and Inquiries* (1957) (Cmnd. 218) (" the Franks report "), paras. 314 et seq., F 318. The applicants emphasise the central importance of the inspector's recommendation. Each objector has the right to be heard, and to cross-examine, though the inspector can say that the point has already been put and an answer given. The Franks Committee's recommendation, at para. 343, that the inspector's report should be published wherever possible does more easily conduce to control by Parliament. If there were no published report, one could more easily say that the purpose of the G inquiry was just to inform the mind of the Secretary of State.

It may have been futile to say that the M1 motorway was not needed as a matter of policy, but that cannot shut off factual material on the matter. The government's policy to build motorways was not properly considered as a matter of policy. It is a fair statement of policy to have a satisfactory network of roads, but the statement of policy in paragraph H 1 (2) of the inspector's report is not properly a statement of policy at all; it is ultra vires and unjustified and should be struck out: see the Act of 1959, Sch. 1, para. 9.

A It was not enough to permit the objectors merely to put forward their opinions as to why the schemes were not needed; it was also a requirement of natural justice in the context of this kind of hearing that they should know what case they had to meet.

What comes out of the Franks report, paras. 262–277, is that the inquiry process has been made subject to important safeguards to ensure that natural justice, in a very developed form, applies, bearing in mind B that after the inquiry, subject to any fresh evidence, the final decision is an administrative, policy decision based not only on the facts reported on but also on other considerations: see the Tribunal and Inquiries Act 1971, s. 11; the Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules 1962 (S.I. 1962 No. 1424), the Rules of 1967, rr. 5, 6, 7, and the Rules of 1976. At all times during the inquiry stage, the Secretary of C State is engaged in a quasi-judicial process, as is the inspector, and the requirements of natural justice must be observed.

The loss of the chance of a favourable recommendation by the inspector amounts to a breach of natural justice. The applicants accept that the requirements of natural justice are not a set of rules and that when there is a public hearing the situation is very different from what it is when it is held behind closed doors by a committee. It varies from case to case. D In the context of public inquiries, however, where Parliament has decreed that there should be a hearing, an investigation, natural justice requires not merely knowing what the case is that one has to meet but also the testing of that case through the time-honoured method of cross-examination, which alone in our system is the satisfactory method of testing. The function of the inspector is not merely to hear and report upon objections. E Under the Rules applicable in practice, and now by law, he has a duty either to make recommendations to the Secretary of State or to give reasons for not making recommendations. There must be a good reason for not making recommendations: for example, if the evidence before the inspector is insufficient for him to form a conclusion, or if, on an assessment of the material before him, factors are so evenly balanced that only F from the application of policy considerations could a decision emerge. In making recommendations, the inspector must consider the evidence and arguments submitted by both the promoting authority and the objectors, for ". . . an objection cannot reasonably be considered as a thing in itself, in isolation from what is objected to" (the Franks report, para. 271).

*Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.N.S. 180, 187, shows that from then on the reason for this implied duty to comply with G the rules of natural justice is not that there is a lis but because of the nature of the act done. [Reference was made to the Tribunals and Inquiries Act 1958 and to the Town and Country Planning Act 1959, s. 33.] The applicants do not submit that one looks only at the rules of procedure to see what the requirements of natural justice are, but the rules have been devised under the authority of Parliament and to give effect to the recom- H mendations of the Franks committee. The court has quite independently its own rules, safeguards, referred to compendiously as "the principles of natural justice." The two are thus not mutually exclusive. One must look at the development of natural justice by the courts. [Reference was

made to *Hopkins* v. *Smethwick Local Board of Health* (1890) 24 Q.B.D. 712, 714; *Errington* v. *Minister of Health* [1935] 1 K.B. 249.] *In re London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2)* 1938 [1939] 2 K.B. 515 was not correctly decided, even at that time. The decision was based on the fact that it was a different sort of inquiry and, therefore, there was no need for any evidence to be called in support of the proposals and no denial of natural justice in refusing to allow any cross-examination. Given that that compulsory purchase order was as much an interference by a public authority with private property, the protection given to objectors ought to have been the same. If that is wrong, *In re London-Portsmouth Trunk Road* certainly does not represent the position today. That would today be regarded as in contravention of the rules of natural justice. The Act of 1959 brings schemes of the minister and of the local authority into one enactment and applies the requirement for a local inquiry to both without distinction. Parliament must have envisaged that there would be an inquiry with the same safeguards in each case. Secondly, there has been a further assimilation of the principles applicable to a minister's scheme and to a local authority's scheme by the adoption of uniform rules.

In relation to what task is the minister required to act fairly? See *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87, where there was a limited inquiry: see *per* Lord Thankerton, at p. 106, whose general statement does not apply in the present case; *Lovelock* v. *Secretary of State for Transport* [1979] R.T.R. 250; *Marriott* v. *Minister of Health* (1935) 52 T.L.R. 63, 66–67. The purpose of the inquiry is to inform not just the Secretary of State but also Parliament and the public at large. The Secretary of State is answerable for his final decision to Parliament. Parliament, and the general public, however, have neither the time nor the expertise to ascertain or weigh the relevant facts. The inquiry process, if carried out quasi-judicially, provides Parliament and the general public, including the objectors, with the means of judging the Secretary of State's policy decision. The value of the inspector's report is that it provides for Parliament "the advantage of being able to understand the pros and cons of the matter": *per* Lord Pearce in *Padfield* v. *Ministry of Agriculture, Fisheries and Food* [1968] A.C. 997, 1054

On cross-examination, see *Marriott* v. *Minister of Health*; *Errington* v. *Minister of Health* [1935] 1 K.B. 249; *Wednesbury Corporation* v. *Ministry of Housing and Local Government (No. 2)* [1966] 2 Q.B. 275, 302; *Nicholson* v. *Secretary of State for Energy*, 76 L.G.R. 693, 701, 702.

As to the facts on the second issue (the facts that occurred subsequent to the inquiry), that design capacity means the desirable level is not in accordance with the inspector's report. The new capacities can also be exceeded. It is manifestly unfair that a decision should be made on such changes without reference to the objectors. They made representations to the Secretary of State, but that is not good enough. They should have had the opportunity to have the new situation objectively weighed by the inspector. They were entitled to have their views on that matter heard. Secondly, the traffic census carried out in August 1974 showed the department's figures to be entirely wrong.

A As to where one draws the line with regard to new material constantly coming into the department, the court must look at the particular material and determine whether it is of such importance that injustice has resulted through its not having been referred to the objectors. In many cases, but not the present, the objectors could be satisfied by a letter from the Secretary of State. In the particular circumstances of this case, he probably would have been under an obligation to cause the inquiry to be B reopened. The applicants put it in that way because they do not have to go that far: the Secretary of State never even informed them of the material that he considered significant and of how significant he thought that it was and allowed them to comment on it. He never informed them at all: the applicants rely on his letter of May 25, 1976 [see *per* Viscount Dilhorne, post, p. 109F–G]. [Reference was made to Technical C Memorandum H 3/75.]

It is elementary that, where one has sought by various means to predict that at a certain date a certain volume of traffic will be travelling on certain roads, one must compare that hypothesis with reality and test and evaluate it in that light, making such adjustments as are necessary due to unforeseen happenings: for example, in the present case, the 1974 oil crisis.

D The general propositions that govern the court's attitude to a complaint of the present kind are as follows. 1. The duty to observe the principles of natural justice continues beyond the close of the inquiry. 2. It is a well-established principle of natural justice that new matter should not be taken into account by the minister without the parties concerned having an opportunity to deal with it. This is subject to three qualifications: (i) E the minister is entitled to have regard to matters of policy (including changed policy); (ii) he is entitled to have regard to matters outside the ambit of the inquiry; (iii) the new matter must be one of substantial importance. 3. In considering what the Secretary of State ought to do, the court must look at all the circumstances: sometimes it may be enough for the Secretary of State to invite representations; sometimes the matters in question will be so substantial that the reopening of the inquiry will F be called for. All the rules (those of both 1967 and 1976) seek to apply natural justice.

The applicants put their case higher than saying that no reasonable minister here could have failed to reopen the inquiry. The discretion to reopen must be exercised so as to conform with the principles of natural justice. Those principles plainly apply in the present case. [Reference G was made to *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395.]

So far as natural justice is concerned, it makes no difference whether the relevant material was obtained by the Secretary of State himself or through his department. [Reference was made to *Darlassis* v. *Minister of Education* (1954) 4 P. & C.R. 281.] If the new matter that comes to H light is of a substantial nature and affects the material that was relevant to and debated at the inquiry, natural justice requires that the objectors should have the opportunity of dealing with it. That is the case whether the deciding authority is a minister of state or some other body and

whether the new information is matter that has been gathered by the minister or by the department or comes from elsewhere. This is because the purpose of requiring the deciding authority to give the respective parties an opportunity to deal with the new material (which is a purpose that applies to all the kinds of decision to which natural justice applies) is that the persons affected must have knowledge of the case that they have to meet: see *Errington* v. *Minister of Health* [1935] 1 K.B. 249. No distinction should be drawn between a scheme of this kind and one promoted by a local authority. There is nothing in principle or authority that should lead the House to hold that natural justice does not apply, or applies in some less measure, because it is the minister who has promoted the scheme. On the contrary, the law on natural justice shows that it is the person or body who decides and who may have initiated the process who still has to apply the principles of natural justice. It is the nature of the thing done that requires the application of natural justice: see *Cooper* v. *Wandsworth Board of Works,* 14 C.B.N.S. 180.

If the scheme is quashed, the consequence is that the Secretary of State, if he wishes to continue to promote it, must hold an inquiry according to law. He has not got to start again; he can reopen the inquiry to deal with such matters as were either not sufficiently dealt with before (cross-examination on the traffic forecasts) or are new.

*Arden* following. From the cases cited, and many other cases dealing with the subjects both of natural justice and of the inquiry process, a framework and a pattern emerges that, when applied to the present case, suggests most forcefully that the applicants did not have what may variously be termed "a fair hearing" or a "fair crack of the *Fairmount* whip."

It is an elementary proposition that the property rights of individuals are not lightly to be interfered with, not to be interfered with without what the Americans call "due process." For a long time, Parliament was most cautious in its approach to the growing demands of administration for property. Commissions of inquiry were appointed; there were direct parliamentary hearings. With the growth of local administration, following the early public health reports of the 1830s, this became impracticable and so-called administrative powers of appropriation or interference with property were accorded to various administrative bodies. The response of the courts to this was forthright: natural justice demanded that a man receive notice of an intended encroachment on his rights in his own property. He was entitled, at the least, to a fair consideration of the matter. The term was used, not in the public inquiry sense "a fair hearing." Reference is made to this history because it is important not to lose sight of the reason why the courts inserted this requirement. It was not for the sake of the hearing itself. That would be an empty right. The court is concerned not with the form but with the substance of the right. It is for the sake of what the hearing affords, of what protection the law gives to the individual whose rights are to be interfered with. The question becomes: what does that protection amount to? Not merely that the local authority should take the individual's representations into account, for that, too, would necessarily be implied as a rele-

A vant consideration. Natural justice has always meant a higher standard than the mere administrative test of "taking into consideration." Its import has always been protection, and, once Parliament had entrusted an administrative body with the relevant powers to interfere with property, the only protection that the courts could offer was the concept of the fair hearing, and its consequence that during the hearing stage there would be a fair and balanced consideration of the relevant matters, albeit that at B the end of the day the public authority would have the power so to weigh up the material that it had gathered in that decision-making process according to its policies and the public interest.

The inquiry process is no more than Parliament's equivalent of, but never a substitute for, a similar processing of the material relevant to a decision. To some extent, the objective is the same: to protect the rights C of individuals affected. To some extent, there is said to be the purpose of "informing the minister's mind," a purpose hardly inconsistent with or mutually exclusive of protecting individuals; one might say that it would be sad indeed if the two were automatically mutually exclusive. To some extent, there is the proposition, as set out in *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, of permitting Parliament to weigh the pros and cons: the "parliamentary answerability" of the D minister. This last purpose is designed to achieve an effect not qualitatively different from that which the courts intend through natural justice, that is, that if a person is deprived of property through the judicial process, through the courts, then he has his redress in the appeal structure. It is trite to remark that there is no appeal from a decision of a minister, and clearly there is not to the courts. There remains, however, an appeal E within the political process. This may appear theoretical, for elections today are not lost and won on individual clearance schemes, nor on motorway schemes. The prospect remains, however, of utilising the political process, whether through one's member of parliament or through the democratic process, of making an issue of an administrative intervention in a most basic property right itself. This redress is only effective if it is possible to point to a case and say: that was a "political" act in the F sense of its being an act based on policy or on a particular conception of public benefit. It affords as much protection to the administrator as it does to the individual, for the administrator is entitled to be protected from attack for his least political, most common-sense actions; for example, in relation to the clearance of a slum property that no reasonable man, or inspector, could think worth preserving.

G Whether by means of natural justice or by compliance with what the law understands by an adequate and proper inquiry it should properly be seen that protection of the individual is afforded to him by application of the relevant facts of the situation under consideration. It is that protection that the courts must uphold. If administrators could apply this process not to the relevant or correct facts of the situation but to a H hypothetical case structured to secure the finding at the end of that process that justifies the decision, it would have taken away from the individual in question the right to a fair and impartial assessment. The quid pro quo is that, if the fair and impartial assessment does justify the decision,

then so much the less is the minister politically answerable. In the present case, the Secretary of State has proceeded on what is now shown to be an entirely incorrect premise; it is incorrect not just because the Leitch Committee deprecated its use but also because the figures that came to light before the decision did not bear out the predictions. Further, design standards, the road capacities, were revised, again before the decision. Lastly, there was a revision of the predictions, before the decision. In this case, given the finely balanced nature of the inspector's decision, there is a strong possibility, or even a likelihood, that the inspector would now say that, on the grounds of traffic need, this scheme was not justifiable.

*Rippon Q.C.* in reply. As to the consequences of the quashing of these schemes, there is at any rate very considerable doubt as to what the consequences of a " semi-quash " are. Technically, the court quashes the schemes, but it is very important that the Secretary of State should know at what point the inquiry should be reopened. At any time now, he may resolve the difficulty regarding extrapolation and the causative element. The same inspector may not be available, but that is not essential. The supporters of the schemes might also want to be heard. One has to look at the particular Act and at the procedure that that particular Act requires.

In looking at the purpose of an inquiry, help can be found in the opinion of Lord Thankerton in *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87. The basis test is fairness, and, if one looks at the whole of the inspector's report and the decision letter in the present case, the inspector and the Secretary of State have acted fairly and responsibly. The objectors were in no way prejudiced by the conduct of the inquiry and the decision-making process. They have been heard at every stage. It cannot be said that there were circumstances here in which no reasonable minister could have failed to reopen the inquiry or in which no reasonable inspector could have made the recommendation that the inspector made. One cannot say: " if any inspector had known that, he would have changed his mind." One can go on making representations up to and after the decision letter.

It is difficult to conceive of an inquiry where there will not be a mass of new material coming to the minister. There may well be political pressure on him to reopen the inquiry.

The withdrawal by the Secretary of State of paragraph 1.2 of his statement of case at the inquiry [see *per* Viscount Dilhorne, post, p. 106G] did not open a debate on national transport strategy. The Secretary of State was saying as his starting point that it was his policy to adopt this methodology nationally. (Noise standards also change from time to time; cross-examination on his methodology as regards noise should also have been excluded.)

The Secretary of State adopts the judgment of Templeman L.J.

" Need " for the Secretary of State covers a wider spectrum than it does for an inspector at a particular local inquiry. Some help as to " policy " may be found from both the *Oxford English Dictionary* and the *Shorter Oxford English Dictionary*.

A The question is not whether the Red Book was right or wrong: it was neither right nor wrong. It was not gospel and was not treated as such. It was the best methodology available at the time. Equally, the Leitch methodology is not gospel. The applicants cannot, therefore, say that they have been deprived of a recommendation in their favour. Their contentions that the Red Book had an "important influence" and that it had a "probable influence on the outcome" cannot be sustained.

B As to the applicants' submission on *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87 that that is not a proper description of an inquiry under the Act of 1959, that *In re London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2)* 1938 [1939] 2 K.B. 515 was wrongly decided at the time and that *Lovelock* v. *Secretary of State for Transport* [1979] R.T.R. 250 should be overruled, the C Act of 1959 is a consolidation Act, with minor amendments, and two earlier Acts incorporated into it, the Trunk Roads Act 1946, Sch. 2, and the Special Roads Act 1949, Sch. 1, used virtually the same words. The procedures were never altered. Parliament must have had *Franklin* and *In re London-Portsmouth Trunk Road* in mind. The Act of 1949 was passed only a year after the decision in *Franklin*.

An inquiry into a scheme under section 11 of the Act of 1959 is held D for the guidance and information of the Secretary of State so as to improve the quality of the administrative decision that he eventually takes.

*Schiemann.* It is likely that during a 100 day inquiry there will have been innumerable refusals to allow cross-examination, but in the context of traffic it was only on the Red Book that the inspector refused to allow it, not on questions of assignment. As to whether he refused to allow E cross-examination on any other of the factors that are taken into account in calculating need, it depends how one defines "need." For example, someone may say that lorries are thundering past his door and that therefore there is a need for a motorway. The Secretary of State cannot say to what degree there was a reduction of cross-examination on, for example, noise methodology. There are different ways of measuring noise, and there was some dispute at the inquiry as to the method of F dealing with it. There was no *complaint* of refusal to allow cross-examination; the complaint, so far as one can see, has been exclusively with regard to the Red Book. The proper document from which to get the Secretary of State's definition of "need" is the inspector's report rather than the documents behind it (rather than, for example, the Secretary of State's statement of case).

G There are provisions for compensation for planning blight; they are rather narrowly defined: see Town and Country Planning Act 1971, s. 192 et seq.

The proof of evidence of the objector Mr. J. L. MacKernan [see *per* Lord Lane, post, pp. 121F—122E], together with the questions and answers on it, went to the Secretary of State with the inspector's report.

H Except for the figures for "combined design capacities: current at inquiry" (column 1), the Secretary of State does not accept the analysis prepared by the applicants after August 1976 and presented to the Court of Appeal [see *per* Templeman L.J., 78 L.G.R. 10, 25]. In particular,

he does not accept the figures for " combined design capacities: new—post inquiry " (column 2) and " traffic flows (p.c.u.) revised (H 3/75) " (column 6). Some of the figures were wrong and were corrected. The Secretary of State did not object to the analysis going in the Court of Appeal, but he did not accept its relevance or accuracy. He does not accept the actual figures, but the substance of the applicants' point is right: that the actual traffic flow was less than had been relied on at the inquiry.

*Lord Gifford.* If the House is not happy about this analysis, the applicants rely on the actual traffic counts made in August 1974.

*Schiemann.* The Secretary of State accepts that, in respect of the A41 and A34, post-inquiry capacity exceeds the revised capacity, properly calculated, for 1990, i.e. he accepts that column 2 of the August 1976 analysis exceeds column 6. He does not accept that in respect of any other " bunch " of roads in that analysis.

[LORD DIPLOCK. Their Lordships propose to exclude this analysis from consideration.]

[Reference was made to the *Report on the Review of Highway Inquiry Procedures* (1978) (Cmnd. 7133), para. 10.]

Their Lordships took time for consideration.

February 7. LORD DIPLOCK. My Lords, this appeal arises out of a local inquiry which lasted 100 days into two proposed schemes made by the Secretary of State for the Environment (" the minister ") under section 11 of the Highways Act 1959, for the provision of two approximately 15-mile lengths of special road (i.e. motorway), through rural areas to the south and south-east of Birmingham. I shall refer to these as " M42 Bromsgrove " and " M40 Warwick." They were intended to form an integral part of the national network of motorways when it is eventually completed and as part of that network catering for traffic between the north-west and south-east of the country and between the north-east and south-west.

The procedure to be followed by the minister in making schemes under section 11 of the Act is to be found in Part II of Schedule 1. It is not necessary to set it out in detail; it suffices to say that paragraph 9 provides for the lodging of objections by persons appearing to the minister to be affected by the proposed scheme and goes on to provide that if any such objection is not withdrawn " the minister shall cause a local inquiry to be held." There is a discretion in the minister to dispense with an inquiry if he is satisfied that circumstances exist that make it unnecessary; but that does not apply to the instant case. The local inquiry was held.

The Act itself says nothing more than this about the scope of the inquiry or the procedure to be followed at or after it, save that paragraph 10 of Schedule 1 provides:

> " After considering any objections to the proposed scheme which are not withdrawn, and, where a local inquiry is held, the report of the person who held the inquiry, the minister may make or

A confirm the scheme either without modification or subject to such modifications as he thinks fit."

So before reaching his decision the minister must consider the objections, so far as not withdrawn, and the report of the inspector who held the local inquiry, before he makes up his mind whether to exercise his administrative discretion in favour of making the scheme either in its B original form or with modifications or not making it at all; and section 12 of the Tribunals and Inquiries Act 1971 requires him to give reasons for his decision. At the time of the inquiry in the instant case no rules regulating the procedure to be followed at the inquiry had been made under section 11 of the latter Act. The Highways (Inquiries Procedure) Rules 1976 did not come into force until long after the inquiry in the instant case had closed. The minister had, however, C announced his willingness at local inquiries into proposed schemes for motorways to comply with those rules that were already applicable in case of compulsory acquisition of land by ministers—the Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967. These are in substantially the same terms as the subsequent rules of 1976, but with one difference to which I shall be referring later.

D My Lords, before I come to the specific complaints as to the procedure followed at the local inquiry and thereafter before the minister's decision, which have been held by a majority of the Court of Appeal to justify quashing the minister's decision on the ground that the objectors were denied natural justice, I think that it is useful to give some general consideration to the scope and purpose of a local inquiry into a scheme for a motorway which the minister himself proposes to make under E section 11 of the Highways Act 1959, and also to the functions of the inspector by whom such an inquiry is held and of the minister after the inspector's report has been received by him and before he has made his decision.

The provision and improvement of a national system of routes for through traffic for which a government department and not a local F authority should be the highway authority has formed a part of national transport policy since the passing of the Trunk Roads Act in 1936. As part of this national network, or superimposed upon it, there have been constructed by stages during the course of the last 30 years special roads familiarly known as motorways which were first authorised by the Special Roads Act 1949. The construction of motorways is a lengthy and expensive process and it has been the policy of successive governments, G which would in any event have been dictated by necessity, to construct the network by stages. The order in which the various portions of the network are to be constructed thus becomes as much a matter of government transport policy as the total extent and configuration of the motorway network itself. It also has the consequence that schemes for the provision of special roads which the minister proposes to make under H section 11 of the Highways Act 1959 deal with comparatively short stretches in a particular locality of what, when the other stretches are completed, will be integral parts of the national network. It follows, therefore, that there will be a whole series of schemes relating to

successive stretches of the national network of motorways each of which may be the subject of separate local inquiries under Schedule 1, paragraph 9, to the Act.

A scheme made by the minister under section 11 does no more than authorise the construction of the stretch of motorway to which it relates. It does not follow that the construction of that stretch will begin immediately or within any fixed time limit or, indeed, at all. Section 286 provides for its revocation or amendment by a subsequent scheme which may be made at any time either before or after construction has begun. Before construction can start however it will be necessary to make compulsory purchase orders in respect of the lands required for the motorway and its approach roads and these in turn are likely to be the subject of further local inquiries. So from the publication of the draft scheme to the actual construction of the stretch of motorway which is authorised the process is necessarily a long one in the course of which circumstances may alter and even government policy may change.

Where it is proposed that land should be acquired by a government department or local authority and works constructed on it for the benefit of the public either as a whole or in a particular locality, the holding of a public inquiry before the acquisition of the land and the construction of the works are authorised has formed a familiar part of the administrative process ever since authorisation by ministerial order of compulsory acquisition of land for public purposes began to be used to replace parliamentary authorisation by private bill procedure in the 19th century. The essential characteristics of a "local inquiry," an expression which when appearing in a statute has by now acquired a special meaning as a term of legal art, are that it is held in public in the locality in which the works that are the subject of the proposed scheme are situated by a person appointed by the minister upon whom the statute has conferred the power in his administrative discretion to decide whether to confirm the scheme. The subject matter of the inquiry is the objections to the proposed scheme that have been received by the minister from local authorities and from private persons in the vicinity of the proposed stretch of motorway whose interests may be adversely affected, and in consequence of which he is required by Schedule 1, paragraph 9, to hold the inquiry. The purpose of the inquiry is to provide the minister with as much information about those objections as will ensure that in reaching his decision he will have weighed the harm to local interests and private persons who may be adversely affected by the scheme against the public benefit which the scheme is likely to achieve and will not have failed to take into consideration any matters which he ought to have taken into consideration.

Where rules regulating the procedure to be followed at a local inquiry held pursuant to a particular statutory provision have been made by the Lord Chancellor under section 11 of the Tribunals and Inquiries Act 1971, the minister and the inspector appointed to hold the inquiry must observe those rules; but no such rules were applicable in the instant case —they had not yet been made. The Highways Act 1959 being itself silent as to the procedure to be followed at the inquiry, that procedure,

within such limits as are necessarily imposed by its qualifying for the description "local inquiry," must necessarily be left to the discretion of the minister or the inspector appointed by him to hold the inquiry on his behalf, or partly to one and partly to the other. In exercising that discretion, as in exercising any other administrative function, they owe a constitutional duty to perform it fairly and honestly and to the best of their ability, as Lord Greene M.R. pointed out in his neglected but luminous analysis of the quasi-judicial and administrative functions of a minister as confirming authority of a compulsory purchase order made by a local authority, which is to be found in *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395, 399–400. That judgment contains a salutary warning against applying to procedures involved in the making of administrative decisions concepts that are appropriate to the conduct of ordinary civil litigation between private parties. So rather than use such phrases as "natural justice" which may suggest that the prototype is only to be found in procedures followed by English courts of law, I prefer to put it that in the absence of any rules made under the Tribunals and Inquiries Act 1971, the only requirement of the Highways Act 1959, as to the procedure to be followed at a local inquiry held pursuant to Schedule 1, paragraph 9, is that it must be fair to all those who have an interest in the decision that will follow it whether they have been represented at the inquiry or not. What is a fair procedure to be adopted at a particular inquiry will depend upon the nature of its subject matter.

What is fair procedure is to be judged not in the light of constitutional fictions as to the relationship between the minister and the other servants of the Crown who serve in the government department of which he is the head, but in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached. To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise. It is they who in reality will have prepared the draft scheme for his approval; it is they who will in the first instance consider the objections to the scheme and the report of the inspector by whom any local inquiry has been held and it is they who will give to the minister the benefit of their combined experience, technical knowledge and expert opinion on all matters raised in the objections and the report. This is an integral

part of the decision-making process itself; it is not to be equiparated with the minister receiving evidence, expert opinion or advice from sources outside the department after the local inquiry has been closed. A

The content of a draft scheme under section 11 of the Highways Act 1959 for a stretch of motorway to be made by the minister is purely factual. It describes the proposed route of the motorway and its connecting roads by reference to a deposited plan. It discloses no reasons why the department considers that it is in the public interest that the B construction of this particular stretch of motorway should be authorised at this particular time upon the particular line shown in the deposited plan. If the minister is to give proper consideration to objections to the scheme by persons in the vicinity of the proposed stretch of motorway, as he is required to do by Schedule 1, paragraph 10, fairness requires that the objectors should have an opportunity of communicating to the C minister the reasons for their objections to the scheme and the facts on which they are based. The Highways Act 1959 requires that the form in which that opportunity is to be afforded to them is at a local inquiry. Fairness, as it seems to me, also requires that the objectors should be given sufficient information about the reasons relied on by the department as justifying the draft scheme to enable them to challenge the accuracy of any facts and the validity of any arguments upon which D the departmental reasons are based.

A draft scheme is likely to attract supporters as well as objectors; to modify the scheme so as to meet an individual objection, for instance as to the line of the motorway or any connecting roads, may have the result of transferring the adverse effect of the scheme from the objecting property-owner to someone else who had no reason to object to E the draft scheme as originally published. Fairness would suggest that supporters of the scheme should also be heard and would require that before a decision is made to modify a draft scheme those adversely affected by the modification should be given an opportunity of stating their reasons for objecting to it.

In the instant case the public inquiries into the two schemes which were for two adjoining stretches of the national motorway network were F held together. There were 170 objections to the schemes which had not been withdrawn when the combined inquiry began. There were about 100 different parties who took part in it and made representations to the inspector orally or in writing in objection to or in support of the schemes. Many of these called witnesses in support of their representations. The hearing of the inquiry by the inspector took 100 working G days between June 1973 and January 1974. He made his report to the minister on June 12, 1975.

It is evident that an inquiry of this kind and magnitude is quite unlike any civil litigation and that the inspector conducting it must have a wide discretion as to the procedure to be followed in order to achieve H its objectives. These are to enable him to ascertain the facts that are relevant to each of the objections, to understand the arguments for and against them and, if he feels qualified to do so, to weigh their respective

merits, so that he may provide the minister with a fair, accurate and adequate report on these matters.

Proceedings at a local inquiry at which many parties wish to make representations without incurring the expense of legal representation and cannot attend the inquiry throughout its length ought to be as informal as is consistent with achieving those objectives. To "over-judicialise" the inquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair. It would, in my view, be quite fallacious to suppose that at an inquiry of this kind the only fair way of ascertaining matters of fact and expert opinion is by the oral testimony of witnesses who are subjected to cross-examination on behalf of parties who disagree with what they have said. Such procedure is peculiar to litigation conducted in courts that follow the common law system of procedure; it plays no part in the procedure of courts of justice under legal systems based upon the civil law, including the majority of our fellow member states of the European Community; even in our own Admiralty Court it is not availed of for the purpose of ascertaining expert opinion on questions of navigation—the judge acquires information about this by private inquiry from assessors who are not subject to cross-examination by the parties. So refusal by an inspector to allow a party to cross-examine orally at a local inquiry a person who has made statements of facts or has expressed expert opinions is not unfair per se.

Whether fairness requires an inspector to permit a person who has made statements on matters of fact or opinion, whether expert or otherwise, to be cross-examined by a party to the inquiry who wishes to dispute a particular statement must depend on all the circumstances. In the instant case, the question arises in connection with expert opinion upon a technical matter. Here the relevant circumstances in considering whether fairness requires that cross-examination should be allowed include the nature of the topic upon which the opinion is expressed, the qualifications of the maker of the statement to deal with that topic, the forensic competence of the proposed cross-examiner, and, most important, the inspector's own views as to whether the likelihood that cross-examination will enable him to make a report which will be more useful to the minister in reaching his decision than it otherwise would be is sufficient to justify any expense and inconvenience to other parties to the inquiry which would be caused by any resulting prolongation of it.

The circumstances in which the question of cross-examination arose in the instant case were the following. Before the inquiry opened each objector had received a document containing a statement of the minister's reasons for proposing the draft scheme. It was itself a long and detailed document, and was accompanied by an even longer and more detailed one called "Strategic Studies Information," which gave an account of various traffic studies that had been undertaken between 1964 and 1973 in the area to be served by M42 Bromsgrove and M40 Warwick, the methodology used for those studies and the conclusions reached. The second paragraph of the minister's statement of reasons said: "The govern-

ment's policy to build these new motorways" (sc. for which the two schemes provided) "will not be open to debate at the forthcoming inquiries [sic]: the Secretary of State is answerable to Parliament for this policy."

"Policy" as descriptive of departmental decisions to pursue a particular course of conduct is a protean word and much confusion in the instant case has, in my view, been caused by a failure to define the sense in which it can properly be used to describe a topic which is unsuitable to be the subject of an investigation as to its merits at an inquiry at which only persons with local interests affected by the scheme are entitled to be represented. A decision to construct a nationwide network of motorways is clearly one of government policy in the widest sense of the term. Any proposal to alter it is appropriate to be the subject of debate in Parliament, not of separate investigations in each of scores of local inquiries before individual inspectors up and down the country upon whatever material happens to be presented to them at the particular inquiry over which they preside. So much the respondents readily concede.

At the other extreme the selection of the exact line to be followed through a particular locality by a motorway designed to carry traffic between the destinations that it is intended to serve would not be described as involving government policy in the ordinary sense of that term. It affects particular local interests only and normally does not affect the interests of any wider section of the public, unless a suggested variation of the line would involve exorbitant expenditure of money raised by taxation. It is an appropriate subject for full investigation at a local inquiry and is one on which the inspector by whom the investigation is to be conducted can form a judgment on which to base a recommendation which deserves to carry weight with the minister in reaching a final decision as to the line the motorway should follow.

Between the black and white of these two extremes, however, there is what my noble and learned friend, Lord Lane, in the course of the hearing described as a "grey area." Because of the time that must elapse between the preparation of any scheme and the completion of the stretch of motorway that it authorises, the department, in deciding in what order new stretches of the national network ought to be constructed, has adopted a uniform practice throughout the country of making a major factor in its decision the likelihood that there will be a traffic need for that particular stretch of motorway in 15 years from the date when the scheme was prepared. This is known as the "design year" of the scheme. Priorities as between one stretch of motorway and another have got to be determined somehow. Semasiologists may argue whether the adoption by the department of a uniform practice for doing this is most appropriately described as government policy or as something else. But the propriety of adopting it is clearly a matter fit to be debated in a wider forum and with the assistance of a wider range of relevant material than any investigation at an individual local inquiry is likely to provide; and in that sense at least, which is the relevant sense for present purposes, its adoption forms part of government policy.

A The " need " for a new road to carry traffic between given destinations is an imprecise concept. If it is to be used as an important factor in comparing one situation with another for the purpose of determining priorities, there must be uniform criteria by which that need in each locality is to be measured. The test of future needs in the design year which the department has adopted is: whether, if the new stretch of motorway is not constructed, there will be undue congestion of traffic B on existing roads, either in the locality or forming other parts of the national network of motorways, for which the new stretch of motorway would provide an alternative route. To apply this test of need to a design year 15 years ahead involves, among other things, estimating (1) the amount of traffic that the existing roads in the locality are capable of bearing without becoming so congested as to involve unacceptC able delays; and (2) the amount of traffic that in the absence of the new stretch of motorway would in the design year be using those existing roads which the motorway is intended to relieve.

The methods used by the department for arriving at these estimates are very complicated. So far as I am capable of understanding them as one who is by now (I hope) a reasonably well-informed layman, it is obvious to me that no one who is not an expert in this esoteric subject D could form a useful judgment as to their merits. The methods used are kept under periodical review by the department's own experts as a result of which they are revised from time to time. They are described in published documents. One which it will be necessary to mention dealt with the capacity of rural roads; but that which is most relevant to the respondents' complaint about refusal to permit cross-examination E in the instant case has been referred to as the " Red Book." It was published in 1968 under the title *Traffic Prediction for Rural Roads (Advisory Manual on)* and described the method that had been used for predicting the growth of traffic up to the design year on the roads which the M42 Bromsgrove and M40 Warwick were intended to relieve. Important features of the method set out in the Red Book for predicting F traffic that will be using the roads in a particular locality are the assumptions (1) that in general, traffic on rural roads throughout the country will grow at the same rate in all areas, except where exceptional changes can be foreseen as likely to take place in a particular locality; and (2) that the annual rate of growth will fall off as vehicle ownership in the country approaches saturation point; and that the best way of predicting what the growth will have been up to a particular design G year is by assuming that it can be graphically represented by a curve that is asymptotic (i.e. broadly " S "-shaped) and whose shape where it represents future years can be extrapolated (i.e. predicted) from the shape of the curve which represents the observed annual increase in vehicle registrations over past years. It was recognised that predictions as applied to individual roads could only be very approximate and were H subject to margins of error as high as 10 per cent. to 20 per cent.

The decisions to make these two assumptions for the purpose of calculating and comparing what traffic needs will be in all localities throughout the country in which it is proposed to construct future

stretches of the national network of motorway might not, in a general context, be most naturally described as being government policy; but if a decision to determine priorities in the construction of future stretches of the national network of motorways by reference to their respective traffic needs in a design year 15 years ahead can properly be described as government policy, as I think it can, the definition of "traffic needs" to be used for the purposes of applying the policy, viz. traffic needs as assessed by methods described in the Red Book and the departmental publication on the capacity of rural roads, may well be regarded as an essential element in the policy. But whether the uniform adoption of particular methods of assessment is described as policy or methodology, the merits of the methods adopted are, in my view, clearly not appropriate for investigation at individual local inquiries by an inspector whose consideration of the matter is necessarily limited by the material which happens to be presented to him at the particular inquiry which he is holding. It would be a rash inspector who based on that kind of material a positive recommendation to the minister that the method of predicting traffic needs throughout the country should be changed and it would be an unwise minister who acted in reliance on it.

At the local inquiry into the M42 Bromsgrove and the M40 Warwick, objectors including the respondents, whose property would be affected by the scheme, and the M42 Action Committee, a "pressure group" which supported them primarily upon environmental grounds, had studied in advance the minister's reasons for the schemes, the "Strategic Studies Information" and the Red Book. They came to the inquiry prepared to criticise the methods used to predict the traffic needs in the design year on local roads in the localities of the M42 Bromsgrove and M40 Warwick and to call evidence of witnesses with professional qualifications to testify to their unreliability. The circumstances in which the inspector was induced to give an early ruling as to what evidence he would admit and what cross-examination he would allow are recounted in the speeches of my noble and learned friends. In the result—and when one is considering natural justice it is the result that matters—the objectors were allowed to voice their criticisms of the methods used to predict traffic needs for the purposes of the two schemes and to call such expert evidence as they wanted to in support of their criticisms. What they were not allowed to do was to cross-examine the department's representatives upon the reliability and statistical validity of the methods of traffic prediction described in the Red Book and applied by the department for the purpose of calculating and comparing traffic needs in all localities throughout the country. This is the only matter in relation to the conduct of the inquiry by the inspector of which complaint is made.

Was this unfair to the objectors? For the reasons I have already given and in full agreement with the minority judgment of Templeman L.J. in the Court of Appeal, I do not think it was. I think that the inspector was right in saying that the use of the concept of traffic needs in the design year *assessed by a particular method* as the yardstick by which to determine the order in which particular stretches of the national network of motorways should be constructed was government policy in the

relevant sense of being a topic unsuitable for investigation by individual inspectors upon whatever material happens to be presented to them at local inquiries held throughout the country.

In June 1975 the inspector sent his report to the minister. He recommended that both schemes should be made as drafted but subject to a considerable number of relatively minor modifications; and he duly reported to the minister the criticisms of the Red Book method of forecasting traffic growth that he had received. As regards traffic needs in the design year, the inspector came to the conclusion that he ought to be guided by the department's forecasts while at the same time recognising the wide margin of error to which they were admitted to be subject. He added:

> "It may well be that more up-to-date and authoritative forecasts will have become available by the time you consider this report; if so, you will, I trust, be in a position to assess my conclusions in the light of this later information."

The inspector's prophecy had been borne out by the time the minister made his decision on August 5, 1976. In August 1974, new standards for assessing the capacity of rural roads were adopted and published by the department. Experience had shown that as a result of improvements in motor vehicles and road construction modern roads were capable of carrying more traffic than they had been credited with under the previous system by which capacity was estimated. In 1975, the method described in the Red Book for predicting traffic growth on rural roads was abandoned by the department and replaced by a revised method. It is not necessary to describe the changes except to say that they resulted in predictions of slower growth than the Red Book method. The respondents claim that it was a denial of natural justice to them on the minister's part not to reopen the local inquiry so as to give to objectors an opportunity of criticising these revised methods of assessment, cross-examining the department's representatives about them and advancing arguments as to the strength they added to the objectors' case.

As a further ground for reopening the inquiry, the respondents also relied upon the fact that in 1974 actual traffic counts were made on roads in the areas affected by M42 Bromsgrove and M40 Warwick which could be compared with figures that had been predicted for that year at the inquiry by extrapolation from actual counts that had been made in 1968. The actual numbers were substantially less than those that had been predicted. This is not at all surprising when it is borne in mind that 1974 was the oil crisis year and I need say no more about it.

My Lords, in the analysis by Lord Greene M.R. in *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395, 399–400 of the common case in which a minister's functions are to confirm, modify or reject a scheme prepared and promoted by a local authority, it is pointed out that the minister's ultimate decision is a purely administrative one. It is only at one stage in the course of arriving at his decision that there is imposed on his administrative character a character loosely described as being quasi-judicial; and that is: when he is considering

the respective representations of the promoting authority and of the objectors made at the local inquiry and the report of the inspector upon them. In doing this he must act fairly as between the promoting authority and the objectors; after the inquiry has closed he must not hear one side without letting the other know; he must not accept from third parties fresh evidence which supports one side's case without giving the other side an opportunity to answer it. But when he comes to reach his decision, what he does bears little resemblance to adjudicating on a lis between the parties represented at the inquiry. Upon the substantive matter, viz., whether the scheme should be confirmed or not, there is a third party who was not represented at the inquiry, the general public as a whole whose interests it is the minister's duty to treat as paramount. No one could reasonably suggest that as part of the decision-making process after receipt of the report the minister ought not to consult with the officials of his department and obtain from them the best informed advice he can to enable him to form a balanced judgment on the strength of the objections and merits of the scheme in the interests of the public as a whole, or that he was bound to communicate the departmental advice that he received to the promoting authority and the objectors.

If the analogy of a lis inter partes be a false analogy even where the scheme which is the subject of the local inquiry is not a departmental scheme but one of which a public authority other than the minister is the originator; the analogy is even farther from reflecting the essentially administrative nature of the minister's functions when, having considered in the light of the advice of his department the objections which have been the subject of a local inquiry and the report of the inspector, he makes his decision in a case where the scheme is one that has been prepared by his own department itself and which it is for him in his capacity as head of that department to decide whether it is in the general public interest that it should be made or not. Once he has reached his decision he must be prepared to disclose his reasons for it, because the Tribunals and Inquiries Act 1971 so requires; but he is, in my view, under no obligation to disclose to objectors and give them an opportunity of commenting on advice, expert or otherwise, which he receives from his department in the course of making up his mind. If he thinks that to do so will be helpful to him in reaching the right decision in the public interest he may, of course, do so; but if he does not think it will be helpful—and this is for him to decide—failure to do so cannot in my view be treated as a denial of natural justice to the objectors.

In the instant case the respondents were in fact aware of the advice the minister had received from his department upon two matters after the local inquiry had closed and before he made his decision. That advice was disclosed in the two publicly available documents that I have mentioned, which announced revisions in the methods to be used by the department, including the minister as its head, in estimating the capacity of rural roads to carry traffic and the predictions of traffic growth on rural roads. Both of these changes in government policy as to the yardstick by which the traffic need for one stretch of the national network of motorways is to be compared with the traffic need for another

were relevant to the minister's decision in August 1976 whether to authorise the schemes for the construction of M42 Bromsgrove and M40 Warwick then or to let them lapse. So the department did their sums again, applying the revised methods of estimation and prediction. The results of these fresh calculations are stated by the minister in those paragraphs of the letter giving the reasons for his decision which are cited by Templeman L.J. in his judgment. It suffices for my purpose to say that, having regard to the later design year that had become appropriate in view of the lapse of time since 1972 when the schemes were first prepared, the minister was of opinion that the traffic needs for the M42 Bromsgrove and for the M40 Warwick disclosed by using the revised methods of estimation and prediction did not differ so materially from those estimates of traffic needs arrived at by the unrevised methods on which the department had relied in its evidence at the local inquiry as to affect the minister's decision to accept the inspector's recommendation that the schemes should be made, despite the fact that it was the latter that were the departmental estimates which the inspector had before him when he made his recommendations.

My Lords, what the respondents really wanted to do in seeking the reopening of the local inquiry was to hold up authorisation of the construction of M42 Bromsgrove and M40 Warwick until the revised methods adopted by the department for estimating the comparative traffic needs for stretches of the national network of motorways which have not yet been constructed had been the subject of investigation at the reopened inquiry. For reasons that I have already elaborated, a local inquiry does not provide a suitable forum in which to debate what is in the relevant sense a matter of government policy. So the minister was in my view fully justified in refusing to reopen the local inquiry and in refusing to defer his decision whether or not to make the schemes until after this had been done and he had received a further report from the inspector. So the second ground on which the respondents claim they have suffered a denial of natural justice in my view also fails.

The schemes were, in my view, validly made by the minister on August 5, 1976, and I would allow the appeal.

I would not, however, part from this case without remarking that the making of a scheme under section 11 of the Highways Act 1959 is by no means the end of the matter. More than three years have passed since the schemes were made in the instant case; the next step, the procedure for making compulsory purchase orders in respect of land needed for the construction of the motorways, has not yet been put in hand. The pendency of the present litigation would have prevented this even if the minister had wanted to start construction by now. In the meantime, even since the minister's decision, there have been further revisions in the method of estimating traffic need in future years. These have now been adopted by the minister on the recommendation of an expert departmental committee, appointed for this purpose. In making his administrative decision whether and when to proceed with the actual construction of M42 Bromsgrove or M40 Warwick, pursuant to the authorisation granted by the schemes, the minister will take into con-

sideration traffic needs as assessed by whatever is the method that it is then the policy of the department to adopt as the most reliable available. But schemes authorising the construction of motorways and decisions to act on such authorisations cannot be held up indefinitely because the current methods of estimating and predicting future traffic needs are imperfect and are likely to be improved as further experience is gained. Comparative traffic needs must be measured by the best yardstick available at the time of the decision and it is in the nature of the problem with which the minister is confronted that this may not be the same at the times when each of the successive decisions is taken: viz. to publish the draft scheme, to make the scheme and to proceed with the construction of the stretch of motorway authorised by the scheme.

That is why in the last letter from the department to the objectors that was put in evidence in the instant case and was dated after the minister's decision had been made, it was said:

> "If your committee wishes to make further representations, such representations can always be considered by the Secretary of State as part of the continuous consideration of any of the department's proposals."

VISCOUNT DILHORNE. My Lords, section 11 of the Highways Act 1959 gives the Minister of Transport power to make a scheme authorising the provision of a special road if the road is to be provided by him. If the special road is to be provided by a local highway authority, the scheme authorising it is made by the local highway authority and confirmed by the minister.

Any scheme for such a road, whether proposed by the minister or submitted to him by a local highway authority, must be published in accordance with the requirements of paragraph 7 of Schedule 1 to the Act. If any objection to the proposed scheme is received by the minister within the stipulated period and is not withdrawn, the minister must cause a local inquiry to be held though in certain circumstances he may dispense with that if he is satisfied that the holding of an inquiry is unnecessary (Schedule 1, paragraph 9). Then, after considering any objections which are not withdrawn, and, when a local inquiry is held, the report of the person who held the inquiry, the minister may make or confirm the scheme either without modification or subject to such modifications as he thinks fit (Schedule 1, paragraph 10).

Two schemes were published in accordance with the statutory requirements for the provision under section 11 of two stretches of motorway, one 18·5 miles in length to form the Bromsgrove section of the proposed M42, and the other about 13·2 miles in length to form the Warwick section of the proposed M40. 900 objections were lodged and, as 170 of them were not withdrawn, the Secretary of State caused a local inquiry to be held. When it has been decided that the construction of a particular motorway is desirable, schemes are published in relation to different stretches of the motorway with the consequence that there may be a number of local inquiries in respect of each motorway. Then, if a scheme is made or confirmed, there may be more local inquiries

A if objection is taken to the acquisition of the land required. It is a lengthy process.

The Franks committee in 1957 in their report on administrative tribunals and inquiries (*Report of the Committee on Administrative Tribunals and Inquiries* (1957) (Cmnd. 218), paras. 280, 281) recommended that before a local inquiry was opened particulars of the case for the proposal should be given in the form of a written statement and B that the views of the minister responsible should be given in the form of a policy statement as fairness required that those whose individual rights and interests were likely to be adversely affected by the action proposed should know in good time the case they had to meet.

In accordance with this recommendation the department produced and sent to objectors a lengthy "statement of case" for their proposals. C It was accompanied by a "Statement of policy by the Secretary of State for the Environment."

The introductory paragraphs of the statement of case read as follows:

"1.1 It is the government's policy as part of a strategic trunk road network to be completed by the early 1980s to build new motorways to provide relief to the M1/M6 and trunk roads in the Oxford–Birmingham corridor and for the M5 and trunk roads in the D Birmingham–Nottingham corridor. The M42 Bromsgrove section and the M40 Warwick section are integral parts of these new motorways. (Policy statement appended.) 1.2 The government's policy to build these new motorways will not be open to debate at the forthcoming inquiries: the Secretary of State is answerable to Parliament for this policy. But objectors will be free to argue, if they so wish, E that the M42 Bromsgrove section and M40 Warwick section should not be built upon the line at present proposed by the Secretary of State in his draft published schemes and that the Umberslade interchange should be differently located. 1.3 This statement of case will, therefore, explain the background against which the Secretary of State reached his policy to build the motorways and the need which they are intended to serve. It will be explained how the published F lines of the M42 Bromsgrove section and the M40 Warwick section and the published location of the Umberslade interchange were selected."

The policy statement also stated that it was the government's policy to build these motorways and that the Bromsgrove and Warwick sections were integral parts of them. It repeated that the Secretary of G State's general policy of providing the strategic network would not be open to debate at the inquiries into the proposals for the Bromsgrove and Warwick sections.

The Franks committee recognised that broad policy was something for which a minister was answerable to Parliament alone and had no wish to suggest that the statement of policy should be automatically open H to debate at a local inquiry. They said that a minister should be free, when issuing a statement of policy, to direct in writing that the whole or certain parts of it were not open to discussion at the inquiry. "This power" they said, "would avoid useless discussion of policy in

the wrong forum, but the manner of its exercise would itself be open to criticism in the right forum—Parliament" (para. 288.)

The Highways Act 1959 contains no provision requiring those appearing at a local inquiry to observe and to comply with such directions as a minister might give as to the matters which might be discussed thereat. If in the present case the directions of the Secretary of State had been observed, then at the inquiry there would have been no consideration of the need for these motorways of which the Bromsgrove and Warwick sections were integral parts. All that could have been considered was the line these sections should take. This was, we were told, the first inquiry at which the need for the proposed motorways was challenged and debated.

It came about in this way. The report of the inspector shows that directly the inquiry was opened on June 12, 1972, it was submitted that the view was not tenable that debate on the need for these motorways could be excluded from the inquiry, and the inspector's ruling on the following three questions was sought:

> "1. Would evidence that this motorway (i.e. M42) is not necessary be admitted? 2. If so, would the inspector be willing to listen to such evidence and report it to the Secretary of State? 3. If answers to both the above questions were in the affirmative, would the Secretary of State be prepared to take such a report into consideration?"

In giving his ruling the inspector said it was entirely for him to decide any question of relevancy but that in deciding as to relevancy he would not be restrictive and would admit any evidence or submission which was aimed at rebutting the department's case on the question of the need for the motorway; nevertheless he would not allow the inquiry to be made into an inquiry into the government's general transport policy as such matters were for Parliament to decide and could not usefully be discussed at a local public inquiry. In answer to the three questions on which he was asked to rule, he said he would admit evidence which appeared to him to be relevant and report to the Secretary of State on all evidence given at the inquiry and that the third question was a matter for the Secretary of State.

Subsequently he amplified his ruling and said that he would not necessarily prevent an objector from giving evidence which was irrelevant but that he would not require the department to deal with such evidence "nor would [he] allow the department's witnesses to be cross-examined on the matters raised."

By agreement paragraph 1.2 of the statement of case and the last paragraph of the statement of policy were deleted with the result that the restriction which the Secretary of State had sought to impose on the matters which might be discussed at the inquiry was treated as inoperative.

After the inspector had dealt with a number of other submissions, witnesses were called to explain the department's case. It used to be exceptional for a department to do this (see the Franks committee's report (Cmnd. 218), para. 314) and then only the evidence and submissions of the objectors were heard at the inquiry. That committee saw no

A reason why the factual basis for a departmental view should not be explained and its validity tested in cross-examination. Their proposals were, they said, designed to broaden the scope of the inquiry sufficiently to give individual objectors reasonable opportunities for testing the case against them and the evidence for that case (para. 316). As I have said, the committee thought that the minister should have power to direct that policy should not be discussed at an inquiry, but, as a policy usually B has a factual basis, the line between what the committee thought should be done and what a minister should be able to direct should not be done is indefinite.

One consequence of the implementation of the recommendation that a department should call evidence in support of its case is that the procedure at an inquiry now more closely resembles that of a trial than C it did. A trial ends with a decision in favour of one party. An inquiry does not. There is no lis between a minister and his department on the one hand and the objectors on the other. An inquiry is followed by the inspector reporting to the minister on the evidence given at the inquiry and his conclusions thereon and recommendations. The minister then has to decide and in reaching his decision he may have regard to policy considerations not discussed at the inquiry. If there were a lis D between the minister putting forward a scheme or proposal and the objectors, then indeed the minister would be judge in his own cause.

Brought about as it is by the lodging of objections, the primary purpose of a local inquiry must be

> " . . . to ensure that the interests of the citizens closely affected should be protected by the grant to them of a statutory right to be heard in E support of their objections, and to ensure that thereby the minister should be better informed of the facts of the case " (Franks committee's report (Cmnd. 218), para. 269).

If objectors are given a full opportunity of being heard in support of their objections, I find it difficult to see that a complaint of unfairness or an allegation of a denial of natural justice in the conduct of the F inquiry can be well-founded.

The witnesses called for the department at this inquiry dealt with a wide variety of matters, including traffic studies that had been made, traffic predictions for the future and the testing of alternatives to the motorways proposed. Owing to the time it takes to provide a new motorway it is necessary to forecast traffic flows 15 years ahead, at the end of what is called the " 15-year design period."

G These witnesses fully explained the department's case and the grounds on which it was proposed that these motorways should be made. The department thought that without these motorways all the roads considered, the A34, A41, A423, M5, M1 and M6, would " carry flows substantially in excess of twice the design capacity in 1990 " and that with them the flows would not exceed twice the design capacity except in two urban H lengths

In making their traffic forecasts, the department had applied the methods prescribed in a booklet published by them in 1968 called *Traffic Prediction for Rural Areas (Advisory Manual on)* (hereafter referred to

as "the Red Book") and they accepted that in the light of knowledge gained since its publication it would be proper to reduce all their traffic forecast based on these methods by 8 per cent. in 1974 and by 7 per cent. in 1990. These methods were used not only for determining whether there was need for a particular motorway but also in determining the priority of proposed motorways.

The inspector after hearing all the evidence called and submissions made at this inquiry which started on June 12, 1973, and ended on January 29, 1974, after over 100 sittings concluded that the justification of the department's proposals was ultimately dependent on the traffic forecasts. He said that it was an unavoidable difficulty that forecasts so far ahead as the design year (1990) must be uncertain to a greater or less degree and that the department's forecasts depended on traffic surveys and the projection of traffic flows from these surveys forward to 1968 ("the base year"), 1974 (the then present year) and 1990 (the design year) and finally on a computer assignment of the traffic identified to the various roads in the network.

All these processes, were, he said, criticised by objectors.

In this appeal we are concerned only with one of them, the projection of traffic flows calculated as prescribed by the Red Book. Considerable expert evidence was called by objectors to establish that more reliable forecasts could be made by the use of different and more sophisticated methods and it was contended that if these methods were used the need for these motorways in 1990 was not established. In accordance with his ruling the inspector allowed this evidence to be given but he did not allow cross-examination of the department's witnesses on the methods prescribed by the Red Book or as to these other methods. He thought that he ought to be generally guided by the department's forecasts but said that he should guard against crediting them with a precision they could not in fact possess and that this applied especially to predictions for 1990. He also said:

> "It may well be that more up-to-date and authoritative forecasts will have become available by the time you consider this report; if so, you will, I trust, be in a position to assess my conclusions in the light of this later information."

He concluded that there was a need for these motorways.

It is against this background that the allegation that the refusal to permit the cross-examination of civil servants as to the validity of the methods prescribed in the Red Book and as to the more sophisticated methods put forward on behalf of the objectors falls to be considered.

It is clear that the objectors at this inquiry had every opportunity of putting forward their case. An inspector at an inquiry has a wide discretion as to its conduct. He may, in my view, properly disallow a particular line of cross-examination if it is not likely to serve any useful purpose. An admission or expression of view in the course of cross-examination at a trial may well affect the result, but the views of departmental witnesses as to the comparative merits of different methods of forecasting traffic elicited in the course of cross-examination are not likely to affect the ultimate outcome.

A In the lengthy and detailed report of the inspector the evidence of the expert witnesses called by objectors was faithfully recorded. It was there for the Secretary of State to see and to consider, no doubt in the light of advice he received from the civil servants in his department. I cannot think that the expression of views at the inquiry by civil servants as to methods of forecasting traffic would have assisted him or have served any useful purpose.

B In my opinion the inspector was fully entitled in the exercise of his discretion to refuse to allow that cross-examination and only if one treats proceedings at an inquiry as a trial—which they are not—can any ground be found for saying that in disallowing this cross-examination there was a denial of natural justice or unfairness. In my opinion there was not.

C After the inquiry had closed on January 29, 1974, and before the inspector had made his report to the Secretary of State, the department published two technical memoranda; the first, published on August 12, 1974, on "Design Flows for Motorways and Rural All-Purpose Roads" and the second, published in February 1975, on "Standard Forecasts of Vehicles and Traffic."

The first of these revised the design flow standards, its first paragraph D stating:

> "Observation, traffic counts and speed/flow studies have shown that modern roads are capable of safely carrying higher numbers of vehicles than the flow levels for which they are currently designed."

The second of these provided a new basis for forecasting future traffic E and superseded the forecasts based on the Red Book. Slower growth of traffic was predicted.

A census taken in August 1974 of traffic on the relevant roads showed that it was less than anticipated in that year.

It was consequently claimed that the department's case at the inquiry was invalidated. After the first of these memoranda was published the reopening of the inquiry was sought. This was not agreed to. On June F 12, 1975, the inspector reported and on May 25, 1976, a letter was written on behalf of the department to the chairman of the Midland Motorways Action Committee which contained the following paragraph:

> "As I explained in my letter of January 15, before he decides about the motorway schemes, the Secretary of State will take into account all the relevant information available to him. This will include any G new information which has a bearing on the proposals considered at the public inquiries and if the consideration of such new information leads the Secretary of State to disagree with the inspector's recommendations about the schemes, there will be an opportunity, in accordance with the usual practice, for the objectors to comment on the information."

H On August 18, 1976, a further letter was written on behalf of the department to the chairman of that committee. Its final paragraph stated:

"If your committee wishes to make further representations, such representations can always be considered by the Secretary of State as part of the continuous consideration of any of the department's proposals."

On August 19, 1976, the Secretary of State gave his decision. He agreed generally with the inspector's recommendations. In the decision letter he said that the department's traffic evidence at the inquiries had been re-examined in the light of developments since they concluded, that the department's evidence at the inquiries as to road capacities was in line with the new standards, and that re-examination of their traffic forecasts on the new basis strengthened the traffic elements of the case for the new motorways. Paragraph 112 of the letter stated:

"The general changes relating to design flow standards and traffic forecasts which have taken place since the inquiries have been fully taken into account by the Secretary of State who is satisfied that these do not materially affect the evidence on which the inspector made his recommendations. He is convinced that the schemes are needed and should be constructed as soon as funds and other road programme priorities permit."

It is now said that failure to reopen the inquiry was a denial of natural justice. I cannot regard this contention as well founded. If it had been reopened, objectors would, it is true, have been able to comment on the new standards and their effect in relation to the proposed motorways and on the disparity between the actual and anticipated traffic in 1974. But without any reopening of the inquiry they could make such comments on these matters as they desired to the Secretary of State and they would have been considered by him. In the circumstances I cannot see that there was any denial of justice or unfairness to objectors by the refusal to reopen the inquiry.

My Lords, the history of this lengthy and expensive litigation shows in my opinion the desirability of ministers having power, for the exercise of which they would be responsible to Parliament, to limit the matters which may be discussed at a local inquiry. If the need for a particular motorway can be discussed at every inquiry held in consequence of objections to a scheme to construct a part of it, the time it takes to deal with these matters is bound to be extended. If the need for a motorway is to be debated at one inquiry, I find it difficult to see any reason why it cannot be considered at others. As was said in the *Report on the Review of Highway Inquiry Procedures* (1978) (Cmnd. 7133):

". . . local inquiries are unsuitable for examining technical issues, such as methods of trunk road assessment, which have a national impact. But technical matters must not be immune from rigorous examination by an independent body. The Leitch committee has already made recommendations on these subjects. The new standing advisory committee, to be chaired by Sir George Leitch, which is being set up by the Secretary of State for Transport, will have a continuing responsibility to monitor developments in methods of technical assessment."

A How much time was spent at this inquiry in examination of technical issues I do not know but with such issues being monitored by a standing advisory committee the case for not permitting them to be debated at a local public inquiry appears to me strong.

For the reasons I have stated I would allow this appeal.

B LORD EDMUND-DAVIES. My Lords, on November 3, 1972, the appellant published draft schemes under section 11 of the Highways Act 1959 for the construction of two sections of motorway. His Statement of Policy was in the following terms:

> "It is the government's policy: 1. As part of a strategic trunk road network to be completed by the early 1980s to build new motorways to provide relief to the M1/M6 and trunk roads in the Oxford–
C Birmingham corridor and for the M5 and trunk roads in the Birmingham–Nottingham corridor. The M42 Bromsgrove section and the M40 Warwick section are integral parts of these motorways. 2. To construct the motorways to standards which will permit them to absorb the increasing traffic loads expected in the next 20 years so that traffic will flow freely and without interruption from congestion. 3. To construct the motorways to standards which will minimise
D the risk of accident and injury. 4. To construct the motorways on routes which will secure the maximum economic benefit for the nation and the communities through which they pass, whilst taking account of the need to preserve property and amenity."

In its original form, the Statement of Policy ended in this way:

E > "The Secretary of State's general policy of providing the strategic network will not be open to debate at the forthcoming inquiries into the proposals for the M42 (Bromsgrove section) and for the M40 (Warwick section), nor will such related questions of policy as the diversion of goods in transit from the roads to the railways or restricting the growth of road transport."

F If the proposed M42 route were adopted, it would divide into four sections the farm-land of the respondent John Bushell at Alvechurch and would also affect leasehold property owned by the respondent Terence James Brunt. They lodged objections to the schemes and joined with others in forming the "M42 Action Committee," which in its turn became a member of the Midland Motorways Action Committee. By the time
G the local inquiry set up by the appellant opened on June 12, 1973, there were 170 objectors.

At the outset, objection was taken by learned counsel for the M42 Action Committee to the following paragraphs in the appellant's Statement of Case:

> "1.2. The government's policy to build these new motorways will
H not be open to debate at the forthcoming inquiries: the Secretary of State is answerable to Parliament for this policy. But objectors will be free to argue, if they so wish, that the M42 Bromsgrove section and M40 Warwick section should not be built upon the line at

present proposed by the Secretary of State in his draft published schemes . . . 1.3. This statement of case will, therefore, explain the background against which the Secretary of State reached his policy to build the motorways and the need which they are intended to serve. It will be explained how the published lines of the M42 Bromsgrove section and the M40 Warwick section . . . were selected."

Counsel for the objectors stated that he wished to call evidence that there was no need for the M42 scheme and also wished to cross-examine the department's witnesses on that topic, and submitted that the prohibition contained in the statement of case was unsupported by the provisions of the Act of 1959. He therefore sought the inspector's ruling on the following questions:

"1. Would evidence that this motorway (i.e. M42) is not necessary be admitted? 2. If so, would the inspector be willing to listen to such evidence and report it to the Secretary of State? 3. If answers to both the above questions were in the affirmative, would the Secretary of State be prepared to take such a report into consideration?"

The inspector's ruling must be quoted verbatim:

"f. i. In giving my ruling I stated that counsel for the department had confirmed my understanding that it was entirely for me, as inspector, to decide any question of relevancy. I said that, in applying my decision as to what was relevant, I would not seek to be restrictive and that, in particular, I would admit any evidence or submission which was aimed at rebutting the department's case on the question of the need for the motorway. Nevertheless I could not allow the inquiry to be made into an inquiry into the government's general transport policy; such matters were for Parliament to decide and they could not properly or usefully be discussed at a local public inquiry. ii. I gave answers as follows to the three questions put by Mr. Marnham: 1. I would admit evidence that appeared to me to be relevant on the above criteria. 2. I would report to the Secretary of State on all evidence given at the inquiry. 3. This would be a matter for the Secretary of State. iii. Subsequently during the inquiry, on a number of occasions, I amplified my ruling by explaining that I would not necessarily prevent an objector from giving evidence which was irrelevant on the criteria of i. above but that, nevertheless, I would not require the department to deal with such evidence (i.e. rebut or cross-examine it) nor would I allow the department's witnesses to be cross-examined on the matters raised. My conduct of the inquiry was guided by my ruling as amplified. g. As a result of my ruling it was suggested by Mr. Norris (Council for the Protection of Rural England (Worcestershire Branch)) that paragraph 1.2 should be deleted from the department's statement of case; no objection to this was raised by counsel for the department and, by common agreement, the deletion was effected. The similar last paragraph of the statement of policy of

A the Secretary of State annexed to the statement of case was not at this time specifically deleted, but it was accepted by the department in a circular letter dated August 31, 1973, that, as a consequence of the agreed deletion of paragraph 1.2, it should be disregarded."

It should be added that the inspector's ruling was expressed to extend to the hearing of M40 objections as well as those relating to M42.

B The ruling rendered this inquiry unique of its kind, and that fact may go a long way towards explaining the unexpected difficulty by which the inspector found himself confronted and of which, as I hold, he fell foul. For, seemingly unlike in all previous inquiries, it followed from his ruling that a cardinal question in this particular inquiry was whether there existed a *need* for the contested sections of the new motorways. That topic constantly recurred during the 100 working days it lasted, and when C the inspector's report ultimately emerged in June 1975 the very first of his "General conclusions on the proposals" was introduced in this way:

> "623. Need for the proposals. a. On the evidence which I have heard and, *in particular, on the basis of the traffic forecasts given in evidence by the department, I conclude that there is a need* for trunk road schemes to provide relief to the M1/M6 and trunk roads in the D Oxford/Birmingham corridor and to M5 and roads in the SW/Birmingham corridor." (Emphasis added.)

That the appellant in his turn attached no less importance to the issue of need emerged with clarity from his decision letter of August 19, 1976, as to which I respectfully adopt the pungent comments of Shaw L.J. below, 78 L.G.R. 10, 20.

E The key witness for the department in this respect was Mr. J. A. Brooks, a traffic engineer who very favourably impressed the inspector. A proof of his evidence was produced to the Court of Appeal, and three comments may fairly be made about it. (1) It recognised the fundamental importance of establishing the *need* for the proposed schemes. (2) It accepted that need depended to a great extent upon traffic projections, F thus foreshadowing the view of the Leitch committee (*Report of the Advisory Committee on Trunk Road Assessment*, 1977, para. 19.1) that "Traffic forecasts are of central importance in the decision to build roads." (3) For Mr. Brooks the proper starting-point for such projections was the Ministry of Transport's *Advisory Manual on Traffic Prediction for Rural Roads*, issued in 1968 and commonly known as "the Red Book." Lord Denning M.R. was, with respect, clearly right in observing, 78 G L.G.R. 10, 16 that, with certain modifications which the department accepted: "The Red Book was the sheet-anchor of the department at the inquiry . . ." The data contained in it provided the basis of the traffic forecasts given on behalf of the department, and the forecasts themselves were arrived at by applying the extrapolatory methods advocated in the Red Book.

H The respondents sought to challenge those methods at the outset by cross-examination. They wanted an opportunity to demonstrate out of the mouths of the department witnesses themselves that the Red Book methodology was neither accurate nor reliable. But the department

resisted their application to do so, submitting that the procedures adopted in the Red Book were "government policy" and so within the inspector's classification of "irrelevant matter." Most regrettably, the inspector upheld that submission and ruled that no such cross-examination could be permitted.

The department has since sought to support that ruling in a variety of ways. Sir Douglas Frank Q.C. said in the course of his judgment, 76 L.G.R. 460, 469:

> "Mr. Woolf [for the department] argued that a scheme under section 11 relates only to the prescription of a route or, as it is commonly called, 'the line,' and that the question of the need for it strictly does not arise at the inquiry, and he remarked that this was the first case where the [department] had given evidence of need. He contended that the Red Book provided no more than a statistical basis on which evidence was given and that because of the 'boundary conditions' it was based on or incorporated matters of policy of the Secretary of State. Further, there was no reason to think that the engineer who based his evidence on the Red Book could give evidence on it; indeed, it was self-evident that he could not. The department is entitled to have its own criteria for deciding need; it is not in the capacity of a party, and he referred to *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87 and *T. A. Miller Ltd.* v. *Minister of Housing and Local Government* [1968] 1 W.L.R. 992."

What happened later in the Court of Appeal may be gathered from the following passage in the judgment of Lord Denning M.R., who commented thus on the inspector's ruling, 78 L.G.R. 10, 16:

> "This attitude was supported by Mr. Schiemann before us. He said that the traffic forecasts were government policy in themselves; or alternatively that it was government policy that they should be accepted: and on this account cross-examination should not be allowed. They came, he said, within the description of policy within the report of Lord Franks's committee (Cmnd. 218) at paragraph 318: 'The evidence to be required of such witnesses should . . . be confined to factual matters, as opposed to policy matters, and the inspector should ensure that this distinction is observed.'"

Before your Lordships, however, Mr. Rippon Q.C., for the department, manifested difficulty in maintaining that the Red Book could itself be regarded as embodying government policy. His difficulty was understandable, and indeed Sir Douglas Frank had rejected the submission outright, saying, 76 L.G.R. 460, 472:

> ". . . [the Red Book] was prepared by . . . the Ministry of Transport for the guidance of engineers in the design of rural roads and accordingly does not purport to be a document containing government policy; on the contrary it is no more than a technical guide."

Rightly agreeing, as I think, with the learned trial judge on this point, Lord Denning M.R. said of the Red Book, 78 L.G.R. 10, 16:

A "... I do not regard these traffic forecasts as government policy at all. They are the predictions by the department's experts about the future. They are just as much matters of fact as the evidence of a medical man as to the prognosis of a disease."

Templeman L.J. took the opposite view, but I have found it difficult to deduce his reasons for doing so. He largely restricted himself to B asserting, 78 L.G.R. 10, 21:

"... the inspector gave full weight to the criticisms which had been voiced, he was fully aware of the dangers and difficulties and unpredictability of national and local predictions of traffic extending over a period of 15 years and in this difficult field he made recommendations which were open to him to make."

C But for my part I respectfully regard this as an unwarranted assumption to make in respect of evidence not subjected to the customary form of challenge.

My Lords, for the present I defer considering whether the outcome of the inquiry would, or might have been, different had cross-examination been allowed. The topic now under consideration relates solely to the propriety of its refusal. I have natural diffidence in differing from your D Lordships in regarding that refusal as clearly wrong, but such is my considered view. It is beyond doubt that the inspector could—and should—disallow questions relating to the merits of government policy. But matters of policy are matters which involve the exercise of political judgment, and matters of fact and expertise do not become "policy" merely because a department of government relies on them. And, as E the Franks committee had put it in 1957: "We see no reason why the factual basis for a departmental view should not be explained and its validity tested in cross-examination." (*Report of the Committee on Administrative Tribunals and Inquiries* (Cmnd. 218), para. 316.)

Then, if the Red Book is not "government policy," on what basis can the cross-examination of departmental witnesses relying on its F methodology be properly refused? Sir Douglas Frank Q.C. surprisingly asserted, 76 L.G.R. 460, 472–473 (a) that its *authors* "were the only persons competent to answer questions on it," and (b) that "it seems to me necessarily to follow that the inspector was entitled to disallow cross-examination on it of a person who had had nothing to do with its preparation." But expert witnesses frequently quote and rely upon G the publications of others and are regularly cross-examined upon the works so relied upon even though they played no part in their preparation. Nor, my Lords, is it right to assume, as was suggested in the course of the inquiry and as some of your Lordships appear to accept, that Mr. Brooks, the highly qualified and experienced traffic engineer, would have been incompetent to deal in cross-examination with questions directed H to establishing the unreliability of the Red Book methodology upon which he himself heavily relied, albeit not without some emendations. Indeed, in paragraph 567 of this report the inspector described the witness as "thoroughly competent."

Pausing there, I conclude that the grounds hitherto considered for refusing cross-examination are unacceptable. But is it the case that, in an inquiry such as that with which this House is presently concerned, some special rule prevails which renders regular a procedure which in other circumstances would undoubtedly have been condemned as irregular? The general law may, I think, be summarised in this way: (a) In holding an administrative inquiry (such as that presently being considered), the inspector was performing quasi-judicial duties. (b) He must therefore discharge them in accordance with the rules of natural justice. (c) Natural justice requires that objectors (no less than departmental representatives) be allowed to cross-examine witnesses called for the other side on all relevant matters, be they matters of fact or matters of expert opinion. (d) In the exercise of jurisdiction outside the field of criminal law, the only restrictions on cross-examination are those general and well-defined exclusionary rules which govern the admissibility of relevant evidence (as to which reference may conveniently be had to *Cross on Evidence*, 5th ed. (1979), p. 17); beyond those restrictions there is *no* discretion on the civil side to exclude cross-examination on relevant matters.

There is ample authority for the view that, as Professor H. W. R. Wade Q.C. puts it (*Administrative Law*, 4th ed. (1977), p. 418): "... it is once again quite clear that the principles of natural justice apply to administrative acts generally." And there is a massive body of accepted decisions establishing that natural justice requires that a party be given an opportunity of challenging by cross-examination witnesses called by another party on relevant issues; see, for example, *Marriott* v. *Minister of Health* (1935) 52 T.L.R. 63, *per* Swift J., at p. 67—compulsory purchase orders inquiry; *Errington* v. *Minister of Health* [1935] 1 K.B. 249, *per* Maugham L.J., at p. 272—clearance order; *Reg.* v. *Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 Q.B. 465, *per* Diplock L.J., at pp. 488A, 490E–G; and *Wednesbury Corporation* v. *Ministry of Housing and Local Government* (*No.* 2) [1966] 2 Q.B. 275, *per* Diplock L.J., at pp. 302G–303A—local government inquiry.

Then is there any reason why those general rules should have been departed from in the present case? We have already seen that the parameters of the inquiry, as agreed to by the department representatives, embraced *need* as a topic relevant to be canvassed and reported upon. We have already considered the unacceptable submission that the Red Book was "government policy." And, while I am alive to the inconvenience of different inspectors arriving at different conclusions regarding different sections of a proposed trunk road, the risk of that happening cannot, in my judgment, have any bearing upon the question whether justice was done at this particular inquiry, which I have already explained was, in an important respect, unique of its kind.

There remains to be considered the wholly novel suggestion, which has found favour with your Lordships, that there is a "grey area"—existing, as I understand, somewhere between government policy (which admittedly may not be subjected to cross-examination) and the exact "line" of a section of a motorway (which may be)—and that in relation

to topics falling within the "grey area" cross-examination is a matter of discretion. I find that suggestion to be too nebulous to be grasped. Furthermore, *why* such an area should exist has not been demonstrated—certainly not to my satisfaction—nor have its boundaries been defined, unlike those existing restrictions on cross-examination to which I have already referred. And I confess to abhorrence of the notion that any such area exists. For the present case demonstrates that its adoption is capable of resulting in an individual citizen denied justice nevertheless finding himself with no remedy to right the wrong done to him.

My Lords, it is for the foregoing reasons that I find myself driven to the conclusion that the refusal in the instant case to permit cross-examination on what, by common agreement, was evidence of cardinal importance was indefensible and unfair and, as such, a denial of natural justice. But, even so, can it be said that no prejudice to the respondents resulted? It was urged for the appellant that, by allowing objectors to call witnesses to attack the Red Book methodology and including their proofs among the papers submitted to the Secretary of State by the inspector when he reported, the inspector had, in effect, put the objectors in as good a position as if he had indeed permitted cross-examination on the Red Book. But that cannot be so. The inspector was no mere messenger charged simply to convey to the minister the views of those appearing before him. His duty was to make recommendations, and these he arrived at by treating as "irrelevant" material evidence for the objectors and by intimating to the department's counsel that they need not cross-examine upon it. That evidence therefore manifestly played no part in the formation of the inspector's conclusions.

That the objectors were in truth prejudiced is, in my judgment, clear. Professor Wade has warned (*Administrative Law*, 4th ed., p. 454): "... in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly" and Lord Wright said in *General Medical Council* v. *Spackman* [1943] A.C. 627, 644–645:

> "If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

Again, in *Annamunthodo* v. *Oilfields Workers' Trade Union* [1961] A.C. 945 Lord Denning, delivering the judgment of their Lordships, said, at p. 956:

> "If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is prejudice to any man to be denied justice. He will not, of course, be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside."

The Act of 1959 expressly provides that the court may quash a scheme or order if it is satisfied that the interests of an applicant have been

substantially prejudiced. In *Miller* v. *Weymouth and Melcombe Regis Corporation* (1974) 27 P. & C.R. 468 Kerr J. rightly said, at p. 476:

> "If there is a possibility that the applicants' interests *may* have been prejudiced, as in the line of cases in which ministers received evidence from improper sources or applicants were deprived of an opportunity to make representations, then the court will in general readily accept that they have satisfied this requirement because they can show that they have lost a chance: . . ."

My Lords, I consider that such test has here been abundantly satisfied, for the most effective "representations" can and often are made in the process of cross-examination. The affidavit of the respondent Mr. Bushell, produced before the Court of Appeal, described in some detail the lines of cross-examination which would have been followed but for the inspector's ruling. It is true that, as already indicated, he nevertheless permitted the objectors to call witnesses supporting such cross-examination, even though he said it was "irrelevant." That evidence was later repeated to the Leitch committee. It is not necessary to examine its report (*Report of the Advisory Committee on Trunk Road Assessment*, 1977) in detail, but it contained substantial criticisms of Red Book methodology, and, to take one example, declared in paragraph 28.2:

> ". . . The department's current methods, because they are based on extrapolatory techniques, are generally insensitive to future policy changes. It is therefore preferable to adopt a 'causal' model . . ."

Had the inspector not ruled as he did, I hold that there was a very real possibility that cross-examination of the department witnesses on the lines projected might have created serious doubts in his mind regarding their traffic forecasts and therefore as to whether need for the motorways had been established. And those doubts, particularly when combined with certain important environmental factors which clearly troubled the inspector (see, for example, paragraph 623 (c) of his report), could well have led him to different conclusions and findings. As matters turned out, however, I consider that the objectors were denied what Lord Russell of Killowen described in *Fairmount Investments Ltd.* v. *Secretary of State for the Environment* [1976] 1 W.L.R. 1255, 1266 as "a fair crack of the whip." On that ground alone, I am for upholding the majority view of the Court of Appeal in favour of quashing the minister's decision accepting (albeit with modifications) the inspector's recommendation in favour of the two draft schemes.

Such being the conclusion to which I am driven, I do not propose to adjudicate upon the further complaints of the respondents regarding post-inquiry events. Certainly no consideration by the minister of further material could cure the fatal flaws in the report. I accept that the minister's ultimate decision was a purely administrative act. But that fact does not render his decision unassailable where, as here, it was preceded by and based upon a substantial injustice. I would therefore dismiss this appeal.

A LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Diplock, Viscount Dilhorne and Lord Lane. I agree with them and I cannot usefully add to their reasoning.

I would allow the appeal.

LORD LANE. My Lords, on November 3, 1972, the Secretary of State B for the Environment published draft schemes under the provisions of the Highways Act 1959 in respect of two sections of motorway to the south of Birmingham. One concerned 18.5 miles of the M42 (the Bromsgrove section), the other was 13.2 miles of the M40 (the Warwick section). There were originally 900 objectors. The Secretary of State therefore caused a local inquiry to be held as paragraph 9 of Schedule 1 C to the Act requires. By this time the number of objectors had been reduced to 170.

The inquiry lasted 100 working days between June 1973 and the end of January 1974. The inspector was faced with a huge volume of evidence. It took 18 months—until June 1975—for him to produce his report. The Secretary of State required another 14 months to consider the matter. On August 6, 1976, he made orders authorising the D construction of the two stretches of motorway.

By paragraph 2 of Schedule 2 to the Act of 1959:

> "If a person aggrieved by a scheme or order to which this Schedule applies desires to question the validity thereof, or of any provision contained therein . . . on the ground that any requirement of this Act or of regulations made thereunder has not been complied with E . . . he may, within six weeks from the date on which the notice . . . is first published, make an application for the purpose to the High Court."

The respondents to the present appeal, who were amongst the many objectors to the Bromsgrove section scheme, both of them likely to be adversely affected by the proposed road, duly made application to the F High Court. The case was tried on December 9, 1977, by Sir Douglas Frank Q.C. sitting as a deputy judge of the Queen's Bench Division. He dismissed the claim. The objectors appealed successfully to the Court of Appeal who on July 30, 1979, by a majority (Lord Denning M.R. and Shaw L.J.; Templeman L.J. dissenting) quashed the orders of the Secretary of State but indicated that any further inquiry should be confined to an examination of whether the volume of traffic in 10 or 15 G years' time would be such as to make the new road necessary. The Secretary of State now appeals from the decision of the Court of Appeal.

There are two main issues. First it is said that the inspector, by making certain rulings as to the conduct of the inquiry, in effect deprived the objectors of the opportunity of a fair hearing. Secondly it is said that after the conclusion of the inquiry there emerged a body of evidence H casting doubt on the basis upon which the alleged need for the new roads had been calculated; that the Secretary of State should therefore have reopened the inquiry and given the objectors the opportunity of renewing their submissions in the light of the new evidence.

The powers of the court to consider an objector's application are contained in paragraph 3 of Schedule 2 to the Act of 1959 as follows:

> "On any such application as aforesaid, the court—. . . (*b*) if satisfied that the scheme or order, or any provision contained therein, is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by failure to comply with any such requirement as aforesaid, may quash the scheme or order or any provision contained therein, either generally or in so far as it affects any property of the applicant."

At the outset of the inquiry, application was made by counsel for a body of objectors that the inspector should allow the question of need to be canvassed. Counsel sought a ruling on three questions: (1) Would evidence that the motorway is not necessary be admitted? (2) If so, would the inspector be willing to listen to such evidence and report it to the Secretary of State? (3) If the answers to both questions were in the affirmative, would the Secretary of State be prepared to take such a report into consideration?

The department's "statement of case," paragraph 1.2, as originally presented read as follows:

> "The government's policy to build these new motorways will not be open to debate at the forthcoming inquiries: the Secretary of State is answerable to Parliament for this policy. But objectors will be free to argue, if they so wish, that the [roads] should not be built upon the line at present proposed by the Secretary of State in his draft published schemes. . ."

The inspector ruled that it was entirely for him as inspector to decide any question of relevancy. He would not seek to be restrictive; he would admit any evidence or submission which was aimed at rebutting the department's case on the question of need for the motorway. Nevertheless he would not allow the inquiry to be made into an inquiry into the government's general transport policy; such matters were for Parliament to decide and they could not properly or usefully be discussed at a local public inquiry: in answer to counsel's specific questions he said: (1) he would admit evidence that appeared to him to be relevant on the above criteria; (2) he would report to the Secretary of State on all evidence given at the inquiry; (3) whether the Secretary of State would be prepared to take such a report into consideration was a matter for the Secretary of State himself. In the light of that ruling, counsel for the department agreed that paragraph 1.2 of the department's case should be deleted.

The inspector in his report made this addendum to his ruling at the inquiry:

> "Subsequently during the inquiry, on a number of occasions, I amplified my ruling by explaining that I would not necessarily prevent an objector from giving evidence which was irrelevant on the criteria . . . but that, nevertheless, I would not require the department to deal with such evidence (i.e. rebut or cross-examine it) nor would I allow the department's witnesses to be cross-examined on the matters raised."

A The objectors submit that by depriving them of the opportunity of cross-examining the department's witnesses as to how they came to the conclusion that the motorway was necessary the inspector in short did not accord them a fair hearing.

There can be no doubt that the obligation to hold an inquiry comprises the requirement that the inquiry should be fair. If the inquiry is not fair then there has been a " failure to comply " within the terms of paragraph B 3 of Schedule 2 to the Act of 1959. If that failure has resulted in the objectors' interests being substantially prejudiced, then the court may quash the order. What happened was that witnesses from the department, in particular a Mr. Brooks, gave evidence in support of the contention that by 1990 (the then " target year ") existing roads would be unable to cope with the then volume of traffic. Their calculations were based upon C a document entitled *Traffic Predictions for Rural Roads* (*Advisory Manual on*) which has for convenience been called the Red Book. The forecasts in the Red Book were founded on surveys made before and during 1968 projected forward to 1974 by a process of extrapolation and thence to 1990. These calculations involved the use of " standard growth factors." All these matters were explained by Mr. Brooks in his written proof of evidence.

D It was the contention of the objectors that the methods of prophesying future traffic levels propounded in the Red Book were unreliable; that to apply a rigid growth factor took no account of the many other factors which would inevitably affect the number of cars on the roads in the future. A number of experts gave evidence on the objectors' behalf to this effect. The inspector, however, true to his initial ruling, did not allow E anyone to cross-examine Mr. Brooks on the reliability of the Red Book methods of prediction.

The inspector's report contains more than 450 pages, and deals in detail with the contentions advanced by the objectors and their witnesses. In deciding whether the objectors have been treated unfairly, it is perhaps instructive to set out one paragraph of the report, paragraph 189 (f):

F > " Mr. MacKernan's objection amounted, essentially, to an attack upon virtually every phase of the technical procedures (network testing, traffic forecasting, cost/benefit analysis and route selection) employed by the department in framing and presenting its proposals. In the paragraphs which follow I endeavour to summarise the salient criticisms made, but it is not possible to deal here with the detailed G arguments used nor the multitude of detailed criticisms; these are to be found in the proofs and other documents accompanying this report."

It is clear that all the material was before the Secretary of State and his staff. The only things missing were the replies which Mr. Brooks might H have made to questions put to him by the objectors and their representatives. I find it difficult to see how in the circumstances the inability to cross-examine can be described as unfair. There are some occasions when cross-examination may be vital, for example, when at trial a witness's

accuracy of recollection or observation is in question. But this was not a trial, nor was the witness's accuracy being challenged. It was a local inquiry convened because there had been objections to proposals in respect of one stretch of a proposed motorway. The obligation on the Secretary of State under paragraph 10 of Schedule 1 to the Act of 1959 was simply to consider any objections which were not withdrawn and to consider the report of the person holding the inquiry before coming to his conclusion about the scheme. To say, as the objectors do, that because cross-examination would have been allowed at a trial it was wrong to disallow it here is to misunderstand the nature of the inquiry. The refusal of cross-examination did not ipso facto result in unfairness. If cross-examination had been permitted, the result would have been, as is apparent from the extract from the report I have quoted, an even lengthier hearing without any appreciable advantage. Mr. Brooks, it is clear from his written evidence and from the report, would have conceded that the Red Book left much to be desired and that the task of forecasting traffic volume 10 or 15 years ahead was (to say the least) formidable. In the end he would clearly have maintained that the Red Book (subject to various qualifications to that document which had been conceded) was the best guide available at the time. The two opposing points of view, department's on one side and objectors' on the other, would have remained as they were, and as they were presented by the inspector in his report.

The decision not to allow this cross-examination was certainly within the discretion of the inspector and he was right to rule as he did. It was not unfair. Certainly there was no question of the interests of the objectors being substantially prejudiced, and consequently so far as this ground is concerned no reason for the court to consider the desirability of quashing the scheme.

Lord Gifford advanced another parallel argument before this House, although it had not been in the forefront of his contentions before the Court of Appeal and did not appear in the statement of the respondent's case.

The inspector, he submitted, was under a duty not merely to report but also to recommend. By treating the question of need for the motorway as irrelevant he excluded from his mind considerations which might have resulted in a recommendation favourable to the objectors. This is said to be a breach of the rules of natural justice and consequently a failure to comply with the provisions of the Act of 1959 requiring the intervention of the court. I disagree. It would have been inappropriate for the inspector to have made recommendations as to the need for the motorway as a whole. He properly fulfilled his duties by presenting all the material evidence to the minister in his report.

One can test the matter in a practical way. If every inspector at every local inquiry is to determine the question of need and make recommendations accordingly one will along the course of a proposed motorway, as local inquiry follows local inquiry, get a series of decisions, doubtless differing from one another, as to the need for the motorway. The effect, apart from the appalling waste of time and money, would be that the Secretary of State would have to make up his mind on the evidence

available to him rather than on the various recommendations. That end can better be achieved by the method adopted here.

In short, the question of need is a matter of policy or so akin to a matter of policy that it was not for the inspector to make any recommendation. Just as his ruling on cross-examination was in the circumstances correct, so was his decision on this aspect.

I now turn to the second limb of the objectors' case, namely that the Secretary of State should have reopened the inquiry to give to the objectors the opportunity of dealing with new figures and matters which emerged after the close of the inquiry and before the Secretary of State made known his decision.

Three material events took place between the close of the inquiry and the publication of the minister's decision.

First, on August 12, 1974, there came from the department a circular setting out changes in design standards for interurban roads which the Secretary of State proposed should in the future be adopted. By virtue of improvements in the design of vehicles and the skill of drivers and other similar developments it had been discovered that the capacity of existing roads had been greatly increased.

Secondly, the predictions of traffic volume which were used at the inquiry were subsequently replaced by fresh ones.

Thirdly, there were in 1974 carried out a number of traffic censuses. Thus it was possible to compare the predictions about 1974 traffic volume made at the inquiry with what had actually happened in 1974. The actual 1974 traffic, on at least a number of the important roads, was a great deal less than had been predicted.

As to the first two events, it is clear from paragraphs 11 to 15 of his decision letter that these fresh factors had been taken into account before the decision was made. The results of the traffic censuses in 1974, even assuming them to be typical, could scarcely warrant reopening the inquiry.

Paragraph 112 of the decision letter puts the matter thus:

> "The Secretary of State has noted that much of the objection to the proposals relates to the fundamental question of whether the new motorways are needed. In support of the view that they are not, objectors have indicated that they consider the department's traffic evidence was incorrect and unreliable and that there is insufficient traffic to justify the schemes. A great deal of traffic evidence was adduced and debated at the inquiries as reported by the inspector. The general changes relating to design flow standards and traffic forecasts which have taken place since the inquiries have been fully taken into account by the Secretary of State who is satisfied that these do not materially affect the evidence on which the inspector made his recommendations. He is convinced the schemes are needed and should be constructed as soon as funds and other road programme priorities permit."

The minister has to balance his duties to the public in general against the interests of the objectors. There may be circumstances in which the emergence of fresh evidence would as a matter of justice demand the

reopening of an inquiry, circumstances in which no reasonable minister would fail to reopen it. There is no doubt in my mind that this is very far from being such a case. A

I would allow the appeal.

*Appeal allowed with costs in House of Lords.*

Solicitors: *Treasury Solicitor; Clinton Davis & Co.* B

M. G.

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[HOUSE OF LORDS] C

HANLON . . . . . APPELLANT

AND

THE LAW SOCIETY . . . . . RESPONDENT

[1979 H. No. 2807] D

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| 1979 | May 14, 15, 16, 18; June 21 | Reeve J. |
| 1979 | Nov. 2, 5; Dec. 4 | Lord Denning M.R., Sir John Arnold P. and Donaldson L.J. |
| 1980 | Feb. 27, 28; March 3, 4; May 1 | Lord Edmund-Davies, Lord Simon of Glaisdale, Lord Fraser of Tullybelton, Lord Scarman and Lord Lowry |

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*Legal Aid—Costs—Charge on property—Property adjustment order—Divorce—House owned by husband—Legally aided wife claiming transfer—Husband disputing claim—Court ordering transfer to wife—Single legal aid certificate covering divorce proceedings and property adjustment proceedings—Whether legal aid fund entitled to charge on house—Whether house "property . . . recovered or preserved"—Whether recovered or preserved "in the proceedings"—Whether discretion in The Law Society to postpone enforcement of charge or accept charge on substitute security—Matrimonial Causes Act* 1973 (*c.* 18), *s.* 24 (1) (*a*)—*Legal Aid Act* 1974 (*c.* 4), *s.* 9 (6)—*Legal Aid (General) Regulations* 1971 (*S.I.* 1971 *No.* 62 (*L.* 1)) (*as amended by Legal Aid (General) (Amendment No.* 2) *Regulations* 1976 (*S.I.* 1976 *No.* 628), *reg.* 2, *and Legal Aid (General) (Amendment) Regulations* 1977 (*S.I.* 1977 *No.* 1293), *reg.* 7), *reg.* 18 (10) (*c*) (i) F G

*Law Reform—Whether necessary—Legal aid—Costs—Divorce—Property adjustment order following divorce—Charge on property recovered or preserved for benefit of legal aid fund—Whether matrimonial home as sole capital asset suitable subject for charge* H

Section 24 of the Matrimonial Causes Act 1973 provides: "(1) On granting a decree of divorce, . . . or at any time thereafter . . . , the court may make any one or

Neutral Citation Number: [2021] EWHC 1633 (Admin)

Case No: CO/3093/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2021

**Before** :

**THE HONOURABLE MR JUSTICE DOVE**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **Georgia Elliott-Smith** | **Claimant** |
| **- and -** | |
| **Secretary of State for Business, Energy and Industrial Strategy** | **First Defendant** |
| **- and –** | |
| **Department for Agriculture, Environment and Rural Affairs Northern Ireland** | **Second Defendant** |
| **- and –** | |
| **Scottish Ministers** | **Third Defendant** |
| **- and –** | |
| **Minister for Environment, Energy and Rural Affairs Welsh Government** | **Fourth Defendant** |

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**David Wolfe QC** and **Ben Mitchell** (instructed by **Leigh Day Solicitors**) for the **Claimant**
**Richard Honey QC** (instructed by **Government Legal Department**) for the **First Defendant**
**Andrew Sharland QC** (instructed by **Government Legal Department**) **for the Second Defendant**
**Tom de la Mare QC** (instructed by **Government Legal Department**) and **Stephen Donnelly** (instructed by **Government Legal Department**) for the **Third Defendant**
**Mona Bayoumi (**instructed by **Welsh Government Legal Services**) for **Fourth Defendant**

Hearing dates: 14th & 15th March 2021

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# Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII
and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down is deemed to be 10:00 am 27 April 2021.

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**Mr Justice Dove:**

Introduction

1. This application for judicial review concerns the legality of the defendants' joint decision to create the UK Emissions Trading Scheme (the UK ETS) as a replacement for the UK's participation in the European Union Emissions Trading System (the EU ETS) following the departure of the UK from the European Union. The claim as originally formulated sought declarations in relation to the defendants' decision on the 1st June 2020 to create a form of UK ETS described in a document entitled "The future of UK carbon pricing, UK Government and devolved administrations response" ("the Response"). The particular features of concern to the claimant are described below. At the time when the claim was issued a draft order to give effect to the UK ETS had been published but not made. Subsequent to the issuing of proceedings, on 11th November 2020, the Greenhouse Gas Emissions Trading Scheme Order 2020 ("the 2020 Order") was made. At the hearing it was clarified by the claimant that she does not seek for that order to be quashed, but rather seeks declarations that the scheme which is enacted by it is unlawful for the reasons which are explained below. It is apparent that the 2020 Order will require revision in the future as part of further phases of the UK ETS, and the claimant seeks the declarations to inform those future revisions so as to take account of the concerns which are central to her bringing this action for judicial review.

2. The second and third defendants raise as part of their defence to this claim, albeit at a very late stage, the submission that this court does not have jurisdiction over the decisions which were reached by those defendants to participate in the UK ETS. Prior to the hearing of this matter it was agreed that the sensible course was for me to determine the substance of the claimant's grounds for challenging the decisions in respect of the UK ETS, and for these jurisdictional questions to be litigated in the event that it was concluded that, in principle, the claimant is entitled to relief. As such, apart from furnishing written material, the second and third defendants did not take an active part in the hearing. In any event both the second and third defendants adopted the submissions made by the first defendant in resisting the substance of the claimant's case.

The factual background

3. The essence of a scheme such as the EU ETS or UK ETS is to establish a scheme to encourage the reduction of emissions of greenhouse gases, in particular by those operating activities which give rise to major greenhouse gas emissions. Both the EU ETS and UK ETS operate as what is known as a "cap and trade" scheme. A cap is set on the total amount of certain greenhouse gases that can be emitted by sectors of the economy over a given period of time (usually around 10 years), and that cap is then divided into allowances. Those required to participate in the scheme are then either given allowances or they have to purchase them to cover the emissions which their activities are generating. Failure to surrender sufficient allowances to cover emissions generated results in civil penalties. Over the course of time the cap is reduced so as to impose a limit on emissions which steadily falls and thereby contains the generation of greenhouse gases. Allowances can be traded, thereby effectively putting a price on emissions or, as it is often termed, carbon. Allowances are sold through auctions by the governments administering the scheme, and the purchase of allowances can lead

to both a trade in allowances taking place and also cause hedging of allowances that may be required in future years. The price of allowances has the potential to have a number of significant influences. It can influence the viability of businesses required to participate in the scheme; it can incentivise investment and other activities to reduce the generation of emissions; it can, if too high, lead to carbon leakage whereby energy intensive industries may seek to transfer to countries elsewhere to avoid the extra costs of the scheme. In establishing the scheme, it is the contention of the defendants that it is necessary to establish a liquid and stable market in allowances in order for the objective of reducing emissions over time to be accomplished. The evidence before the court demonstrates that there are numerous emissions trading schemes in operation, with the EU ETS being the largest.

4. The objective of implementing an emissions trading scheme and the need to limit greenhouse gas emissions is directly related to the need to combat climate change. In November 2008 the Climate Change Act 2008 (which is dealt with in greater detail below) came into force, bringing with it a decision-making structure which included the enactment of carbon budgets taking account of the advice of the Committee on Climate Change ("the CCC"), an institution created by the 2008 Act. The setting of legally binding carbon budgets through the 2008 Act is designed to bear down on the emission of greenhouse gases in order for the UK to play its part in combatting climate change.

5. Following advice from the CCC delivered in May 2019 to the first defendant, the UK legislated for a target comprising a net zero increase in greenhouse gas emissions compared to the level of emissions in 1990 to be achieved by 2050. Amongst the other provisions contained within the 2008 Act are powers to establish an emissions trading scheme which are dealt with in detail below.

6. On 12th December 2015 the state parties to the UN Framework Convention on Climate Change adopted the Paris Agreement in relation to climate change. The recitals to the agreement recognise "the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge", along with "the importance of the engagements of all levels of government and various actors… in addressing climate change". The recitals recognised that sustainable lifestyles and sustainable patterns of consumption and production, with developed country parties taking the lead, play an important role in addressing climate change. Articles 2 and 4 of the agreement provided as follows so far as relevant to the issues in this case:

> "Article 2
>
> 1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
>
> (a) Holding the increase in the global average temperature to well below 2 ℃ above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 ℃ above pre-

> industrial levels, recognising that this would significantly reduce risks and impacts of climate change.
>
> …
>
> Article 4
>
> 1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognising that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic by sources and removals by sinks of greenhouses gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty."

7. In October 2017 the first defendant published a document entitled "The Clean Growth Strategy". At that time, it was clear that the UK would be leaving the EU and the document noted that the UK's departure would have no impact on the level of commitment to tackling climate change and implementing the provisions of the Paris Agreement. The document also noted the participation of the UK in the EU ETS, and indicated that consideration was being given to future participation in the EU ETS after exit from the EU.

8. On the 2nd May 2019, and with the deadline for the UK leaving the EU no doubt clearly in mind, the defendants wrote to the CCC seeking their advice on the establishment of a UK ETS. This was on the basis of two scenarios: firstly, a standalone UK ETS and, secondly, a UK ETS linked to the EU ETS (subject to satisfactory negotiation of a linking agreement). The letter pointed out (with specific reference to the statutory framework) as follows:

> "Pursuant to Section 41(3)(b) of the CCA, we request that your advice takes into account the following principles that a UK ETS must:
>
> - Be an operational system which facilitates cost effective decarbonisation through trading of allowances;
>
> - Be deliverable for operation from 1 January 2021;
>
> - meet the UK Government's commitment in the Clean Growth Strategy: *"We will seek to ensure our future approach is at least as ambitious as the current scheme and provides a smooth transition for the relevant sectors"* p.44, CGS;

- maintain industrial competitiveness whilst supporting delivery of the UK's and DA's domestic and international climate change commitments and targets – noting that UK, Scottish and Welsh Ministers have also recently jointly sought the CCC's advice on long term emissions reduction targets in light of the Paris Agreement and recent IPCC Special Report;

- meet the UK's commitment to the robust implementation of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA); and

- be capable of being linked to the EU scheme, so that UK and EU tradable allowances are fully fungible, noting that securing a linking agreement is the UK's preferred outcome."

9. The CCC responded in a letter dated 7th August 2019. This response provided as follows:

> "Economic theory characterises carbon pollution as a market failure and an externality that needs to be priced in order to ensure that those responsible bear the costs of polluting. Appropriate pricing incentivises emissions reductions by encouraging investment decisions that reduce the damage that greenhouse gases cause.
>
> However, carbon pricing alone will not provide sufficient decarbonisation – for example the Stern Review also identifies the need for support for innovation and in tackling barriers to behaviour change. Whilst carbon pricing is essential it needs to be used as part of a suite of policy instruments, as confirmed by real-world experience internationally.
>
> …
>
> We agree with the Government's preference for a linked UK-EU ETS in the case of the EU exit. This maintains key benefits of membership of the EU system, most notably access to a wider market and addressing competitiveness within a level playing field across the EU.
>
> We recommend that the cap of the linked UK ETS be set based on the cost-effective path to the UK's new net-zero target. We will provide that trajectory in our advice on the sixth carbon budget (covering 2033-2037), which is due in 2020. Following this advice, the level of the cap should be adjusted as soon as possible to align to the carbon budgets.

- For sectors currently covered by the EU ETS, the UK is decarbonising more quickly than other EU countries, meaning the UK's emissions are lower than its share of the EU ETS cap (the overall limit on allowed emissions during a prescribed period).

- If this remains the case during the 2020s, this risks other EU countries buying UK allowances to continue polluting rather than reducing overall EU emissions. That would provide a net gain to UK Treasury, as the UK sells excess permits to non-UK participants, but reduce the impact of UK actions in tackling climate change as the quantity of emissions assigned to the UK would exceed expected UK emissions.

- A lower cap in the 2020s would avoid this, and be more in line with expected UK emissions over the fourth and fifth carbon budget periods (2023-2027 and 2028-2032)."

10. On 4th March 2020 the defendants again sought the advice of the CCC in respect of a UK ETS, operating as a standalone system and not linked with the EU ETS, but retaining the option of becoming linked to the EU ETS at a later date if that was considered desirable. The advice which was sought, (again pursuant to s41(3)(b) of the 2008 Act and with the same parameters set out above) and the context of the proposed scheme, was described in the letter as follows:

> "We would like to follow up on your offer to provide further advice on a standalone system operational from 1 January 2021, which retains the option of being linked to the EU ETS at a later date if desired. Therefore we are asking for your advice on the key elements of our proposed standalone system, relating to ambition, effectiveness and competitiveness."
>
> 1. We acknowledge your recommendation that the cap of a linked UK ETS be set based on the cost-effective path to the UK's net zero target, which you are providing as part of your advice on the sixth carbon budget (CB) later in 2020. However, in order to implement a UK ETS for January 2021, we will need to lay legislation before receiving this advice. Having analysed a number of scenarios, we intend to set the cap on the total number of allowances at 95% of the UK's expected national share of the EU ETS Phase IV cap. The cap will then be reduced annually, in line with the EU ETS IV trajectory. The rationale for setting the cap at this level is that we believe it provides the right balance between climate ambition and business competitiveness in the early years of a UK ETS by signalling our ambition in cutting carbon emissions, whilst minimising the risk of high and volatile prices which could destabilise a new market which could occur if the cap is tightened beyond 95%. We

will make it clear in the government response to the consultation that this will be the cap for the initial years of the system, and make a commitment to reconsult on the level of the cap in 2021 following receipt of your advice later this year on Carbon Budget 6 and a net zero consistent cap. We will make an announcement on the cap and trajectory for the remainder of the phase following the consultation, and ensure the implementation of any changes provides a reasonable notice period for participants.

2. We acknowledge your advice that the Government should ensure a tighter cap does not lead to carbon leakage. Therefore, we propose keeping the size of the free allocation share and the new entrants reserve the same as expected if the UK remained in Phase IV of the EU ETS. The reduction in the overall cap set out above will be taken from the auction share.

3. To ensure a minimum and consistent carbon price signal in the early years of a standalone link-ready system, we intend to implement an Auction Reserve Price (ARP) of £15. The ARP is intended to be transitional, and will be reviewed in line with any changes to the cap. The ARP will not apply if the system is linked to the EU ETS.

4. To protect UK participants from the risk of sustained high prices in the early years of the system, which could place them at competitive disadvantage compared to EU counterparts, we intend to make the Cost Containment Mechanism (CCM) more responsive by lowering the price trigger threshold and reducing the time period before intervention. In a linked system these adaptations would not apply, and we would instead seek to mirror the EU ETS mechanism (subject to negotiations). We intend to implement a CCM which will be trigged if the carbon price is:

(a) Year one of the system: two times the average carbon price in effect in the UK in the two preceding years, for three consecutive months.

(b) Year two of the system: two and a half times the average carbon price in effect in the UK in the two preceding years, for three consecutive months.

(c) Year three of the system and thereafter: three times the average carbon price in effect in the UK in the two preceding years, for six consecutive months.

5. As stated in our consultation, the scope for a standalone system would remain the same as EU ETS for the first 10

> year phase, but we will review how the scope could be increased for subsequent phases.

11. The CCC responded to this letter on 20th March 2020. The essence of the advice which they gave in response to the statutory request is contained in the following extract from the letter:

> "However the interim proposals for the scheme set out in your letter are inconsistent with the UK's Net Zero ambitions in some respects, primarily relating to the relatively high level of allowed emissions under the proposed cap. In a year when the UK needs to be seen as a climate leader, adopting the proposed trading scheme risks sending a damaging signal internationally ahead of UN climate talks in Glasgow in November. It also risks undermining the scheme as a trading system, since if the cap is set too high the floor price in the scheme will set the price and become a de-facto tax.
>
> - Your letter proposes launching the scheme with a cap set at 5% below the UK's notional share of the EU ETS. We do not consider that to be a suitable basis, as the UK will no longer be part of the EU scheme. Rather, the starting point for the cap should be the latest data on actual UK emissions in the traded sector.
>
>  - UK traded sector emissions from stationary sources (i.e. power and industry) were around 129 $MtCO_2$ in 2018. Verified emissions in 2019 are likely to be lower than this, given continued reduction in coal-fired electricity generation. 2019 emissions will be published in early April and are likely to be a better basis for informing the cap.
>
>  - The cap as currently proposed would begin the scheme in 2021 with considerably higher allowed emissions from stationary sources of 150 $MtCO_2$ (around 17% above the actual emissions in 2018). That implies a large surplus continuing until the point when a revised cap in line with the sixth carbon budget advice comes into force (e.g. 2023). That surplus is likely to trigger the price floor (£15/ $tCO_2$) and mean the scheme effectively operates as a tax.
>
> - In theory there may be arguments for creating some initial 'headroom' in the scheme by issuing permits above the level of expected emissions in the early years. That would allow participants to buy additional permits beyond their immediate needs in the initial years of the scheme as a hedge against future prices increases, and reduce the risk of high prices resulting

> from the cap being set too tight, which could lead to negative competitiveness effects and 'carbon leakage'.
>
> - However given the world's current economic position and uncertainty around Covid-19, in practice the need for 'headroom' is likely to be limited. Risks are also limited by your proposals to continue free allocation of allowances for at-risk industries and for the Cost Containment Mechanism.
>
> - If the Government chooses to keep the cap as proposed, then a higher Auction Reserve Price will be necessary since this will effectively become the price-setting mechanism and not merely a backstop.
>
> We also note a change in language over linking to the EU ETS, which was originally the Government preference – and with which the Committee agreed. It is now described only as an option at a later date, and if desired. The Committee remains of the view that a UK ETS should link to the EU ETS as soon as is practicable, for the same reasons as expressed in our advice of 8 August 2019, including increased liquidity and the protection around competitiveness of being part of a larger scheme."

12. On the 1st June 2020 the defendants responded to the CCC in a letter contemporaneous with the publication of the results of a consultation exercise which had been undertaken in respect of a UK ETS between May 2019 and 12th July 2019 in the form of the Response. The letter which the defendants wrote to the CCC provided as follows:

> "We share your view that there is a need to ensure the UK ETS cap is in line with a trajectory consistent with the UK's net zero targets and ambitions. We look forward to receiving your full and considered advice on the next Carbon Budgets, which will enable us to review our current approach and work towards meeting our commitments as quickly as possible through a suite of decarbonisation measures, including the cap.
>
> However, it is the joint governments' view that for the launch of the UK ETS, it is important to put in place a policy which provides a pragmatic and feasible approach to meeting net zero through ETS. Our approach, as set out below, provides the necessary flexibility to raise ambition in the near future and supports the traded sector to decarbonise, while appropriately mitigating the risks of carbon leakage.
>
> Ensuring we have a fully functioning UK market from January 2021, which gives industry certainty and continues to deliver

> significant emission reductions in line with current carbon budgets, is key. This task is further complicated by an unprecedented pandemic and associated economic emergencies, whose full, long term impact on traded emissions cannot by assessed by present, making it difficult to accurately adjust the cap or set an auction price reserve (APR) in advance.
>
> As such we are proposing a two-stage approach. The first stage is intended to be purely temporary in nature. We will continue to demonstrate clear climate ambition by cutting the cap by 5% compared to the notional cap the UK would have had if we remained in the EU ETS. Our analysis suggests that this starting point, combined with a transitional ARP of £15 and temporary market stability mechanisms, would also minimise the risks associated with transition from the EU ETS. This provides a balance between a tightening of the cap on emissions and stability and competitiveness for business.
>
> Our administrations are strongly committed to ensuring UK emissions reduction is consistent with our different net zero commitments, including the different pace of our interim targets. Once we have your published advice on the Sixth Carbon Budget, we will consider this again immediately. Our response therefore commits us to a second stage, during which we will swiftly consult on an appropriate net zero consistent trajectory for the cap for Phase 1 of the UK ETS within nine months of your advice being published. We will commit to implementing any changes by January 2023 if possible, and certainly no later than January 2024.
>
> Reducing carbon emissions and enhancing the environment are major priorities for the UK Government and Devolved Administrations and we intend to continue to lead the global carbon markets. All administrations demonstrate global leadership in tackling climate change: the UK government as president of COP 26 climate negotiations and the Welsh and Scottish Governments through states and regions initiatives, such as the Under2Coalition."

13. Within the Executive Summary of the Response document the defendants set out the purpose of the design of the UK ETS that they were seeking to establish in the following terms:

> "2. We intend to establish a UK Emissions Trading System with Phase 1 running from 2021-2030, which could operate as either a linked or standalone system. As stated in 'The UK's Approach to Negotiations' the UK would be open to considering a link between any future UK Emissions Trading Scheme ETS and the EU ETS (as Switzerland has done with its ETS), if it suited both sides interests. As announced at Budget 2020, the UK Government will publish a consultation later this

year on the design of a Carbon Emission Tax as an alternative to a UK ETS, to ensure a carbon price remains in place in all scenarios.

3. The UK ETS will apply to energy intensive industries (Ells), the power generation sector and aviation – covering activities involving combustion of fuels in installations with a zero rated thermal input exceeding 20 MW (except in installations for the incineration of hazardous or municipal waste) and sectors like refining, heavy industry and manufacturing. The proposed aviation routes include UK domestic flights, flights between the UK and Gibraltar, flights from the UK to EEA, and flights from the UK to Switzerland once an agreement is reached.

4. In light of the UK's commitment to reaching net zero emissions by 2050, the UK ETS will show greater climate ambition from the start. As such, the cap will initially be set 5% below the UK's notional share of the EU ETS cap for Phase IV of the EU ETS. The Committee on Climate Change (CCC) will advise later this year on a cost-effective pathway to net-zero, as part of their advice on the Sixth Carbon Budget. We will consult again on what an appropriate trajectory for the UK ETS cap is for the remainder of the first phase within nine months of this advice being published. Our aim is that any changes to the policy to appropriately align the cap with a net zero trajectory will be implemented by 2023 if possible and no later than January 2024, although we would also aim to give the industry at least one year's notice to provide the market with appropriate forewarning.

5. Auctioning will continue to be the primary means of introducing allowances into the market. To safeguard competitiveness in the UK ETS and reduce the risk of carbon leakage, a proportion of allowances will be allocated for free. Some free allowances will also be made available for new stationary entrants to the UK ETS as well as existing operators who increase their activity – these allowances will be accessible through the New Entrants Reserve. Our initial UK ETS free allocation approach will be similar to that of Phase IV in order to ensure a smooth transition for participants for the 2021 launch.

6. However, we recognise the range of views expressed in response to the consultation and the crucial need to take a fair, proportionate and considered approach to potential improvements to free allocation and we will begin a full review of possible future changes in the coming months.

7. In a standalone UK ETS we will introduce a transitional Auction Reserve Price (ARP) of £15 (nominal) to ensure a minimum level of ambition and price continuity during the

> initial years of UK ETS. To address concerns around the reactiveness of the UK ETS in managing high price spikes, in years one and two of a UK ETS the Cost Containment Mechanism (CCM) will have lower price and time triggers, providing a mechanism by which the UK Government can decide whether to intervene sooner should very high prices occur. We will revert to the EU ETS CCM design in year three of a UK ETS, or sooner if we link with the EU ETS. We will consult separately on the design of a Supply Adjustment Mechanism (SAM) in a standalone UK ETS if required.
>
> …
>
> 11. The UK ETS will play an important role in cross-government efforts to deliver the net zero target as part of a coherent policy package alongside £2 billion to support decarbonisation in a range of sectors, and the £315m Industrial Energy Transformation Fund to support industry to invest in energy efficiency and decarbonisation technology."

14. Within the introduction to the Response the following appears by way of explanation in respect of the approach which has been taken:

> "14. Having left the EU, the UK will remain at the forefront of domestic and international action on climate change by committing to go further and faster in our efforts to deliver clean energy and a net zero future.
>
> 15. The UK Government are expecting advice from the Committee on Climate Change (CCC) on Sixth Carbon Budget (emissions for 2033-2037). This will include advice on the cap for the UK Emissions Trading System (UK ETS) in a net zero context, which will go to both UK Government and DAs. This advice will give the evidence on what is cost-effective and inform the evolution of the UK ETS after its launch.
>
> 16. The UK Government and the DAs are committed to carbon pricing as an effective emissions reduction tool. Placing a price on carbon creates the incentive for emissions to be reduced in a cost-effective way, while mobilising the private sector to invest in emissions reduction technologies and measures.
>
> …
>
> 24. The UK ETS will cover a significant proportion of emissions within scope of our carbon budgets (between 2013 and 2020 the EU ETS has covered around a third of UK emissions) and will play an important role in cross-government efforts to deliver the net zero target as part of a policy package

which includes £2 billion to support decarbonisation in a range of sectors, and the £315 million Industrial Energy Transformation Fund to support industry to invest in energy efficiency and decarbonisation technologies.

25. The overall cap for the UK ETS will determine the limit on total emissions allowances. Our UK ETS cap is set to signal our long-term climate commitments while ensuring our economy remains competitive.

26. The UK Government and DAs are committed to clean growth. The global shift to a low carbon economy is one of the greatest industrial opportunities of our time, and climate leadership can drive UK competitiveness while securing long term prosperity.

27. We are however aware that UK industry competes in a global market, and operators exposed to international competition may be put at a competitive disadvantage compared to their counterparts in other countries without similar carbon costs. There is a risk that this disadvantage could lead to businesses relocating their production, investment and associated emissions abroad – a concept known as carbon leakage.

…

32. The Future of UK Carbon Pricing consultation ran prior to the ongoing COVID-19 emergency. We appreciate that some businesses are facing financial difficulties as a result of COVID-19, and we will be working closely across Government and the DAs to respond to difficulties faced by operators. The UK Government has set out a package of temporary, timely and targeted measures to support businesses through this period of disruption caused by COVID-19. A dedicated website helps businesses to find the right support, advice and information to help with the impact of COVID-19.

33. Business support is also offered by DAs, with dedicated websites outlining support in Scotland, Wales and Northern Ireland

34. We are also mindful of the continuing need to maintain climate ambition, and will continue to put measures in place that enable us to achieve net zero emissions by 2050, whilst balancing this with the need to maintain UK business competitiveness."

15. Questions were contained within the consultation exercise related to the proposed scope of the UK ETS, and in particular the sectors and activities which would be included within it. One of the issues raised in the consultation process was the question of whether or not municipal waste incinerators should be included within the scheme The Response deals with that issue at paragraph 52 as follows:

> "52. We acknowledge respondents' comments regarding expanding the scope of the scheme to include municipal waste incinerators. The complex environmental requirements placed on municipal waste incinerators, as well as their role in diverting waste from landfill, make it difficult to include them in a UK ETS. We also acknowledge the CCC's advice to expand the scope to include agriculture and land use. While we agree emissions from these sectors will need to be abated to meet our net zero target, there may be more appropriate measures than the UK ETS for doing so. This will be for the appropriate government departments to consider following the CCC's advice on the Sixth Carbon Budget and a net zero trajectory, however municipal incinerators will not be included within the scope of the UK ETS for the period 2021-2015."

16. A further consideration which featured in the consultation exercise was the role of costs to business alongside climate ambition in the decisions related to setting the cap and the trajectory for emissions reduction. The Response records that a company in the power sector was "suggesting that alignment to the Paris Agreement future recommendations from the Intergovernmental Planning Climate Change (IPCC) and CCC should be considered". The document addressed the responses in relation to costs to business and climate ambition in the following terms:

> "58. The UK and Devolved Administrations firmly believe that the key considerations in setting the level of the cap are climate ambition balanced with the costs to business. We welcome the support for this approach from the majority of our stakeholders.
>
> 59. The UK is committed by law to reducing emissions to net zero by 2050, and the UK ETS will play a key role in decarbonising the power sector, EIIs and aviation. However, it is important that in meeting this commitment the UK Government considers the traded sectors competitiveness, and other pressures that businesses currently face as a result of our departure from the EU. In addition, the UK ETS will be a new emissions market, whereby any uncertainties around how the market will respond will need to be considered when setting the cap.
>
> 60. To balance these objectives, the cap for a UK ETS will initially be set at 5% below the UKs expected notional share of the EU ETS cap for Phase IV of the EU ETS. Based on the proposed design scope, this equates to around 156 million allowances in 2021. These cap figures include our proposed aviation scope.

> 61. We note the CCC's advice from 20 March 2020 on further tightening of our proposed cap for day 1 of the UK ETS, and have considered this advice carefully, particularly in the context of the uncertainties and risks posed by COVID-19. We also note the CCC's recommendation that the cap for a standalone or linked UK ETS should be set in line with the cost-effective pathway to net zero emissions in 2050. They will be providing more detail on this when they advise on the Sixth Carbon Budget, which is expected in December 2020. It was recommended that the cap should be adjusted to align with this trajectory as soon as possible following receipt of further advice.
>
> 62. We intend to consult again on what an appropriate trajectory for the UK ETS cap is for the remainder of the first phase within nine months of this advice being published. Our aim is that any changes to the policy to appropriately align the cap with a net zero trajectory will be implemented by January 2023 if possible and no later than January 2023, although we would also aim to give the industry at least one year's notice to provide the market with appropriate forewarning.
>
> 63. In the interim, particularly given the current uncertainties, we believe it is appropriate to maintain sufficient headroom of allowances for a time-limited period at the start of the UK ETS. We therefore believe that initially tightening the cap by 5% provides the appropriate balance between the UK's climate ambition in the context of the UK's net zero commitment and any risk of disproportionate costs to businesses which could arise in the early years of a UK ETS. The initial cap will be reduced annually by 4.2 million allowances, meaning that the UK ETS cap will remain 5% below where we would have expected the UK's notional share of the Phase IV EU ETS cap to be year on year."

17. The consultation had included a question relating to whether or not there should be a transitional Auction Reserve Price (ARP). The conclusions which the defendants had reached in the light of the responses from consultees were set out as follows:

> "135. In order to ensure a minimum level of ambition in a standalone UK ETS and to minimise the potential for a significant fall in the UK carbon price in a transition to a standalone UK ETS, we plan to introduce a transitional ARP of £15. This will reduce the severity or possibility of a large difference between the EU ETS price and the price in a standalone UK ETS.
>
> 136. We are tightening the cap compared to the UK's expected notional share of the EU ETS cap for Phase IV. There remains

> a risk that prices in a standalone UK ETS could be very low in the early years. Low prices will undermine our climate ambition, confidence in the market and remove the investment signal necessary to drive innovation in low carbon technologies. A £15 ARP will mitigate against these risks and maintain a level of climate ambition until we are able to reassess the level of the cap in terms of our net zero commitment, following further advice from the CCC.
>
> 137. As set out in the consultation, the ARP will be to facilitate the transition from a EU ETS to a standalone UK ETS, and we will review it alongside a subsequent consultation on the cap (as set out in the cap section above). This may take place outside the whole-system reviews mentioned in the Phases and Reviews section. We will aim to coordinate this review with other targeted reviews.
>
> 138. Stakeholders expressed concerns around competitiveness should the EU ETS price fall below the level of the ARP. While this risk is likely to be somewhat increased due to the effects of COVID-19, we believe that an ARP of £15 strikes the appropriate balance between climate ambition and business competitiveness. This price will be kept under review however given the full implications of COVID-19 are, as yet, uncertain. Free allocation of allowances also exists to protect those most exposed to the risk of a negative price disparity between UK and EU allowance prices."

18. A question was also presented to consultees in relation to the phasing periods proposed within the UK ETS, and in response the defendants indicated that they had decided to implement two whole system reviews of the UK ETS, firstly from 2023 to assess performance during the first half of the phase from 2021 – 2025 and, secondly, from 2028 to assess performance across the whole of Phase 1 of the UK ETS from 2021 – 2030 enabling any update to inform Phase 2 from 2031. The Response noted that the reviews proposed were "exactly in line with the EU ETS Phase IV reviews and Paris Agreement Global Stock take" dates. It was noted that aligning the review points with the Global Stock take dates would ensure that the UK ETS remained "aligned with our global ambitions on carbon".

19. The Response document was accompanied by an Impact Assessment. At the start of the document a summary pro forma was presented addressing an overview of the contents of the Impact Assessment. At the outset this identified the policy objectives and intended effects of the implementation of the UK ETS design which the defendants had arrived at. That noted that the objective of the policy was "to incentivise cost-effective emissions reductions for sectors currently in scope of the EU ETS, while balancing this ambition with the competitiveness of UK industry". Part and parcel of this was to be at least as ambitious as the current EU ETS and to provide a smooth transition from that scheme into the new scheme.

20. The summary set out that the policy option which was under consideration related to the initial years of operation of the UK ETS, from 2021 to 2024, and was intended

both to operate as a standalone system and also as a platform from which to negotiate a linked system with the EU ETS if that was in the best interests of both parties. The summary sheet posed the question as to what was "the $CO_2$ equivalent change in greenhouse gas emissions?" and the answer was identified as -2 to -3 million tonnes (see below). It went on to establish that the UK ETS design which had been modelled was expected to deliver greater greenhouse gas emission reductions than the counterfactual which had been evaluated, namely the EU ETS.

21. The accompanying impact assessment set out in detail the key features which had been included within the policy analysis and the consideration and evaluation of its impact. For the purposes of the present proceedings one of the features relied upon by the claimant was the design of the cap about which the impact assessment provided as follows:

> "20. A key feature of the UK ETS design is the cap which sets the maximum level of emissions allowed in the system and therefore the supply of allowances. Relative to 'business as usual' (BAU emissions), this determines the level of abatement effort required under the policy.
>
> 21. As set out in the introduction section of this IA and government response, we are fully committed to achieving the UK's net zero targets and recognise the contribution that can be made by the UK ETS policy. As set out in the government response we acknowledge the CCC's recommendation to set the UK ETS cap in line with their cost-effective pathway to net zero, which they will provide further detail on as part of their Sixth Carbon Budget advice at the end of this year. We will subsequently consult again on what an appropriate trajectory for the UK ETS should be in light of this advice and aim to implement any amendments by January 2023 and no later than January 2024, while aiming to give participants at least one year's notice of changes.
>
> 22. In the meantime the UK ETS will be initially set at 5% below the UK's expected notional share of the EU wide cap in Phase IV of EU ETS (hereafter referred to as the 'notional minus 5%' cap).
>
> 23. In 2021 the notional minus 5% cap level equates to around 156 $MtCO_2e$ (based on the assumed scope of the policy set out earlier in the year). This is higher than our BAU emissions projections in that year (ranging from around 126 to 131 $MtCO_2e$). However there is significant uncertainty over these projections and market participant behaviour in this initial period could lead to significant demand for allowances above BAU emissions. This in turn means there is uncertainty over the level of demand for allowances in these years relative to supply, and therefore risk of extreme high or low prices.

> 24. Given these uncertainties we therefore believe it is appropriate to maintain sufficient headroom of allowances for a time-limited period at the start of the new system. However we believe that initially tightening the cap by 5% provides an appropriate balance between climate ambition in the context of the UK's net zero commitment and business competitiveness, which may be at risk due to early years' market behaviour (see 'behavioural section' below). This cap level alongside other temporary measures (see 'market stability mechanisms' section) seeks to provide appropriate mitigation of extreme high or low price risks, in the initial years of the UK ETS market.
>
> 25. As in the EU ETS, this cap level will be reduced annually to drive emissions reductions over time. In this IA we assume an annual linear reduction of around 4 $MtCO_2e$, based on the policy set out in the government response. Within the overall cap, all allowances are interchangeable between participating sectors, including stationary installations and aircraft operators."

22. The impact assessment went on to consider market stability measures and included within the assessment it was noted that the defendants intended to introduce an ARP of £15/$tCO_2e$. The approach to modelling assumed an ARP consistent with that level.

23. The impact assessment described in detail the economic modelling work which had been undertaken in order to establish the impact of the scheme design upon greenhouse gas reductions. Behavioural assumptions including the foresight of the market in relation to its performance and the practice of buying allowances in advance, or hedging, were built into the modelled scenarios. The results of the modelling are described in the following passages from the impact assessment:

> "56. The following tables summarise the average modelled carbon values and total abatement in the initial years of the UK ETS (from January 2021 to December 2024) relative to the counterfactual over the same period. Note: this abatement represents abatement <u>in addition to</u> abatement delivered by other UK policies in the BAU scenarios.
>
> …
>
> Table 5 estimated total level of abatement in the UK ETS and counterfactual scenarios, $MtCO_2e$ (from 2021 to 2024 inclusive)

| Counterfactual | | | UK ETS |
|---|---|---|---|
| | Low | High | Low |
| Total abatement | 1 | 9 | 4 |

| | | | |
|---|---|---|---|
| $MtCO_2e$ | | | |
| Difference from counterfactual | | | +3 |

…

UK ETS Results

61. In this scenario we estimate an average annual carbon value ranging from £15 to £32/$tCO_2e$ per year from 2021 to 2024, based on the UK ETS design assumptions set out earlier in this IA.

62. At the low end of the range BAU emissions in the UK are lower than the notional minus 5% cap over the entire period modelled. This suggests there is an over-supply of allowances relative to demand. In the absence of any market stability measures, our model would suggest equilibrium carbon values of £0/$tCO_2e$ (as no additional abatement effort would be required to achieve the cap) – even when our hedging and foresight assumptions are taken into account. The main driver of the carbon values at this end of the range in this IA is therefore the introduction of the ARP, which in our model reduces the supply of allowances to the point at which the £15/ $tCO_2e$ reserve price is achieved. At this value, we estimate that it would be cost-effective for UK participants to deliver around 4 $MtCO_2e$ in total from 2021 to 2024.

63. At the high end of our range our projected BAU emissions in the UK are higher than at the low end of the range, but still lower than the notional minus 5% cap over the initial period. However, these higher BAU emissions in combination with our hedging behaviour assumptions (described earlier) drive the demand for allowances higher relative to the cap. As a result, additional abatement effort is required to meet the cap level, resulting in higher average annual carbon values (of around £32/$tCO_2e$) compared to the low end of the range. At this value, we estimate that it would be cost-effective for UK participants to deliver around 11 $MtCO_2e$ in total from 2021 to 2024.

64. Our modelling therefore suggests that a UK ETS – based on the design set out in the government response, combined with it being in its initial years of operation and a relatively smaller carbon market – could lead to higher carbon values compared to if the UK remained in Phase IV of the EU ETS. This in turn suggests UK installations/operators within scope of the policy

> could be incentivized to deliver more abatement compared to the counterfactual."

24. The impact assessment observed that the "key aim and benefit of the policy is the reduction of GHG emissions", and that the analysis which was presented showed more abatement being achieved under the UK ETS scheme compared to the counterfactual, namely the EU ETS. All of this material was placed into the public domain at the time that the defendants reached the decisions in relation to the appropriate design of the UK ETS.

25. As part of the disclosure process in these proceedings documentation has been disclosed from the defendants addressing the briefing of ministers in each of the administrations, and the process of decision making preparatory to the publication of the Response and the impact assessment on the 1st June 2020. Starting with the first defendant there is a ministerial submission dated 22nd April 2020 related to seeking clearance of the Response document. Within it the minister was reminded of the letter which had been written by the defendants to the CCC on 4th March 2020 within which the ARP of £15 had been identified "to ensure a minimum level of ambition and price continuity during the initial years of the UK ETS". The document went on to record the substance of the CCC's formal response to the request for advice dated 20th March 2020 (a full copy of the letter was annexed to the submission). The advice provided to the minster was set out in the following terms:

> "12. On substance, we agree with the CCC's advice but judge that it is better to implement changes to the cap to a different timescale; we will seek to implement a Net Zero consistent cap as soon as possible after the start of the UK ETS. This is appropriate given the need for a smooth transition for industry, and furthermore, given the full implications of COVID-19 are as yet uncertain. While there may be some benefits in tightening the cap or increasing the ARP in the initial years of the UK ETS, these are far outweighed by the significant risks that this could pose to the functionality of this new UK market. At the same time, there is little evidence to support the CCC's assumption that a large headroom of allowances would lead to low carbon values. A more detailed policy analysis and response to the points made by the CCC can be found in Annex C.
>
> 13. We therefore recommend to not change the previously cleared policy on the cap and ARP for the start of the UK ETS, while signalling in the Government Response our commitment to the net zero ambition for the longer term. We consider that our initial for the start of the UK market remains more appropriate in light of Covid than what has been suggested by the CCC; although a case may now be emerging for lowering the ARP and we therefore recommend to keep it under review. This is important given the uncertain economic outlook currently presented by the COVID-19 crisis and the CCC are

yet to provide their thinking on COVID-19 (expected May 2020) and their formal advice on CB6 (expected December 2020).

14. This recommendation is supported by our extensive analysis on hedging and other types of expected market behaviours. The analysis findings indicate that a tighter cap could result in unacceptably high prices in the early 2020s, depending on participants' behaviour, and jeopardise our objectives of delivering a smooth transition for participants while safeguarding the competitiveness of our industry. Further detail is provided in Annex C. This will be kept under review, however, given the full implications of COVID-19 remain uncertain.

15. At the same time, we agree that concerns raised by the CCC could risk our climate ambition in the long term and intend to promptly set out an enduring approach following their advice on the Sixth Carbon Budget (CB6), expected December 2020. To show that we recognise the CCC's concerns, we recommend reinforcing our longer-term commitments on the cap in the government response. Therefore our proposal in response to the latest CCC advice on a standalone UK ETS consists of:

i. Retaining the previously agreed cap and ARP in the initial years of the UK ETS.

ii. Considering the CCC's advice on a net zero-compliant cap and consulting on the appropriate trajectory for the UK ETS cap within nine months of the CCC advice being published.

iii. Aiming to implement any changes to the trajectory of the cap by January 2023 and no later than January 2024, while aiming to give participants at least one year's notice of changes.

iv. Recognising the CCC's advice to expand the scope of the traded sector for a standalone UK ETS, we recommend to commit to considering this part of the first ETS review to enable implementation of any changes in 2026.

v. Consulting on how to appropriately address any long-term surplus of allowances that build up in the UK ETS allowance reserve, as part of the other planned reviews during Phase 1 of the UK ETS."

26. Within the material furnished to the minster at Annex D was a policy analysis in relation to the recommendations with respect to the cap and the market stability mechanisms within the design of the scheme. This analysis noted that the CCC in

their response "has not presented any analysis or brought forward any arguments that bring this original policy and analytical assessment into question" in relation to the cap and ARP presented to them. The document notes in relation to decarbonisation that a policy objective is "increased ambition consistent with UK and DA carbon budget and net zero commitments". The recommendation in relation to the cap (-5% on the UK share of the EU ETS cap) is recommended on the basis that it "takes a step towards our net zero ambition whilst minimising the risk of high prices and associated competitiveness concerns". In the cap options analysis section of the paper, the claimant draws attention to the fact that it states "little/no abatement is needed to meet the notional or notional -5% caps across our range of demand scenarios". Further analysis is provided adopting ARP levels of £5, £15 and £25 leading to the adoption of a recommendation of an ARP of £15 on the basis that it is high enough to provide a smooth transition from the EU price and provide a signal for investment, but not so high as to pose a competitiveness risk should the EU price fall, nor would it preclude "price discovery".

27. On 28th April 2020 a further note was provided for the first defendant analysing the UK ETS cap and ARP in response to the CCC's advice on 20th March. The recommendation remained that the cap should be fixed at -5% of the UK's proportion of the EU ETS coupled with an ARP of £15, that being consistent with timely implementation of a net zero consistent cap once the CCC provided the advice which was expected on that topic in December 2020. The paper observed that this recommendation was appropriate in that "it is better to set a temporary cap with clear climate ambition (-5%) but to manage other set up risks, and then implement changes to the cap to a different time scale" rather than adopting other options. This would ensure a healthy headroom of allowances necessary when moving to a standalone UK ETS scheme so as to provide smooth transition for businesses from the EU ETS scheme "with the -5% acting as a down payment on our future, more ambitious, net zero consistent cap". The option preferred would provide acceptable price risks in respect of a new and uncertain UK ETS carbon market "whilst still demonstrating climate ambition". The paper analysed, in the light of the CCC's advice, tightening the cap further to -6.5% and -10%. It set out significant adverse consequences in both cases, and noted that there would only be a smaller decarbonisation benefit compared to the recommendation even if the cap were tightened to -10%. The paper concluded that tighter cap options led to the risk of zero or low values for carbon remaining, but also brought substantially increased risk of significantly higher values relative to EU ETS carbon prices.

28. It appears that the first defendant accepted the recommendations made to him with respect to the design of the UK ETS, and this is recorded in an email dated 30th April 2020. On the same date there was a conference call between all four defendants at which they concluded agreement in principle to the Response's text subject to a final agreement following consultation with other government departments. That consultation was undertaken by way of a memo dated 15th May 2020 which reiterated the nature of the proposal. On the 18th May 2020 the first defendant wrote to the Prime Minister seeking clearance for the UK ETS scheme and again explaining the nature of the proposal. Following this approval process the Response was issued along with the response to the CCC on 1st June 2020.

29. Disclosure has also been provided by the second, third and fourth defendants. Commencing with the second defendant, a Final Executive Paper was presented by the second defendant to his colleagues on the executive setting out the nature of the UK ETS and identify its intention as being "at least as ambitious as EU ETS". The aim of the UK ETS cap is identified as having been set to meet long-term climate commitments whilst ensuring economic competitiveness for UK companies. The danger of carbon leakage is noted. The observations of the CCC in the advice which was sought from them and obtained on 20th March 2020 is noted, and the response to those concerns is addressed in similar terms to those set out in the first defendants' documentation. A copy of the Response and the Impact Assessment in draft form also appear to have accompanied this paper. The paper recommended that the Executive adopt the proposals which were set out. Specific material in relation to the impact on Northern Ireland was provided.

30. The third defendant has disclosed a briefing document provided in order to prepare for the conference call on 30th April 2020. The paper sets out the development of the UK ETS and the response received to the request for advice from the CCC provided on 20th March 2020. The nature of the response to the CCC is identified including the rationale for the approach taken to the cap and the ARP. The briefing note provides points that it was suggested might be taken up during the course of the meeting.

31. The fourth defendant has disclosed briefing material provided in relation to the UK ETS in the early part of 2020. In particular a paper providing ministerial advice dated 27th April 2020, has been disclosed containing a recommendation to agree the key policy decisions required for the setting up of the UK ETS whilst recognising the CCC's concerns. It was recommended to the minister that the CCC be written to with a commitment to consult on future required changes once the CCC's advice on net zero emissions had been obtained and, further, agreement was sought in relation to the content of the Response. The reasons for this approach were set out in the document and reflected those in the material which has been set out above. A further ministerial advice paper was provided dated 28th May 2020 which addressed the arrangements necessary for the publication of the Response and the correspondence with the CCC. A written statement from the minister pursuant to this was published on 1st June 2020 which provided as follows:

> "Today, I jointly published the Government response to the consultation on the future of UK carbon pricing alongside Ministers of the other UK nations. We intend to establish a UK Emissions Trading System (UK ETS) with Phase 1 running from 2021 – 2030, which could operate either as a linked or a standalone system. The scheme delivers on our environmental ambition while managing costs to businesses and leading the development of global carbon markets.
>
> …
>
> Our policies in Wales will deliver our statutory targets and contribute fully to the net zero UK emissions by 2050. As such, the cap will initially be set 5% below the UK's notional share of the EU Trading Scheme (EU ETS) cap for Phase IV which starts in 2021. However, we will review this level following

> receipt of advice from the Committee on Climate Change regarding our carbon budgets and future emissions reduction pathway."

The Grounds

32. The claimant brings the application for judicial review on two grounds. The claimant's ground 1 is the contention that in approving the UK ETS with the cap and ARP proposed the defendants failed to have regard to a material consideration, namely the imperatives of the Paris Agreement. The claimant contends that the Paris Agreement requires, by virtue of articles 2 and 4, that alongside limiting global temperature increases to 1.5℃ above pre-industrial levels the participating states should reach global peak emissions and start to reduce them as soon as possible. Thus, it is contended that the Paris Agreement includes as an important component of its provisions a requirement to take urgent action, and that in the present case the defendant focused simply upon the longer term and achieving net zero, not the need for short term urgency in limiting greenhouse gas emissions. It is submitted for the further reasons set out below that the Paris Agreement was a mandatory material consideration to be taken into account by the defendants, and the claimant points to the fact that neither articles 2 nor 4 are specifically referenced in the Response. The claimant furthermore relies upon the fact that whilst extensive reference is made by the defendants to what was known by civil servants, the key question in relation to the legality of the decision is what was known to the ministers themselves in reaching their decisions. In this connection the claimant contends that it is not possible to draw any inference that the ministers were aware and took account in the decision of the requirement for urgency required by the provisions of the Paris Agreement. There was, therefore, in the claimant's submission a clear illegality in the decision reached in that a material consideration was left out of account by the decision makers.

33. Ground 2 is the contention that the UK ETS which has now been established does not fulfil or serve the statutory purpose for establishing such schemes under section 44 of the 2008 Act (see below). The level at which the cap was set and the ARP decided upon was, for instance, above the anticipated emissions under business as usual, and therefore would not be effective in order to achieve abatement of greenhouse gas emissions. The claimant draws attention to the observations of the CCC as supporting the contention that as designed the scheme will not be effective or fulfil its statutory purpose, and therefore as a consequence the scheme itself is unlawful. The claimant submits that the documentation shows that considerations such as the impact on businesses were taken into account in designing the scheme before it had been established that the scheme fulfilled or was justified by the statutory purpose.

34. The claimant contends that there is no substance in the suggestion that if the illegality had not occurred it would be highly likely that the decision which the defendants reached would be the same. As an example the claimant draws attention to her particular concerns with the exclusion of municipal waste incinerators from the scheme. Had the decision been properly directed in accordance with the concerns raised in her grounds the claimant contends that municipal waste incinerators could

well have been incorporated within the scope of the scheme. Furthermore, the claimant contends that re-evaluation would lead to a different cap and ARP being imposed.

The Law

35. Section 1 (1) of the 2008 Act provides that it is the duty of the first defendant "to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline". Under section 4 of the 2008 Act a further duty is provided for the first defendant to set carbon budgets in 5 year periods and to ensure that the net UK carbon account for each budgetary period is not exceeded. Subsidiary sections set out further details in relation to the setting of carbon budgets. For the purposes of the present case it is important to set out the detail of the sections pertaining to the establishment of trading schemes and the role of the CCC in that process. In particular, sections 44 and 48 of the 2008 Act provide as follows:

> "44 Trading Schemes
>
> 1. The relevant national authority may make provision by regulations for trading schemes relating to greenhouse gas
>
> 2. A "trading scheme" is a scheme that operates by -
>
> (a) limiting or encouraging the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions, or
>
> (b) encouraging activities that consist of, or that cause or contribute, directly or indirectly, to reductions in greenhouse gas emissions or the removal of greenhouse gas from the atmosphere.
>
> …
>
> 48 Procedure for making regulations
>
> 1. Before making regulations under this Part, a national authority must;
>
> (a) obtain, and take into account, the advice of the Committee on Climate Change, and
>
> (b) consult such persons likely to be affected by the regulations as the authority considers appropriate.
>
> 2. In particular, before making regulations under this Part that set a limit on the total amount of activities to which a

> trading scheme applies for a trading period or periods, a national authority must obtain, and take into account, the advice of Committee on Climate Change on the amount of that limit."

36. In Wales section 29 (1) of the Environment (Wales) Act 2016 similarly sets a requirement upon the fourth defendant to ensure that the net Welsh emissions account for the year 2050 is a least 100% lower than 1990. The provisions of this Act are related to the well-being goals set out in section 4 of the Wellbeing of Future Generations (Wales) Act 2015. Furthermore in the Climate Change (Interim Emissions Targets) (Wales) Regulations 2018, regulation 2 sets out interim emissions targets for 2020, 2030 and 2040 so as to enable the net zero target to be achieved.

37. Mr Wolfe's submissions on behalf of the claimant in relation to ground 1 commence with the contention that the Paris Agreement was a material consideration to which the defendants needed to have regard in reaching their decision. In this respect he placed reliance upon the decision of the Supreme Court in *R (on the application of Friends of the Earth limited & others) v Heathrow Airport Limited* [2020] UKSC 52, a challenge under the provisions of the Planning Act 2008 to the decision to designate a national policy statement in respect of airports, including the proposal to provide for a further north western runway at Heathrow as part of the policy framework. Before the Supreme Court four grounds of challenge were advanced, including the contention that the defendant failed to have regard, or adequate regard, to the Paris Agreement when reaching the decision to designate the national policy statement. In paragraph 116 of the judgment of Lord Hodge and Lord Sales (with whom the other members of the court agreed) the judgment of Simon Brown LJ in *R v Somerset County Council ex p Fewings* [1995] 1 WLR 1037 at page 1049 was cited as follows:

> "The basic legal approach is agreed. A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:
>
> "…The judge speaks of a decision maker who fails to take account of all and only those consideration materials to his task. It is important to bear in mind, however, that there are in fact three categories of consideration. First, those clearly (whether expressly or implied) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Thirdly, those to which the decision-maker may decide just what considerations should play a part in his reasoning process.""

38. The judgment of Lord Hodge and Lord Sales went on to reflect that this statement of the law had been endorsed subsequently in decisions of the House of Lords and the Supreme Court. At paragraph 122 of the judgment the following is recorded:

> "122. The Divisional Court (para 648) and the Court of Appeal (para 237) held that the Paris Agreement fell within the third category identified in *Fewings*. In so far as it is an international

> treaty which has not been incorporated into domestic law, this is correct. In fact, however, as we explain, the UK's obligations under the Paris Agreement are given effect in domestic law, in that the existing carbon target under section 1 of the CCA 2008 and the carbon budgets under section 4 of that Act already meet (and, indeed, go beyond) the UK's obligations under the Paris Agreement to adhere to the NDCs notified on its behalf under that Agreement. The duties under the CCA 2008 clearly were taken into account when the Secretary of State decided to issue the ANPS."

39. The Supreme Court went on to conclude that on the particular facts of that case the defendant had asked the question as to whether or not the Paris Agreement should be taken into account beyond the extent to which it was reflected in the provisions of the 2008 Act, and determined that it would not be appropriate to do so and, further, that this judgment was plainly rational in the circumstances. Mr Wolfe submits on this basis that in the present case the provisions of the Paris Agreement were plainly a mandatory material consideration which needed to be taken into account.

40. Mr Wolfe makes the further submission that what he characterises as the urgency requirement of the Paris Agreement is part and parcel of this material consideration, and that the defendant failed to understand and take account of the urgency requirement in setting the cap and ARP in the present case. He submits that a proper construction of articles 2 and 4 of the Paris Agreement require the tackling of greenhouse gas emissions "as soon as possible" so as to "undertake rapid reductions" (see in particular article 4.1), and that this imperative of the Paris Agreement is not properly reflected in the design of the UK ETS which has been approved.

41. Mr Richard Honey QC on behalf of the first defendant observes that this submission raises the question of the role of the court in construing an obligation created in an unincorporated international treaty's provisions. In *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756 Lord Bingham observed at paragraph 44 of his speech that it was "at least questionable" as to whether or not the court would embark upon resolving a dispute on the meaning of an unincorporated provision from an international treaty on which there was no judicial authority, since it would be "unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the United Kingdom by fear that their decisions might be held to be vitiated by an incorrect understanding". In his speech Lord Brown stated as follows in paragraph 65:

> "65. Although, as I have acknowledged, there are occasions when the court will decide questions as to the state's obligations under unincorporated international law, this, for obvious reasons, is generally undesirable. Particularly this is so where, as here, the contracting parties to the Convention have chosen not to provide for the resolution of the disputed questions of constructions by an international court but rather (by article 12) to create a Working Group through whose continuing processes it is hoped a consensus view will emerge. Really this is no more than to echo para 44 of Lord Bingham's opinion. For a national court itself to assume the role of

> determining such a question (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons."

42. This question was returned to by the High Court in the case of *R (ICO Satellite Limited) v The Office of Communications* [2010] EWHC 2010 Admin in which Lloyd Jones J (as he then was) dealt with an application for judicial review of the defendant's decision to write to the International Telecommunications Union requesting cancellation of assignments in its Master International Frequency Register in respect of the claimant's mobile satellite communications system. The International Telecommunications Union was established by an international treaty and the UK was a member of that organisation. Part of the argument in the case involved a dispute between the parties as to the meaning and effect of the instruments creating the International Telecommunications Union regime. Having noted the passages from the case of *Corner House* set out above, Lloyd Jones J observed as follows in relation to the approach which the court should take:

> "92. There are, undoubtably, circumstances in which the courts of England and Wales will decide questions as to the extent of the obligations of the United Kingdom or, indeed, other States under treaties which have not been implemented into domestic law. (See, for example, *J H Rayner (Mincing Lane) Limited v Department of Trade and Industry* [1990] 2 AC 418 per Lord Oliver at pp. 500-501; *Occidental Exploration and Production Company v. The Republic of Ecuador* [2005] EWCA Civ.1116). Thus as Lord Pannick points out, in *R v. Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839 and *R v. Director of Public Prosecutions, ex parte Kebilene* [2000] AC 326 domestic courts decided the extent of the United Kingdoms obligations under the European Convention on Human Rights before it was given effect in domestic law by the Human Rights Act 1998. In *R (Barclay) v. Lord Chancellor* [2009] UKSC 9; [2009] 3 WLR 1270 *Launder* and *Kilbene* were treated in *Corner House* as exceptions to the general rule (Lord Brown at paragraph 65) and justified as cases in which there was no live dispute over the provisions of international law in issue or where there was a body of Convention jurisprudence on which the national court could draw in deciding the issue before it (Lord Bingham at paragraph 44 and Lord Brown at paragraph 66).
>
> 93. Lord Pannick submits that the present case is to be distinguished from *Corner House* because the decision maker is not suggesting that it has acted in accordance with international law; rather it has based its decisions on a mistaken view of international law and so has acted by reference to irrelevant considerations. As explained earlier in this judgment, I do not accept the premise. However, in any event, I do not see that the distinction proposed provides any relief from the difficulty. In

> either case, to the extent that the issue before the court requires it to decide the disputed question of the effect of the ITU regime the objections identified in *Corner House* apply.
>
> 94. To my mind, the present case provides a compelling example of the difficulties and the undesirability of a domestic court expressing a concluded view on a disputed point as to the meaning and effect of non-implemented instruments governing a regime established by an international organisation. It will be apparent from the documents referred to above that widely different views are held as to the consequences which should follow under the ITU regime in circumstances where, as in the present case, a number of years after its registration, an assignment has not been brought into regular operation in accordance with its notified specification. That is a live dispute as to the rights and duties of the 191 national administrations which participate in the ITU regime. Moreover, there is provision within the ITU regime for dispute resolution, although the question whether that would be applicable in the circumstances of the present case is itself apparently in dispute. A further difficulty in the present case is that the statements emanating from various officers of the ITU referred to above would, given their quality and characteristics, hardly be an appropriate basis for the task of resolving the issue. However, that apart, it would not be appropriate for this court to embark on such an undertaking for the policy reasons given by Lord Bingham and Lord Brown in *Corner House*. This court is not in an appropriate position to determine the issue for all those subject to the ITU scheme. Given the dispute between the parties as to the effect of the ITU regime, it would not be appropriate for this court to go beyond the "tenable view" approach in examining the point of international law in question."

43. A further subsidiary issue raised in connection with these arguments is the contention that the nub of the issue is what was known to the minister making the decision in the case of each of these defendants, as opposed to that which was known to the civil servants advising the minster. Mr Wolfe on behalf of the claimant places reliance on the case of *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 in which this point was observed by McCombe LJ at paragraph 26(3) of his judgment with which the other members of the court agreed. This decision was in the context of the Public Sector Equalities Duty and the court concluded that the material presented to the minster failed to "give to her an adequate flavour of the responses received" in relation to the issues which were to be determined.

44. A further case related to the Public Sector Equalities Duty relied upon by the claimant is the case of *R (on the application of Hunt) v North Somerset Council* [2013] EWCA Civ 1320. The facts of the case were that the defendant had decided to cut its Youth Services Budget, a service from which the claimant benefitted. One of the issues before the court was whether the members of the defendant charged with the

responsibility of deciding that to approve the budget had read the relevant equalities impact assessments ("EIA's"). The EIA's were not included in the papers sent to the members but they were informed how to access them in order to read them. Whilst the court accepted the evidence of the defendant's portfolio holder in relation to equality issues that he had read the EIA's in order to discharge the Public Sector Equalities Duty, the court was unprepared to draw the inference from the circumstances that the other members of the committee making the relevant decision had themselves read that material given that the EIA's were not available as part of the committee papers. The court was therefore unable to accept that the duty had been discharged. Further discussion in relation to the question of the knowledge of a minister in reaching a decision and the correct approach to examining whether or not there was a legal flaw in the process caused by inadequacies in the available material is set out in the case of *R (Stephenson) v SSHCLG* [2019] EWHC 519 (Admin); [2019] PTSR 2209 at paragraphs 36 to 40.

45. In relation to ground 2, namely the contention that the UK ETS which has been designed and approved does not meet the requirements of the statutory framework, the correct approach is set out in the case of *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Limited* [1995] 1 WLR 386. The case concerned the award of a grant of overseas aid in respect of the Pergau Dam Project in Malaysia. It was contended by the claimant that the award of the aid was outwith the power granted to the defendant by section 1 (1) of the Overseas Development Co-operation Act 1980. The evidence before the court included material advising the defendant that the project was uneconomic and unsound and indeed an abuse of the aid programme. This led the claimant to contend that the award of the grant was not within the powers of the Act, and that the defendant had been motivated by purposes which were not permitted by the terms of the statute. In response it was contended that the project was within the power conferred by Section 1 (1) in that it was for a developmental purpose, and the defendant was entitled to take into account wider political and economic considerations.

46. It was common ground before the court that the decision-maker could take into account political and economic considerations provided that in the first place there was sufficient and substantive power to authorise the award of the grant pursuant to section 1 (1) of the 1980 Act. Giving the leading judgment in the Divisional Court Rose LJ observed as follows:

> "For my part, I am unable to accept Mr Richards' submission that it is the Secretary of State's thinking which is determinative of whether the purpose was within the statute and that therefore paragraph 3 of his affidavit is conclusive. Whatever the Secretary of State's intention or purpose may have been, it is, as it seems to me, a matter for the courts and not for the Secretary of State to determine whether, on the evidence before the court, the particular conduct was, or was not, within the statutory purpose.
>
> …
>
> Accordingly, where, as here, the contemplated development is, on the evidence, so economically unsound that there is no

> economic argument in favour of the case, it is not, in my judgment, possible to draw any material distinction between questions of propriety and regularity on the one hand and questions of economy and efficiency of public expenditure on the other. It may not be surprising that no suggestion of illegality was made by any official, of that the Secretary of State was not advised that there would, or might be, any illegality. No legal advice was ever sought.
>
> The Secretary of State is, of course, generally speaking, fully entitled, when making decisions, to take into account political and economic considerations such as the promotion of regional stability, good government, human rights and British commercial interests. In the present case, the political impossibility of withdrawing the 1989 offer has been recognised since mid-April of that year, and had there, in 1991, been a developmental promotion purpose within section 1 of the Act of 1980, it would have been entirely proper for the Secretary of State to have taken into account, also, the impact which withdrawing the 1989 offer would have had, both on the United Kingdom's credibility as a reliable friend and trading partner and on political and commercial relations with Malaysia. But for the reasons given, I am of the view, on the evidence before this court, that there was, in July 1991, no such purpose within the section. It follows that the July 1991 decision was, in my judgment, unlawful. This, of course, serves to reinforce the conclusion already indicated, that the applicants have standing."

47. Finally, it was submitted on behalf of the first defendant by Mr Honey that even were the court to be satisfied that the legal errors which the claimant relied upon had been committed the court should, pursuant to Section 31 (2A) of the Senior Courts Act 1981, refuse to grant relief on the basis that it is highly likely the outcome would not have been substantially different even if the conduct complained of had not occurred. In essence, Mr Honey submitted that the same decisions would have been reached on the available evidence, and therefore the legal errors complained of would have made no difference. Mr Wolfe responds to this contention by submitting that alternatives to the cap and ARP proposals could have been arrived at, and the scope of the scheme may have been different incorporating, for instance, municipal waste incinerators.

Submissions and Conclusions

48. Ground 1 of the claim, as set out above, is the contention that the defendants left out of account a mandatory material consideration, namely the Paris Agreement and, in particular, the requirement of the Paris Agreement as properly construed, which required an urgency in seeking the reduction of greenhouse gas emissions in order to achieve the Paris Agreement's temperature objectives.

49. The interpretation placed upon the Paris Agreement by the claimant has already been rehearsed. The claimant notes the defendants' concession that nowhere in the Response is there express reference to the provisions of articles 2 and 4.1 of the Paris

Agreement, and thus it is submitted the requirement that action to reduce greenhouse gas emissions should be taken urgently was left out of account in constructing the provisions of the UK ETS. The claimant relies upon the observations of the Supreme Court in the *Friends of the Earth* case and submits that this consideration, and in particular the dimension of the Paris Agreement addressing urgency, has not been taken into account. It is not sufficient for the defendants to rely solely upon the provisions of the 2008 Act in this respect, because it is submitted that the Paris Agreement's requirements to take action in the short and medium term are not encompassed within its provisions. The net zero requirement of Section 1 of the 2008 Act is not a proxy for the Paris Agreement imperative for urgent action to be taken in the short and medium term. The inference which the defendants rely upon, namely that the defendants can be taken to have brought the provisions of article 4.1 of the Paris Agreement into account on the basis that all of the ministers were well familiar with the Paris Agreement and its provisions, is not an inference which is open to the defendants in order to excuse the fact that ministers did not have placed before them the implications for the implementation of article 4.1 of the Paris Agreement in constructing the design of scheme that they did.

50. In response to these contentions Mr Honey on behalf of the first defendant accepts that the Paris Agreement was a material consideration, and indeed draws attention to the various places within the Response where the Paris Agreement is referenced, for instance when the Response refers to ensuring that the reviews of the UK ETS are aligned with the Paris Agreement's Global Stocktake dates. Thus he submits that the Paris Agreement was taken into account as a material consideration. Indeed, Mr Honey points out that the claimant accepts that this is the reality, and therefore seeks to rely not upon the failure to take account of the Paris Agreement, but rather a failure to take account of what the claimant contends is an aspect of the Paris Agreement namely a requirement to act urgently in the short and medium term.

51. In response to this contention Mr Honey submits as follows. Firstly, it is not open to the court to determine as a matter of law the meaning of the Paris Agreement as an unincorporated international treaty, in particular where to do so would be to give it legal effect when in truth it has none. The correct approach is, in his submission, to consider whether the approach taken to the Paris Agreement by the defendants is one which is tenable, in accordance with the authorities set out above and following the case of *Corner House*. In this connection Mr Honey submits that the approach taken by the defendants was that achieving the longer term goal requires action in the short term, and to that extent a requirement for acting as soon as possible or urgently was reflected in the approach to the UK ETS, and was recognised as being part and parcel of meeting net zero and the requirements of the Paris Agreement. Mr Honey draws attention, for instance, to the references in the executive summary of the Response to showing "greater climate ambition from the start", and in its introduction to going "further and faster in our efforts to deliver clean energy and a net zero future." Thus, whilst Mr Honey accepts that there is no express reference in the Response to articles 2 and 4.1, the need to take action urgently and in the short term is acknowledged and taken into account in the approach of the Response and the setting up of the UK ETS.

52. Mr Honey further submits that the absence of reference to articles 2 and 4.1 of the Paris Agreement is neither a material omission in the particular circumstances of the case, nor evidence that a material consideration was left out of account. The Paris

Agreement was central to the concerns of the first defendant in exercising his ministerial role, and was a matter which arose so commonly in his role both as a minister and as president of COP 26 (the next international conference in relation to climate change) it was not necessary for him to be explicitly reminded of it. Like the portfolio holder in *Hunt,* he had a special role in which considerations such as the 2008 Act and the Paris Agreement were instrumental. Mr Honey draws attention to speeches made by the first defendant as COP 26 President on the 6th March 2020, in which he exhorted member states to submit more ambitious plans for cutting carbon emissions by 2030 "with all nations committing to reaching net zero emissions as soon as possible". On 27th April 2020 the first defendant again made a speech as COP 26 President, in which he observed that in order to "meet the goals of the Paris Agreement, we need to decarbonise the global economy about three to five times faster over the next decade than we did over the last two decades". Thus, Mr Honey submits that it is plain on the public record that the first defendant was fully familiar with the requirements of the Paris Agreement and the extent to which it required urgent action to be taken on climate change in the short term.

53. Mr Honey submits that these speeches provide further context to the witness statement provided by Mr Charlie Lewis, the Deputy Director for Emissions Trading in the first defendant's department, in which he explains the centrality of the Paris Agreement to the work undertaken by the department in which he works and the first defendant's ministerial responsibilities. Mr Honey places reliance upon the observations of Lord Lloyd in *Bolton MDC v Environment Secretary* [2017] PTSR 1091 at 1096 when he observed;

> "Since there is no obligation to refer to every material consideration, but only the main issues in dispute, the scope for drawing any inference will necessarily be limited to the main issues, and then only, as Lord Keith pointed out, when "all of the known facts and circumstances appear to point overwhelmingly" to a different decision."

54. Mr Honey submits that similar considerations apply to the other defendants in relation to the obvious centrality of the Paris Agreement to their ministerial responsibilities. On behalf of the fourth defendant Ms Bayoumi, in addition to adopting the submissions made by Mr Honey, further draws attention to the setting of decadal emission targets in law in Wales, illustrating both the centrality of net zero and achieving the objectives of the Paris Agreement within the legal framework, as well as the obvious proposition that the fourth defendant was fully aware of the requirements of the Paris Agreement. The carbon budgets being set in Wales were set with articles 2 and 4.1 of the Paris Agreement clearly in mind and therefore she submits it is inconceivable that the fourth defendant was unaware of the Paris Agreement's provisions.

55. My conclusions in relation to ground 1 are as follows. It appears to be common ground that, in principle, the Paris Agreement was a material consideration in the formulation of the UK ETS and that it was taken into account. I have no difficulty in accepting that proposition, bearing in mind both the relationship between the 2008 Act and the Paris Agreement, and also the regular referencing of the Paris Agreement throughout the Response. The Paris Agreement is an obvious instrument to be reflected in the architecture of national measures to address climate change and abate

greenhouse gas emissions. The real substance of the claimant's contentions relates to their interpretation of the Paris Agreement and what they contend is the element of urgency contained in particular within article 4.1 for the short to medium term. In my view it is not for this court to resolve definitively any questions of construction in relation to an unincorporated international treaty for the reasons set out in the earlier authorities. The Paris Agreement is an international instrument to which 197 states are parties. It contains a mechanism for enforcing the implementation of the Agreement within article 14 of its text, along with other mechanisms for dispute resolution. There are, therefore, strong policy reasons as well as practical considerations which clearly militate against the court embarking on an exercise of construing the terms of the Paris Agreement. At most, in accordance with the approach set out in the authorities set out above, the court should assess whether or not the defendants' view of the Paris Agreement was one which was tenable in examining the question posed by the claimant.

56. Adopting this tenable view approach, I am entirely satisfied that the approach to the Paris Agreement described in his submissions by Mr Honey is one which is tenable and entirely appropriate. As he pointed out, this does not deny the urgency of the need to address climate change and involves the recognition that in order to meet the long term requirements of the Paris Agreement action is required now. Taking measures in the short term is an essential part of achieving the longer term objective, and that approach is clearly tenable in the light of the provisions of article 4.1. The question which then arises is whether or not the Paris Agreement as understood in this way was known to the ministers involved in the decision-making process, and thereafter taken into account in the decision to promote a UK ETS.

57. In my view it is important when establishing what would have been known and taken into account by the minister in reaching a decision to have careful regard to the factual context. This case was not concerned with a bespoke document instrumental to the decision making process such as *Hunt*, nor was it a case concerned with knowledge of specific consultation responses or the accuracy with which they had been distilled and reflected in ministerial paperwork so as to be consistent with a specific statutory duty. The claimant in this case relies upon an alleged lack of knowledge by ministers whose roles engaged them directly in climate change initiatives, and the contents of perhaps the most important international instrument on tackling climate change issues at the global scale. The Paris Agreement, as set out above, is one of the key elements in the ministers' portfolios and is an essential and firmly fixed component of the defendants' ministerial brief; it is closely allied to the current provisions of the relevant statutory framework, the 2008 Act, which contains the powers enabling the UK ETS to be established. In the circumstances I have no difficulty in accepting that each of the defendants was fully aware of the Paris Agreement as understood in Mr Honey's submissions and the tenable view as to its application set out above.

58. The speeches made by the first defendant provide further support for this and emphasise the obvious centrality of the commitments under the Paris Agreement to the discharge of his roles. I am also entirely satisfied that this approach to the Paris Agreement was not only within the defendants' knowledge but was also taken into account in reaching the decisions identified in the Response. The references to showing "greater climate ambition from the start" and "committing to go further and

faster" reinforce my conclusions in this respect. During the course of the claimant's submissions it was contended that this use of language, and indeed the use of language in the first defendant's speeches did not demonstrate the extent of the urgency required by the provisions of the Paris Agreement. At its heart that is a submission based upon a semantic disagreement rather than one demonstrating any substantive legal error.

59. Moreover, as is evident from the way in which the UK ETS is designed it is integrally linked to the Global Stocktakes required by the Paris Agreement in order to ensure appropriate progress is being made towards achieving its goals. The UK ETS thus engages with both the short and medium term requirements for the Paris Agreement as well as its longer term objectives. Thus, these points, coupled with the repeated reference within the response to the Paris Agreement, provide convincing evidence that the Paris Agreement and an appropriate or tenable understanding of its requirements were taken into account in formulating the decisions in relation to the UK ETS.

60. Whilst during the course of his submissions Mr Honey made a number of observations in support of the conclusion that it would have been rational for the defendants not to have had regard to the urgency dimension aspect of the Paris Agreement, it is unnecessary for those contentions to be resolved. I am entirely satisfied that on the basis of the material before the court that an appropriate and tenable understanding of the Paris Agreement was taken into account (reflecting the need for action to be taken in the short and medium term to achieve its long term objective) and that this understanding was known to the defendants in reaching decisions in respect of the UK ETS and taken into account by them in reaching their decisions.

61. Turning to ground 2 this ground engages, firstly, a question of statutory construction in relation to section 44 of the 2008 Act and then, secondly, issues arising in relation to whether on the evidence the UK ETS is within the power conferred by the 2008 Act. The preliminary point of statutory construction relates to section 44 (2)(a) of the 2008 Act. Section 44 (2) provides a definition for the purposes of the statute of a "trading scheme". The present case concerns a scheme which it is said was established using the power provided under section 44 (1), and falling within the definition provided by section 44 (2)(a) as a scheme "limiting or encouraging the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions".

62. The claimant contends that the words "limiting or encouraging the limitation of activities" must be interpreted to mean a reduction in greenhouse gas emissions. This submission is founded on a number of features in relation to the 2008 Act. Firstly, attention is drawn to the provisions of section 44 (2)(b) which are directly expressed in terms of encouraging activities "that consist of, or that cause or contribute, directly or indirectly, to reductions in greenhouse gas emissions or the removal of greenhouse gas from the atmosphere". This, the claimant contends, illustrates directly that the purpose of a trading scheme within the terms of the act is to reduce greenhouse gas emissions, and the provisions of section 44 (2)(a) must be read in that light. Furthermore, the claimant draws attention to the Explanatory Notes to the 2008 Act, which in relation to the trading scheme powers describes that the Act "includes powers to enable the Government and the devolved administrations to introduce new

domestic trading schemes to reduce emissions through secondary legislation" (see paragraph 4). In paragraph 210 of the Explanatory Memorandum it is noted that Schedule 2 of the 2008 Act contains details of what could be included in a trading scheme, and provides as an example a proposed scheme to reduce energy use as being within the scope of the 2008 Acts powers. The claimant notes that in Hansard extracts from the debates in relation to the 2008 Act, trading schemes were repeatedly noted as being amongst the means available to deliver "emissions reductions". It is submitted that this provides further context to the claimant's construction of section 44 (2)(a) of the 2008 Act.

63. In response it is contended by the first defendant that the use of the language "limiting or encouraging the limitation of activities" is not simply contemplating schemes which lead to reductions, but also schemes which set a limit or cap for emissions and are designed to retain them within that cap. In support of that construction Mr Honey draws attention to the usual meaning of the words limiting or limitation as setting a boundary or terminal point so as to confine or restrict something or fix its maximum extent. This definition does not include the necessity for reductions to take place. Secondly, he draws attention to the long title to the Act which includes the following purpose:

> "To confer powers to establish trading schemes for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gases from the atmosphere."

64. Mr Honey submits that the phrase "limiting greenhouse gas emissions" is consistent with the first defendant's construction of the Act. This use of language is also consistent with section 48 (2), the section which describes the procedure for making regulations to implement a trading scheme, in which the language used in relation to making regulations is that they may "set a limit on the total amount of activities to which a trading scheme applies". This approach is further consistent with the first defendant's construction, and certainly inconsistent, it is submitted, with the claimant's interpretation that requires reducing or reduction to be part of the interpretation of section 44 (2)(a). It is language which is further reflected within the Explanatory Memorandum at paragraph 13 which states:

> "Trading schemes may limit activities that lead, directly or indirectly, to emissions of greenhouse gases (for example, by capping emissions from a particular set of activities and allowing trading emissions within the cap), or they may encourage activities that directly or indirectly lead to a reduction in greenhouse gas emissions or the removal of greenhouse gas emissions from the atmosphere."

65. In conclusion, Mr Honey submits that a trading scheme under section 44 (2)(a) could be lawfully established so as to, for instance, limit the emissions from a sector of the UK economy, without necessarily requiring a reduction in emissions in order to qualify as being a scheme within the powers of the Act.

66. I accept the submissions made on behalf of the first defendant by Mr Honey in respect of the correct approach to section 44 (2)(a). In my judgment a trading scheme within the definition provided by section 44 (2)(a) does not necessarily have to achieve a reduction in the activities consisting of greenhouse gas emissions or causing or contributing such emissions: it is sufficient that the design of the scheme limits or encourages the limitation of those activities. That construction is consistent, firstly, with the use of the words "limiting" or "limitation" and, secondly, consistent with the language of section 48 (2) and the long title to the 2008 Act. Thirdly, it is at least not inconsistent with, and probably consistent with, the Explanatory Memorandum to the 2008 Act read as a whole.

67. In my view it is clear that section 44 (2) is describing two types of trading scheme, and it is not therefore necessary to read paragraph 44 (2)(a) in the light of section 44 (2)(b), which is directed to describing a different type of trading scheme from that covered by section 44 (2)(a). Whilst Mr Wolfe on behalf of the claimant objects to the first defendant's construction of the basis that all that is necessary is for a number to be placed in a cap and a scheme would qualify under the 2008 Act, such a scheme would nonetheless have to be designed to place a limit upon or encourage the limitation of activities leading to greenhouse gas emissions. As Mr Honey points out in his submissions, it may well be that as part of a suite of measures a judgment could be reached as to certain sectors in which the level of emissions should be held or limited and others where there should be reductions. Section 44 of the 2008 Act provides flexibility in relation to a range of approaches which might be taken in devising trading schemes so as to be part of the means whereby the objectives set in section 1 of the 2008 Act are to be met. The references relied upon by the claimant taken from Hansard do not dissuade me from the view which I have taken based upon, in particular, the language of the legislation.

68. Turning to the claimant's contentions in relation to the evidence, in ground 2 the claimant submits that the design of the UK ETS approved on 1st June 2020 is not within the powers contained within section 44 of the 2008 Act. Whilst it is not disputed that if the scheme had been within the scope of the powers of the Act other factors could have been taken into account, it is the claimant's submission that, in accordance with the principles set out in *World Development Movement*, the opportunity to take those other factors into account never arose because the scheme itself was not within the powers and purposes of the statute from the outset.

69. The first matter upon which the claimant relies is the level at which the cap was set. As the impact assessment conceded, the proposed cap was set above the emissions projections for business as usual, and thus it is contended that it did not anticipate in the opening year that there would be any reduction in emissions. In the documents related to the preparation of the UK ETS it is plain that adopting the cap at a level of -5% in relation to the EU ETS led to emissions which were above business as usual during the period of the first phase of the scheme, and only brought below business as usual once hedging assumptions had been brought into the modelling work. It is further clear from the documentation that the initial cap was decided upon as, in reality, setting an initial level of cap to "strike an appropriate balance between climate ambition and reflecting net zero with competitiveness of the traded sector". Similarly, in relation to the options analysed in the preparation of the UK ETS with respect to the ARP, it was clear that all of the options were evaluated against factors including,

but not limited to, the need to achieve net zero: in the claimant's submission the evaluation should have proceeded solely in relation to net zero in order to be a scheme within the powers provided in section 44 (2)(a). The analysis prepared for ministers on 13th January 2020 set out the modelling results in relation to the cap options and noted that "little/no abatement is needed to meet the Notional Cap or Notional -5% cap across our range of demand scenarios". Thus it is submitted that the design of the scheme was not focused upon the requirements of section 44 (2)(a), but rather depended upon other factors in its formulation.

70. The claimant goes on to place particular reliance upon the response to the proposed scheme from the CCC. This advice was provided pursuant to the statutory framework and the requirements of section 41 (3)(b) of the 2008 Act. The full context of that response is set out above, and the claimant's submission is that the observations of the CCC make plain their view that the proposed scheme was not within the statutory purpose. They pointed out the risk that with the cap set too high the scheme would effectively set a price for carbon and become a de facto tax, and contended that the starting point for the cap should not be the EU ETS, but the latest data on actual UK emissions. They expressed the view that if the cap was kept to the level proposed a higher ARP was required in order to ensure that it became the price setting mechanism rather than simply a backstop. The claimant contends that the material following receipt of this letter on 20th March 2020, and prior to the publication of the scheme on 1st June 2020, does not in reality dispute what the CCC was saying and its criticisms of the scheme. Ultimately, in the discussions following the receipt of the letter of the 20th March from the CCC and prior to the publication of the Response, there was no dispute as to the validity of the CCCs contentions, but rather simply the adoption of a strategy of delay in relation to properly engaging with the CCC's concerns and producing a scheme which would comply with the statutory purposes. This was clearly reflected in the text of the letter of 1st June 2020 which the defendants wrote to the CCC in adopting the level of the cap and the ARP as a temporary part of a two stage approach, the second stage arising once the CCC have provided their up to date advice.

71. In response to these submissions Mr Honey and Ms Bayoumi commence by drawing attention to the evidence which records the proposition that the UK ETS was an initiative established in order to achieve the statutory purpose set out in section 44 (2)(a). In terms of the proper construction of that statutory power, in addition to the points set out above, Mr Honey draws attention to the fact that no particular level of limitation or reduction is specified within the terms of the statutory power, which encompasses both encouragement as well as specific limitation. Mr Honey draws attention to the detailed modelling work which was undertaken in support of the development of the scheme and used to evaluate the options for elements of the scheme such as the levels of the cap and the ARP, together with the output of the modelling in respect of the UK ETS which was ultimately decided upon. The modelling demonstrated, as set out in the Impact Assessment, that with the cap and ARP proposed, and in the light of the incorporation in the modelling of hedging and banking of allowances, that even at the low end of the range the UK ETS would achieve effective abatement of greenhouse gas emissions. Thus, it is contended, it would achieve the statutory purpose.

72. In relation to the response of the CCC Mr Honey points out that they did not state in their letter of 20th March 2020 that the scheme as proposed would not achieve its statutory purpose. As was observed during the course of the discussions following the receipt of the CCC's letter, the CCC had not provided any modelling or analysis of their own in order to gainsay the results of the defendants' modelling exercise. It was therefore legitimate for their concerns to be acknowledged, but (in particular in the context of the COVID-19 pandemic) for the defendants to form the conclusion that the UK ETS achieved its statutory purpose and could be adopted as a part of a two stage process providing for review once the CCC's further advice in relation to carbon budgeting and achieving the net zero objective had been received.

73. In evaluating these submissions, in my judgment the first point to be observed is that it is clear from the documentation that the development of the UK ETS, and the decision reached on 1st June 2020, was underpinned by an evidence base which included a significant amount of modelling work. The modelling which was required in order to evaluate the impact of the UK ETS on abatement of greenhouse gas emissions was technically complex. It involved incorporating in its analysis an assessment of the impacts upon the way in which the scheme would operate as a result of behaviours such as banking and hedging by operators, together with forecasting how the market which would be created in the allowances within the scheme would trade. This is the kind of detailed technical work which it is neither appropriate or possible for the court to go behind (see for instance *R (Mott) v Environment Agency* [2016] EWCA Civ 564; [2016] 1 WLR 4338 paragraph 76 and 77), and indeed no detailed criticism of the modelling work has been advanced. Rather the claimant's case depends upon drawing attention to factors which were included within the modelling work. What cannot, however, be gainsaid is that the modelling work demonstrated that across the period of operation of this initial phase of the UK ETS abatement of emissions would be achieved, and therefore activities leading to the emission of greenhouse gases would be limited. This was the position notwithstanding that the cap was set above business as usual. Indeed the setting of the cap above business as usual was but a starting point to understanding the impact of the scheme, which in my judgment was modelled to examine whether a reduction in greenhouse gas emissions consistent with the statutory purpose contained with section 44 (2)(a) could be achieved. The detailed modelling showed that it would.

74. Whilst the CCC in their letter of advice of the 20th March 2020 set out detailed concerns in relation to the way in which the scheme was proposed to be constructed, and in particular whether it would indeed establish an effective market for allowances rather than simply operating as a tax, it is equally clear that they were not suggesting that the UK ETS as proposed to them would not fulfil its statutory purpose. Had that been their view I am in little doubt that it would have been clearly expressed by them as part of them providing the advice required by statute when a scheme of this kind is being contemplated. The defendants were entitled to rely upon the modelling work which had been commissioned in addressing the detailed concerns raised by the CCC in respect of the levels at which the cap and the ARP had been set. In the absence of any rival modelling the conclusion that the outputs of the model showed a functional scheme reducing greenhouse gas emissions was one which was open to the defendants on the available evidence. I am satisfied therefore that the UK ETS was developed

and designed in order to fulfil the statutory purpose contained within section 44 (2)(a), and did indeed achieve that aim and therefore fell within the scope of the statutory power. Once that point is accepted, then it was open to the defendants to take account of other factors in the detailed design of the scheme, such as impacts on business competitiveness. In summary therefore I do not consider that there is any substance in the claimant's submissions raised under ground 2.

75. In the light of these conclusions this application for judicial review must be dismissed on its merits. There is therefore no need to give consideration to the further submissions which were made in relation to the question of relief in the event of the claimant's case having been established. Further there is no need to investigate the submissions on jurisdiction made by the second and third defendants since they do not arise. The outcome, therefore, in relation to this case is that the claimant's application for judicial review must be dismissed.

Court of Appeal

# Regina (Plan B Earth) *v* Secretary of State for Transport (WWF-UK intervening)

# Regina (Friends of the Earth Ltd) *v* Secretary of State for Transport (WWF-UK intervening)

# Regina (Hillingdon London Borough Council and others) *v* Secretary of State for Transport (WWF-UK intervening)

[On appeal from Regina (Spurrier) v Secretary of State for Transport]

**[2020] EWCA Civ 214**

2019 Oct 17, 18, 22, 23;
2020 Feb 27

Lindblom, Singh, Haddon-Cave LJJ

*Planning — Development — National policy statement — Secretary of State designating national policy statement on new runway capacity and airport infrastructure — Statement indicating preferred location for airport development and rejecting alternatives — Whether statement lawful — Standard of review to be applied — Whether commitment to Paris Agreement on Climate Change "Government policy" — Whether failure to take Paris Agreement into account rendering designation of national policy statement unlawful — Planning Act 2008 (c 29) (as amended by Localism Act 2011 (c 20), s 128, Sch 13, para 49(4)), ss 5(1)(8), 10(3) — Council Directive 92/43/EEC, art 6(3)(4) — Parliament and Council Directive 2001/ 42/EC, art 5(1)(2), Annex I(a)(c) — Paris Agreement on Climate Change (2016)*

The Secretary of State, having received a report by the independent Airports Commission and conducted a consultation exercise, designated the national policy statement "Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England" in June 2018, pursuant to section 5(1) of the Planning Act 2008[1], for the purpose of outlining the policy framework in which an application for a development consent order would be determined. The statement set out the Government's preference to meet the need for new airport capacity in the south east of England through a third runway at Heathrow Airport situated to the north west of the existing runways ("the NWR scheme") to retain the airport's status as a leading aviation hub rather than through a second runway at Gatwick Airport. Several claimants issued claims for judicial review under section 13 of the 2008 Act challenging the lawfulness of the policy statement. The key grounds of challenge in the third case centred on the rejection of the Gatwick Airport scheme as an alternative to the NWR scheme and alleged unlawfulness, inter alia, by the Secretary of State's (i) rejection of the Gatwick proposal as an alternative solution on the basis that it would not meet the hub objective contrary to

[1] Planning Act 2008, s 5(1)(8): see post, para 38.
S 10(3), as amended: see post, para 42.

A the assessment requirements of article 6(3) and (4) of Council Directive 92/43/EEC[2] on the conservation of natural habitats and of wild fauna and flora, (ii) failure to either (a) give an outline of the relationship between the policy statement and other relevant plans and programmes or (b) identify the environmental characteristics of areas likely to be significantly affected in breach of article 5(1) and (2) of and Annex I(a)(c) to Parliament and Council Directive 2001/42/EC[3] on the assessment of the effect of certain plans and programmes on the environment. The key grounds of
B challenge in the first and second cases were that the Secretary of State's failure to consider the United Kingdom's commitments to the Paris Agreement on Climate Change ratified in November 2016[4], which it was common ground had occurred, in breach of the requirements under section 5(8) of the Planning Act to have regard to "Government policy" and under section 10(3)(a) of the Act to have regard to the desirability of mitigating and adapting to climate change, which also included
C non-carbon dioxide climate impacts of aviation, the effect of future emissions and the ability of future generations to meet their needs, rendered the designation of the Airports National Policy Statement unlawful. Having held that the policy statement had been lawfully produced, the Divisional Court refused permission to proceed with the claims for judicial review on all grounds in the first and second cases and granted permission to proceed on five grounds in the third case but dismissed that claim on all grounds. The claimant in the first and second cases sought permission to appeal
D and the claimants in the third case appealed.

On the applications and the appeal—

*Held*, dismissing the appeal in the third case, (1) that in accordance with the jurisprudence of the Court of Justice of the European Union, in the absence of European Union ("EU") rules it was for the domestic legal system of each member state to determine the applicable standard of review to be applied by the courts when determining a challenge to a decision involving complex scientific or technical
E assessments taken under EU legislation concerned with environmental protection, provided that the approach adopted did not render the EU rights in question virtually impossible or excessively difficult to exercise in practice; that where the court determined that a particular standard of review was appropriate in judging compliance with a provision in EU environmental legislation involving a decision-maker's assessment, that standard of review was likely to be appropriate for the corresponding exercise under another such provision, so long as the requirements
F of the two provisions were sufficiently alike and the context was not materially different; that, therefore, the appropriate standard of review to be applied by the court when determining a challenge that a decision was unlawful for having failed properly to comply with article 6(3) and (4) of Directive 92/43/EEC was *Wednesbury* irrationality, the normal standard of review in judicial review proceedings, since (i) article 6(3) and (4) did not provide for any particular standard of review, (ii) the
G requirements of the two provisions were sufficiently similar, (iii) no fundamental rights of EU law were engaged, (iii) the exercise of the rights would not thereby be rendered virtually impossible or excessively difficult and (iv) that was the standard applied to challenges seeking to protect rights arising under domestic environmental law; that, applying that standard to the decision in the present case, the "hub objective" had been a central aim throughout the national policy statement process, having been firmly in place before that process began, and since it had been the

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[2] Council Directive 92/43/EEC, art 6(3): see post, para 48.
Art 6(4): see post, para 49.

[3] Parliament and Council Directive 2001/42/EC, art 5(1)(2): see post, para 57.
Annex I(a)(c): see post, para 58.

[4] Paris Agreement on Climate Change, arts 2, 4: see post, para 23.

consistent view of the Secretary of State that the Gatwick proposal was not only incompatible with the hub objective but was inimical to it, it had been open to the Secretary of State to conclude that the Gatwick scheme was not to be considered a realistic "alternative solution" for the purposes of article 6(4) of Directive 92/43/EEC so that the requirements of article 6(4) ceased to apply to it; that it had been neither inconsistent nor unlawful for the Secretary of State to rule out the Gatwick scheme as an "alternative solution" for the purposes of article 6(4) of Directive 92/43/EEC while continuing to consider it as a "reasonable alternative" for the purposes of the assessments required under Directive 2001/42/EC, since the latter required public consultation on the contents of environmental reports which could not effectively be carried out unless all "reasonable alternatives" were put in the public domain, whereas the former imposed no such duty to consult on the competent authority; and that, in those circumstances, the Secretary of State had not acted in breach of Directive 92/43/EEC (post, paras 75, 77, 79, 80, 87, 88, 93, 106, 111, 112, 116, 118).

*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, CA, dicta of Sales LJ in *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417, paras 78–80, CA, dicta of Peter Jackson LJ in *R (Mynydd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] PTSR 1274, para 8, CA and *Craeynest v Brussels Hoofdstedelijk Gewest* (Case C-723/17) [2020] Env LR 4, ECJ applied.

(2) That the approach of the court when considering whether an environmental report complied with the requirements of article 5 of and Annex I to Directive 2001/42/EC had to reflect the breadth of the discretion given to a public authority in deciding what information might reasonably be required when taking into account (i) current knowledge and methods of assessment, (ii) the contents and level of detail of the plan or programme concerned, (iii) its stage in the decision-making process and (iv) the extent to which certain matters were more appropriately assessed at different levels in that process in order to avoid duplication of the assessment; that it was not an explicit requirement of article 5 that the information had to provide as full a picture as possible, although such a requirement could properly be inferred where reasonably required in the circumstances of a particular case, subject to considerations including the extent to which certain matters were more appropriately assessed at different levels in the decision-making process; that it followed that the appropriate standard of review was that of *Wednesbury* irrationality, since a more intense standard would risk the court effectively being invited to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker, which would exceed the proper remit of the court; and that, applying that test, the Secretary of State had not breached the provisions of Directive 2001/42/EC as alleged (post, paras 136, 139, 140, 143, 156, 158, 160, 175, 177, 183).

*R (Blewett) v Derbyshire County Council* [2004] Env LR 29 and dicta of Lord Hoffman in *R (Edwards) v Environment Agency (Note)* [2008] 1 WLR 1587, para 61, HL(E) applied.

But (3), granting permission to proceed with the claim for judicial review in the first and second cases and allowing the claims, that although section 5(8) of the Planning Act 2008 did not require that the Secretary of State follow or act in accordance with government policy in designating a national policy statement, it did require an explanation as to how government policy had been taken into account, which was an important aspect of transparency and accountability both to Parliament and the wider public; that for the purposes of section 5(8), the words "Government policy" were not to be ascribed any specific or technical meaning but were to be applied in their ordinary sense to the facts of any given situation; that in the context of climate change, the Planning Act did not require the consideration of "Government policy" to be restricted to the legal requirements under the Climate Change Act 2008

since the concept of policy was necessarily broader than legislation; that in the present case it was clear from the UK Government's solemn act of ratification of, and firm ministerial statements reiterating government policy of adherence to, the Paris Agreement that by the time of designation of the Airports National Policy Statement, that commitment to the Paris Agreement formed part of government policy; that, therefore, the Secretary of State had been legally obliged to consider the commitments under the Paris Agreement and to explain how they had been taken into account before designating the policy; that the Secretary of State had failed to do so, seemingly on the basis of flawed legal advice that he was under a positive obligation not to take the Paris Agreement into account; that that had been a material misdirection of law at a crucial stage which fed through to the decision-making process and was fatal to the decision to designate the Airports National Policy Statement; that, furthermore, by failing to ask himself whether he could take the Paris Agreement into account, the Secretary of State had acted in breach of his obligations under section 10(3) of the Planning Act; that had he realised that he had a discretion in the matter, the only reasonable view open to him would have been that the Paris Agreement was so obviously material that it had to be taken into account; and that, in all the circumstances, the appropriate form of relief was a declaration that the designation was unlawful and had no legal effect unless and until the Secretary of State undertook a review of it in accordance with the relevant provisions of the Planning Act 2008 taking the Paris Agreement into account (post, paras 223–233, 234–238, 280, 283–285).

Decision of the Divisional Court of the Queen's Bench Division [2019] EWHC 1070 (Admin); [2020] PTSR 240 reversed in part.

The following cases are referred to in the judgment of the court:

*Ashdown Forest Economic Development llp v Secretary of State for Communities and Local Government* [2015] EWCA Civ 681; [2016] PTSR 78, CA

*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; [1947] 2 All ER 680, CA

*Cogent Land llp v Rochford District Council* [2012] EWHC 2542 (Admin); [2013] 1 P & CR 2

*Craeynest v Brussels Hoofdstedelijk Gewest* (Case C-723/17) EU:C:2019:168; EU:C:2019:533; [2020] Env LR 4, ECJ

*Holohan v An Bord Pleanála (National Parks and Wildlife Service intervening)* (Case C-461/17) EU:C:2018:883; [2019] PTSR 1054; [2019] Env LR 16, ECJ

*IBA Healthcare Ltd v Office of Fair Trading* [2004] EWCA Civ 142; [2004] ICR 1364; [2004] 4 All ER 1103; [2005] 1 All ER (Comm) 147, CA

*Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale* (Case C-567/10) EU:C:2012:159; [2012] Env LR 30, ECJ

*Kennedy v Information Comr (Secretary of State for Justice intervening)* [2014] UKSC 20; [2015] AC 455; [2014] 2 WLR 808; [2014] 2 All ER 847, SC(E)

*Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij (Coöperatieve Producentenorganisatie van de Nerderlandse Kokkelvisserij UA intervening)* (Case C-127/02) EU:C:2004:482; [2005] All ER (EC) 353; [2004] ECR I-7405, ECJ

*Mass Energy Ltd v Birmingham City Council* [1994] Env LR 298, CA

*No Adastral New Town Ltd v Suffolk Coastal District Council* [2014] EWHC 223 (Admin); [2015] Env LR 3; [2015] EWCA Civ 88; [2015] Env LR 28, CA

*Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591; [2015] 3 All ER 1015, SC(E)

*R v Ministry of Defence, Ex p Smith* [1996] QB 517; [1996] 2 WLR 305; [1996] ICR 740; [1996] 1 All ER 257, CA

*R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin); [2004] Env LR 29
*R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] PTSR 182; [2014] 1 WLR 324; [2014] 2 All ER 109, SC(E)
*R (Edwards) v Environment Agency (Note)* [2008] UKHL 22; [2008] 1 WLR 1587; [2009] 1 All ER 57, HL(E)
*R (Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers* [2015] EWHC 776 (Admin); [2015] PTSR D28; [2016] Env LR 1
*R (Hillingdon London Borough Council) v Secretary of State for Transport* [2017] EWHC 121 (Admin); [2017] 1 WLR 2166
*R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189; [2007] 2 WLR 726; [2007] 2 All ER 1025, HL(E)
*R (Lumsdon) v Legal Services Board* [2015] UKSC 41; [2016] AC 697; [2015] 3 WLR 121; [2016] 1 All ER 391, SC(E)
*R (Mott) v Environment Agency* [2016] EWCA Civ 564; [2016] 1 WLR 4338, CA
*R (Mynydd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231; [2018] PTSR 1274, CA
*R (Prideaux) v Buckinghamshire County Council* [2013] EWHC 1054 (Admin); [2013] PTSR D39; [2013] Env LR 32
*R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin); [2018] ICR 269; [2018] 1 All ER 142, DC
*R (Squire) v Shropshire Council* [2019] EWCA Civ 888; [2019] Env LR 36, CA
*Rayner (JH) (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; [1989] 3 WLR 969; [1989] 3 All ER 523, HL(E)
*Save Historic Newmarket Ltd v Forest Heath District Council* [2011] EWHC 606 (Admin); [2011] JPL 1233
*Seaport Investments Ltd's Application for Judicial Review, In re* [2007] NIQB 62; [2008] Env LR 23
*Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin); [2013] Env LR D2
*Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [2017] PTSR 1041; [1988] 3 PLR 25, CA
*Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174; [2015] PTSR 1417, CA
*Terre Wallonne ASBL v Région Wallonne* (Joined Cases C-105/09 and C-110/09) EU:C:2010:355; [2010] ECR I-5611, ECJ
*Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51, SC(Sc)

The following additional cases were cited in argument:

*Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321; [2012] Env LR 22, CA
*Commission of the European Communities v Italian Republic* (Case C-304/05) EU:C:2007:532; [2007] ECR I-7495, ECJ
*Commission of the European Communities v Kingdom of the Netherlands* (Case C-441/03) EU:C:2005:233; [2005] ECR I-3043, ECJ
*CREEDNZ Inc v Governor General* [1981] 1 NZLR 172
*Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (Joined Cases C-293/12 and C-594/12) EU:C:2014:238; [2015] QB 127; [2014] 3 WLR 1607; [2014] 2 All ER (Comm) 1, ECJ
*European Commission v Federal Republic of Germany* (Case C-142/16) EU:C:2017:301, ECJ
*Heard v Broadland District Council* [2012] EWHC 344 (Admin); [2012] PTSR D25; [2012] Env LR 23
*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, HL(E)

*People Over Wind v Coillte Teoranta* (Case C-323/17) EU:C:2018:244; [2018] PTSR 1668, ECJ

*R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL(E)

*R (An Taisce (National Trust for Ireland)) v Secretary of State for Energy and Climate Change* [2014] EWCA Civ 1111; [2015] PTSR 189, CA

*R (Barclay) v Lord Chancellor and Secretary of State for Justice (No 2)* [2014] UKSC 54; [2015] AC 276; [2014] 3 WLR 1142; [2015] 1 All ER 429, SC(E)

*R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] 1 WLR 3710; [2015] 4 All ER 169, SC(E)

*R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114; [2013] JPL 1027, CA

*R (Gladman Developments Ltd) v Aylesbury Vale District Council* [2014] EWHC 4323 (Admin); [2015] JPL 656

*R (Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin)

*Sweetman v An Bord Pleanála (Galway County Council intervening)* (Case C-258/11) EU:C:2013:220; [2014] PTSR 1092, ECJ

*Tele2 Sverige AB v Post-och telestyrelsen (Tele2 Sverige AB v Post-och telestyrelsen* (Joined Cases C-203/15 and C-698/15); EU:C:2016:970; [2017] QB 771; [2017] 2 WLR 1289, ECJ

*United Kingdom of Great Britain and Northern Ireland v Council of the European Union* (Case C-84/94) EU:C:1996:431; [1996] ECR I-5755, ECJ

*Van Buggenhout v Banque Internationale à Luxembourg SA* (Case C-251/12) EU:C:2013:566; [2013] Bus LR 1322, ECJ

The following additional cases, although not cited, were referred to in the skeleton arguments:

*ARCO Chemie Nederland v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (Joined Cases C-418/97 and C-419/97) EU:C:2000:318; [2002] QB 646; [2002] 2 WLR 1240; [2003] All ER (EC) 237; [2000] ECR I-4475, ECJ

*Commission of the European Communities v Ireland* (Case C-418/04) EU:C:2007:780; [2007] ECR I-10947, ECJ

*Commission of the European Communities v Republic of Austria* (Case C-209/04) EU:C:2006:195; [2006] ECR I-2755, ECJ

*Department of the Environment for Northern Ireland v Seaport (NI) Ltd* (Case C-474/10) EU:C:2011:681; [2012] Env LR 21; [2011] ECR I-10227, ECJ

*Dimos Kropias Attikis v Ipourgos Perivallontos, Energias kai Klimatikis Allagis* (Case C-473/14) EU:C:2015:582, ECJ

*English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] EWCA Civ 605; [2002] 1 WLR 2409; [2002] 3 All ER 385, CA

*Firma Ambulanz Glöckner v Landkreis Südwestpfalz* (Case C-475/99) EU:C:2001:577; [2001] ECR I-8089, ECJ

*Flannery v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)* [2000] 1 WLR 377; [2000] 1 All ER 373, CA

*Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103; [2007] 1 WLR 482; [2006] 4 All ER 982, CA

*Grüne Liga Sachsen eV v Freistaat Sachsen (Landeshauptstadt Dresden intervening)* (Case C-399/14) EU:C:2016:10; [2016] PTSR 1240, ECJ

*Inter-Environnement Wallonie ASBL v Conseil des ministres* (Case C-411/17) EU:C:2019:622, ECJ

*Newick (Baroness Cumberlege of) v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, CA

*Pepper v Hart* [1993] AC 593; [1992] 3 WLR 1032; [1993] ICR 291; [1993] 1 All ER 42, HL(E)

*R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168

*R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, Ex p Else (1982) Ltd* [1993] QB 534; [1993] 2 WLR 70; [1993] 1 All ER 420, CA
*R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037; [1995] 3 All ER 20; 93 LGR 515, CA
*R (Buckinghamshire County Council) v Secretary of State for Transport* [2013] EWHC 481 (Admin); [2013] PTSR D25
*R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 860; [2018] 1 WLR 5161, CA
*R (KE) v Bristol City Council* [2018] EWHC 2103 (Admin); [2018] ELR 502
*R (MA (Eritrea)) v Secretary of State for the Home Department* [2011] EWCA Civ 1446, CA
*R (Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2516 (Admin); [2003] JPL 583
*R (Morge) v Hampshire County Council* [2011] UKSC 2; [2011] PTSR 337; [2011] 1 WLR 268; [2011] 1 All ER 744; [2011] LGR 271, SC(E)
*R (P) v Essex County Council* [2004] EWHC 2027 (Admin)
*R (Professional Contractors Group Ltd) v Inland Revenue Comrs* [2001] EWCA Civ 1945; [2002] STC 165, CA
*R (Richardson) v North Yorkshire County Council* [2003] EWCA Civ 1860; [2004] 1 WLR 1920; [2004] 2 All ER 31; [2004] LGR 351, CA
*R (Shimbles) v City of Bradford Metropolitan District Council* [2018] EWHC 195 (Admin); [2018] Env LR 25
*R (Shirley) v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 22; [2019] PTSR 1614, CA
*R (Stirling) v Haringey London Borough Council* [2014] UKSC 56; [2014] PTSR 1317; [2014] 1 WLR 3947; [2015] 1 All ER 495; [2014] LGR 823, SC(E)
*R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441; [2016] PTSR 982; [2016] 1 WLR 3923, CA
*R (Williams) v Powys County Council* [2017] EWCA Civ 427; [2018] 1 WLR 439, CA
*R (Yam) v Central Criminal Court* [2015] UKSC 76; [2016] AC 771; [2016] 2 WLR 19; [2016] 1 Cr App R 17, SC(E)
*Rheinmühlen-Düsseldorf v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* (Case 166/73) EU:C:1974:3; [1974] ECR 33, ECJ
*Wealden District Council v Secretary of State for Communities and Local Government* [2017] EWHC 351 (Admin); [2017] Env LR 31

**APPLICATIONS** for permission to appeal and **APPEAL** from the Divisional Court of the Queen's Bench Division

*Regina (Plan B Earth) v Secretary of State for Transport (WWF-UK intervening)*

By a claim form the claimant, Plan B Earth, sought judicial review pursuant to section 13 of the Planning Act 2008 of the decision of the defendant, the Secretary of State for Transport, on 26 June 2018 designating a national policy statement entitled "Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England" under section 5 of the 2008 Act for the purpose of setting out the policy framework within which any application for a development consent order for such development was to be determined, and indicating that the Government's preferred location and scheme for meeting the need for new airport capacity in the south east of England was a third runway at Heathrow to the north west of the existing runways. The grounds of claim were set out in the judgment of the Divisional Court of the Queen's Bench Division

A [2020] PTSR 240, Appendix A, paras 14–16. Heathrow Airport Ltd and Arora Holdings Ltd were joined as interested parties to the proceedings. On 1 May 2019 the Divisional Court (Hickinbottom LJ and Holgate J) refused permission to proceed with the claim on all grounds.

By an appellant's notice filed on 8 May 2019 the claimant applied for permission to appeal on the grounds that the Divisional Court had erred in (1) treating the then-extant target of at least an 80% greenhouse B gas emissions reduction by 2050 (against the 1990 baseline) as precluding any consideration of government policies and commitments that implied a more stringent level of emissions reduction, (2) holding that neither the temperature limit set out in the Paris Agreement on Climate Change nor the Government's policy commitment to introducing a net zero target formed any part of relevant government policy for the purposes of section 5(8) C of the Act, and that both were otherwise irrelevant, (3) holding that the 2°C temperature limit was a relevant consideration, and (4) in treating as irrelevant the Secretary of State's failure to explain the basis of his decision to Parliament. On 22 July 2019 Lindblom LJ ordered that the application for permission to appeal and, if permission to proceed with the claim for judicial review were granted under CPR r 52.8(5), the claim itself be heard with the related proceedings pursuant to CPR r 52.8(6). On 4 October 2019 D Lindblom LJ granted WWF–UK permission to intervene in the proceedings by written submissions.

The facts are stated in the judgment of the court, post, paras 2–9.

*Regina (Friends of the Earth Ltd) v Secretary of State for Transport (WWF-UK intervening)*

E By a claim form the claimant, Friends of the Earth Ltd, sought judicial review of the same decision pursuant to section 13 of the Planning Act 2008. The grounds of claim were set out in the judgment of the Divisional Court of the Queen's Bench Division [2020] PTSR 240, Appendix A, paras 11–13. Heathrow Airport Ltd and Arora Holdings Ltd were joined as interested parties to the proceedings. On 1 May 2019 the Divisional Court F (Hickinbottom LJ and Holgate J) refused permission to proceed with the claim on all grounds.

By an appellants' notice filed on 8 May 2019 the claimant applied for permission to appeal on the grounds that the Secretary of State (1) in designating the national policy statement, had wrongly confined himself to consideration of the Climate Change Act 2008 and the carbon reduction targets contained therein because it was mandatory under section 10(3) of G the Planning Act 2008 for him to consider the Paris Agreement on Climate Change, (2) had failed to give reasons in respect of non-$CO_2$ climate impacts of aviation and the effect of emissions beyond 2050, and (3) had failed to take the Paris Agreement into account in an appraisal of sustainability prepared in support of the policy statement. On 22 July 2019 Lindblom LJ ordered that the application for permission to appeal and, if permission to proceed with H the claim for judicial review were granted under CPR r 52.8(5), the claim itself be heard with the other two proceedings pursuant to CPR r 52.8(6). On 4 October 2019 Lindblom LJ granted WWF–UK permission to intervene in the proceedings by written submissions.

The facts are stated in the judgment of the court, post, paras 2–9.

*Regina (Hillingdon London Borough Council and others) v Secretary of State for Transport (WWF-UK intervening)*

By a claim form the claimants, Hillingdon London Borough Council, Wandsworth London Borough Council, Richmond upon Thames London Borough Council, Windsor and Maidenhead Royal London Borough Council, Hammersmith and Fulham London Borough Council, Greenpeace Ltd and the Mayor of London, sought judicial review of the same decision pursuant to section 13 of the Planning Act 2008. The grounds of claim were set out in the judgment of the Divisional Court of the Queen's Bench Division [2020] PTSR 240, Appendix A, paras 1–10. Heathrow Airport Ltd, the Secretary of State for Environment, Food and Rural Affairs, Transport for London and Arora Holdings Ltd were joined as interested parties to the proceedings. On 1 May 2019 the Divisional Court (Hickinbottom LJ and Holgate J) granted permission to proceed with the claim for judicial review on five grounds but dismissed the claim on those grounds.

By an appellant's notice filed on 21 May 2019, and with permission granted by the Court of Appeal (Lindblom LJ) on 22 July 2019, the claimants appealed on the grounds that the Divisional Court had erred in concluding that the Secretary of State (1) had acted lawfully in not treating the Gatwick scheme as an alternative to the scheme at Heathrow Airport to the north west of the existing runways for the purposes of article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L206, p 7), and (2) had complied with the requirements of article 5(1) and (2) taken with Annex 1(a) (c) of Parliament and Council Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L197, p 30). On 4 October 2019 Lindblom LJ granted WWF–UK permission to intervene in the proceedings by written submissions.

The facts are stated in the judgment of the court, post, paras 2–9.

The claimant by its director, *Tim Crosland*, in the Plan B Earth case.

*David Wolfe QC*, *Andrew Parkinson* and *Peter Lockley* (instructed by *Leigh Day*) for the claimant in the Friends of the Earth case.

*Nigel Pleming QC*, *Catherine Dobson* and *Stephanie David* (instructed by *Harrison Grant*) for the first to sixth claimants in the Hillingdon London Borough Council case.

*Ben Jaffey QC*, *Catherine Dobson*, *Flora Robertson* and *Stephanie David* (instructed by *Transport for London Legal*) for the Mayor of London in the Hillingdon London Borough Council case.

*James Maurici QC*, *David Blundell*, *Andrew Byass* and *Heather Sargent* (instructed by *Treasury Solicitor*) for the Secretary of State for Transport in each case.

*Michael Humphries QC* and *Richard Turney* (instructed by *Bryan Cave Leighton Paisner llp*) for the interested party Heathrow Airport Ltd.

*Charles Banner QC* (instructed by *CMS Cameron McKenna Nabarro Olswang llp*) for the interested party Arora Holdings Ltd.

*Helen Mountfield QC* and *Raj Desai* (instructed by *Head of Legal, WWF-UK*) for the intervener WWF-UK.

The other interested parties did not appear and were not represented.

A The court took time for consideration.

27 February 2020. **LINDBLOM, SINGH AND HADDON-CAVE LJJ** handed down the following judgment of the court.

*Introduction*

B

**1** This is the judgment of the court.

**2** Heathrow is a major international airport—the busiest in Europe, and the busiest in the world with two runways. Each year it handles about 70% of the United Kingdom's scheduled long-haul flights, 80 million passengers, and up to 480,000 air traffic movements. Gatwick is the busiest single runway airport in the world and each year handles about 11% of the United C Kingdom's scheduled long-haul traffic. If the United Kingdom is to maintain its status as a leading aviation "hub", it is argued that its aviation capacity must increase. Whether this increase in capacity should be supported in national policy, and in particular whether it should involve the construction of a third runway at Heathrow, has long been a matter of political debate and controversy, intensified by concerns over the environmental cost of achieving D it, and more recently by the concerted global effort to combat climate change by reducing carbon emissions. These judicial review proceedings, which have reached us in the form of an appeal from the Divisional Court (Hickinbottom LJ and Holgate J) and two applications for permission to appeal, do not draw us into that political debate. They do not face us with the task of deciding whether and how Heathrow should be expanded. That is not the kind of decision that courts can make, and is ultimately a political E question for the Government of the day. Rather, we are required to consider whether the Divisional Court was wrong to conclude that the Government's policy in favour of the development of a third runway at Heathrow was produced lawfully. That is the question here. It is an entirely legal question.

**3** The policy is contained in the "Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of F England" ("the ANPS"), designated by the Secretary of State for Transport ("the Secretary of State") under section 5 of the Planning Act 2008 ("the Planning Act") on 26 June 2018.

**4** There were originally five claims for judicial review challenging the designation decision. Four of them came before the Divisional Court in March 2019 at a "rolled-up" hearing over seven days—as applications for G permission to apply for judicial review, together with the claim itself if permission were granted. The fifth (claim no CO/3071/2018), brought by Heathrow Hub Ltd and Runway Innovations Ltd, which raises issues of a different kind from the other four, is also the subject of an appeal before us. That appeal is dealt with in a separate judgment, also handed down today. One of the other four claims (claim no CO/2760/2018), brought by Mr Neil Spurrier, is no longer pursued. The three claims we are dealing with here H are these: claim no CO/3089/2018 brought by seven claimants, five of them local authorities—Hillingdon London Borough Council and the councils of four adjacent London boroughs—Greenpeace Ltd ("Greenpeace") and the Mayor of London ("the Hillingdon claimants"); claim no CO/3147/2018 brought by Friends of the Earth Ltd ("Friends of the Earth"); and claim no CO/3149/2018 brought by Plan B Earth ("Plan B Earth").

**5** Under the Greater London Authority Act 1999 ("the GLA Act") the Mayor of London is required to have in place a London Environment Strategy that contains provisions dealing with climate change (sections 361A, 361B and 361D of the GLA Act), air quality (sections 362 to 369) and noise (section 370). He is subject to a specific "duty to address climate change, so far as relating to Greater London" (section 361A(1) and (2), as inserted by section 42 of the Greater London Authority Act 2007). Greenpeace and Friends of the Earth are both non-governmental organisations concerned with the protection of the environment. Plan B Earth is a charity promoting efforts to arrest climate change.

**6** In each of the three claims in these proceedings, and in the claim brought by Heathrow Hub and Runway Innovations, the defendant or respondent is the Secretary of State. In the Hillingdon claimants' proceedings, Transport for London ("TfL") is an interested party. TfL has responsibility, under section 154 of the GLA Act, for implementing the Mayor of London's strategy for transport in London. In all three claims Heathrow Airport Ltd ("HAL") and Arora Holdings Ltd ("Arora") are interested parties. HAL is the airport operator at Heathrow, and is promoting a scheme for the north west runway. Arora represents a group of companies that own land within the boundary of that development and intend to build and operate a new terminal constructed as part of it.

**7** The Divisional Court dismissed all four claims. Its reasons for doing so are lucidly set out in a judgment handed down on 1 May 2019 [2020] PTSR 240, which is fairly described as a "tour de force". In Mr Spurrier's claim the court refused permission to apply for judicial review on all grounds. In the Hillingdon claimants' challenge, it granted permission to apply for judicial review on five grounds but dismissed the claim on each of those grounds, and refused permission on the others. In Friends of the Earth's claim and in Plan B Earth's, it refused permission on all grounds.

**8** The Hillingdon claimants, Friends of the Earth and Plan B Earth all appealed. On 22 July 2019 Lindblom LJ granted permission to appeal in the Hillingdon claimants' case, and in both the Friends of the Earth and Plan B Earth proceedings ordered that the application for permission to appeal and, if permission to apply for judicial review were granted on that application (under CPR r 52.8(5)), the claim itself (under CPR r 52.8(6)) would be heard together with each other and with the Hillingdon claimants' appeal. Lindblom LJ also made case management directions, which, among other things, required the parties in all three cases to agree the main issues for the court.

**9** On 18 September 2019, the court received an application by WWF-UK ("WWF") for permission to intervene by the making of oral or written submissions on the significance of the United Nations Convention on the Rights of the Child to the Secretary of State's duty in section 10(2) of the Planning Act when exercising its functions with the objective of achieving "sustainable development". That application was opposed by the Secretary of State. On 4 October 2019 Lindblom LJ granted WWF permission to intervene by written representations only and gave the parties permission to respond in writing, with a deadline later extended—by an order dated 8 October 2019—to 1 November 2019. By a further order dated 15 October 2019 he gave permission for all other parties to reply to the responses to WWF's submissions by 6 November 2019.

A *The main issues before us*

**10** The main issues for us to decide, as agreed by the parties, fall into four groups: first, issues on the operation of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L206, p 7) ("the Habitats Directive"); second, issues on
B the operation of Parliament and Council Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L197, p 30) ("the SEA Directive"); third, issues relating to the United Kingdom's commitments on climate change; and fourth, relief.

**11** The issues on the operation of the Habitats Directive are:

(1) what standard of review the court should apply when considering
C whether there has been a breach of the requirements of article 6(4) of the Habitats Directive;

(2) whether the Secretary of State breached the Habitats Directive in deciding that the scheme for a second runway at Gatwick was not an alternative solution to the scheme for the north west runway at Heathrow on the basis that it would not meet the "hub objective";

D (3) whether the Secretary of State breached the Habitats Directive in deciding to exclude the Gatwick second runway scheme as an alternative solution to the north west runway scheme at Heathrow because it would potentially harm a Special Area of Conservation ("SAC") in which a priority species was present, and that an opinion of the European Commission might be required;

E (4) whether the Divisional Court erred: (i) in distinguishing between the obligation to consider "alternative solutions" in article 6(4) of the Habitats Directive and the obligation to consider "reasonable alternatives" under the SEA Directive; and (ii) in determining that the Secretary of State could lawfully rule out the Gatwick second runway scheme as an alternative solution under the Habitats Directive while also treating it as a reasonable alternative for the purposes of the SEA Directive; and

F (5) whether the court should refer the following questions to the Court of Justice of the European Union under article 267 of the Treaty on the Functioning of the European Union ("TFEU"): (i) Is the identification of an "alternative solution" under the Habitats Directive to be approached differently from the identification of a "reasonable alternative" under the SEA Directive? And what test should be applied? (ii) Is it compatible with
G European Union ("EU") law for the court to limit its role to considering whether a process of identifying alternative solutions was not irrational?

**12** The issues on the operation of the SEA Directive are:

(1) what approach the court should take when considering whether an environmental report complies with the SEA Directive, and in particular, whether or not it should apply the approach indicated in *R (Blewett) v Derbyshire County Council* [2004] Env LR 29;

H (2) whether, in deciding to designate the ANPS, the Secretary of State breached article 5(1) and (2) of, and Annex 1(a) to, the SEA Directive by failing to provide an outline of the relationship between the ANPS and other relevant plans and programmes;

(3) whether, in deciding to designate the ANPS, the Secretary of State breached article 5(1) and (2) of, and Annex 1(c) to, the SEA Directive by

failing to identify the environmental characteristics of areas likely to be significantly affected by the ANPS; and

(4) whether the Secretary of State breached the SEA Directive by failing to consider the Paris Agreement on Climate Change (2016).

**13** The issues relating to the United Kingdom's commitments on climate change, in addition to issue (4) on the operation of the SEA Directive, are:

(1) whether the designation of the ANPS was unlawful because the Secretary of State, in breach of section 10(3)(a) of the Planning Act, failed to have regard to the desirability of mitigating, and adapting to, climate change in the light of the United Kingdom's commitment to the Paris Agreement, the non-carbon dioxide ("non-$CO_2$") climate impacts of aviation, the effect of emissions beyond 2050, and to the ability of future generations to meet their needs;

(2) whether the Divisional Court erred by failing to give reasons for rejecting Friends of the Earth's argument on the non-$CO_2$ climate impacts of aviation and the effect of emissions beyond 2050, having regard to the ability of future generations to meet their needs;

(3) whether the Divisional Court erred in treating the then extant 2050 target of a reduction in greenhouse gas emissions of at least 80% (against the 1990 baseline) as precluding any consideration of government policies and commitments, implying a more stringent level of protection;

(4) whether the Divisional Court erred in holding that neither the "Paris Temperature Limit" nor "the Government's policy commitment to introducing a net zero target" formed any part of relevant government policy within section 5(8) of the Planning Act, and that both were otherwise irrelevant;

(5) whether the Divisional Court erred in holding that the 2°C temperature limit was a relevant consideration; and

(6) whether the Divisional Court erred in treating as irrelevant the Secretary of State's "failure to explain to Parliament the basis of his decision".

**14** The issue on relief is whether any remedy, and what, should be granted if any of the grounds of claim is made out.

*The origins and genesis of the ANPS*

**15** The Divisional Court set out a full and clear account of the events leading to the formulation and designation of the ANPS (in paras 42 to 85 of its judgment, under the heading: "The Factual Background"). We gratefully adopt that account. For the hearing before us, the parties provided an agreed narrative. In setting the scene for what follows, we confine ourselves to the most salient events in that history. We shall describe the relevant circumstances in more depth, and refer to the relevant content of the ANPS, as we deal with the issues we have to consider.

**16** On 16 December 2003, the Government published a White Paper, "The Future of Air Transport", which proposed a new runway at Heathrow (Cmnd 6046, chapter 11).

**17** On 26 November 2008, both the Climate Change Act 2008 ("the Climate Change Act") and the Planning Act received Royal Assent. The Climate Change Act established the Committee on Climate Change (section 32). It also set a "carbon target" for the United Kingdom to reduce its greenhouse gas emissions by 80% from their level in 1990, by 2050 (section 1). This was consistent with the global temperature limit in place at the time,

which was 2°C. However, on 27 June 2019 article 2(2) of the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (SI 2019/1056) amended the target figure in section 1 of the Climate Change Act from 80% to 100%.

**18** On 7 September 2012, the Government established the Airports Commission to "examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub", and to "identify and evaluate how any need for additional capacity should be met in the short, medium and long term" (para 1.3 of the Airports Commission's Final Report, published in July 2015). The Airports Commission duly considered 58 different proposals for delivering additional airport capacity in the south east of England by 2030 (para 10.4.14 of the Habitats Regulations Assessment for the ANPS). It recognised that increasing airport capacity would have "significant impacts on the environment and local communities" (para 3.49 of the ANPS). Its terms of reference required it to look at the environmental impact of meeting the need for additional capacity, and to provide a final report, recommending credible options by "no later than summer 2015" (para 1.3 of the Airports Commission's Final Report).

**19** In March 2013, the Secretary of State issued an Aviation Policy Framework, setting out the Government's long-term policy for aviation. The Aviation Policy Framework included a climate change strategy for aviation, which concentrated on action at a global level (paras 12 to 20). It emphasised the important role to be played by the Airports Commission (paras 21 to 24). On 17 December 2013, the Airports Commission published an interim report, which assessed the evidence on "the nature, scale and timing of the steps needed to maintain the United Kingdom's status as an international hub for aviation" (para 5). In the context of the United Kingdom's "hub status", it explained that the strength of Heathrow's route network was underpinned by the airport's transfer passengers, a third of its total passenger traffic (para 3.88). Three options were selected for further consideration: first, the Heathrow north west runway scheme proposed by HAL—a new runway, 3,500 metres in length, constructed to "the north west of the airport" (para 6.67 of the Airports Commission's Interim Report); second, the Heathrow extended northern runway scheme proposed by Heathrow Hub—extending the existing northern runway to at least 6,000 metres to allow it to operate as two separate runways (ibid); and third, the Gatwick second runway scheme —a new runway over 3,000 metres in length, south of the existing runway (ibid).

**20** In January 2014, the Airports Commission consulted on a draft Appraisal Framework, entitled "Airports Commission: Appraisal Framework", which included "appraisal modules" on noise, air quality, biodiversity and carbon (Appendix A, sections 5 to 8). It appointed an Expert Advisory Panel "to help [it] to access, interpret and understand evidence relating to [its] work, and to make judgements about its relevance, potential and application" (Annex A to its Final Report). It adopted the Appraisal Framework in April 2014. Between November 2014 and February 2015, it undertook a consultation on the short-listed schemes (para 1.16), whose main purpose was to "test the evidence base, to identify any concerns stakeholders may have as to the accuracy, relevance or breadth of the assessments undertaken, and to seek views on the potential conclusions that might be drawn" (para 4.12). It also held public discussion sessions

in the local areas around Heathrow and Gatwick to hear the views and concerns of local people, MPs and councillors, community groups and business organisations (para 4.15).

**21** On 1 July 2015, the Airports Commission published its Final Report. It highlighted the consolidation of the airline industry and the rise of alliances within the industry, which had led to the expansion of "hub-and-spoke" networks run by major carriers at the world's largest airports—in which traffic is routed through local airports ("hubs"), with feeder traffic from other airports in the network ("spokes"). It emphasised the strength of competition from European and Middle-Eastern "hubs" (Executive Summary). It acknowledged that there was a need for additional runway capacity in the south east of England by 2030 and that all three short-listed schemes were "credible" (Executive Summary and para 16.62). It concluded that the Heathrow north west runway scheme was the most appropriate way to meet the need, if combined with measures to address environmental and community impacts, including "[incentivisation] of a major shift in mode share for those working at and arriving at the airport"; a requirement that additional operations at an expanded Heathrow "must be contingent on acceptable performance on air quality"; a ban on all scheduled night flights in the period between 11.30 p m and 6 a m; and the ruling out of a fourth runway at Heathrow (para 13.3). It also concluded that the Heathrow north west runway scheme performed "most strongly" in the "Strategic Fit appraisal module" because "[it] would deliver the greatest increase in connectivity, particularly with regard to strategically important long-haul connections, [and] would provide a world-class passenger experience and support growth in airfreight more effectively than expansion at Gatwick" (para 6.91). Conversely, it concluded that the Gatwick second runway scheme was directed more towards "short-haul European travel, with significant changes in industry structure needed to see a substantial increase in long-haul connectivity" (para 6.92). At the same time the Airports Commission published a Business Case and a Sustainability Assessment to provide a foundation for an appraisal of sustainability.

**22** Between July and December 2015, the Airports Commission's conclusions were subjected to a number of reviews undertaken on behalf of the Secretary of State. One of these was conducted by a Senior Review Panel chaired by Ms Caroline Low, the Aviation Capacity Programme Director at the Department for Transport. In October 2015, on behalf of the Mayor of London, TfL published a response to the Airports Commission's Final Report, entitled "Mayor of London's response to the Airports Commission recommendation for a three-runway Heathrow". In section 7, "Summary", it expressed concerns about noise, $NO_2$ levels, the increase in freight traffic and the lack of rail infrastructure.

**23** In December 2015, the Paris Agreement was concluded as an agreement within the United Nations Framework Convention on Climate Change ("the UNFCCC"), but outside the Kyoto Protocol. It was adopted by consensus following the 21st Conference of the UNFCCC on 12 December 2015, by all 195 participating member states and by the European Union. It brought about a stronger international commitment to mitigating climate change. It enshrines a firm commitment to restricting the increase in the global average temperature to "well below 2°C above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1·5°C above pre-

industrial levels" (article 2(1)(a)), as well as an aspiration to achieve net zero greenhouse gas emissions during the second half of the 21st century —a "balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (article 4(1)). It requires each state to determine its own contribution to this target (article 4(2) and (3)).

**24** On 14 December 2015, in an oral statement to Parliament, the Secretary of State announced that the Government accepted the case for airport expansion; that it agreed with, and would further consider, the Airports Commission's shortlist of options; and that it would use a national policy statement under the Planning Act to establish the policy framework within which to consider an application for development consent. The Secretary of State also stated that further work had to be done on environmental impacts, particularly those relating to air quality, noise, carbon emissions and local communities (Hansard (HC Debates), 14 December 2015, cols 1306 and 1307). The decision to make the announcement had been agreed at a Cabinet Economic and Industrial Strategy (Airports) Sub-Committee meeting on 10 December 2015.

**25** In March 2016, WSP Parsons Brinkerhoff ("WSP"), the consultants retained by the Secretary of State to advise on the environmental issues involved in the preparation of the ANPS, produced the "Appraisal of Sustainability: Airports NPS Scoping report", which was to be sent to the consultation bodies—Natural England, Historic England and the Environment Agency—under regulation 12(5) of the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) ("the SEA Regulations"). The scoping report was formally issued to the consultation bodies on 9 March 2016. The period of consultation ran to 18 April 2016.

**26** In mid-2016, the process of "appropriate assessment" began under regulation 61 of the Conservation of Habitats and Species Regulations 2010 (SI 2010/490)—later replaced by regulation 63 of the Conservation of Habitats and Species Regulations 2017 (SI 2017/1012) ("the Habitats Regulations"). Throughout this process WSP consulted Natural England. The Habitats Regulations Assessment produced for the shortlisted options in June 2018 stated that the Gatwick second runway scheme would result in "fewer types of impact at fewer European sites" than either of the two Heathrow schemes (para 9.2.11). However, changes to air quality caused by nitrogen oxide ("$NO_x$") could not be discounted at the Mole Gap to Reigate Escarpment SAC, which contained a priority natural habitat type—for a rare species of wild orchid (ibid).

**27** On 13 October 2016, the Committee on Climate Change published "UK climate action following the Paris Agreement", which considered the implications of the Paris Agreement and made recommendations for action by the United Kingdom. The Executive Summary stated, on p 7:

> "Do not set new UK emissions targets now. The UK already has stretching targets to reduce greenhouse gas emissions. Achieving them will be a positive contribution to global climate action. In line with the Paris Agreement, the Government has indicated it intends at some point to set a UK target for reducing domestic emissions to net zero.

> We have concluded it is too early to do so now, but setting such a target should be kept under review. The five-yearly cycle of pledges and reviews created by the Paris Agreement provides regular opportunities to consider increasing UK ambition."

The report said that "[the] UK 2050 target is potentially consistent with a wide range of global temperature outcomes" (p 16).

**28** On 25 October 2016, the Secretary of State announced that the Government's preferred option was the north west runway scheme at Heathrow. This decision had been agreed at the Cabinet's Economy and Industrial Strategy (Airports) Sub-Committee meeting on that day.

**29** On 17 November 2016, the United Kingdom ratified the Paris Agreement.

**30** In December 2016, the Hillingdon claimants issued a claim for judicial review of the preference decision made on 25 October 2016. On 30 January 2017, that claim was struck out by Cranston J. He concluded that the court had no jurisdiction to hear it because, under section 13 of the Planning Act, the matters it raised could only be pursued during the six-week period following the adoption or publication of a national policy statement, and the policy statement under challenge had not yet been adopted or published (*R (Hillingdon London Borough Council) v Secretary of State for Transport* [2017] 1 WLR 2166, paras 4–5).

**31** In February 2017, WSP produced a Scoping Consultation Responses Report, which explained how responses from the consultation bodies had been taken into account in the preparation of the Appraisal of Sustainability. On 2 February 2017, the Department for Transport launched a consultation on the draft ANPS for a period of 16 weeks. Alongside the draft ANPS, the Secretary of State published for consultation several draft documents, including the Appraisal of Sustainability and the Habitats Regulations Assessment. There were more than 72,000 responses to that consultation.

**32** On 24 October 2017, the Department for Transport launched a further consultation on updated evidence, including the Government's revised aviation demand forecasts. A revised draft ANPS and a number of other supporting documents were published at the same time, including an updated Appraisal of Sustainability and an updated Habitats Regulations Assessment. There were more than 11,000 responses to that consultation. A joint response was provided by the Hillingdon claimants. Hillingdon London Borough Council and Hammersmith and Fulham London Borough Council also submitted individual responses. The Mayor of London responded to this consultation in December 2017. The responses raised a number of concerns, including alleged breaches of the SEA Directive and the SEA Regulations.

**33** On 23 March 2018, the Transport Committee published the report on its inquiry on the revised draft ANPS, which had been set up in November 2017. The report made 33 recommendations. Subject to those recommendations, it approved the draft ANPS (paras 1 to 25 of the report, entitled "House of Commons Transport Committee Airports National Policy Statement Third Report of Session 2017–2019").

**34** In June 2018, the Secretary of State published the final "Appraisal of Sustainability: Airports National Policy Statement". Table 1.1 sets out the information referred to in Schedule 2 to the SEA Regulations. On the

A "environmental protection objectives, established at international … level", it states:

> "The topics in Appendix A include a review of policy and legislation which has been taken into account by the assessment of the NPS.
>
> "The scoping report also undertook a full review of policies, plans and programmes which may affect the Airports NPS (Appendix A of the
B Scoping Report). Section 4.3 summarises the key sustainability themes and objectives."

Appendix A of the scoping report includes a list of international policy and legislation relevant to airport policy. The Paris Agreement is not in the list.

**35** On 5 June 2018, the Department for Transport published the Government's response to the representations made in the course
C of consultation on the ANPS, entitled "Government response to the consultations on the Airports National Policy Statement: Moving Britain Ahead". This document considered, among other things, noise (chapter 7) and carbon emissions (chapter 8). On the same day, following its approval by the Cabinet sub-committee, the Secretary of State laid before Parliament the final draft of the proposed ANPS. On 25 June 2018, the House of Commons
D debated and voted on the proposed ANPS. 415 MPs voted in favour of it, 119 against—a majority of 296. It is not suggested in these proceedings that the fact that there was such approval has any legal significance. The ANPS does not have the status of an Act of Parliament and can, in principle, be the subject of challenge by a claim for judicial review. If the process by which the ANPS was adopted by the Secretary of State was unlawful, the fact that it was approved by the House of Commons could not save it from a successful
E claim.

**36** On 26 June 2018, the Secretary of State designated the ANPS under section 5(1) of the Planning Act. On the same day, the Secretary of State also published "The Airports National Policy Statement: Post Adoption Statement", explaining how environmental considerations and consultation responses had been taken into account; and the "Relationship Framework
F Document between the Secretary of State for Transport and Heathrow Airport Ltd", explaining how the Department for Transport and HAL would work together to achieve additional airport capacity.

*The Planning Act*

**37** National policy statements are the statements of national planning
G policy for "nationally significant infrastructure projects" in England and Wales under the statutory regime in Parts 2 and 3 of the Planning Act. Section 14(1) defines "nationally significant infrastructure projects" as including projects consisting of "airport-related development" (section 14(1)(i)). The Planning Act specifies the procedural steps that must be undertaken before a national policy statement can be formally "designated" by the Secretary of State, including consultation, parliamentary scrutiny
H and consideration of sustainability (section 5(3) and (4)). It also obliges the Secretary of State, when determining an application for development consent, to have regard to any relevant national policy statement (section 104 in Part 6).

**38** Section 5, as amended by section 130(2) of the Localism Act 2011, provides:

"(1) The Secretary of State may designate a statement as a national policy statement for the purposes of this Act if the statement— (a) is issued by the Secretary of State, and (b) sets out national policy in relation to one or more specified descriptions of development."

"(3) Before designating a statement as a national policy statement for the purposes of this Act the Secretary of State must carry out an appraisal of the sustainability of the policy set out in the statement.

"(4) A statement may be designated as a national policy statement for the purposes of this Act only if the consultation and publicity requirements set out in section 7, and the parliamentary requirements set out in section 9, have been complied with in relation to it and— (a) the consideration period for the statement has expired without the House of Commons resolving during that period that the statement should not be proceeded with, or (b) the statement has been approved by resolution of the House of Commons— (i) after being laid before Parliament under section 9(8), and (ii) before the end of the consideration period."

"(7) A national policy statement must give reasons for the policy set out in the statement.

"(8) The reasons must (in particular) 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."

An appraisal of sustainability is capable of constituting the environmental report for the purposes of articles 3 and 5 of the SEA Directive. This was so in the case of the ANPS.

**39** Section 6, "Review", provides for a national policy statement to be reviewed. Section 6(1) states: "(1) The Secretary of State must review each national policy statement whenever the Secretary of State thinks it appropriate to do so." Subsection (2) states that such a review "may relate to all or part of a national policy statement". Section 6(3) provides:

"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."

Subsection (4) contains equivalent provisions for a decision to "review part of a national policy statement". Section 6(5) and (7) provide:

"(5) After completing a review of all or part of a national policy statement the Secretary of State must do one of the following— (a) amend the statement; (b) withdraw the statement's designation as a national policy statement; (c) leave the statement as it is."

(7) The Secretary of State may amend a national policy statement only if the consultation and publicity requirements set out in section 7, and the parliamentary requirements set out in section 9, have been complied with in relation to the proposed amendment and— (a) the consideration period for the amendment has expired without the House of Commons resolving during that period that the amendment

should not be proceeded with, or (b) the amendment has been approved by resolution of the House of Commons— (i) after being laid before Parliament under section 9(8), and (ii) before the end of the consideration period."

**40** Sections 7 and 8 reflect the consultation requirements of the SEA Directive. They oblige the Secretary of State to "carry out such consultation, and arrange for such publicity, as [he] thinks appropriate in relation to the proposal" (section 7(2)), to "consult such persons, and such descriptions of persons, as may be prescribed" (section 7(4)), and to "have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal" (section 7(6)). The Secretary of State must consult any local authority in whose area the plan is based and "the Greater London Authority, if any of the locations concerned is in Greater London". (Section 8(1) and (2).)

**41** Section 9 states:

"(1) This section sets out the parliamentary requirements referred to in sections 5(4) and 6(7).

"(2) The Secretary of State must lay the proposal before Parliament.

"(3) In this section 'the proposal' means— (a) the statement that the Secretary of State proposes to designate as a national policy statement for the purposes of this Act, or (b) (as the case may be) the proposed amendment."

**42** Section 10 provides:

"(1) This section applies to the Secretary of State's functions under sections 5 and 6.

"(2) The Secretary of State must, in exercising those functions, do so with the objective of contributing to the achievement of sustainable development.

"(3) For the purposes of subsection (2) the Secretary of State must (in particular) have regard to the desirability of— (a) mitigating, and adapting to, climate change …"

**43** Section 13(1) provides that the court "may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if— (a) the proceedings are brought by a claim for judicial review".

**44** Section 104, as amended by section 128 of and paragraph 149 of Schedule 13(1) to the Localism Act 2011, states:

"(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates."

"(3) 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.

"(4) 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 United Kingdom being in breach of any of its international obligations.

"(5) 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.

"(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment."

*The Habitats Directive*

**45** Article 2(1) of the Habitats Directive states: "1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the member states to which the Treaty applies."

**46** Article 6(1) requires member states to establish necessary conservation measures for an SAC, involving if necessary "appropriate management plans specifically designed for the sites". Article 6(2) compels member states to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species within the SACs.

**47** We are largely concerned with the correct interpretation of the requirements of article 6(3) and (4), which are transposed into domestic law by regulations 63 and 64 of the Habitats Regulations.

**48** Article 6(3) states:

"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."

The effect of article 6(3), therefore, is that a competent national authority—here the Secretary of State—may only designate a national policy statement or grant a development consent order after an appropriate assessment under the Habitats Regulations has been performed and if satisfied, on the basis of that assessment, that the national policy statement or the development consent order would not "adversely affect the integrity" of the site concerned —subject to the derogation provisions in article 6(4).

**49** Article 6(4) provides:

"If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the member state shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

A Article 6(4) also provides for the situation where an SAC hosts a "priority natural habitat type" or a "priority species". Priority natural habitat types are "natural habitat types in danger of disappearance" (article 1(d)) and priority species are those which are "endangered" (article 1(g)(i)), "vulnerable" (article 1(g)(ii)), "rare" (article 1(g)(iii)), or "requiring particular attention" (article 1(g)(iv)), for the conservation of which "the
B Community has particular responsibility" (article 1(g) and (h)). In such cases, article 6(4) states that the only considerations that may be raised are restricted to "those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest".

C *The SEA Directive and the SEA Regulations*

**50** The purpose of the SEA Directive is "to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development" (article 1).

**51** The provisions of the SEA Directive are founded on the "precautionary
D principle". Recital (1) states:

> "Article 174 of the Treaty provides that Community policy on the environment is to contribute to, inter alia, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle …"

E

**52** Recital (9) states: "This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in member states or incorporated in specifically established procedures."

**53** Recital (14) states:

> "Where an assessment is required by this Directive, an environmental
F report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme."

**54** Article 2(b) provides that an "environmental assessment" means the
G preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making, and the provision of information on the decision. Under article 2(c) an "environmental report" should contain the information required in article 5 and Annex I.

**55** Article 3 states:

H

> "1. An environmental assessment, in accordance with articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
>
> "2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes, (a) which are prepared for … transport … and which set the framework for future development

consent of projects listed in Annexes I and II to Directive 85/337/EEC …"

"4. Member states shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects."

**56** Article 4(1) requires that the environmental assessment must be carried out "during the preparation of a plan or programme and before its adoption". In this case, therefore, the environmental assessment had to be carried out before the ANPS was designated.

**57** Article 5 provides:

"1. Where an environmental assessment is required under article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."

The information required by article 5(1) and Annex 1 is subject to articles 5(2) and (3) which state:

"2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

"3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I."

**58** So far as is relevant here, Annex I states:

"The information to be provided under article 5(1), subject to article 5(2) and (3), is the following: (a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes … (c) the environmental characteristics of areas likely to be significantly affected; (d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC; (e) the environmental protection objectives, established at international, Community or member state level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation … (h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information …"

**59** Article 6(1) states: "The draft plan or programme and the environmental report prepared in accordance with article 5 shall be made available to the authorities referred to in paragraph 3 of this article and the public."

**60** The SEA Directive has been transposed into domestic law by the SEA Regulations. It was common ground before this court that, since the Regulations are in similar terms to the Directive, it is appropriate to go straight to the Directive, although it does not strictly speaking have direct effect in domestic law.

**61** Regulation 12 of the SEA Regulations states:

> "12 *Preparation of environmental report*
>
> "(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.
>
> "(2) The report shall identify, describe and evaluate the likely significant effects on the environment of— (a) implementing the plan or programme; and (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.
>
> "(3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of— (a) current knowledge and methods of assessment; (b) the contents and level of detail in the plan or programme; (c) the stage of the plan or programme in the decision-making process; and (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."
>
> "(5) When deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation bodies."

*The EIA Directive*

**62** Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L26, p 1) ("the EIA Directive") has been transposed into domestic law by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571) ("the EIA Regulations"). It applies at the development consent order stage.

*The issues on the operation of the Habitats Directive*

**63** Before the Divisional Court, and before us, the parties were agreed on the consequences of a plan not qualifying as an "alternative solution". As the Divisional Court put it in para 299:

> "During the course of oral submissions, as we understood it, it became common ground that, if and when a plan or scheme does not qualify as an 'alternative solution' within the meaning of article 6(4), then it does not need to be considered any further under the Habitats Directive. If it is properly assessed as not qualifying as an 'alternative solution' before an HRA has been conducted, it is not necessary for Habitats Directive purposes to consider that plan or scheme in any later

HRA or otherwise at all. It was also common ground that article 6(3) and (4) involve an iterative process, certainly for policy-making as a plan proceeds from an initial draft through consultation to its finally adopted form; and, in that iterative process, something which is considered by the competent authority to be an 'alternative solution' at one stage may, in the light of further information and/or assessment, properly cease to be so regarded subsequently."

**64** The ANPS acknowledges (in para 1.32) that the development of the north west runway at Heathrow has the potential to have adverse effects on the integrity of European sites for the purposes of article 6(3) of the Habitats Directive, because "more detailed project design information and detailed proposals for mitigation are not presently available and inherent uncertainties exist at this stage". However, it rejects the Gatwick second runway scheme as an alternative solution under article 6(4), concluding that:

> "1.32. … [No] alternatives [to the preferred scheme] would deliver the objectives of the Airports NPS in relation to increasing airport capacity in the south east and maintaining the UK's hub status. In line with article 6(4) of the Directive, the Government considers that meeting the overall needs case for increased capacity and maintaining the UK's hub status, as set out in chapter 2, amount to imperative reasons of overriding public interest supporting its rationale for the designation of the Airports NPS."

**65** There are numerous references in the ANPS to the importance of the objective of "maintaining the UK's hub status". Para 1.3 says that the Airports Commission had been established "to examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub". Several passages in chapter 2, which deals with the need for additional airport capacity, emphasise the United Kingdom's role as a "hub". In chapter 3, which explains why the north west runway at Heathrow was chosen as the preferred scheme, paras 3.18 and 3.19 state:

> "3.18 Heathrow Airport is best placed to address this need by providing the biggest boost to the UK's international connectivity. Heathrow Airport is one of the world's major hub airports, serving around 180 destinations worldwide with at least a weekly service, including a diverse network of onward flights across the UK and Europe. Building on this base, expansion at Heathrow Airport will mean it will continue to attract a growing number of transfer passengers, providing the added demand to make more routes viable. In particular, this is expected to lead to more long haul flights and connections to fast-growing economies, helping to secure the UK's status as a global aviation hub, and enabling it to play a crucial role in the global economy.
>
> 3.19 By contrast, *expansion at Gatwick Airport would not enhance, and would consequently threaten, the UK's global aviation hub status*. Gatwick Airport would largely remain a point to point airport, attracting very few transfer passengers. Heathrow Airport would continue to be constrained, outcompeted by competitor hubs which lure away transfer passengers, further weakening the range and frequency of viable routes. At the UK level, there would be significantly fewer

A long haul flights in comparison to the preferred scheme, with long haul destinations served less frequently. Expansion at Heathrow Airport is the better option to ensure the number of services on existing routes increases and allows airlines to offer more frequent new routes to vital emerging markets." (Emphasis added.)

*Habitats Directive issue (1)—the standard of review*

B

**66** Having cited relevant authority, including the decisions of the Supreme Court in *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 and *Kennedy v Information Comr (Secretary of State for Justice intervening)* [2015] AC 455 and observations made by Carnwath LJ, as he then was, in *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, paras 91 and 92 and of Sir Thomas Bingham MR, as he then was, in *R v* C *Ministry of Defence, Ex p Smith* [1996] QB 517, 556B), the Divisional Court said that in its view,

> "as well as the nature of the decision under challenge, the factors upon which the degree of scrutiny of review particularly depends include (i) the nature of any right or interest it seeks to protect, (ii) the process by which the decision under challenge was reached and (iii) the nature D of the ground of challenge" (para 151 of the judgment).

**67** With those considerations in mind, the Divisional Court acknowledged that the interests the claimants sought to protect were "matters of great public importance", but also that the proponents of airport expansion had pointed to "the contribution made to the national economy and the creation of employment". It accepted that, "[inevitably], policy- E making in this area involves the striking of a balance in which these and a great many other factors are assessed and weighed", and "is carried on at a high, strategic level and involves political judgment as to what is in the overall public interest" (para 152).

**68** As the Divisional Court said, "the degree of scrutiny required by any challenge before [it] will be dependent upon … the strand of policy F which is under review" (para 166). It saw in the decision of this court in *R (Mott) v Environment Agency* [2016] 1 WLR 4338 "a helpful reminder of well-established good law: the court should accord an enhanced margin of appreciation to decisions involving or based upon 'scientific, technical and predictive assessments' by those with appropriate expertise". It observed that

> "where a decision is highly dependent upon the assessment of a wide G variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament), the margin of appreciation will be substantial" (para 179).

And it accepted that, by analogy with the first instance decision in *R (Prideaux) v Buckinghamshire County Council* [2013] PTSR D39; [2013] Env LR 32, "the Secretary of State was entitled to attach great weight H to the reports of [the Airports Commission], particularly [the Airports Commission's] Final Report" (para 180).

**69** The Divisional Court concluded that the appropriate standard of review to be applied when considering whether there has been a breach of the requirements of article 6(3) and (4) of the Habitats Directive is *Wednesbury* irrationality (see *Associated Provincial Picture Houses Ltd v Wednesbury*

*Corpn* [1948] 1 KB 223). In coming to this conclusion, it relied on the judgment of Sales LJ, as he then was, in *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417, paras 78–80, and the judgment of Peter Jackson LJ in *R (Mynydd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] PTSR 1274, para 8. It said that "although a strict precautionary approach is required for article 6(3) of the Habitats Directive, the appropriate standard of review is [*Wednesbury* irrationality]: the court should not adopt a more intensive standard or effectively remake the decision itself" (para 350). It saw no "arguable justification for a different standard of review to be adopted" when the court is assessing whether a project or plan meets core policy objectives under article 6(4) as opposed to article 6(3). Indeed, it went on to say that,

> "if anything, the assessment of whether a policy meets the core objectives of a policy-maker, assigned by Parliament with the task, is … even more essentially a matter for that policy-maker, and not the court which is peculiarly ill-equipped to make such assessments" (para 351).

**70** In coming to those conclusions, the Divisional Court distinguished *R (Lumsdon) v Legal Services Board* [2016] AC 697 on its facts. The decision in that case—where the crucial issue was whether a quality assurance scheme for advocates was proportionate as a derogation from the freedom of establishment for providers of services under EU law—was, it said, of "no assistance in determining whether article 6(3) and (4) of the Habitats Directive is to be construed as incorporating a proportionality approach" (para 347). The relevant provision there—article 9(1)(b) and (c) of Parliament and Council Directive 2006/123/EC—explicitly required the use of a "less restrictive measures" test, which included proportionality (para 345). The Habitats Directive imposes no such test. The passages in the judgment of Lord Reed JSC and Lord Toulson JSC relied on by the Hillingdon claimants (in particular, paras 63 and 67) related to "national measures" derogating from "fundamental freedoms". In this case there was no such derogation (para 346 of the Divisional Court's judgment).

**71** The Divisional Court added, however, that "the nature and standard of review is not determinative in this case" (para 351). This was because, in its view, there was "no legal basis for challenging the Secretary of State's decision to adopt the … 'hub objective' and/or his assessment that [the Gatwick second runway scheme] failed to meet it" (para 353). Even if "the proportionality approach" were appropriate here, the Secretary of State "would have a significant margin of appreciation; and the evidence was firmly against [the Gatwick second runway scheme] being able to maintain the UK's hub status function" (para 356).

**72** For the Hillingdon claimants, Mr Ben Jaffey QC submitted, as he did before the Divisional Court, that the appropriate standard of review here is proportionality. He argued that the use of the domestic law concept of review on *Wednesbury* principles is inappropriate where fundamental principles of EU law are in play. He invoked article 191(2) of the TFEU, which states:

> "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that

A environmental damage should as a priority be rectified at source and that the polluter should pay."

The "precautionary principle", Mr Jaffey submitted, should have been applied by the Secretary of State when preparing and designating the ANPS —because uncertainty remained over the environmental impacts of the Heathrow north west runway. And the preference accorded to "alternative B solutions" by article 6(4) of the Habitats Directive was an example of the requirement to take "preventive action".

**73** Mr Jaffey maintained that the application of a standard of review based on proportionality was consistent with the opinion of Advocate General Kokott in *Commission of the European Communities v Portuguese Republic* ("*Commission v Portugal*") (Case C-239/04) [2006] ECR I-10183, C points 42–43). The identification of alternatives under the Habitats Directive was, he submitted, the same kind of exercise as establishing, in the second stage of a proportionality assessment, whether the means chosen are the least restrictive alternative. Measures that impair fundamental environmental protections granted by EU law are, he argued, comparable in their significance to a serious interference with fundamental rights under EU law. He relied again on the Supreme Court's decision in *Lumsdon* [2016] AC D 697. And he drew our attention to the opinion of Advocate General Kokott in *Craeynest v Brussels Hoofdstedelijk Gewest* (Case C-723/17) [2020] Env LR 4, in which she said:

> "43. … [In] complex scientific or technical assessments and weighing up there is, as a rule, broad discretion which can be reviewed only to some degree. That discretion is nevertheless limited in certain cases and E must therefore be reviewed more intensively, in particular where they are particularly serious interferences with fundamental rights."
>
> "53. … The rules on ambient air quality … put in concrete terms the Union's obligations to provide protection following from the fundamental right to life under article 2(1) of the Charter and the high level of environmental protection required under article 3(3)TEU, F article 37 of the Charter and article 191(2) [of the TFEU]."

Mr Jaffey submitted that fundamental rights under article 37 of the Charter of Fundamental Rights of the European Union (OJ 2010 C83, p 389) were interfered with by the ANPS, and the decision of the Secretary of State must therefore be "reviewed more intensively".

**74** Mr James Maurici QC for the Secretary of State and Mr Charles G Banner QC for Arora reminded us that the Advocate General's analysis in *Craeynest* was not adopted by the court in its judgment in that case. The court held in para 54 of the judgment:

> "[It] is clear from the court's case law that, in the absence of EU rules, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed H procedural rules governing actions for safeguarding rights which individuals derive from EU law, such as Directive 2008/50. However, the detailed rules provided for must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) …"

Thus the court effectively confirmed that it is for the member states to determine the applicable standard of review, and that this is so in cases involving complex scientific or technical assessments in Directives concerned with environmental protection. Therefore, submitted Mr Maurici and Mr Banner, it is wrong to suggest that review on the basis of "manifest error"—equivalent in EU law to *Wednesbury* unreasonableness—is inadequate here. The Hillingdon claimants had failed to demonstrate that it would otherwise be "impossible in practice" to exercise rights conferred by EU law.

**75** We accept those submissions of Mr Maurici and Mr Banner, for two reasons. First, although the Advocate General in *Craeynest* [2020] Env LR 4 indicated that in some cases a more intensive standard of review will apply, this was especially—as she put it (in point 43 of her opinion)—"where they are particularly serious interferences with fundamental rights". The Hillingdon claimants have not shown how any fundamental EU rights have been interfered with in this case, let alone seriously interfered with or made "impossible in practice" to exercise. Secondly, as the court said in *Craeynest*, there is a clear strand of EU case law that respects the discretion of member states to lay down procedural rules for the protection of EU law rights. *Wednesbury* irrationality is the normal standard of review applicable in judicial review proceedings in this jurisdiction where interferences are alleged with rights of various kinds, including rights arising in domestic environmental law. And it seems to us appropriate in principle, and not less favourable, to apply the same standard to rights under EU law. Nor does it render the exercise of EU rights virtually impossible or excessively difficult in practice. In our view, therefore, there is no justification for applying a more intense standard of review than *Wednesbury* to the operation of the provisions of article 6(4) of the Habitats Directive. Neither the court's decision in *Craeynest* nor the Advocate General's opinion supports a different conclusion.

**76** Mr Jaffey also submitted that the Divisional Court's reliance on *Smyth* [2015] PTSR 1417 and *Mynydd y Gwynt* [2018] PTSR 1274 was misguided: first, because those cases do not address article 6(4) explicitly, and that provision is different from article 6(3); and secondly, because the concept of an "alternative solution" under article 6(4) is a question of EU law, not domestic law.

**77** We cannot accept that argument. In our view, as Mr Maurici submitted, the Divisional Court was right to follow *Smyth* and *Mynydd y Gwynt*, and to conclude there is no good reason to distinguish between the appropriate standard of review for article 6(3) and that for article 6(4). In *Smyth* it was submitted that in scrutinising the performance by the Secretary of State of his obligations under article 6(3) of the Habitats Directive the national court is required to adopt a more intensive standard of review than *Wednesbury*. Sales LJ said [2015] PTSR 1417, para 80:

> "I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment ('EIA') Directive and Regulations, this court has held that the relevant standard of review is the *Wednesbury* standard … Although the requirements of article 6(3) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is

A very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts."

**78** A similar conclusion is to be seen in the judgment of Peter Jackson LJ in B *Mynydd y Gwynt* [2018] PTSR 1274, para 8 where he said:

"The proper approach to the Habitats Directive has been considered in a number of cases at European and domestic level, which establish the following propositions … (9) The relevant standard of review by the court is the *Wednesbury* rationality standard … and not a more intensive standard of review: *Smyth's* case at para 80."

C

**79** It seems to us, therefore, that the Hillingdon claimants' criticism of the Divisional Court's reliance on *Smyth* and *Mynydd y Gwynt* is unfounded. If a particular standard of review is appropriate in judging compliance with a provision in EU environmental legislation that involves a decision-maker's assessment, the same standard is likely to be appropriate for the corresponding exercise under another such provision, so long as the D requirements of the two provisions are sufficiently alike and the context is not materially different. The assessment called for in article 6(3) and in article 6(4) is similar. There is, as Sales LJ put it in *Smyth*, "no material difference in the planning context in which both instruments fall to be applied". Neither assessment nor context diverge. We therefore agree with the Divisional Court that the same standard of review should apply to both E provisions, and that the appropriate standard is *Wednesbury*.

**80** Ultimately however, as the Divisional Court also concluded, the question of the appropriate standard of review is, in this case, academic. Even on the approach urged on us by the Hillingdon claimants, applying the test of proportionality, we would agree with the Divisional Court that the Secretary of State was entitled to reach the conclusion he did on "alternative solutions" F under article 6(4). In our view he was not in breach of any provision of the Habitats Directive or the Habitats Regulations in finding the Gatwick second runway scheme failed to meet the "hub objective". If this is right, the standard of review appropriate to article 6(4) does not affect the outcome of these three claims for judicial review.

*Habitats Directive issue (2)—the rejection of the Gatwick second runway* G *scheme for its failure to meet the "hub objective"*

**81** In the draft Habitats Regulations Assessment published for consultation on 2 February 2017, the Heathrow extended northern runway was ruled out as an alternative because it was not shown to have less damaging ecological impacts than the north west runway (para 9.2.6, under the heading "Habitats Regulations Assessment of Short-List"). The second H runway at Gatwick was ruled out because of its impact on air quality at the Mole Gap to Reigate Escarpment SAC (para 9.2.7). The draft Habitats Regulations Assessment concluded:

"9.2.8 Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be

raised for IROPI are those relating to human health or public safety, to beneficial consequences of primary importance for the environment. Airport capacity expansion is not applicable to those considerations. Accordingly given the potential for adverse effects to priority [habitats] at [the Gatwick second runway scheme] opinion from the European Commission would be necessary with regard to other IROPI; in the absence of such an opinion being obtained it is not possible to conclude that [the Gatwick second runway scheme] is a reasonable alternative. In [*Sweetman v An Bord Pleanála* (Case C-258/11) [2014] PTSR 1092] the European court said at para 55 that maintaining protected sites in a favourable status was 'particularly important' where there was a priority species/habitat and in [*European Commission v Kingdom of Spain* (Case C-404/09) [2011] ECR I-11853] it was said, at para 163, that under the Habitats Directive member states must take appropriate protective measures to preserve the characteristics of sites which host priority natural habitat types and/or priority [species] and should generally avoid 'intervention when there is a risk that the ecological characteristics of those sites will be seriously compromised as a result'.

"9.2.9 In conclusion based on the information available at this stage it has not been possible to identify any reasonable alternatives to the preferred scheme."

**82** The draft ANPS, published for consultation on the same day, concluded (in para 3.18) that the "expansion at Gatwick Airport would not enhance, and would consequently threaten, the UK's global aviation hub status"; that "Gatwick Airport would largely remain a point to point airport, attracting very few transfer passengers"; and that expansion at Heathrow was "the better option to ensure the number of services on existing routes increases", which would allow "airlines to offer more frequent new routes to vital emerging markets". Para 3.19 of the ANPS itself is in identical terms (see para 65 above).

**83** The same conclusion was expressed in the revised draft of the Habitats Regulations Assessment, published for consultation on 24 October 2017, which stated unequivocally (in para 9.2.7) that the Gatwick scheme could not be regarded as an "alternative solution" under article 6(4) of the Habitats Directive.

"9.2.7 The LGW-2R scheme is not considered to meet the plan objectives of increasing airport capacity in the south east and maintaining the UK's hub status, *because expansion at Gatwick Airport would not enhance (and would consequently threaten) the UK's aviation hub status*. Gatwick Airport would largely remain a point to point airport, attracting very few transfer passengers. At the UK level, there would be significantly fewer long haul flights in comparison to the preferred scheme, with long haul destinations served less frequently. As such, it cannot be considered as an alternative solution." (Emphasis added.)

**84** Explaining its conclusion that there was no legal basis for challenging the Secretary of State's decision to adopt the "hub objective" or his view that the Gatwick second runway scheme failed to meet that objective, the Divisional Court observed that "at least as far back as September 2012 when

A [the Airports Commission] was established, increasing airport capacity so as to maintain the UK's position as Europe's most important aviation hub was identified as a core objective". The Airports Commission's Final Report had "confirmed the economic importance of the 'hub objective', and the need to increase capacity in order to reverse the decline in the UK's hub status". This had been acknowledged both in the February 2017 draft ANPS and in the final designated version of it. Thus "the inclusion of the 'hub objective' as B properly one of the fundamental aims of the ANPS [was] simply not open to challenge" (para 354 of the judgment).

**85** The Divisional Court noted that although the Hillingdon claimants contested the conclusion in the ANPS and in the Habitats Regulations Assessment that the expansion of Gatwick by the addition of a second runway would not deliver the "hub objective", there were "no legal C challenges to the assessments and conclusions reached in paragraphs 3.18–3.19 … of the ANPS". One of those conclusions was that the Gatwick second runway scheme would not maintain, but would threaten, the United Kingdom's "global aviation hub status", and this was "entirely consistent with [the Airports Commission's] Final Report" (para 355). It continued:

D "355. … Therefore, on the conclusions reached by the Secretary of State, this is not an issue about the *extent* to which the Gatwick [second runway ('2R')] Scheme would meet the 'hub objective', which would be a matter of degree or relative attainment of that aim. Rather, the Secretary of State has concluded that the scheme would not meet that policy objective at all. That conclusion is not open to challenge by way of judicial review. The Secretary of State was entitled to decide that a E proposal that would threaten the 'hub objective' is not an 'alternative solution' for the purposes of the Habitats Directive. That conclusion too is not open to legal challenge.

"356. … The selection of the 'hub objective' as a consideration of central importance to the ANPS and the Gatwick 2R Scheme as failing to deliver that objective, were both key points for Parliament to consider F when the final version of the NPS was laid before it and for the Secretary of State when he designated the NWR scheme."

"357. Finally, Mr Jaffey contends that the decision to reject the Gatwick 2R Scheme as an 'alternative solution' for the purposes of the [Habitats Regulation Assessment ('HRA')] is inconsistent with its retention as a 'reasonable alternative' in the [appraisal of sustainability G ('AoS')] for the purposes of the SEA Directive. We have already dealt with the language of these two regimes and their differing legal purposes (see paras 320–322 above). The Gatwick 2R Scheme was not ruled out as an alternative at the beginning of the SEA process. An opportunity was given for the case for it to be advanced. The 'sifts' of alternatives referred to by Mr Jaffey were carried out either by the [Airports Commission] or before the consultation stage under the SEA Directive.

H "358. Mr Jaffey then relied upon the description of the Gatwick 2R Scheme as an alternative in the final version of the AoS (June 2018) and the post-adoption statement (26 June 2018). But these documents are not to be construed as if they were legal instruments. Moreover, they plainly state that they are to be read together with the ANPS, and so the passages relied upon should be read compatibly with the policy

statement unless that is made impossible by the language used. That is not the case here. The documents referred to by Mr Jaffey state that, even with a second runway, Gatwick would largely remain a point-to-point airport. In other words, as paragraph 3.10 of the ANPS states, Gatwick would attract 'very few transfer passengers'. That is an assessment by the Secretary of State that is justified on the evidence. On the basis of that assessment, Gatwick would be the antithesis of a hub.

"359. Furthermore, Annex C of the submission by officials to the Secretary of State on 25 September 2017 explained why Gatwick was retained in the consideration of alternatives in the AoS, having regard to the different purposes of the SEA regime, in accordance with the analysis set out above (para 322), and to record and explain how the evidence underpinning the decision to select the NWR had been tested comprehensively. We see no merit in Mr Jaffey's criticisms, which we consider overly forensic."

**86** The Hillingdon claimants do not, and in our opinion cannot, challenge the Secretary of State's conclusion that the Gatwick second runway scheme would not fulfil the "hub objective" or his conclusion that such a development "would not enhance (and would consequently threaten) the UK's aviation hub status". The thrust of this part of the claim is different. It goes to the Secretary of State's selection and use of the "hub objective" as a criterion by which to measure potential plans or projects and "alternative solutions" in formulating the ANPS. Mr Jaffey's main submission on this issue is that the "hub argument" was adopted by the Secretary of State at a late stage in the evolution of the ANPS, with the aim—or at least with the effect—of avoiding the need to consider expansion at Gatwick as an alternative and then potentially having to select that option. Mr Jaffey confirmed, however, that he was not alleging bad faith on the part of the Secretary of State. The Divisional Court had countenanced a "deliberately narrow redefinition" of the object of the ANPS.

**87** We reject that argument, essentially for the same reasons as did the Divisional Court. First, as the Divisional Court recognised, the "hub objective" was a central aim of the ANPS throughout its process, and indeed was firmly in place before that process began. When the Airports Commission was established in September 2012, its explicit purpose was to "examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub" (para 1.3 of the ANPS). The suggestion that the "hub argument" was adopted by the Secretary of State only at a late stage in the process, and with a view to avoiding the need to consider expansion at Gatwick as an alternative, is incorrect as a matter of fact.

**88** Secondly, and again as the Divisional Court concluded, the Secretary of State was entitled to decide that a potential scheme threatening the "hub objective" could not properly be an "alternative solution" under the Habitats Directive. It is true that the Airports Commission's Final Report accepted that a second runway at Gatwick was a "credible option" for expansion, stating:

"16.62 Whilst each of the three schemes shortlisted for detailed consideration was considered a credible option for expansion, the Commission has unanimously concluded that the proposal for a new northwest runway at Heathrow Airport … presents the strongest case.

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> "16.63 … [It] is the most effective means of achieving the goal set out in the Commission's original terms of reference to maintain the UK's position as a global hub for aviation."

However, as the Divisional Court acknowledged, the consistent view of the Secretary of State in the course of the ANPS process, accurately reflected in the Habitats Regulations Assessment, was that the Gatwick second runway B scheme was not merely incompatible with the "hub objective" but inimical to it. It could therefore scarcely be considered a realistic "alternative solution" under article 6(4) of the Habitats Directive.

**89** The conclusion in para 3.19 of the ANPS, foreshadowed by the conclusion in para 9.2.7 of the Habitats Regulations Assessment, which firmly rejected the Gatwick second runway scheme as an "alternative C solution" under the Habitats Directive, is legally unimpeachable. It is not attacked in these proceedings, nor could it be. And it provides a complete answer to much of the Hillingdon claimants' case on the Habitats Directive issues.

**90** Mr Jaffey relied on a passage in the judgment of Hickinbottom J, as he then was, in *R (Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers* [2015] PTSR D28; [2016] Env LR 1, para 88(xi):

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> "An assessment as to whether the objectives would be 'met' by a particular option is therefore peculiarly evaluative; but an option will meet the objectives if, although it may not be (in the authority's judgment) the option that best meets the objectives overall (ie the preferred option), it is an option which is capable of sufficiently meeting E the objectives such that that option could viably be adopted and implemented. That, again, is an evaluative judgment by the authority, which will only be challengeable on conventional public law grounds. However, whilst allowing the authority a due margin of discretion, the court will scrutinise the authority's choice of alternatives considered in the SEA process to ensure that it is not seeking to avoid its obligation to evaluate reasonable alternatives by improperly restricting the range F options it has identified as such."

Mr Jaffey sought to deploy those observations in support of his submission that the Secretary of State had consistently treated the Gatwick second runway scheme as an option that sufficiently met the Government's objectives to make it a viable "alternative solution" under article 6(4).

G **91** We do not think that submission is tenable. It seems to be based on a misunderstanding of the relevant conclusions in the Habitats Regulations Assessment and the ANPS. On a true reading, those conclusions were not to the effect that Heathrow, with or without a third runway, would be merely a better "hub" than Gatwick with the addition of a second runway. Rather, as the Divisional Court recognised, the crucial point was that, in the Secretary of State's view, Gatwick was simply not capable of attaining the necessary H "hub status" to meet the essential aim of the ANPS even if it was expanded by the development of a second runway.

**92** As the Divisional Court said in para 341:

> "[The] correct approach to 'alternative solution' in article 6(4) of the Habitats Directive is tolerably clear. In respect of an NPS, a proposed

> option is not an 'alternative solution' unless it meets the core policy objectives of the statement. In this regard, Mr Jaffey's concern that, at an early stage, objectives may be defined with deliberate narrowness so that potential alternatives are (he said) unreasonably or (we say) unlawfully excluded has some force; but the objectives must be both genuine and critical, i e objectives which, if not met, would mean that no policy support would be given to the development. It would be clearly insufficient to exclude an option simply because, in the policy-maker's view, another, preferred option meets the policy objectives to a greater extent and is on balance more attractive … But the extent to which an option meets policy objectives is different from an option not meeting a core policy objective at all."

**93** Here, the "hub objective" was clearly a "genuine and critical" objective of the ANPS, which, "if not met, would mean that no policy support would be given to the development". It was described in the Divisional Court's judgment, at para 46, as "the aim of maintaining the UK's position as Europe's most important aviation hub". It cannot be said that this objective was constructed with "deliberate" and unlawful "narrowness" to exclude other options. Given that a central purpose of the ANPS was to promote the United Kingdom's status as an "aviation hub", we see no room for a submission that the Secretary of State acted unlawfully in rejecting the Gatwick second runway scheme on the evidence that it could not fulfil that objective. On the contrary, as we have said, since there was a clear and unassailable finding that expansion at Gatwick "would not enhance, and would consequently threaten, the UK's global aviation hub status" (para 3.19 of the ANPS), a scheme for the development of a second runway at that airport could not realistically qualify as an "alternative solution" under article 6(4). In fact, it would be no solution at all.

*Habitats Directive issue (3)—was the exclusion of the Gatwick second runway scheme as an alternative solution because of its potential harm to an SAC in breach of the Habitats Directive?*

**94** On 25 September 2017, a document was presented to the Secretary of State by officials in the Airport Capacity Policy Directorate of the Department for Transport, distilling the most significant parts of the draft Habitats Regulations Assessment published in February 2017. The relevant content of that document was summarised by the Divisional Court in para 308:

> "The submission document explained that, because it had not been possible at this policy-making stage to exclude the possibility of adverse effects of the NWR scheme on European sites, an assessment had been made of potential 'alternative solutions'. Increased capacity at Gatwick would generate additional traffic which was expected to have adverse effects on two European protected sites, the Ashdown Forest SPA/SAC and the Mole Gap to Reigate Escarpment SAC, by causing increases in $NO_x$ levels. The latter site is important for wild orchids, and therefore treated under the Habitats Directive as a priority habitat requiring enhanced protection. Consequently the Gatwick 2R Scheme 'was discounted as an alternative solution'."

**95** The revised draft Habitats Regulations Assessment published in October 2017 concluded:

> "9.2.11 … Unlike the other European sites considered for LHR-NWR and LGW-2R, Mole Gap to Reigate Escarpment SAC contains a priority natural habitat type, which is defined as one in danger of disappearance, and for the conservation of which the European Community has particular responsibility (see article 1(d) of the Habitats Directive)."

The following two paragraphs (paras 9.2.12 and 9.2.13) were in identical terms to paras 9.2.8 and 9.2.9 of the February 2017 draft Habitats Regulations Assessment (see para 81 above). Thus a second runway at Gatwick was considered not to be an "alternative solution" because of the potential adverse effects on priority habitats.

**96** In their response to consultation dated 19 December 2017 on the draft Habitats Regulations Assessment and the revised draft Habitats Regulations Assessment, in their role as relevant "nature conservation body", Natural England said (in para 4(e)) that they "broadly [agreed] with the conclusions of the strategic Habitats Regulations Assessment, but would highlight the importance of the work still to be done at the project level HRA, with much of the detail still to be worked out … through detailed design assessment". Commenting on paras 9.2.11 to 9.2.13 of the Habitats Regulations Assessment, they stated (in para 14 of Annex 2):

> "Paras 9.2.11, 9.2.12, 9.2.13 [of the Habitats Regulations Assessment]: These sections identify the potential for air quality impacts from road traffic on Mole Gap to Reigate Escarpment SAC, with the presence of a priority natural habitat making an IROPI case challenging. This section concludes 'based on the information available at this stage it has not been possible to identify any alternative solutions to the preferred scheme'. Whilst we recognise this position for the strategic level assessment, we would advise that if the detailed project level HRA for Heathrow NWR also produces findings that are negative or uncertain, then a more detailed assessment of alternatives (including Gatwick) is needed. This would need to consider in more detail the ecological impacts of emissions on the Mole Gap to Reigate Escarpment SAC in view [of] its qualifying features and conservation objectives. For example if the priority features of interest do not fall within the distance criteria for air quality impacts (200m for roads), then such an impact may be able to be ruled out, which may affect the view taken on alternative solutions."

**97** In December 2017, Gatwick Airport Ltd submitted to the Secretary of State a report produced by RPS in response to the Habitats Regulations Assessment ("Revised draft Airports National Policy Statement: Mole Gap to Reigate Escarpment SAC Orchid Survey of Unit 23"), which asserted that "potential effects on the Mole Gap Reigate Escarpment SAC could be excluded as not likely to have a significant effect on this site" (para S1). The report went on to say (in paras S2 to S4 and S6):

> "S2. Notwithstanding that, the purpose of this current RPS report is to present the results of a survey, undertaken by RPS for Gatwick, of the

part of the MGRE SAC closest to the M25 to map the location of orchids and the condition of the grassland in general. The aim of the survey was to provide further clarification to the conclusions of the previous RPS work with respect to the potential for effects on priority habitat.

"S3. The survey did not identify any orchids of any species on this small part of the SAC that lies within 200m of the M25. As expected, orchids are restricted to areas that are not grazed or trampled and to those that can tolerate rougher grassland such as Common Twayblade, Common Spotted-orchid and possibly Bee-orchid. Therefore, based on the survey reported here, this part of the SAC does not currently support the Annex I priority habitat calcareous grassland with 'important orchid sites'.

"S4. Further, the grassland in the 200m buffer was found to be depauperate compared to the more species-rich swards on the steep slopes elsewhere in the SAC. Some small areas of more species-rich grassland did occur but these were rabbit grazed and subject to high visitor pressure. Therefore, it is highly unlikely that such grassland would support the rare orchid species characteristic of the priority habitat in its current condition."

"S6. Based on the survey work carried out by RPS, this report concludes that the grassland within 200m of the M25 is of a condition unlikely to support SAC quality orchidaceous rich grasslands. There are no plans to change the management of this area in the foreseeable future. Therefore there is no potential for an increase in traffic on the M25, as a result of LGW-2R, to have a significant effect with respect to the Annex 1 priority habitat calcareous grassland with 'important orchid sites'."

**98** In the light of Natural England's response to consultation, accepting the possibility that the development of a second runway at Gatwick might have an impact on priority species within an SAC, the Divisional Court was satisfied there was "evidence before the Secretary of State to support the conclusion that potential significant effects upon the SAC arising from [the Gatwick second runway scheme] could not be ruled out" (para 368). It also concluded that the reference made in the draft Habitats Regulations Assessment published in February 2017 to the need to obtain the opinion of the European Commission on the potential effects on the SAC was not in itself an obstacle to the Gatwick second runway scheme being treated as an "alternative solution". But equally, this "did not detract from the essential judgment that, on the information available at the stage of preparing the ANPS, and applying the precautionary approach, the adverse impacts of [the Gatwick second runway scheme] could not be discounted" (para 369). The Divisional Court's final conclusions on this point were these:

"370. [We] accept that that leads to a further question: why should the Gatwick 2R Scheme have been completely discounted as an alternative solution at the ANPS stage because of this potential impact on an SAC near the M25 when, according to the advice of Natural England, a more detailed study at the project level stage for the NWR might be able to rule that impact out? In our view, before us, that question has not been satisfactorily answered.

"371. However, ground 8.2 was not put in that way; and, whatever the answer to that question might be, it could not establish a failure

A to satisfy article 6(4) because, in any event, the Secretary of State acted lawfully in excluding the Gatwick 2R Scheme as an alternative solution on the grounds that it failed to meet the 'hub objective'."

**99** The Hillingdon claimants say it is common ground that there is a substantial risk of harm to a number of SACs if the development of the B Heathrow north west runway proceeds and a risk of harm to priority species at the Mole Gap to Reigate Escarpment SAC if the Gatwick second runway scheme is built. But in any event, Mr Jaffey submitted, it was unlawful to exclude the Gatwick second runway scheme as an alternative on the basis of potential harm to the SAC, for two reasons: first, because no attempt had been made to evaluate the comparative harm of the two developments; and secondly, because the nature and extent of harm likely to be caused by the C Gatwick second runway had not been identified and assessed.

**100** Mr Maurici submitted that this was to misunderstand Natural England's advice. The true sense of that advice, he contended, was that Natural England had accepted the Secretary of State's approach, while also, and correctly, pointing out that article 6(4) would apply again at the project stage. In response to the Divisional Court's observation (in para 370) that the D question to be answered was why the Gatwick scheme had been discounted at the ANPS stage because of its impact on the SAC when, according to Natural England, a "more detailed assessment" might have ruled the impact out, Mr Maurici submitted that the requirements of article 6(4) are engaged at two distinct stages, each of which involves its own process: first, the plan stage—here the stage at which the ANPS was prepared and designated —and second, the project stage—when an application for a development E consent order would be submitted and determined. It was inevitable that less information would be available at the plan stage. In the case of the ANPS, on the information available at the plan stage the Secretary of State, in agreement with Natural England, decided that the harmful effects of a second runway at Gatwick could not be ruled out, and Natural England had advised that more detailed work should be done at the project stage. But the F Gatwick second runway scheme was conclusively ruled out as an alternative at that stage because it did not meet—and indeed was seen to threaten—the United Kingdom's "hub status". It follows, Mr Maurici submitted, that only if the Secretary of State was demonstrably wrong on the "hub objective" issue could the Gatwick second runway scheme be regarded as an alternative to the third runaway at Heathrow, at either stage. The Secretary of State's G conclusion on this issue was legally sound.

**101** We see force in those submissions. If, as we have held, the Secretary of State was entitled to reject the concept of a second runway at Gatwick as an "alternative solution" to the north west runway at Heathrow because, in his lawful view, it was contrary to the "hub objective", this was logically an overriding factor. It was conclusive on the question of the Gatwick second runway scheme being an "alternative solution"—regardless of the possibility H that a scheme could be devised that would avoid harm to the SAC and the priority species within it. Crucially, it meant that such expansion at Gatwick could never be a solution, alternative or otherwise.

**102** Under article 6(4) the Secretary of State has the power, and the duty, to make appropriate judgments about the possible harmful effects of a proposed scheme on a European site, and the "overriding public interest"

in fulfilling the objectives of the plan or project in question. Mr Jaffey laid emphasis on the opinion of the Advocate General in *Commission v Portugal* [2006] ECR I-10183. But, as Mr Maurici pointed out, the facts of that case can be distinguished from this, because the relevant authority there failed to consider any alternative plan at all. In this case the criticism made of the Secretary of State is not that he simply failed to consider the Gatwick second runway scheme as an alternative; it is that he wrongly excluded that scheme after he had considered it. And it also seems to us that the Advocate General's reasoning in *Commission v Portugal* supports Mr Maurici's submission that the Secretary of State acted reasonably and lawfully in carrying out the exercise he did to determine which scheme should be pursued. In point 44 of her opinion the Advocate General said:

> "Among the alternatives shortlisted … the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest."

**103** Mr Jaffey also relied on the opinion of Advocate General Kokott in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-6/04) [2005] ECR I-9017 as supporting his submission that it may often not be possible to determine the outcome of compliance with the requirements of article 6(4) until final approval comes to be given, and it is essential therefore that potentially harmful impacts must be dealt with as fully as possible at every stage.

**104** In principle, that proposition can hardly be doubted. As Advocate General Kokott said at point 49 of her opinion:

> "The United Kingdom Government is admittedly right in raising the objection that an assessment of the implications of the preceding plans cannot take account of all the effects of a measure. Many details are regularly not settled until the time of the final permission. It would also hardly be proper to require a greater level of detail in preceding plans or the abolition of multi-stage planning and approval procedures so that the assessment of implications can be concentrated on one point in the procedure. Rather, adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedure."

**105** We readily accept that article 6(4) requires an iterative assessment of adverse effects, so far as is practical, at each stage of a procedure comprising more than a single stage. This is not in dispute. If the Gatwick second runway scheme had not fallen decisively outside the range of "alternative solutions" to the expansion of Heathrow by the addition of a third runway because such development was incompatible with—and hostile to—the "hub objective", it might well have been necessary to retain it as an alternative. If, in the course of the process leading to the designation of the ANPS, the Secretary of State had finally excluded the Gatwick second runway scheme as an alternative solely or principally on the ground of possible harm to the SAC, or to the priority species within it, his decision to do so might have been vulnerable to the criticism that it was premature and inappropriate.

**106** That, however, is not what the Secretary of State did in this case. As the Divisional Court rightly concluded (in para 371 of its judgment), it was, in the circumstances, reasonable and lawful for the Secretary of State to exclude the Gatwick second runway scheme as an "alternative solution" because in his view the evidence before him clearly indicated that it did not comply with the qualifying conditions for an "alternative solution" under the Habitats Directive. So the requirements of article 6(4) effectively ceased to apply to that scheme. It had been validly excluded as an alternative for the project stage for reasons unrelated to, and unaffected by, any possible conclusions relating to harmful effects, or the absence of them, on the Mole Gap and Reigate Escarpment SAC. It follows that if the Secretary of State was in error in relying on such conclusions as an additional and separate consideration, this ultimately had no effect on his performance of the duties imposed on him by the Habitats Directive and the Habitats Regulations, or on the outcome of the designation process. The decisive reason for the exclusion of the Gatwick second runway scheme as an alternative was its failure to satisfy the central objective of maintaining the United Kingdom's "hub status". This, in our view, is clear.

*Habitats Directive issue (4)—did the Divisional Court err in distinguishing as it did between "alternative solutions" under the Habitats Directive and "reasonable alternatives" under the SEA Directive?*

**107** The scoping report produced by WSP in March 2016, was intended to comply with article 5(1) of the SEA Directive and section 5(3) of the Planning Act. It formed the environmental report for the purposes of the SEA Directive.

**108** The consultation on the draft ANPS that began on 2 February 2017 was intended to comply with the relevant obligations under both article 6 of the SEA Directive and article 6(3) of the Habitats Directive.

**109** The Divisional Court (in para 322 of its judgment) contrasted the operation of the Habitats Directive with that of the SEA Directive. In particular, it contrasted the obligation to consider "alternative solutions" in article 6(4) of the Habitats Directive with the requirement to consider "reasonable alternatives" under article 5 of the SEA Directive. It emphasised the "substantive" nature of the obligation in article 6(4) of the Habitats Directive, whose operation bears on the outcome of the process, in contradistinction to the requirement in article 5 of the SEA Directive, which is not "substantive" but "procedural". This essential difference between the provisions for the consideration of alternatives in the two Directives enabled it to conclude (in para 323) that it was lawful for the Secretary of State to rule out the Gatwick second runway scheme as an "alternative solution" under article 6 of the Habitats Directive while also treating it as a "reasonable alternative" under article 5 of the SEA Directive. It said in para 322:

> "Second, and more importantly, it is necessary to have well in mind fundamental differences in the operation of the Habitats Directive and the SEA Directive. Where a proposal (whether to adopt a policy or to grant consent for a project) adversely affects the integrity of a European site, the operation of article 6(3) and (4) of the Habitats Directive (and regulations 63 and 64 of the Habitats Regulations) determines the outcome of the process, according to the results of applying the tests laid

down in those provisions. It is therefore rightly said by Mr Jaffey that these provisions are *substantive* in nature, and not merely *procedural*. In our judgment, an option which does not meet a core objective of a policy should not be allowed to affect the application of article 6(4). By contrast, the requirements of the SEA Directive for the content of an environmental report and for the assessment process which follows are entirely procedural in nature. Thus, the requirement to address 'reasonable alternatives' in the environmental report (or AoS under section 5(3) of the [Planning Act 2008]) is intended to facilitate the consultation process under article 6 (and section 7 of the [Planning Act 2008]). The operator of Gatwick and other parties preferring expansion at that location would be expected to advance representations as to why the hub objective should have less weight than that attributed to it by the Secretary of State or that, contrary to his provisional view, the Gatwick 2R Scheme could satisfy that objective. The outputs from that exercise are simply taken into account in the final decision-making on the adoption of a plan, but the SEA Directive does not mandate that those outputs determine the outcome of that process."

**110** The Hillingdon claimants seek to fault those conclusions in two ways. First, they say it was inconsistent and unlawful for the Secretary of State to recognise the Gatwick second runway scheme as a credible alternative throughout the SEA process but not to treat it as an alternative under the Habitats Directive. The result of this, they say, was that, before designating the ANPS, the Secretary of State did not fully and properly consider the comparative effects of the north west runway at Heathrow against the second runway at Gatwick on European protected sites. Secondly, they contend that the Divisional Court was wrong to hold that the corresponding provisions on alternatives in the SEA Directive and the Habitats Directive can be distinguished on the basis that the provisions of the SEA Directive are "procedural" in nature and those of the Habitats Directive "substantive". Mr Jaffey submitted that this false distinction led the Divisional Court to adopt an incorrect approach to the interpretation of the EU law concept of an "alternative". He argued that the test for ruling out alternatives under the Habitats Directive is no less stringent than under the SEA Directive, because an "alternative solution" is necessarily a broader concept than a "reasonable alternative".

**111** We cannot accept these submissions. It is necessary, we think, to keep in mind the underlying purpose of each Directive. The purpose of the SEA Directive is to ensure the consideration of environmental information and to secure public participation in the formulation of plans and programmes (see recitals (1), (4), (5), (14), (15), (17) and (18)). As a reflection of this basic purpose, and to give effect to it, all "reasonable alternatives" must be considered in an "environmental report" (article 5), which must be prepared and consulted upon before the adoption of the plan or programme (article 6). This exercise, if it is to be carried out effectively, requires that "reasonable alternatives" be put to the public in consultation. In this case, that requirement made it necessary that consultees, including Gatwick Airport Ltd, were given the opportunity to submit to the Secretary of State their representations in favour of particular alternatives, including the Gatwick second runway scheme, and to explain how such alternatives

A would meet the essential objectives of government policy, of which the "hub objective" was one.

**112** In the Habitats Directive, however, there is no duty on the competent authority to consult before concluding that the requirements of article 6(4) are met. This is apparent in the language of article 6(4), which specifies what must be done "[if], in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must B nevertheless be carried out". It is implicit that the consequent requirements —that "the member state shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected", and that it "shall inform the Commission of the compensatory measures adopted"—are engaged only after a consideration of alternatives has been undertaken.

**113** We therefore agree with the Divisional Court's conclusion. Whether C or not the difference between the relevant provisions in the SEA Directive and those in the Habitats Directive is accurately described as a distinction between "procedural" and "substantive" is not, in the end, the decisive point. One must look at the substance of the provisions in either Directive, and their effect. The Divisional Court did that. As it recognised, in both substance and effect there is a real difference between the respective provisions.

D **114** In this case, where—in the Secretary of State's judgment—the suggested alternative proposal would go against the "hub objective" as a "core objective" of the policy, its consideration as an "alternative solution" would not only have been unnecessary under article 6(4) of the Habitats Directive, but also inappropriate. As Mr Maurici and Mr Michael Humphries QC for HAL submitted, when the Secretary of State came to consider the designation of the ANPS, he was not obliged by the Habitats E Directive and the Habitats Regulations to consider other schemes already rejected as possible "alternative solutions" because of their failure to meet an essential objective of the policy.

**115** The operation of article 3 of the SEA Directive, however, is different. In this case it enabled consultees to argue that the "hub objective" should not be decisive against the suggested alternative, and to have their representations F to that effect taken into account under article 6. But it did not bind the Secretary of State to a particular outcome. If the Gatwick second runway scheme had been ruled out as an alternative at the beginning of the SEA process, consultees would have been denied the opportunity of making representations in support of it, and having those representations considered.

**116** It follows that we accept the argument presented by Mr Maurici and Mr Humphries on this issue. The Secretary of State's approach to the G procedure for considering alternatives under each of the two Directives is not to be criticised. It was not inconsistent, irrational or otherwise unlawful. Since the respective provisions were, in substance and effect, different, a difference in approach was justified. Under the Habitats Directive, if a suggested alternative does not meet a central policy objective of the project or plan in issue, then it is no true alternative and will properly H be excluded. It is not then, and cannot be, an "alternative solution". In short, the Habitats Directive has a determining effect on the inclusion or exclusion of alternatives. By contrast, the identification of "reasonable alternatives" under the SEA Directive is a requirement designed to inform the following consultation process. It was, therefore, permissible, in the preparation of the ANPS, to retain the Gatwick second runway scheme as

a "reasonable alternative" in the Appraisal of Sustainability throughout the process. However good a plan or project the alternative in question might be in itself, and even if there may be a strong case on environmental grounds for preferring it to the plan or project actually proposed, the SEA Directive does not dictate that it be adopted and the proposed plan or project rejected.

**117** Although the Appraisal of Sustainability included consideration of the Gatwick second runway scheme as an alternative, it also expressly acknowledged (in paras 7.4.52 to 7.4.57) the exclusion of that scheme as an alternative under article 6(4) of the Habitats Directive because it failed to meet the "hub objective":

> "7.4.52 On the basis of information that is available or can be reasonably obtained, and in accordance with the Precautionary Principle, it has not been possible to rule out adverse effects on the integrity of the above Natura 2000 sites, either alone or in combination with other plans and projects, with respect to each site's conservation objectives.
>
> "7.4.53 Where mitigation does not conclude an absence of adverse effects on integrity, both alone and in-combination, further assessment of the Airports NPS would be required under stages 3 and 4 of the HRA process."
>
> "7.4.55 … The assessment of alternative solutions has considered whether there are any feasible ways to deliver the overall objectives of the proposed plan, which will be less damaging to the integrity of the European sites affected. The two other schemes shortlisted by the Airports Commission have been considered against the objectives of the plan in relation to meeting the need to increase airport capacity in the south east and maintaining the UK's hub status. Whilst the Heathrow Extended Northern Runway scheme (LHR-ENR) would meet both of these objectives, the Gatwick Second Runway scheme (LGW-2R) would not. The assessment of the LHR-ENR scheme shows it would be no less damaging to European sites and as such is not an alternative solution."
>
> "7.4.57 Notwithstanding the conclusion above, the AA undertaken for the two other shortlisted schemes also led to no suitable alternative solutions to LHR-NWR being identified. Further, the basis on which it could be concluded that the LHR-NWR scheme needed to be carried out for [imperative reasons of overriding public interest] has been examined and it is considered that the needs case underpinning the Airports NPS sufficiently fulfils those reasons. In any event, the Airports NPS provides that no consent will be granted unless there is full compliance with article 6(3) or article 6(4) of the Habitats Directive and that any necessary compensatory measures will be secured in accordance with regulation 66."

**118** Those four paragraphs demonstrate the true nature of the process involved in the provisions of article 6(3) and article 6(4) of the Habitats Directive. A scheme considered by the competent authority to be an "alternative solution" at one stage may, in the light of further information or assessment, cease to be so regarded at a subsequent stage. No conflict with this process arose from the Secretary of State's decision to rule out the Gatwick second runway scheme as an "alternative solution" under article 6

of the Habitats Directive while also continuing to treat it as a "reasonable alternative" under article 5 of the SEA Directive.

**119** But even if the Divisional Court's analysis, and ours, were incorrect, we would conclude nevertheless that there was no basis for granting relief on this issue. This is because, in our view, the Secretary of State was clearly entitled to reject the Gatwick second runway scheme as an "alternative solution" under the Habitats Directive for its failure to meet an essential objective of his policy. If, as the Hillingdon claimants assert, "alternative solutions" under article 6 of the Habitats Directive and "reasonable alternatives" under article 5 of the SEA Directive are synonymous, it would follow that the Gatwick second runway scheme should also have been rejected as a "reasonable alternative" under the SEA Directive. The criticism levelled at the Secretary of State for adopting an inconsistent approach would amount only to a complaint that he undertook a broader and more burdensome assessment than the SEA Directive required. The Gatwick second runway scheme would have been included unnecessarily, and unjustifiably, as an alternative in the strategic environmental assessment for the ANPS. So as Mr Maurici and Mr Humphries submitted, under section 31(2A) of the Senior Courts Act 1981 ("the Senior Courts Act") (see paras 269 to 280 below), the court would have been right to withhold a remedy for an error of no real consequence in the ANPS process.

*Habitats Directive issue (5)—a reference under article 267 of the TFEU?*

**120** The Hillingdon claimants request a reference to the Court of Justice of the European Union under article 267 of the TFEU. They say the relevant EU law is not "acte clair", in two respects. The first question should be whether the test for the identification of "alternative solutions" in the Habitats Directive differs from the test for the identification of "reasonable alternatives" in the SEA Directive, and, if so, how. The second should be whether it is compatible with EU law for the court to limit its role to considering whether the identification of "alternative solutions" under article 6 of the Habitats Directive is "irrational", in the sense of being in defiance of logic or lacking any coherent basis.

**121** Mr Jaffey referred to these remarks of Advocate General Kokott in her opinion in *Commission v Portugal* [2006] ECR I-10183, point 43:

> "The absence of alternatives cannot be ascertained when only a few alternatives have been examined, but only after *all* the alternatives have been ruled out. The requirements applicable to the exclusion of alternatives increase the more suitable those alternatives are for achieving the aims of the project without giving rise—beyond reasonable doubt—to manifest and disproportionate adverse effects."

As Mr Jaffey pointed out, the court in its judgment did not adopt, or even comment upon, what the Advocate General had said about the "absence of alternatives". He submitted that a reference is therefore necessary if this important issue of EU law is to be definitively decided. At the time of the hearing before us, "exit day" was to be 31 October 2019, but it was subsequently postponed to 31 January 2020. Mr Jaffey provided us with an outline of the likely effect of each of three scenarios for the United Kingdom's

departure from the EU on references under article 267 of the TFEU. Subsequently, Parliament has enacted the European Union (Withdrawal Agreement) Act 2020, which, among other things, amends the European Union (Withdrawal) Act 2018. There is now to be an "implementation period" after exit day, until 31 December 2020. Given the view to which we have come on the merits of the application for a reference, it is not necessary to discuss those scenarios here.

**122** The Secretary of State resists the request for a reference on the grounds that an answer to the questions raised is not necessary to enable the court to give judgment, and that in the circumstances the inevitable delay and uncertainty would be unjustified.

**123** The Divisional Court did not consider making a reference. In its view, as we have said, the status and consideration of "alternative solutions" under the Habitats Directive and of "reasonable alternatives" under the SEA Directive does not present any real difficulty. It evidently regarded both concepts as uncomplicated. It described the correct approach to "alternative solutions" under article 6(4) of the Habitats Directive as "tolerably clear" (para 341 of the judgment).

**124** We agree. In our view, there is no need for a reference in this case. The meaning of—and distinction between—"alternative solutions" under the Habitats Directive and "reasonable alternatives" under the SEA Directive is not unclear. And, in our opinion, the Advocate General's unsurprising observation in *Commission v Portugal* on the need for "*all* the alternatives" to have been ruled out before "the absence of alternatives" can be ascertained does not cast doubt on what an "alternative" may be in either of these two regimes. This must be established in the conventional way, by reading the legislative language in its own legislative context. Neither the Advocate General's remarks nor the absence of endorsement from the court can be said to create any uncertainty on the issues we have to consider. A reference here would serve no useful purpose.

*The issues on the operation of the SEA Directive*

**125** The grounds of appeal concerning the operation of the SEA Directive relate to the adequacy and quality of the Appraisal of Sustainability against the criteria for an environmental report under the SEA Directive.

*SEA Directive issue (1)—the court's approach when considering whether an environmental report complies with the SEA Directive*

**126** The Divisional Court concluded that the judgment of Sullivan J, as he then was, in *Blewett* [2004] Env LR 29 demonstrates the correct standard of review for an environmental report prepared under the SEA Directive (para 434 of the Divisional Court's judgment). On the legal adequacy of an environmental statement prepared under the EIA Directive and the EIA Regulations, Sullivan J said this, at para 41 of his judgment:

> "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

A not intended to obstruct such development … 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 B 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 … but they are likely to be few and far between."

C

**127** Whilst those observations concerned the EIA Regulations, the Divisional Court held that they applied by analogy to the SEA Directive and the SEA Regulations. It said in para 419 of its judgment:

"Sullivan J held that the starting point was that it was for the local D planning authority to decide whether the information supplied by the applicant was sufficient to meet the definition of an environmental statement in the EIA Regulations, subject to review on normal [*Wednesbury*] principles (see paras 32–33). Information capable of meeting the requirements in Schedule 4 to the EIA Regulations should be provided (see para 34), but a failure to describe a likely significant effect on the environment does not result in the document submitted E failing to qualify as an environmental statement or in the local planning authority lacking jurisdiction to determine the planning application. Instead, deficiencies in the environmental information provided may lead to the authority deciding to refuse permission, in the exercise of its judgment (see para 40). Thus, the statement in para 41, that the deficiencies must be such that the document could not *reasonably* be F described as an environmental statement in accordance with the EIA Regulations, was in line with the judge's earlier observations in paras 32–33. It simply identified conventional *Wednesbury* grounds as the basis upon which the court may intervene."

And in para 420:

G

"In *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) at [73] Beatson J referred to a number of authorities which had taken the same approach in EIA cases to judicial review of the adequacy of environmental statements or the environmental information available: [*R v Rochdale Metropolitan Borough Council, Ex p Milne* [2001] Env LR 22, para 106], *R (Bedford) v Islington* H *London Borough Council* [2003] Env LR 22, paras 199 and 203, and *Bowen-West v Secretary of State for Communities and Local Government* [2012] Env LR 22, para 39. In *Bedford*, Ouseley J held that the environmental statement for the development of a new stadium for Arsenal was not legally inadequate because it had failed to assess transportation impacts using the local authority's preferred modal split,

> the loss of an existing waste handling capacity to make way for the development, noise effects at night and on bank holidays, contaminated land issues, and the effects of dust during construction. He considered that the significance or otherwise of those matters had been a matter for the local authority to determine. The claimant's criticisms did not show that topics such as modal split or noise effects had not been assessed at all. Instead, they related to the level of detail into which the assessment had gone and hence its quality. That was pre-eminently a matter of planning judgment for the decision-maker and not the court."

**128** In *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) Beatson J, as he then was, said, in para 73 of his judgment:

> "As to the role of the court, review of the adequacy of environmental appraisals, assessments, and impact statements, is on conventional *Wednesbury* grounds: see [*Ex p Milne*] [2001] Env LR 22, para 106 per Sullivan J (environmental assessment); *R (Bedford)* [2003] Env LR 22, paras 199 and 203 per Ouseley J (environmental statement); *R (Jones) v Mansfield District Council* [2003] EWCA Civ 1408 at [14]–[18] (environmental impact assessment), and [*Bowen-West*] [2012] Env LR 22, para 39 per Laws LJ (environmental impact assessment and environmental statement)."

**129** Though there are differences between the two legislative regimes, those differences did not, in the Divisional Court's view, justify a divergence in the intensity of review. The similarities were significant. Both Directives require an environmental assessment to be undertaken if significant environmental effects are likely (para 417(i) of the Divisional Court's judgment). Both allow the responsible authority to exercise its judgment in deciding the scope of, and detail to be included in, an environmental statement under the EIA Directive or an environmental report under the SEA Directive (para 417(ii)). And both allow for a defect in an environmental statement or an environmental report to be cured by the subsequent publication of, and consultation upon, supplementary material (para 417(iv)). Claims challenging the adequacy of an environmental report under the SEA Directive have been successful only when it has been shown that the authority responsible for preparing the plan or programme has failed to take into account something that article 5 and Annex I expressly require to be dealt with (para 422).

**130** As the Divisional Court saw it, the "*Blewett* approach" does not represent a freestanding principle of law, but is simply a "practical application of conventional [*Wednesbury*] principles of judicial review" (para 432). As the information to be included in an environmental report under article 5(1) and Annex I is a matter of judgment on what "may reasonably be required", that judgment is subject to review on normal public law principles, including *Wednesbury* unreasonableness (para 433). The "*Blewett* approach" exemplified this principle and was applicable here. The Divisional Court concluded in para 434:

> "Where an authority fails to give any consideration at all to a matter which it is explicitly required by the SEA Directive to address, such

A as whether there are reasonable alternatives to the proposed policy, the court may conclude that there has been non-compliance with the Directive. Otherwise, decisions on the inclusion or non-inclusion in the environmental report of information on a particular subject, or the nature or level of detail of that information, or the nature or extent of the analysis carried out, are matters of judgment for the plan-making authority. Where a legal challenge relates to issues of this kind, there is B an analogy with judicial review of compliance with a decision-maker's obligation to take reasonable steps to obtain information relevant to his decision, or of his omission to take into account a consideration which is legally relevant but one which he is not required (eg by legislation) to take into account: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B; C *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172; *In re Findlay* [1985] AC 318, 334; *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, para 57. The established principle is that the decision-maker's judgment in such circumstances can only be challenged on the grounds of irrationality: see also *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35; *R (Government of the Republic of France) v Kensington and Chelsea Royal London Borough* D *Council* [2017] 1 WLR 3206, para 103; and *R (Jayes) v Flintshire County Council* [2018] ELR 416, para 14. The '*Blewett* approach' is simply an application of this public law principle."

In the Divisional Court's view, therefore, "the question whether the decision-maker has acted irrationally, be they a local planning authority or a E Minister, demands the intensity of review appropriate for those particular circumstances" (para 435).

**131** Arguing this part of the Hillingdon claimants' appeal, Mr Nigel Pleming QC submitted that although under article 5(2) the question of what information is "reasonably … required" involves an evaluative judgment by the decision-maker, it remains a legal requirement that the information is F sufficient for the purposes of the SEA Directive. Whether this requirement has been met is a matter for the court. The effect of the Divisional Court's approach, said Mr Pleming, is that if the authority responsible for the preparation of the plan or programme is able to point to some information that can be said to address the requirements of the SEA Directive, the court will not examine the adequacy or quality of that information. Mr Pleming submitted that the appropriate intensity of review for testing compliance G with the SEA Directive should match the requirements it contains and the court's obligation to give effect to the "precautionary principle". In short, the Divisional Court should have applied greater scrutiny than it did.

**132** In the light of the decision of the Court of Justice of the European Union in *Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale* (Case C-567/10) [2012] Env LR 30, Mr Pleming submitted that H an environmental report cannot be regarded as compliant with the SEA Directive simply because it refers to the requirements of article 5. In that case the court held, at para 37, that

> "given the objective of [the SEA Directive], which consists in providing for a high level of protection of the environment, the

provisions which delimit the Directive's scope, in particular those setting out the definitions of the measures envisaged by the Directive, must be interpreted broadly".

Mr Pleming contended for an interpretation that is both broad and purposive. He referred to the basic objective identified in recital (14), and the mandatory requirements of articles 5 and 12. An appropriately purposive construction of article 5, he submitted, would indicate that the court should ask itself whether the environmental report is of sufficient quality to allow for effective comment by those affected. Any failure to fulfil this essential purpose would amount to non-compliance with the SEA Directive. Pointing to the language of article 12(2), which requires member states to "ensure that environmental reports are of a sufficient quality to meet the requirements of this Directive", Mr Pleming cited *Save Historic Newmarket Ltd v Forest Heath District Council* [2011] JPL 1233, where Collins J, at para 12 of his judgment, said that "[quality] involves ensuring that a report is based on proper information and expertise and covers all the potential effects of the plan or programme in question".

**133** As Mr Pleming reminded us, a principle stated by Lord Mance JSC in his judgment in *Pham* [2015] 1 WLR 1591, para 96 is that, "[whether] under EU, Convention or common law, context will determine the appropriate intensity of review". The relevant context here, submitted Mr Pleming, is set by the guiding objectives of the SEA Directive. Those objectives demand a structured review of the environmental report to ensure that compliance is achieved. This, he argued, accords with a modern approach to review commended by the Supreme Court in *Pham*, an approach more exacting than that adopted in *Blewett* [2004] Env LR 29. He referred to an observation by Advocate General Kokott in her opinion in *Holohan v An Bord Pleanála (National Parks and Wildlife Service intervening)* (Case C-461/17) [2019] Env LR 16, point 90: that "[for] the purposes of a judicial challenge … an applicant must show which potential significant effects of the project concerned the developer has not adequately assessed and discussed". He submitted that the Advocate General's deliberate use of the word "adequately" is consistent only with a more demanding approach than review at the standard of *Wednesbury* irrationality.

**134** Mr Maurici and Mr Banner disputed the proposition that article 5 and Annex I impose requirements justifying a more intensive review than traditional public law principle dictates. They do not lay down hard-edged legal requirements. They allow the Secretary of State a broad discretion to determine what "may reasonably be required". Mr Banner emphasised the fact that the SEA Directive does not prescribe a right of appeal against an authority's decision to adopt a plan or programme. Where a challenge is made, he submitted, the use of conventional principles in domestic public law, including *Wednesbury* irrationality, is an orthodox application of the member state's discretion. He relied on the principle acknowledged by Advocate General Léger in his opinion in *Upjohn Ltd v Licensing Authority Established under Medicines Act 1968* (Case C-120/97) [1999] 1 WLR 927; [1999] ECR I-223, point 50:

"[the] court has always taken the view that when an authority is required, in the exercise of its functions, to undertake complex

A assessments, a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority's freedom of action would be definitively paralysed."

Consistently with that principle, as Mr Maurici reminded us, the Court of Appeal accepted in *Ashdown Forest Economic Development llp v Secretary*
B *of State for Communities and Local Government* [2016] PTSR 78 that, as Richards LJ put it, in para 42 of his judgment, "the identification of reasonable alternatives [under article 5(1) of the SEA Directive] is a matter of evaluative assessment for the local planning authority, subject to review by the court on normal public law principles, including [*Wednesbury*] unreasonableness".

C **135** In our view, the submissions made by Mr Maurici and Mr Banner on this issue are correct. The question here goes not to the principle of an appropriate role for the court in reviewing compliance with article 5 of the SEA Directive. That principle is, of course, uncontroversial. We are concerned only with the depth and rigour of the court's inquiry. How intense must it be?

D **136** The answer, we think, must be apt to the provisions themselves. The court's role in ensuring that an authority—here the Secretary of State—has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information "may reasonably be required" when taking into account the considerations referred to—first, "current knowledge and methods of assessment"; second, "the contents and level of detail in the
E plan or programme"; third, "its stage in the decision-making process"; and fourth "the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment". These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature
F and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional *Wednesbury* standard of review—as adopted, for example, in *Blewett* [2004] Env LR 29. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would
G exceed the proper remit of the court.

**137** None of the authorities relied on by Mr Pleming casts doubt on the well-established principle in domestic case law that it is not the court's task to adjudicate on the content of an environmental statement under the EIA Directive or an environmental report under the SEA Directive, unless there is some patent defect in the assessment, which has not been put right in the making of the decision (see, for example, *R (Squire) v Shropshire Council*
H [2019] Env LR 36, paras 65–69). This principle is not inconsistent with the relevant jurisprudence in the Court of Justice of the European Union. In her opinion in *Craeynest* [2020] Env LR 4 the Advocate General said, at point 42, that "EU law does not require the member states to establish a procedure for judicial review of national decisions applying rules of EU law which involve a more extensive review than that carried out by the court in similar cases".

**138** The Hillingdon claimants also contended that the Divisional Court understated the so-called "*Blewett* standard of review"—and presumably the related case law cited by Beatson J in *Shadwell Estates* [2013] EWHC 12, which the Divisional Court mentioned in its reasoning here. Assuming for the moment that this was the correct standard, Mr Pleming urged us to note Sullivan J's reference to the need, under the EIA Directive, for the "resulting "environmental information" [to provide the authority] with as full a picture as possible". He submitted that there is a parallel requirement under the SEA Directive for the "information" included in an environmental report to provide the decision-maker with "as full a picture as possible". Thus the "*Blewett* approach" itself does not merely require the court to consider whether an environmental report is "so deficient that it could not reasonably be described as" being such a document. It requires nothing less than the "full picture" to be provided. And in this case, Mr Pleming submitted, the Secretary of State had failed to ensure that the environmental report for the ANPS measured up to this level of content and assessment.

**139** We do not accept that argument. Providing "as full a picture as possible" is not an explicit requirement of article 5 of the SEA Directive. Without distorting the words actually used in that provision, one can sensibly infer from them a requirement to provide as full a picture as "may reasonably be required", subject to the considerations referred to—which include "the extent to which certain matters are more appropriately assessed at different levels in [the decision-making] process". They do not compel an exhaustive provision of information or an exhaustive assessment. The expression used by Sullivan J must be read together with what he said in the following sentence—that

> "[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 … but they are likely to be few and far between".

As he recognised in the same paragraph of his judgment, deficiencies in the environmental statement could, in principle, be overcome in the course of the process, so that, in the end, the "environmental information" in its totality—not merely the environmental statement itself—composed "as full a picture as possible".

**140** Our conclusion on this issue is, we think, consistent with the reasoning of Lord Hoffmann in *R (Edwards) v Environment Agency* [2009] 1 All ER 57, para 61:

> "In *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] ECR I-2189 the German authorities gave consent to the construction of a power station without requiring the submission, eo nomine, of an environmental statement. (At that time the EIA Directive had not yet been transposed into German law). Instead, the authorities required and published the information specified by the Bundesimmissionsschutzgesetz (Federal Pollution Protection Law). The Court of Justice found that as this information coincided with that required by the EIA Directive and the public had been given the opportunity to make representations about it, the requirements of the Directive had been satisfied. The same is in my opinion true of the

A application in this case. No doubt more information could have been provided, but the observations of Sullivan J in [*Blewett*] at para 41 … show that this does not make the statement inadequate. I should add that this is not a case like *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 in which the alleged environmental statement had to be pieced together from a number of documents emanating from different sources. The application itself, emanating from the applicant as the EIA B Directive requires, was perfectly adequate."

There is nothing in those observations of Lord Hoffmann to suggest that the *Wednesbury* standard of review is not the appropriate standard. And they seem to us to support Mr Maurici's argument that, although more information could have been provided in the Appraisal of Sustainability for C the ANPS, this does not mean it was legally inadequate as an environmental report.

**141** We can see no force in the contention that the approach adopted in *Blewett* [2004] Env LR 29 is, in principle, inapplicable to the SEA Directive. As we understand this argument, it is, essentially, that the procedure provided for in the EIA Directive is materially different from that under the SEA D Directive. The former is directed to the assessment of the likely significant effects on the environment of an individual project, within a decision-making process in which the merits of the project, and its credentials as sustainable development, must also be judged against policy. The latter, by contrast, involves assessment of the environmental effects of the policy itself—here the ANPS—and there is no other means of formally testing the sustainability of that policy before it has crystallised.

E **142** Mr Pleming sought to derive support for this argument in an observation made by Baroness Hale of Richmond DPSC in *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] PTSR 182, the case in which challenges to the HS2 project came before the court. Baroness Hale DPSC said, in para 133 of her judgment, that the "evaluation of alternatives [under the SEA Directive] is of a different F order from that required for projects covered by the EIA Directive". And Lord Carnwath JSC observed, in para 44 of his judgment, that the "difference between the two procedures [EIA and SEA Directive] is significant principally in relation to the treatment of alternatives". Mr Pleming submitted that "a different order" in the treatment of alternatives necessarily implies "a different order" in the assessment itself. Thus, he argued, the G "*Blewett* approach" cannot simply be read across from one process to the other.

**143** We reject this submission, as did the Divisional Court. In our view, there is no warrant for a more taxing approach to be taken in reviewing compliance with the SEA Directive than that indicated in *Blewett* [2004] Env LR 29. Indeed, this would be contrary to the clear indications in the case law that the approach to judging the adequacy of an environmental report H under the SEA Directive should be essentially the same. The Divisional Court accepted that. And in our opinion it was clearly right to do so.

**144** This view seems consistent with both domestic and European authority. In *Walton v Scottish Ministers* [2013] PTSR 51 Lord Reed JSC (in paras 10–30 of his judgment), in the light of European case law including *Terre Wallonne ASBL v Région Wallonne* (Joined Cases C-105/09 and

C-110/09) [2010] ECR I-5611, recognised that the objectives and the procedures for environmental assessment in the SEA Directive and those in the EIA Directive are intended to complement each other. We have referred already to the observation of Beatson J in *Shadwell Estates* [2013] EWHC 12 at [73] that "review of the adequacy of environmental appraisals, assessments, and impact statements, is on conventional *Wednesbury* grounds". In the same vein, in *In re Seaport Investments Ltd's Application for Judicial Review* [2008] Env LR 23 Weatherup J, as he then was, said, in para 26 of his judgment, that "[the] responsible authority must be accorded a substantial discretionary area of judgment in relation to compliance with the required information for environmental reports". He added that the court "will not examine the fine detail of the contents but seek to establish whether there has been substantial compliance with the information required". And in *No Adastral New Town Ltd v Suffolk Coastal District Council* [2015] Env LR 28 this court too has, in effect, approved the application of the "*Blewett* approach" in a challenge to the adequacy of an environmental report prepared under regulation 12 of the SEA Regulations. At first instance Patterson J [2015] Env LR 3 had found there were two flaws in the early stages of the process, but concluded that these had later been remedied. In the subsequent appeal Richards LJ considered the judgment of Singh J, as he then was, in *Cogent Land llp v Rochford District Council* [2013] 1 P & CR 2, where a similar issue arose. Singh J had applied the approach of Sullivan J in *Blewett* [2004] Env LR 29, and Richards LJ concluded he was right to do so (see paras 48 to 54 of Richards LJ's judgment). This, in our view, is a clear indication that the "*Blewett* approach" can and should be applied in claims alleging breaches of the legislative regime for SEA.

*SEA Directive issue (2)—a failure to provide an outline of the relationship between the ANPS and other relevant plans or programmes?*

**145** The Divisional Court noted that the Secretary of State had

> "made it plain in the SEA process that [the Appraisal of Sustainability] drew upon and updated the extensive work which had previously been carried out by, and on behalf of, [the Airports Commission], including numerous reports to [the Airports Commission] and its own final report".

None of the claimants had suggested that the Secretary of State was not entitled to take that course, and in the view of the Divisional Court "[he] clearly was" (para 393 of the judgment).

**146** In section 2.4, "Cumulative Effects", the scoping report produced in March 2016 confirmed that "[local] land-use plans and policies for proposed development in local authorities relating to options considered", and "[other] major projects" would be considered for their cumulative effects with expansion at Heathrow in the "next stage". However, it provided an "initial indication" of the "policies, plans and programmes" that should "potentially be included in the assessment of cumulative effects of other developments" (para 2.4.2).

**147** In section 6.15 of the Appraisal of Sustainability itself, under the heading "Cumulative Effects", paras 6.15.1 and 6.15.2 state:

A "6.15.1 As described in section 3, cumulative effects arise, for instance, where several developments each have insignificant effects but together have a significant effect, or where several individual effects of the plan (eg noise, dust and visual) have a combined effect. In the context of AoS, this is also taken to include [policies, plans and programmes] as well as major projects. A review of [policies, plans and programmes] and major infrastructure projects was undertaken and potential for B cumulative effects identified. This is presented in table 6.5 below. *Potential cumulative effects have been included within the assessments described above and in the topic based assessments in Appendix A.*

"6.15.2 It should be noted that at the strategic level, this list is not exhaustive and cumulative effects arising from individual projects and plans should be revisited as part of a project level C assessment." (Emphasis added.)

The potential cumulative effects referred to in table 6.5, "Potential cumulative effects of schemes for the NPS", include effects arising from development planned by the councils among the Hillingdon claimants. The table lists local development plans, local mineral and waste plans, and the London Plan. It recognises that local plans will provide for residential and D commercial development and infrastructure, and that an increase in airport capacity would have cumulative effects with such development. It identifies the potential effects to be addressed, including the reduction in land available for other forms of development, the loss of "greenfield" land, noise and air quality impacts from aircraft, and the environmental effects of additional housing and commercial development and infrastructure. It recognises the E increasing difficulty of identifying suitable land for development faced by many local authorities, particularly around Heathrow, where the availability of land is "highly constrained".

**148** Table 6.5 states, under the heading: "Plans: Local Development Plans":

"The local authorities located in the vicinity of the expansion F schemes have various plans for residential, commercial or infrastructure development. Cumulative effects with planned development can be anticipated, particularly where proposed new development is located in close proximity to the expansion schemes and the associated surface access improvements. A detailed consideration of the potential for cumulative effects arising would need to be undertaken as part of an EIA …"

G

**149** Bringing its various assessments together, the ANPS states, in para 3.53:

"3.53. The Appraisal of Sustainability identifies that, in addition to changes due to local noise and air quality impacts, communities may be affected by airport expansion through loss of, and/or additional demand H for housing, community facilities or services, including recreational facilities. In addition, there will be effects on parks, open spaces and the historic environment, which will affect the quality of life of local communities which benefit from access to these facilities and features. *These effects will be of a higher magnitude for the two Heathrow expansion schemes and a lower magnitude for [the second runway at]*

*Gatwick*. Overall, each of the three schemes is expected to have negative impacts on local communities, with more severe impacts expected from the Heathrow schemes. Impacts of all three schemes will not be felt equally across social groups." (Emphasis added.)

**150** The Divisional Court was unpersuaded by the Hillingdon claimants' argument that the Appraisal of Sustainability failed properly to address the relationship of the ANPS with other relevant plans (paras 448 and 449 of the judgment). It accepted that, "although individual effects on local authority areas were not separately identified, the cumulative effects of such matters as additional demand for housing and community facilities, together with impacts on open spaces, were weighed in the balance; and they were assessed as counting more severely against the Heathrow schemes than [the Gatwick second runway scheme]" (para 453). It held that the absence of a reference to "cumulative effects" in paragraph (a) of Annex I to the SEA Directive "does not mean that an environmental report cannot deal with the relationship with a group of other plans in terms of 'cumulative effects' rather than as impacts on individual plans" (para 454). It saw no reason to reject the evidence given on behalf of the Secretary of State that "it would not have been appropriate in the SEA to analyse the effects of the draft ANPS on the policies of individual local plans and that even if that approach had been followed, the Appraisal Framework would not have changed (Stevenson 1, paras 3.44–3.53)" (para 455).

**151** It went on to say:

> "457. The court was referred in Ms Stevenson's evidence; and, in a table of key points submitted by Mr Maurici, to a large number of references where matters such as loss of housing, schools and community facilities, along with increased demand for such development and facilities, have been addressed at a strategic level. For example, the AoS states that the NWR scheme is likely to generate a demand for 300 to 500 additional homes per local authority per year as well as support from additional schools, two additional health centres and two primary care centres per local authority to 2030. The AoS makes the judgment that overall impacts on housing demand will affect local authorities across London and the South East and that the demand will spread and be low in comparison to existing planned housing. Those effects were assessed as being negative in relation to the NWR scheme (see para 1.12.2 of Appendix A to the AoS).
>
> "458. So, it is plain that consequences of this kind (and not just impacts) *have* been assessed for the NWR scheme, albeit on a cumulative basis. Essentially, the Hillingdon claimant boroughs' complaint is limited to those consequences not having been assessed individually for each local authority area and the analysis having been carried out only at a 'high level'. By the end of the argument, it had therefore become clear that this was a challenge solely to qualitative aspects of the assessment."

**152** As the wording of paragraph (a) of Annex I makes plain, the information to be provided under the provisions in article 5(1) and (2) is specifically "*an outline* of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes" (our emphasis). With this in mind, the Divisional Court

A concluded that "[the] relevant plans [had] not been ignored" in this case, and "the relationship with these plans [had] been addressed". The Appraisal of Sustainability had "addressed impacts cumulatively", and likewise "the consequences of those impacts". In discharging the obligation to provide an "outline", the Secretary of State was at liberty to decide how far the analysis should be taken. His decision not to analyse these matters at the level of each local authority was not open to challenge (para 460). And his "series B of judgments" did not betray a failure to comply with the requirement to provide an "outline of the relationship with other relevant plans". None of those judgments was irrational "as regards the content and level of detail of the coverage by [the Appraisal of Sustainability]" (para 461). Even on the standard or review contended for by the Hillingdon claimants, the Divisional Court "would have concluded that the 'quality' of [the Appraisal C of Sustainability] did not fail to comply with [paragraph (a) of Annex I to the SEA Directive]" (para 462).

**153** It concluded in para 463:

> "[As] accepted by the Secretary of State … the issues raised by the Hillingdon Claimant Boroughs, namely the consequences of the NWR scheme for the areas of individual local authorities, taking into account D environmental and planning constraints and the scope for distributing additional development across a number of areas, will remain to be considered in the EIA accompanying any application for development consent and the examination of that application through the DCO process. It follows that the Mayor and local planning authorities will be able to make representations in that process about harmful impacts of E this nature, both for individual areas and cumulatively, and the findings about these matters will be taken into account and weighed in the balance under section 104(7) of [the Planning Act]."

**154** Before us, as before the Divisional Court, the Hillingdon claimants' main submission was that the Appraisal of Sustainability did not describe, even in outline, the relationship between the north west runway scheme at F Heathrow and the local plans for administrative areas where the environment would be severely affected by that development, nor the relationship with local strategies for the environment, including the London Environment Strategy, adopted by Greater London Authority in May 2018, which includes the London Zero Carbon Target.

**155** Mr Pleming complained that there was no reference in the scoping report to the London Environment Strategy or the London carbon budgets. G He did not contest the Divisional Court's conclusion in para 459 that

> "the London Environment Strategy, [the Ultra-Low Emissions Zone] and [the Air Quality Plan of 2017] … were addressed during the SEA process in a number of places, eg in section 8.10 of Appendix A to [the Appraisal of Sustainability] and in the [WSP Parsons Brinckerhoff] October 2017 [Air Quality] re-analysis to which [the Appraisal of H Sustainability] cross-refers".

But he submitted that no consideration was given in the Appraisal of Sustainability to the London carbon budgets. The Secretary of State concedes that. However, Mr Maurici said this was a deliberate decision in the light of expert advice that separate consideration of carbon budgets for London

would have made no difference to the relevant assessment. The Secretary of State relied on the expert advice of Ms Ursula Stevenson, an "environmental consultant" and, as she describes her role (in para 1.5 of her first witness statement dated 28 November 2018) WSP's "internal 'Technical Excellence' lead for Environmental Assessment and Management services", that the carbon budgets would not change the outcome of the assessment and therefore need not be included in it.

**156** We see nothing unlawful in the Secretary of State taking this course. This was a matter of judgment for him. The judgment itself was not irrational or otherwise unlawful. It was consistent with the advice the Secretary of State received, which Ms Stevenson explains (in paras 3.125 to 3.134 of her first witness statement).

**157** It is common ground that development provided for in local plans was taken into account in the Appraisal of Sustainability, but that this was done cumulatively—not individually, plan by plan. The issue therefore, as it was before the Divisional Court, is whether cumulative consideration of local plan policies and allocations was sufficient to satisfy the requirement under paragraph (a) of Annex I to the SEA Directive to provide "an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes". The Hillingdon claimants say the obligation to provide an outline of the "relationship" of the plan or programme "with other relevant plans" can only be satisfied if an outline of its relationship with each relevant plan is provided individually; it is not enough to provide a description of its relationship with all the relevant plans and an assessment of its cumulative effects in combination with them, taken as a whole. For example, the local plan for the London Borough of Hillingdon—"A vision for 2026, Local Plan: Part 1, Strategic Policies" adopted in November 2012—provides for the development of new housing in the borough in the course of the plan period. But the expansion of Heathrow, if it proceeds, will itself generate pressure for additional housing, not planned in the local plan. The nature of the "relationship" between the local plan and the ANPS, therefore, is that the amount of development in the local area is likely to be more than has been identified and assessed in the SEA process. This should have been done, in accordance with paragraph (a) of Annex I, but it was not.

**158** The simple answer to this argument, as Mr Maurici submitted, is that the total amount of development likely to come forward through local plans, including the Hillingdon Local Plan Part 1, together with the expansion of Heathrow by the development of a third runway, was sufficiently embraced in the scoping report and sufficiently assessed in the Appraisal of Sustainability to satisfy the requirements of the SEA Directive and the SEA Regulations. We share the conclusions of the Divisional Court (in paras 457, 458 and 460 of its judgment). It is, we think, unrealistic to suggest that the assessment was invalidated by taking the effects of development in several local plans together, rather than separately. To do this, at least in the circumstances of this case, was not at odds with the requirement in paragraph (a) of Annex I. On a straightforward reading of that provision, the requirement to provide an "outline" of the "relationship" between the plan or programme under consideration and "other relevant plans and programmes", in the plural, does not preclude such "relevant plans

A and programmes" being dealt with, as the words suggest, on their aggregate effects.

**159** The Hillingdon claimants dispute the contention that it was unnecessary for local plans to be considered individually under paragraph (a) of Annex I because the ANPS addresses airport capacity at the national level. Mr Pleming submitted that the complexity of considering the relationship of the ANPS to each of a number of local plans does not excuse a failure to B comply with paragraph (a) of Annex I. The ANPS provides policy support for a specific scheme at a specific location, and the effects of that scheme in combination with individual local plans should therefore have been assessed in the SEA.

**160** We do not agree. Like the Divisional Court, we consider the approach taken to assessing cumulative effects in the Appraisal of Sustainability to C have been lawful. It does not offend either the letter or the spirit of the relevant provisions of the SEA Directive. Given the national policy context in which the ANPS takes its place, it was in our view appropriate to adopt a broad approach to cumulative effects. That was realistic, and, we think, perfectly lawful. It was not a culpable omission to leave out a consideration of cumulative effects with individual local plans in favour of a D more comprehensive assessment, following the expert guidance the Secretary of State received. There was no breach of article 5(2) or paragraph (a) of Annex I.

**161** Finally, the Hillingdon claimants take issue with the Divisional Court's conclusion (in para 499 of its judgment) that the interaction of the ANPS with local plans can be adequately addressed in the EIA at the development consent stage. The purpose of the legislative regime for SEA, E they say, is to ensure that the strategic implications of development are known and considered at the plan-making stage, so that the Secretary of State, local authorities, those affected by the development, and the wider public are able to understand its effects. The counter argument from the Secretary of State is that the Divisional Court was right to recognise the inevitably more detailed assessment under the regime for EIA at the F development consent order stage. As it accepted (in para 463), the Mayor of London and local planning authorities will at that stage be able to make specific representations about the likely effects on the environment, including cumulative impacts, and those effects will have to be considered before a development consent order is granted.

**162** Again, we agree with the view of the Divisional Court. The SEA regime and the regime for EIA will operate, at different stages of the G process under the Planning Act, to ensure that the cumulative impacts of the development are fully assessed. Both at the policy-making stage in the preparation of the ANPS and in the subsequent process by which an application for a development consent order under section 103 of the Planning Act is considered, the cumulative effects of development at Heathrow and any other development with which it interacts, including H development planned in local plans, will be assessed. The outcome of that process is not predetermined by the strategic-level assessment of cumulative effects in the Appraisal of Sustainability. The strategic-level assessment informs an understanding of the strategic implications of the development envisaged in the ANPS. The degree of refinement required in that assessment, under the SEA Directive, is set by the terms of article 5 and Annex

I. Those provisions are not unduly onerous. They do not stipulate a particular approach to cumulative assessment. They leave with the authority responsible for promulgating the plan or programme a reasonably generous discretion in deciding how it should go about that work. In our view, that discretion was not exceeded by the Secretary of State in the preparation of the Appraisal of Sustainability.

*SEA Directive issue (3)—a failure to identify the environmental characteristics of areas likely to be significantly affected by the ANPS?*

**163** The Appraisal of Sustainability included, in Appendix A-4 Noise, a noise impact assessment for the three shortlisted schemes. Because the patterns of air traffic movement likely to be created by the use of a new runway were at that stage uncertain—as indeed they are now—it was not possible to base the assessment of likely noise impacts on definite flight paths. The authors of the assessment therefore used indicative flight paths. They adopted a 54 dB LAeq 16-hour threshold as the level of noise likely to have a significant effect on people (paras 4.5.6 to 4.5.9 and 4.8.2).

**164** In its response to representations made in consultation on the ANPS, published in June 2018, the Government said this on the future design of changes to airspace in para 6.48:

> "Airspace design falls outside the scope of the Airports NPS. As stated in the Airports NPS, precise flight path designs can only be defined at a later stage after detailed airspace design work has taken place. Once completed, the airspace proposal will be subject to consultation with local communities and relevant stakeholders in line with the requirements of the airspace change process which is owned by the Civil Aviation Authority ('CAA'). This is a very thorough and detailed process that covers all aspects of the proposal including safety and environmental impacts."

It was made clear in para 7.13 that the use of the indicative flight paths for the three schemes was considered to be appropriate for the taking of "strategic" decisions at the ANPS stage:

> "The AoS noise assessment is based on one set of indicative flight paths. This is consistent with the approach adopted by the [Airports] Commission to compare the three expansion schemes in its final report. The purpose of this assessment is to draw out key strategic considerations relevant to noise. In light of this, the Government considers that the AoS is satisfactory, given that airspace design is currently highly uncertain, and the AoS follows the same approach as that used by the [Airports] Commission to compare the three expansion schemes in its final report."

The time likely to be required for making changes in airspace design was emphasised in para 7.15:

> "Proposals to change the UK's airspace design are governed by the separate [CAA's] airspace change process, which was made more rigorous from 2 January 2018. The design of new flight paths is highly technical and can take several years. It is a requirement of the CAA's airspace change process that there must be adequate

consultation. Airspace change sponsors would need to take account of the Government's new policy on appraising options for airspace design, such as considering the use of multiple routes. It is therefore through this regulatory process that communities will see and have the opportunity to comment on detailed proposals for new flight paths which may affect them."

Whilst the Government acknowledged that the Gatwick second runway scheme clearly performed better than the Heathrow schemes in the number of people likely to be significantly affected by aviation noise, this had been only one factor in the Secretary of State's decision. When all "benefits and dis-benefits" were considered together, the Secretary of State considered that the north west runway scheme at Heathrow would deliver the greatest "net benefits" to the United Kingdom (para 7.20).

**165** The Government emphasised the "strategic" nature of the noise assessment for the ANPS in paras 7.54 to 7.56:

"7.54. The noise analysis that is presented in the AoS represents a strategic assessment of unmitigated noise impacts, based on indicative flight paths. Its purpose is to draw out key strategic considerations relevant to noise. To this end, relevant noise metrics are presented in the AoS. The high level noise assessment presented in the AoS includes an assessment of unmitigated noise impacts at 54 dB LAeq, 16hr, which is consistent with the findings of the [Survey of Noise Attitudes] report …

"7.55. The Lowest Observed Adverse Effects Level ('LOAEL') recommended in the Government's response to the consultation on UK Airspace Policy (51 dB LAeq, 16hr) is specifically for comparing different options for airspace design. The AoS Noise Appendix explains why it would not be appropriate at this stage of the process to assess absolute noise levels and associated local population exposure below 54 dB LAeq 16hr. For practical reasons it becomes more difficult to estimate noise exposure accurately, and therefore population numbers affected, below this noise level. This is because it is difficult to measure aircraft noise levels at greater distances from an airport where aircraft noise levels are closer to those of other noise sources. Also, due to variability in aircraft position in the air at these greater distances from the airport, the absolute noise levels have a lower level of certainty.

"7.56. Any airspace change required for the Heathrow Northwest Runway scheme would be subject to the CAA's airspace change process. This would require a comparative assessment of options for airspace design with noise impacts assessed from the LOAELs set out in the new national policy on airspace—51 dB LAeq, 16hr for day time noise and 45 dB L night for night time noise. This would be done using WebTAG, which is the Government's standard appraisal methodology for transport schemes, and would ensure that the total adverse effects of each option on health and quality of life can be assessed."

**166** On the use of indicative flight paths, the ANPS says this in para 5.50:

"The Airports Commission's assessment was based on 'indicative' flight path designs, which the Government considers to be a reasonable approach at this stage in the process. Precise flight path designs can only be defined at a later stage after detailed airspace design work has taken

> place. This work will need to consider the various options available to ensure a safe and efficient airspace which also mitigates the level of noise disturbance. Once the design work has been completed, the airspace proposal will be subject to extensive consultation as part of the separate airspace decision making process established by the Civil Aviation Authority."

**167** The ANPS indicates (in para 5.52) the likely requirements for the noise impact assessment in the EIA that will have to be undertaken if an application for a development consent order is made. The environmental statement prepared at that stage would include an "assessment of the likely significant effect of predicted changes in the noise environment on any noise sensitive premises (including schools and hospitals) and noise sensitive areas (including National Parks and Areas of Outstanding Natural Beauty)". A number of necessary noise mitigation measures are specified. These include the alternation of runway use to ensure local communities have predictable periods of respite from noise (para 5.61) and a ban on scheduled night flights for six and a half hours between 11 pm and 7 am (para 5.62). Describing the approach that will be taken to any decision on an application for development consent, the ANPS says in para 5.68:

> "Development consent should not be granted unless the Secretary of State is satisfied that the proposals will meet the following aims for the effective management and control of noise, within the context of Government policy on sustainable development:
>
> • Avoid significant adverse impacts on health and quality of life from noise;
>
> • Mitigate and minimise adverse impacts on health and quality of life from noise; and
>
> • Where possible, contribute to improvements to health and quality of life."

**168** As the Divisional Court recognised, even using indicative flight paths and the 54 dB LAeq 16-hour noise threshold—the two points on which the Hillingdon claimants say the Secretary of State's approach was legally flawed—the Appraisal of Sustainability had still found that the potential negative effects of each of the two Heathrow schemes on quality of life, health and amenity would be greater than those of the Gatwick second runway scheme. This was, as the Divisional Court put it, "because Gatwick is in a more rural location and fewer people are affected by the impact there" (para 467 of the judgment). It is quite clear, however, that the more harmful noise impacts arising from expansion at Heathrow were considered by the Secretary of State in making the decision to select the north west runway scheme at Heathrow as the preferred development in the ANPS. Equally clear is that even if different flight paths had been assumed or a different noise threshold selected, the conclusion that the Heathrow schemes would result in worse and more widespread noise effects than a second runway at Gatwick would have been the same. As the Divisional Court said, "[this] self-evident point has clearly been taken into account in the decision to designate the ANPS" (ibid).

**169** The Divisional Court reminded itself, and the parties, of the limits to the court's jurisdiction in a claim for judicial review where criticism is made

of the decision-maker's approach on a technical or scientific question. As it rightly said, "although many people may be concerned about the noise effects of airport expansion, it is not the function of this court to become involved in the technical merits of the two criticisms made by [the councils among the Hillingdon claimants] in their claim", but only to "[decide] whether they can demonstrate that the Secretary of State has made an error of law" (para 468).

**170** In its conclusion on the Secretary of State's use of indicative flight paths, the Divisional Court saw a distinction between an approach based on areas "over which flight paths *may* be located" and one based on areas "within which it is *likely* that landings and take offs causing noise pollution will occur". It concluded that the former does not accord with the requirement in paragraph (c) of Annex I to the SEA Directive to identify areas "likely to be significantly affected". The Hillingdon claimants' argument based on that approach was, in its view, "misconceived" (para 475). It also held that "there can be no legal objection to the use of indicative flight paths as a matter of principle" (para 476).

**171** As for the argument that flight paths ought to have been determined on a "worst case" basis to "respect the precautionary principle in the SEA Directive", the Divisional Court observed that even if this were correct "there would still remain the same difficult judgment for experts to make as to how to predict where such flight paths are likely to be located". Then there would be the question of "what factors would produce a "worst case" analysis, without arriving at something which is unrealistic and not therefore a sound basis for decision-making". Though this was, as the Divisional Court said, "[to] some extent … a matter of degree", it necessarily involved "an evaluative judgment using predictive techniques and [was] dependent upon expert technical opinion". Undoubtedly, it engaged the "enhanced margin of appreciation" described in *Mott* [2016] 1 WLR 4338 (para 477). Having considered the evidence and submissions before it on this issue, the Divisional Court concluded in para 487:

> "Ultimately, it was a matter of judgment for the Secretary of State, assisted by expert advice, to determine what information was reasonably required in relation to flight paths, so as to identify areas likely to be significantly affected. On the material before the court, it is impossible to say that the judgment he reached was irrational or that there has been a failure to comply with the SEA Directive in this respect."

**172** The Divisional Court grasped the differences in the expert evidence on the appropriate threshold for the noise assessment. Ms Low and Mr Michael Lotinga, a chartered engineer and acoustician employed by WSP, had explained why, in taking strategic level decisions for the ANPS, it had been judged appropriate to adopt the 54 dB LAeq 16-hour level rather than 51 dB LAeq 16-hour. Mr Colin Stanbury, the aviation project officer for the councils of the London Boroughs of Richmond upon Thames and Wandsworth, had explained why he disagreed and believed the lower figure should have been used. But, as with the issue of flight paths, the Divisional Court stood back from adjudicating on technical questions of this kind. It said in para 490:

> "We were invited to review the extensive evidence on this subject filed by both sides. Mr Stanbury says (in Stanbury 1, para 28) that in its

> Air Navigation Guidance 2017 the Government has set the LOAEL at 51dB LAeq16hour based upon the CAA's publication 1506: Survey of noise attitudes 2014: Aircraft. We note in passing that, in his footnotes 24 and 29, Mr Stanbury explains that, according to this survey, at the 51dB level 7% of the population would be 'highly annoyed' compared with 9% at the 54dB level. The source for those results is table 31 of CAA publication 1506. To put that into context, the AoS treats 54dB LAeq16hour as signifying 'a level at which significant community annoyance starts to occur' (table 4.2 [of Appendix A to the] AoS)."

It concluded, in para 491:

> "[*Mott*] again underscores that point. There was nothing that could be described as irrational in the Secretary of State's approach to the selection of noise parameters. This issue did not involve any failure to comply with the SEA Directive."

**173** In what was largely a reprise of the argument that did not succeed before the Divisional Court, Mr Pleming's main submission here was that the noise impact assessment carried out in the Appraisal of Sustainability failed adequately to define the extent of the areas likely to be significantly affected by noise, as paragraph (c) of Annex I requires. The Secretary of State went wrong in three ways: first, in deciding to use a single set of indicative flight paths that understated the geographical extent of the areas likely to be subject to overflying; secondly, in adopting the 54 dB LAeq 16-hour threshold for identifying noise whose effect on people would be significant—in spite of the Government's own policy setting the threshold at 51 dB LAeq 16-hour; and thirdly, in deciding to identify the numbers of people and buildings, rather than the areas, likely to be significantly affected.

**174** Mr Pleming submitted that if paragraph (c) of Annex 1 is read, as it should be, in the light of the precautionary principle and the aim of the SEA Directive to ensure that communities likely to be affected by a plan or programme are consulted and given an early and effective opportunity to comment, it is necessary to avoid underestimating the area over which flights may occur. Using only one set of indicative flight paths, as the Secretary of State did here, was not enough. It was probable that many people significantly affected by noise would not be under those flight paths. It was true that in the Divisional Court the Hillingdon claimants had not argued for the use of "actual flight paths" in the Appraisal of Sustainability (see para 473 of the judgment). But in the absence of precise flight paths, the Secretary of State ought to have used areas instead, not indicative flight paths. Mr Pleming relied on the approach indicated in Advocate General Kokott's opinion in *D'Oultremont v Région Wallonne* (Case C-290/15) EU:C:2016:561, points 37–45.

**175** We cannot accept those submissions. In our opinion, there was nothing amiss in the Secretary of State's use of indicative flight paths. It was neither irrational nor in any other way unlawful. As Mr Maurici argued, it was understandable, for at least three reasons. First, when the ANPS was being prepared, the siting, dimensions and design of the new runway were not yet final. Secondly, the assessment of noise impacts in the Appraisal of Sustainability had to be undertaken before the separate statutory process for airspace change was conducted, and its outcome known. And thirdly,

A the approach adopted by the Secretary of State corresponded to that of the Airports Commission when comparing the three airport expansion schemes in its final report in July 2015.

**176** Mr Pleming also submitted that the Divisional Court was wrong to think it was purely a matter of judgment for the Secretary of State, aided by expert advice, to decide what information was reasonably required when establishing the areas likely to be significantly affected by noise. The B Divisional Court should have looked beyond the mere fact that the noise assessment was informed by expert technical judgment. This, of itself, was not enough to comply with the requirements of the SEA Directive. To rely here on an "enhanced margin of appreciation", as suggested in *Mott* [2016] 1 WLR 4338, was wrong. It was possible for an environmental report to be technically adequate but still not compliant. *Mott* concerned a challenge to C the rationality of a decision taken by the Environment Agency to impose an annual "catch limit" on a commercial fisherman's licence to operate a salmon fishery on the strength of technical evidence and judgment. In this case, Mr Pleming submitted, the question is of a different kind, and more basic. It is whether the Secretary of State complied with the mandatory requirement under paragraph (c) of Annex I to the SEA Directive to identify areas likely D to be significantly affected by noise caused by aircraft using the north west runway.

**177** We find that argument unconvincing. The Divisional Court was, in our view, right to conclude that the Secretary of State's decision, on expert advice, to use indicative flight paths in the noise assessment lay squarely within his decision-making discretion. This was a classic exercise of planning judgment, on the kind of issue for which the court will allow the decision- E maker a substantial "margin of appreciation"—as explained in *Mott*. The Secretary of State exercised his judgment rationally. And there was no default in his meeting the requirement in paragraph (c) of Annex I to identify areas "likely to be significantly affected" or that in article 5(2) to include in an environmental report "the information that may reasonably be required". Both of those requirements leave the authority responsible for preparing a F plan or programme a wide margin of judgment.

**178** A similar conclusion applies to Mr Pleming's other submission on this issue, which attacks the Secretary of State's decision to adopt the 54 dB LAeq 16-hour threshold as the LOAEL. Mr Pleming accepted that the SEA Directive and the SEA Regulations do not provide generally for prescriptive limits or thresholds to be used in the assessments performed in an environmental report, nor any specific threshold for noise impact assessment. G Yet he submitted that in this case the adoption by the Secretary of State of the 54 dB LAeq 16-hour threshold was unlawful, for two reasons. First, he submitted, it was irrational and contrary to the precautionary principle to adopt a higher threshold than was set in the Government's own policy, namely the 51 dB LAeq 16-hour level in its Air Navigation Guidance 2017. Secondly, the adoption of that threshold had the effect of masking the true H potential noise impacts of aircraft using the north west runway at Heathrow.

**179** In responding to those submissions Mr Maurici contended, as he did before the Divisional Court, that they amount to no more than a disagreement with expert opinion—an impermissible basis for impugning a decision-maker's exercise of judgment in a claim for judicial review (see the judgment of Beatson LJ in *Mott* [2016] 1 WLR 4338, para 70). Mr Maurici

pointed to Mr Lotinga's evidence, which explained why the adoption of the 54 dB LAeq 16-hour contour was appropriate. In his first witness statement, dated 28 November 2018, Mr Lotinga concluded in para 3.3.39:

> "[In] aviation noise policy terms, a suitable threshold for identifying potentially significant adverse effects of aviation noise is considered to be 54 dB LAeq,16hr … In the AoS, the assessment approach taken was that any predicted increases in exposure to the noise impact categories of 54 dB LAeq,16hr and above, due to an expansion scheme option, constituted a 'significant negative effect'— this is consistent with current national policy."

As Mr Maurici also told us, the CAA, as regulator, specifically advised against the use of a threshold below 54 dB LAeq 16-hour.

**180** The Secretary of State's position here is, it seems to us, correct. The Hillingdon claimants' argument is, in truth, a criticism of the expert evidence upon which the Secretary of State based his decision to select 54 dB LAeq 16-hour as the appropriate threshold. The court's reviewing role does not stretch to determining disputed issues of technical, expert evidence. As the Divisional Court concluded (in para 491 of its judgment), it was inappropriate to expect, in a claim for judicial review, a resolution of contentious matters of expert opinion on the question of whether the threshold ought not to have been set at 54 dB, but at 51 dB or some other level. This again was, obviously, a matter of judgment for the Secretary of State, having in mind the expert advice he was given. The judgment he reached might have been different. But it is not vulnerable to public law challenge.

**181** Mr Pleming submitted that it was not enough for the Secretary of State to identify in the Appraisal of Sustainability only the numbers of people and buildings likely to receive a significant noise impact. This, he submitted, was inconsistent with the requirement under paragraph (c) of Annex I to identify the "areas" likely to be significantly affected. "Areas" would include, for example, schools, open spaces, hospitals and care homes. The impacts on them ought to have been considered in the noise assessment—but were not. Failure to do this went against the purpose of the SEA Directive to ensure that communities likely to be affected by a plan or programme are properly consulted and given an early and effective opportunity to comment. If, as here, only numbers of people and buildings are included in a noise impact assessment, communities are denied that opportunity.

**182** This argument, we think, rests on a misunderstanding of paragraph (c) of Annex I. The concept of "areas" in that provision does not, in our view, exclude the approach to noise impact assessment adopted in the Appraisal of Sustainability. It does not preclude an assessment that concentrates on the effects of aviation noise on the population of an area within particular noise contours, demonstrating the number of people and buildings likely to experience noise at given levels. This does not mean that an approach that goes further—for example, by bringing into the assessment the effects on particular land uses within the "areas" affected by noise—would not also comply. But it does mean that the hurdle of demonstrating irrationality or illegality in the noise impact assessment undertaken for the ANPS in the Appraisal of Sustainability is not overcome by the submission that the assessment should have been on a different basis, or enlarged beyond what was actually done.

**183** A further point, fairly made by Mr Maurici, is that, at the development consent order stage, there will be a full process of consultation and assessment in the EIA for the third runway project—if and when that project is pursued; and that the airspace change process also lies ahead. In both of those future processes the Hillingdon claimants will be able to make submissions on noise and other environmental impacts, with the advantage, then, of much greater clarity not only on the third runway development itself but also on the flight paths to and from the expanded airport.

*The climate change issues*

**184** The issues concerning the United Kingdom's commitments on climate change can conveniently be simplified, and dealt with, under four principal headings: "Climate change issues (3), (4), (5) and (6)—did the Government's commitment to the Paris Agreement constitute government policy on climate change, which the Secretary of State was required to take into account?"; "Climate change issue (1)—whether the designation of the ANPS was unlawful because the Secretary of State acted in breach of section 10(3) of the Planning Act"; "SEA Directive issue (4)—whether the Secretary of State breached the SEA Directive by failing to consider the Paris Agreement"; and "Climate change issue (2)—did the Secretary of State err in his consideration of non-$CO_2$ impacts and the effect of emissions beyond 2050?" (see paras 12 and 13 above).

**185** As we have said, the Climate Change Act set a "carbon target" for the United Kingdom to reduce its greenhouse gas emissions by 80% from their level in 1990 by 2050 (section 1). This was consistent with the global temperature limit in place in 2008, which was 2°C (see para 17 above). In contrast, the Paris Agreement enshrines a firm commitment to restricting the increase in the global average temperature to "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1·5°C above pre-industrial levels" (article 2(1)(a)) (see para 23 above).

**186** It is common ground that the Secretary of State did not take the Paris Agreement into account in the course of making his decision to designate the ANPS.

*The judgment of the Divisional Court*

**187** We begin by outlining the reasoning of the Divisional Court, which considered the topic of climate change in paras 558 to 660 of its judgment.

**188** In paras 558 to 592, the Divisional Court set out a helpful summary in chronological form of developments in this area, both at the international level and at the domestic level. It set out the history of international agreements since 1992, culminating in the Paris Agreement in 2015. It also referred to the domestic legislation, in particular the Climate Change Act.

**189** In paras 593 to 601, the Divisional Court summarised what was said in the ANPS about the subject of climate change. In particular, it quoted in full paras 3.61 to 3.69 and 5.82 of the ANPS. It is unnecessary to set out paras 3.61 to 3.69 of the ANPS again here. But we should set out para 5.82, which states:

> "Any increase in carbon emissions alone is not a reason to refuse development consent, unless the increase in carbon emissions resulting

from the project is so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets."

**190** In paras 602 to 660, the Divisional Court considered in turn Plan B Earth's grounds of challenge and Friends of the Earth's grounds of challenge in the applications for permission to bring claims for judicial review then before it. The court concluded that none of the arguments were viable and refused permission to bring claims for judicial review. Some—but not all—of the arguments made to the Divisional Court have been resurrected before this court.

**191** It is to be noted that Plan B Earth's grounds centred upon the meaning and effect of section 5(8) of the Planning Act, with the support of the Hillingdon claimants, whereas the arguments for Friends of the Earth focused on section 10. Indeed, counsel for Friends of the Earth (Mr David Wolfe QC) expressly distanced himself from the submissions of Plan B Earth based on section 5(8), accepting the relevant policy was no more and no less than that set out in the Climate Change Act (see paras 605 and 636 of the judgment).

**192** In paras 606 and 607, the Divisional Court said:

"606. It is well established that English law is a dualist legal system under which international law or an international treaty has legal force at the domestic level only after it has been implemented by a national statute: see, e g, *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 500, per Lord Oliver of Aylmerton, and *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 747F–H, per Lord Bridge of Harwich. Therefore, none of them having been incorporated, any obligation imposed on the UK Government by the Paris Agreement has no effect in domestic law.

"607. But, in any event, as we have described, whilst expressing international objectives—notably, to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1·5°C above pre-industrial levels—the Paris Agreement imposes no obligation upon any individual state to limit global temperatures or to implement the objective in any particular way. It expresses global objectives, and aspirations in respect of national contributions to meet those objectives; and it obliges each state party to 'prepare, communicate and maintain successive nationally determined contributions that it intends to achieve'. Parties are required to pursue domestic mitigation measures, with the aim of achieving the objectives; and ensure they meet the requirement for successive nationally determined contributions to be progressive (article 4). But it clearly recognises that the action to be taken in terms of contributions to the global carbon reduction will be nationally determined 'in the light of different national circumstances' (article 2(2)); and that, in that determination of national contributions, economic and social (as well as purely environmental) factors and the consideration of how other states are proposing to contribute will or may play a proper part. It is clearly recognised on the face of the Paris Agreement that the assessment of the appropriate

A contribution will be complex and a matter of high level policy for the national government."

It went on to say in para 608:

> "Parliament has determined the contribution of the UK towards global goals in the [Climate Change Act 2008 ('CCA 2008')]. Of course, B that is not framed in terms of global temperature reduction—a national contribution could not be so framed—but it was clearly based on a global temperature limit in 2050 of 2°C above pre-industrial levels. No one suggests otherwise. However, the target set in section 1 of the Act—that the net UK carbon account for 2050 is at least 80% lower than the 1990 baseline—was set, by Parliament, having taken into C account, not just environmental, but economic, social and other material factors. It is an entrenched policy, in the sense that that target cannot be changed other than in accordance with the Act, ie only if there have been significant developments in scientific knowledge about climate or in European or international law or policy, and then only after obtaining and taking into account advice from the [Committee on Climate Change ('CCC')] and being subject to the parliamentary affirmative resolution D procedure."

And in para 610:

> "The most recent formally expressed view of the CCC is that the current target in section 1 of the CCA 2008 is potentially compatible with the ambition of the Paris Agreement to limit temperature rise to E 1·5°C and 'well below' 2°C, ie that ambition could be attained even if the current target is maintained, and therefore one possible rational response to the Paris Agreement is to retain the current CCA 2008 targets, at least for the time being."

**193** In para 612, the court agreed with the submission of Mr Maurici in this regard, supported by Mr Wolfe for Friends of the Earth, "that F government policy in respect of climate change targets was and is essentially that set out in the CCA 2008".

**194** In para 615, the Divisional Court said:

> "The UK policy in this regard, now and at all relevant times, is and has been based on a national carbon cap. The cap is as set out the CCA 2008. It is based upon the 2°C temperature limit. For the reasons we G have given, that policy is 'entrenched' and can only be changed through the statutory process. Despite the fact that government policy could of course be outside any statutory provisions—and despite Mr Crosland's submissions that, in some way, the CCA 2008 cap has to be read with the Paris Agreement (see, eg transcript, day seven, pp 112 and 116)—neither policy nor international agreement can override a statute. Neither H government policy (in whatever form) nor the Paris Agreement can override or undermine the policy as set out in the CCA 2008. In our view, this way of putting the submission is inconsistent with Mr Crosland's express and unequivocal concession that the carbon target in the CCA 2008 *is* government policy and *was* a material consideration for the purposes of the ANPS. It seeks collaterally to undermine the statutory

provisions. The same flaw permeated Plan B Earth's amended statement of facts and grounds and written submissions."

And in paras 618 and 619:

"618. For those reasons, in his decision to designate the ANPS, the Secretary of State did not err in taking the CCA 2008 targets into account; indeed, he would clearly have erred if he had not taken into account the targets as fixed by Parliament.

"619. Nor, in our view, did he err in failing to take into account the Paris Agreement, or the premise upon which that Agreement was made namely that the temperature rise should be limited to 1·5°C and 'well below' 2°C. This way of putting the ground substantially overlaps with ground 12 pursued by Mr Wolfe on behalf of [Friends of the Earth], and we will not repeat our response to that ground here (see, rather, paras 633 and following below). However, briefly, the Secretary of State was not obliged to have foreshadowed a future decision as to the domestic implementation of the Paris Agreement by way of a change to the criteria set out in the CCA 2008 which can only be made through the statutory process; and, indeed, he may have been open to challenge if he had proceeded on a basis inconsistent with the current statutory criteria. Nor was he otherwise obliged to have taken into account the Paris Agreement limits or the evolving knowledge and analysis of climate change that resulted in that agreement."

**195** As that passage mentions, the court also addressed, and rejected, a similar argument that was advanced by Friends of the Earth (in paras 633 to 649 of its judgment).

*Relevant evidence*

**196** In her first witness statement (dated 29 November 2018) Ms Low, on behalf of the Secretary of State, said in para 458:

"In October 2016 the CCC said that the Paris Agreement '*is more ambitious than both the ambition underpinning the UK 2050 target and previous international agreements*', but that the UK should not set new UK emissions targets now, as it already has stretching targets and achieving them will be a positive contribution to global climate action. Furthermore, the CCC acknowledged in the context of separate legal action brought by Plan B against the Secretary of State for Business, Energy and Industrial Strategy [here there is footnote 111] that it is possible that the existing 2050 target could be consistent with the temperature stabilisation goals set out in the Paris [Agreement]. Subsequently, in establishing its carbon obligations for the purpose of assessing the impact of airport expansion, *my team has followed this advice and considered existing domestic obligations as the correct basis for assessing the carbon impact of the project*, and that it is not appropriate at this stage for the government to consider any other possible targets that could arise through the Paris Agreement." (Emphasis added.)

**197** The document referred to in footnote 111 was the Committee on Climate Change's response to Plan B Earth's reply to the summary grounds

of defence in the proceedings brought by Plan B Earth in 2018 against the Secretary of State for Business, Energy and Industrial Strategy.

**198** That document was ordered to be served by Nicola Davies J on 20 March 2018. It does not take the form of evidence, for example as a witness statement, because it is not signed as to the truth of its contents. Nor is it a formal pleading or skeleton argument because it is not signed by counsel or solicitors either. Nevertheless, it comprises submissions made in the then proceedings for judicial review. Para 11(v) stated:

> "In considering the implications of the political agreement reached in Paris for the UK's 2050 target, it is necessary to translate the temperature goal in the Agreement to what this could mean for UK emissions. Having considered this in our 2016 report, we noted that: 'The UK 2050 target is potentially consistent with a wide range of global temperature outcomes' (p 16). *The CCC recommended no change to the existing UK 2050 target (at that time, October 2016), not because a more ambitious target was infeasible, but rather because the existing UK target was potentially consistent with more ambitious global temperature goals, including that in the Paris Agreement.*" (Emphasis added.)

**199** In para 9 it was stated:

> "In any consideration of the need to amend the 2050 target for reducing emissions, there is an explicit role for the CCC. The Climate Change Act (2008) sets out (section 3(1)(a)) that before amending the 2050 target, the SoS must obtain and take into account the advice of the CCC. Following on from the Paris Agreement, reached towards the end of 2015, the CCC decided—and in the absence of a request from the Government—that it should provide advice to the SoS. This advice was provided in October 2016."

And in para 27:

> "The CCC accepts that the Paris Agreement describes a greater level of global ambition, in terms of limiting temperature rise, than the one which formed the *basis* for setting the UK's existing 2050 target. However, the committee's advice in its 2016 report was based on an updated assessment, taking account of the latest evidence, including the IPCC Fifth Assessment Report ('AR5'). That evidence had moved on, reflecting factors including: (a) The latest scientific understanding, including a wider range for climate sensitivity, i e the amount of warming that would result from a given amount of greenhouse gas emissions (b) Slower growth in global emissions since 2008 than had previously —in 2008—been assumed (partly reflecting the effects of the global financial crisis) (c) The latest assessments of options for reducing emissions, including greenhouse gas removal technologies. On this basis, *as assessed in 2016*, the evidence suggested an at least 80% emissions reduction target for the UK in 2050 *could be consistent* with achieving a less than 2°C temperature rise globally." (Emphasis added.)

In para 32, in its summary, the document said the claimants' argument in that case was based on a misinterpretation of the Paris Agreement and a

confusion between the Committee on Climate Change's advice relating to the 2050 target and that relating to the achievements of net zero emissions. The summary continued (at sub-paragraph b):

> "The claim that the CCC's advice in terms of consistency with the Paris Agreement is 'untenable'. It was integral to the CCC's advice that it should be consistent with the Paris Agreement. The long-term temperature goal in the Paris Agreement covers a range of ambition from 'well below 2°C' to 'efforts towards 1·5°C'. It does not specify a separate 1·5°C goal. The CCC's 2016 advice reflected consideration of the range and concluded that the existing 2050 target was consistent with a wide range of global temperature outcomes. There will be opportunities, and further evidence, to look at this again."

**200** Mr Tim Crosland, on behalf of Plan B Earth, submitted that this was not evidence, still less was it an up-to-date statement of the Committee on Climate Change's advice to the Secretary of State in April 2018. Rather it was no more than a cross-reference back to the Committee on Climate Change's report of October 2016. Furthermore, he submitted, it was merely the interpretation of the person, presumed to be counsel, responsible for drafting the legal submissions of that report.

**201** Nevertheless, as is apparent from the terms of para 458 in the witness statement of Ms Low, the document was treated by her and her team as "advice" from the Committee on Climate Change. As is also clear from para 458, Ms Low and her team clearly regarded "existing domestic legal obligations" as being "the correct basis for assessing the carbon impact of the project". We do not think, however, that this necessarily followed from what the Committee on Climate Change was saying in its response document.

**202** In our view, there are two difficulties with the reliance that Ms Low and her team placed upon the "advice" from the Committee on Climate Change. First, the committee was not necessarily saying that the targets set by the Climate Change Act were consistent with the Paris Agreement. It was saying that they "could" be consistent with it.

**203** Secondly, and more fundamentally, even if the legal targets in the Climate Change Act were consistent with the Paris Agreement, it did not follow that, as a matter of law, the Government was somehow precluded from taking into account the Paris Agreement when designating the ANPS. What the Committee on Climate Change was addressing was a different question, namely whether the legal targets for reducing $CO_2$ emissions set out in the Climate Change Act should be amended. Those targets would naturally apply across the board, in a variety of contexts. The narrower question that is raised in this case is whether the Secretary of State was under a legal obligation to take into account the Paris Agreement—or indeed an obligation not to take it into account at all—in the particular context of the decision to designate the ANPS. That question was not necessarily answered, as a matter of law, by what the legal targets in the Climate Change Act were.

**204** Mr Crosland submitted that the Committee on Climate Change report of October 2016 did not in fact say that the 80% target for 2050 was potentially consistent with the Paris Agreement.

**205** We have already referred (in para 27 above) to the passage in the Executive Summary of the Committee on Climate Change's report, advising the Government that it should "not set new UK emissions targets now".

**206** In section 1 of its report the Committee on Climate Change said:

"1. *UK and international ambition*

"In December 2015 the UK, under the UN negotiations and alongside over 190 other countries, drafted the Paris Agreement to tackle climate change. It will enter into force by the end of 2016 having been ratified by the US, China, Brazil, the EU and others. The agreement describes a higher level of global ambition than the one that formed the basis of the UK's existing emissions reduction targets:

• The UK's current long term target is a reduction of greenhouse gas emissions of at least 80% by the year 2050, relative to 1990 levels. This 2050 target was derived as a contribution to a global emissions path aimed at keeping global average temperature to around 2°C above pre-industrial levels.

• The Paris Agreement aims to limit warming to well below 2°C and to pursue efforts to limit it to 1·5°C. To achieve this aim, the agreement additionally sets a target for net zero global emissions in the second half of this century.

"Alongside the Agreement nearly all parties have submitted pledges of action to 2030. Current pledges fall short of a path to meet either the stated temperature aim of the Paris Agreement or the implicit aim behind the UK target. However, the agreement includes a process for taking stock of progress and increasing action around the world:

• Pledges by parties in total imply annual global emissions in 2030 of 56 billion tonnes of carbon dioxide equivalent ($GtCO_2e$) whereas the parties to the agreement agreed the need to reduce annual emission to 40 $GtCO_2e$ to be on a path to below 2°C.

• The agreement creates a 'ratchet' mechanism of pledges and reviews to facilitate parties increasing their ambition towards the temperature target. A UN dialogue to take stock of current pledges will take place in 2018. Starting in 2020 the parties will provide new pledges every five years, with stocktakes of the pledges occurring every five years from 2023.

• Parties are also asked to publish mid-century, long term low greenhouse gas emission development strategies by 2020.

"We welcome the Government's commitment to ratifying the Paris Agreement by the end of the year. The clear intention of the agreement is that effort should increase over time. *While relatively ambitious, the UK's current emissions targets are not aimed at limiting global temperature to as low a level as in the Agreement, nor do they stretch as far into the future.*" (Emphasis added.)

**207** On p 9 of the report it was said that to stay close to 1·5°C, $CO_2$ emissions would need to reach net zero by the 2040s. Reference was made to table 1, which was set out on the same page.

**208** In section 4 of the report the Committee on Climate Change said:

"4. *Implications for UK policy priorities in the nearer term*

"Current policy in the UK is not enough to deliver the existing carbon budgets that Parliament has set. The Committee's assessment in our 2016 Progress report was that current policies would at best deliver around half of the emissions reductions required to 2030, with

no current policies to address the other half. This carbon policy gap must be closed to meet the existing carbon budges, and to prepare for the 2050 target and net zero emissions in the longer term.

"The existing carbon budgets are designed to prepare for the UK's 2050 target in the lowest cost way as a contribution to a global path aimed at keeping global average temperature to around 2ºC. Global paths to keep close to 1·5ºC, at the upper end of the ambition in the Paris Agreement, imply UK reduction of at least 90% below 1990 levels by 2050 and potentially more ambitious efforts over the timescale of existing carbon budgets.

"*However, we recommend the Government does not alter the level of existing carbon budgets or the 2050 target now. They are already stretching and relatively ambitious compared to pledges from other countries*. Meeting them cost-effectively will require deployment to begin at scale by 2030 for some key measures that enable net zero emissions (eg carbon capture and storage, electric vehicles, low-carbon heat). In theory these measures could allow deeper reductions by 2050 (on the order of 90% below 1990 levels) if action were ramped up quickly.

"The priority now should be robust near-term action to close the gap to existing targets and open up options to reach net zero emissions:

• The Government should publish a robust plan of measures to meet the legislated UK carbon budgets, and deliver policies in line with the plan.

• If all measures deliver fully and emissions are reduced further, this would help support the aim in the Paris Agreement of pursuing efforts to limit global temperature rise to 1·5ºC.

• The Government should additionally develop strategies for greenhouse gas removal technologies and reducing emissions from the hardest-to-treat sectors (aviation, agriculture and parts of industry). There will be several opportunities to revisit the UK's targets in future as low-carbon technologies and options for greenhouse gas removals are developed, and as more is learnt about ambition in other countries and potential global paths to well below 2ºC and 1·5ºC:

• 2018: the Intergovernmental Panel on Climate Change ('IPCC') will publish a Special Report on 1·5ºC, and there will be an international dialogue to take stock of national actions.

• 2020: the Committee will provide its advice on the UK's sixth carbon budget, including a review of progress to date, and nations will publish mid-century greenhouse gas development plans.

• 2023: the first formal global stocktake of submitted pledges will take place.

"We will advise on whether to set a new long term target, or to tighten UK carbon budges, as and when these events or any others give rise to significant developments." (Emphasis added.)

*Statements made on behalf of the Government after its ratification of the Paris Agreement*

**209** In the Government paper, "The Clean Growth Strategy" first published in 2017, the Secretary of State for Business, Energy and Industrial Strategy stated, at p 8:

A "The UK played a central role in securing the 2015 Paris Agreement in which, for the first time, 195 countries (representing over 90% of global economic activity) agreed stretching national targets to keep the global temperature rise [well] below two degrees. The actions and investments that will be needed to meet the Paris commitments will ensure the shift to clean growth *will be at the forefront of policy and economic decisions made by government* and businesses in the coming B decades." (Emphasis added.)

**210** In the judicial review application (CO/16/2018) brought by Plan B Earth against the Secretary of State for Business, Energy and Industrial Strategy (see paras 197 to 199 above), the Secretary of State served summary grounds of defence dated 29 January 2018. Those summary grounds C included quotations from government ministers, upon which Mr Crosland now relies.

**211** Para 23 stated:

"[While] the Government is fully committed to the objectives in the Paris Agreement, the legal obligation upon the parties is to prepare, communicate and maintain nationally determined contributions to D reduce net emissions, with a view to achieving the purpose of holding global average temperature increases to '*well below 2°C*' above pre-industrial levels, and pursuing efforts to limit them to 1·5°C. *This is not the same as a legal duty or obligation for the parties, individually or collectively, to achieve this aim*." (Emphasis in original.)

**212** In para 29 there were quotations set out from two relevant ministers. E First on 14 March 2016, the Rt Hon Andrea Leadsom MP, then Minister of State for Energy, said in a debate in the House of Commons during the report stage of the Energy Bill:

"*The Government believe we will need to take the step of enshrining the Paris goal of net zero emissions in UK law*—the question is not whether, but how we do it, and there is an important set of questions F to be answered before we do. The Committee on Climate Change is looking at the implications of the commitments made in Paris and has said it will report in the autumn. We will want to consider carefully its recommendations." (Emphasis added.)

**213** On 24 March 2016, the Rt Hon Amber Rudd MP, then Secretary of State for Energy and Climate Change, said, in answer to an oral question G on what steps her department was taking to enshrine the commitment to net zero emissions made at the Paris Climate Change Conference:

"As confirmed last Monday during the report stage of the Energy Bill, *the Government will take the step of enshrining into UK law the long-term goal of net zero emissions, which I agreed in Paris last December*. The question is not whether we do it but how we do it." (Emphasis H added.)

**214** On 14 June 2018, the Chair and Deputy Chair of the Committee on Climate Change (Lord Deben and Baroness Brown of Cambridge) wrote a letter to the Secretary of State for Transport (the Rt Hon Chris Grayling MP) in the following terms:

"The UK has a legally binding commitment to reduce greenhouse gas emissions under the Climate Change Act. *The Government has also committed, through the Paris Agreement, to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1·5°C.*

"*We were surprised that your statement to the House of Commons on the National Policy statement on 5 June 2018 made no mention of either of these commitments*. It is essential that aviation's place in the overall strategy for UK emissions reduction is considered and planned fully by your department …

• Our analysis has illustrated how an 80% economy-wide reduction in emissions could be achieved with aviation emissions at 2005 levels in 2050. Relative to 1990 levels this is a doubling of emissions, and an increase in its share of total emissions from 2% to around 25%. We estimate that this would allow for around 60% growth in aviation demand, dependent on the delivery of technological and operational improvements and some use of sustainable biofuels.

• Aviation emissions at 2005 levels in 2050 means other sectors must reduce emissions by more than 80%, and in many cases will likely need to reach zero.

• Higher levels of aviation emissions in 2050 must not be planned for, since this would place an unreasonably large burden on other sectors.

"The Airports Commission also incorporated the CCC's advice on aviation, concluding that 'any change to [the] UK's aviation capacity would have to take place in the context of global climate change, and the UK's policy obligations in that area'.

"We look forward to the department's new aviation strategy in 2019, which we expect will set out a plan for keeping UK aviation emissions at or below 2005 levels by 2050. To inform your work we are planning to provide further advice in spring 2019." (Emphasis added.)

**215** On 20 June 2018 the Secretary of State replied:

"I note your surprise that the UK's commitments to reduce greenhouse gas emissions were not specifically addressed in the oral statement to the House of Commons but I can assure you that the Government remains committed to meeting our climate change target of an at least 80% emissions reduction below 1990 levels by 2050 and remains open and willing to consider all feasible measures to ensure that the aviation sector contributes fairly to UK emissions reduction. I hope you will understand that I am not always able to include all the detail I would like in an oral statement."

**216** It is clear, therefore, that it was the Government's expressly stated policy that it was committed to adhering to the Paris Agreement to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1·5°C.

*The Secretary of State's stance as pleaded*

**217** In the amended detailed grounds for contesting the claim dated 29 November 2018 (and amended on 1 February 2019), it was submitted on behalf of the Secretary of State (at para 30) that the Climate Change Act does not include emissions from international aviation. It was said that

A the Committee on Climate Change had advised that emissions from UK aviation (both domestic and international) should be no more than 2005 levels (37·5 $MtCO_2$) in 2050. This is sometimes referred to as "the Planning Assumption". Plan B Earth had referred to it as "the Aviation Target". It was said that the Government had not yet decided whether to accept that advice. A decision on this was deferred by the Aviation Policy Framework and would be considered as part of the emerging Aviation Strategy to be adopted in B 2019. This would re-examine how the aviation sector can best contribute its fair share to emissions reductions at both UK and global level.

**218** In para 61 of the amended grounds the Secretary of State submitted:

> "There is no credible basis for a suggestion that the obligation in section 10(2) and (3) in some way extends further than section 5(8) C to cover (ie in the sense of mandating) "*consideration of how the NPS policies relate to known developing areas of climate change policy*". Rather, *those provisions provide a very strong pointer that such matters should not be considered*: the clear intention of Parliament being that consideration should be given only to existing domestic legal obligations and policy commitments in relation to the mitigation of, and adaptation to, climate change. At the least, the provisions D provide no statutory obligation to consider anything other than existing domestic legal obligations and policy commitments. There is, in sum, no warrant for the suggestion that Parliament was intending to set the Secretary of State the impossible task of assessing and taking into account in an NPS not just existing domestic legal obligations and policy commitments in relation to the mitigation of, and adaptation to, climate E change but also any possible and as yet unsettled future policies and commitments." (Emphasis added.)

He went on in para 62(5) and (6) to submit:

> "(5) Unless and until the 2050 Target is amended following the proper processes under the CCA 2008, the correct approach is to F consider existing domestic legal obligations and policy commitments and this is what the ANPS does. The relevant domestic legal and policy commitments being those found principally in or set under the CCA 2008 itself (which included for example the Clean Growth Strategy referred to paras 8.5 and 8.6 of the Consultation Response) and the APF.
>
> "(6) The Secretary of State and his officials did not ignore the G Paris Agreement, or that there would be emerging material within Government evidencing developing thinking on its implications, but *it was concluded that such material should not be taken into account, ie it was not relevant*, since it did not form an appropriate basis upon which to formulate the policies contained in the ANPS. This included for the reasons set out in para 34, above. Those reasons relate to the nature of the obligations set out in the Paris Agreement, its effect in domestic law H as an unincorporated, international treaty, and to the fact that as at the date of designation of the ANPS, the CCC's views on the implications of the Paris Agreement had not yet been sought, let alone received. As the Government's statutory adviser on matters relating to climate change, the CCC has a critical advisory role in relation to the setting of relevant policy by the Government." (Emphasis added.)

And in para 63(9):

> "Accordingly, the Secretary of State will not pursue any discretion argument that there: (a) was no emerging material within government evidencing developing thinking on the implications of the Paris Agreement, or (b) that such material would highly likely have made no difference to the decision to designate the ANPS. There is no need for him to do so as the argument that he was obliged to consider such material in the first place is hopeless and should be refused permission."

**219** There were similar matters pleaded in the amended detailed grounds for contesting the claim brought by Plan B Earth, in particular at para 10.

**220** In early 2019, Holgate J conducted a pre-trial review ("PTR") in preparation for the substantive hearing due to take place in the Divisional Court in March. After that PTR the judge conveyed the following message (via his clerk) to the parties:

> "The judge has read the recent exchange of e-mails on the statement of common ground and climate change issues. His recollection of what occurred at the PTR is broadly along the lines recounted in the letter from Mr Crosland. The defendant's 'concession' (if that be the correct description), or rather helpful narrowing of issues, arose in the context of submissions regarding the applications for disclosure by FoE and Plan B. A principal submission by the defendant was that once the real issue under the grounds of challenge were correctly defined, then the disclosure sought was unnecessary. Para 29 of his position statement says that the only issue is whether the defendant was entitled as a matter of law to consider matters as against existing legal obligations and policy commitments as given effect by the Climate Change Act 2008. If he was, then this particular ground fails. If he was not, and the matter had to be considered as against the Paris Agreement, then the ground of challenge would be made out. Leading counsel for the defendant confirmed to the court that that was the issue and that any other references in the defendant's documents which might be taken to suggest otherwise could be ignored. He also said that if the defendant lost on this issue (defined in this way) he would not raise any discretion points which would justify further specific disclosure. Instead discretion points would be 'generic' in nature. The indication given for the defendant at the hearing was that in so far as the Paris Agreement differs from the 2008 Act in any relevant, significant way, then the matter was not taken into account."

**221** It has been made clear before this court, both in writing and in oral submissions, that the Secretary of State (in contrast to HAL) does not take any point under section 31 of the Senior Courts Act. It follows therefore that the Secretary of State accepts that, if he erred in law in failing to take into account the Paris Agreement before designating the ANPS, it cannot be said that it is highly likely that the outcome would have been substantially the same in any event. If the court does reach that conclusion therefore, the Secretary of State (but not HAL) accepts that there would be no reason to deny the claimants appropriate remedies to give effect to the judgment of the court.

*Climate change issues (3), (4), (5) and (6)—did the Government's commitment to the Paris Agreement constitute government policy on climate change, which the Secretary of State was required to take into account?*

**222** As we have said, the grounds advanced on behalf of Plan B Earth by Mr Crosland focused principally on the requirements of section 5(8) of the Planning Act. Mr Crosland submitted in essence that the Government's commitment to the Paris Agreement was part of "Government policy" within the meaning of that provision. Mr Crosland's position was supported by Mr Pleming for the Hillingdon claimants. In our view, that submission is well founded.

**223** It is important to start by emphasising what section 5(8) does and does not require of the Secretary of State. It does not require him to follow or act in accordance with government policy. In terms what it requires is that the ANPS should explain how the Secretary of State has "taken into account" government policy. It is necessarily implicit in that obligation that the Secretary of State must indeed first have taken that government policy into account. This is an important aspect of the transparency of the Secretary of State's actions and his accountability, both to Parliament and to the wider public.

**224** Next it is important to appreciate that the words "Government policy" are words of the ordinary English language. They do not have any specific technical meaning. They should be applied in their ordinary sense to the facts of a given situation. In particular, we can find no warrant in the legislation for limiting the phrase "Government policy" to mean only the legal requirements of the Climate Change Act. The concept of policy is necessarily broader than legislation.

**225** Thirdly, there is no inconsistency or contradiction between that interpretation and the express language of the Climate Change Act. We note that the target set out in the Act is "at least" 80% by 2050. We consider that the Divisional Court fell into error in those passages of its judgment that we have cited earlier (in particular at para 615), where it appears to have taken the view that the Secretary of State was somehow being required to take a position inconsistent with what was required by his statutory obligations in the Climate Change Act.

**226** Fourthly, there is no question of giving effect to the Paris Agreement (an unincorporated international agreement) through "the back door", as Mr Maurici submitted before us. In our view, the debate that took place before the Divisional Court about the possible impact of an international agreement on domestic law that has not been incorporated by legislation enacted by Parliament was a distraction from the true issue. That debate, it seems to us, did not bear on the proper interpretation of a statutory provision deliberately and precisely enacted by Parliament itself, in the words of section 5(8) of the Planning Act. As we have said, those words do not require the Secretary of State to act in accordance with any particular policy; but they do require him to take that policy into account and explain how it has been taken into account. None of that was ever done in the present case.

**227** It appears that the reason why it was never done is that the Secretary of State received legal advice that not only did he not have to take the Paris Agreement into account but that he was legally obliged not to take it into

account at all (see the quotations from the Secretary of State's pleaded case in the Divisional Court, in paras 216 to 220 above, in particular the passages we have emphasised). In our view, that was a clear misdirection of law and there was, therefore, a material misdirection of law at an important stage in the process. That misdirection then fed through the rest of the decision-making process and was fatal to the decision to designate the ANPS itself.

**228** In our view, the Government's commitment to the Paris Agreement was clearly part of "Government policy" by the time of the designation of the ANPS. First, this followed from the solemn act of the United Kingdom's ratification of that international agreement in November 2016. Secondly, as we have explained, there were firm statements reiterating government policy of adherence to the Paris Agreement by relevant ministers, for example the Rt Hon Andrea Leadsom MP and the Rt Hon Amber Rudd MP in March 2016.

**229** It is important to stress that this means no more than that the executive must comply with the will of Parliament, as expressed in the terms of section 5(8).

**230** Furthermore, it simply requires the executive to take account of its own policy commitments. After all, the acts of negotiating, signing and ratifying an international treaty are all acts which under the British constitution are entrusted to the executive branch of the state—the Crown. This distinction between the functions of the Crown and Parliament is what underlies the dualist character of our legal system (see, for example, the speech of Lord Oliver of Aylmerton in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 500) and explains why the ratification of an international treaty cannot, without more, change domestic law; if it could, the Crown would be able to change the law of this country without the consent of Parliament. But requiring the Crown to comply with what has been enacted by Parliament (in this case the obligations in section 5(8) of the Planning Act) is an entirely conventional exercise in public law.

**231** We repeat that the duty in section 5(8) does not even require the executive to conform to its own policy commitments, simply to take them into account and explain how it has done so.

**232** Finally, as we have already said, the Secretary of State has accepted that, if this court should conclude that he fell into legal error in this respect, there can be no question of refusing remedies under section 31 of the Senior Courts Act 1981.

**233** We would add this observation. It was not submitted to us that in designating the ANPS the Secretary of State committed no error of law —or that, if he did, the error itself was immaterial—because the relevant consequences of meeting the targets already in place under the Climate Change Act would have been, or at least might have been, the same as those of implementing the United Kingdom's commitments under the Paris Agreement. Such an argument, had it been put forward, would in our opinion have been mistaken. If the Secretary of State was to comply with his duty under section 5(8) of the Planning Act, the implications of the Paris Agreement for his decision, and whether they were different from the implications of meeting the targets under the Climate Change Act, were matters for him specifically to consider and explicitly address in that very exercise. But he did not do so. It is clear that, in deciding to designate the ANPS, he did not take the Paris Agreement into account at all. On the

A contrary, as we understand it, he consciously chose—on advice—not to take it into account. And in our view, as we have said, his failure to take it into account was enough to vitiate the designation.

*Climate change issue (1)—whether the designation of the ANPS was unlawful because the Secretary of State acted in breach of section 10(3) of the Planning Act*

B **234** The grounds advanced on behalf of Friends of the Earth by Mr Wolfe focused in particular on the requirements of section 10 of the Planning Act. Mr Wolfe submitted:

(1) There was an error of law in the approach taken by the Secretary of State because he never asked himself the question whether he could take into account the Paris Agreement pursuant to his obligations under section 10.

C (2) If he had asked himself that question, and in so far as he did, the only answer that would reasonably have been open to him is that the Paris Agreement was so obviously material to the decision he had to make in deciding whether to designate the ANPS that it was irrational not to take it into account.

**235** We accept those submissions in essence.

D **236** First, it is clear to us from the material that was before the Divisional Court that the Secretary of State was advised that he was not permitted as a matter of law to take into account the Paris Agreement because he should for relevant purposes confine himself to the obligations set out in the Climate Change Act (see paras 218 and 220 above). He therefore did not ever consider whether to take the Paris Agreement into account as a matter of discretion.

E **237** Secondly, and in any event, if he had appreciated he had any discretion in the matter, we agree that the only reasonable view open to him was that the Paris Agreement was so obviously material that it had to be taken into account. It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations

F that may be taken into account in the discretion of the decision-maker (see, for example, the opinion of Lord Brown of Eaton-under-Heywood in *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, paras 57 to 59). As Lord Brown observed of that third category (in para 58 of his opinion), there can be some unincorporated international obligations that are "so obviously material" that they must be taken into account. The Paris Agreement fell into this category.

G **238** Again we would emphasise that it does not follow from this that the Secretary of State was obliged to act in accordance with the Paris Agreement or to reach any particular outcome. The only legal obligation, in our view, was to take the Paris Agreement into account when arriving at his decision.

*WWF's submissions*

H **239** We had substantial written submissions placed before us on behalf of the intervener, WWF. This generated a great deal of dispute between the parties. With the permission of the court, the Secretary of State filed a 30-page response some time after the hearing had finished; together with a new witness statement and documents, taking up a lever arch file. There were replies by WWF and Friends of the Earth and an unsolicited response to

those replies by the Secretary of State, dated 8 November 2019, for which no permission was granted and to which objection was taken by WWF and Friends of the Earth.

**240** What Ms Helen Mountfield QC on behalf of WWF submitted is that the phrase "sustainable development" must now be interpreted in the light of the United Kingdom's obligations in international law generally and, in particular, under the 1989 UN Convention on the Rights of the Child, as interpreted by the committee established under that Convention. The Secretary of State objected to this line of argument, essentially because he submitted that this is, in substance, a new ground of challenge and it is inappropriate for this to be raised on an appeal, let alone by an intervener.

**241** In the end we have not found it necessary to resolve these procedural and new substantive issues. This is because the submissions for WWF were made in support of the grounds advanced by Friends of the Earth, which we have in essence accepted for the reasons set out above.

*SEA Directive issue (4)—did the Secretary of State breach the SEA Directive by failing to consider the Paris Agreement?*

**242** On behalf of Friends of the Earth, Mr Wolfe (under what he has called ground C in this appeal) also relied on an alleged breach of the duty to undertake a lawful strategic environmental assessment in accordance with the requirements of the SEA Directive and the SEA Regulations.

**243** Mr Wolfe submitted that the reference to the "international" level in Annex I to the SEA Directive must include unincorporated international agreements because otherwise, if an agreement has been incorporated into either EU law or domestic law, there would be no need to refer to the international level at all. Mr Wolfe also emphasised that what has to be taken into account are the "objectives" established at international level. This does not necessarily have to consist of particular, precise legal obligations.

**244** We accept those submissions on behalf of Friends of the Earth.

**245** Mr Maurici submitted that this provision still leaves a wide margin of discretion to the Secretary of State in deciding what is "relevant" to the plan or programme in question.

**246** That is of course right. But no matter how wide the margin of judgment to be afforded to the Secretary of State in this context, in our view the Paris Agreement was obviously relevant to the plan or programme under consideration in this case. This is essentially for the reasons we have already given in considering domestic law (see section 10 of the Planning Act).

**247** We have therefore come to the conclusion that in this respect too the designation of the ANPS was vitiated by an error of law.

*Climate change issue (2)—did the Secretary of State err in his consideration of non-$CO_2$ impacts and the effect of emissions beyond 2050?*

**248** Mr Wolfe submitted that the Divisional Court failed in its duty to set out reasons why it was refusing permission to bring this application for judicial review on two grounds: (1) the non-$CO_2$ climate impacts of aviation; and (2) the effect of emissions beyond 2050.

**249** Mr Wolfe contended that these grounds of challenge were clearly raised in the arguments before the Divisional Court by Friends of the Earth. He submitted, first, that the total adverse impact of aviation on the climate is around twice that of its $CO_2$ emissions if taken alone. These impacts are

A not accounted for under the Climate Change Act framework, which is only concerned with $CO_2$ emission targets. Secondly, the Heathrow third runway project was envisaged to last until well into the second half of the present century. Its benefits were assessed in the ANPS up to 2085 but, Mr Wolfe submitted, there was no assessment of the climate change impacts beyond 2050. Furthermore, he argued, aviation is one of the very few sectors for which there are no current or currently envisaged credible alternatives to B fossil fuel, it was obviously relevant to consider whether it was sustainable in the long term to expand aviation activity in the light of the foreseen need to move to net zero emissions during the lifetime of the new runway and the potential need to move to net negative emissions.

**250** Mr Wolfe's fundamental complaint on this ground is that none of these arguments was addressed in the judgment of the Divisional Court. This C ground of appeal in effect raises a "reasons" point.

**251** It is clear from para 659(iv) of the Divisional Court's judgment that it was aware that two of the grounds of challenge brought by Friends of the Earth concerned non-$CO_2$ emissions and the needs of future generations. However, submitted Mr Wolfe, the reasoning of the court that led to its conclusions in para 659 did not separately deal with those two aspects at all.

D **252** Earlier in its judgment (in para 638), the court noted that the Secretary of State accepted that, in designating the ANPS, he took into account only the Climate Change Act carbon emission targets and did not take into account either the Paris Agreement, or otherwise, any post-2050 target or non-$CO_2$ emissions. Mr Wolfe submitted that the reasoning of the court that then followed dealt exclusively with the Paris Agreement point and not these two other aspects at all.

E **253** Mr Maurici made two essential responses to those complaints. First, he submitted that it was unnecessary for the Divisional Court to set out every step in its reasoning and that, in substance, its reasoning relating to the Paris Agreement issue also applied to these two matters. Secondly, if he is wrong about that, he invited this court to rely on the additional grounds set out in the Secretary of State's respondent's notice. We will address each of those F submissions in turn.

**254** In so far as the first submission is sound, which we would not accept, the consequence of this court's conclusions above on the relevance of the Paris Agreement and the defect in the Secretary of State's decision-making process would apply equally to these two further aspects. It is therefore unnecessary for us to dwell at length on what is in essence a "reasons" complaint under Friends of the Earth's ground B. It will suffice that the G preparation and designation of the ANPS will be remitted to the Secretary of State for reconsideration in accordance with the law, during which exercise the Secretary of State can take these further matters into account as well.

**255** On the Secretary of State's respondent's notice we would make these observations.

**256** Mr Maurici submitted that the effect of emissions beyond 2050 was H a matter closely bound up with the aspiration in the Paris Agreement to achieve net zero greenhouse gas emissions in the second half of this century. He submitted, by reference to the witness evidence of Ms Low, that it would be sensible to assess the impact of airport expansion against current climate change targets and that, as and when carbon reduction targets are developed for the post-2050 period, all those concerned will have to comply with the

obligations which result when, and to the extent that, they apply. This point is closely related to the fundamental submission made by Mr Maurici, that there was no obligation on the Secretary of State to take into account the Paris Agreement at all. For the reasons we have already given, we reject that submission. It follows therefore that these two additional aspects of the case, being closely bound, as Mr Maurici submitted they are, with the Paris Agreement issue, will need to be considered in the exercise that the Secretary of State must perform according to law.

**257** That said, we would not be inclined to accept the other submission made by Mr Maurici on the Secretary of State's respondent's notice which relates to non-$CO_2$ emissions. Mr Maurici submitted that the reason why this was not taken into account in the preparation of the ANPS was that the state of scientific knowledge was too uncertain to be capable of accurate measurement at that stage. He pointed out that the question of non-$CO_2$ effects was highlighted in the Airport Commission's discussion paper on aviation and climate change (in April 2013) and in its interim report (on 17 December 2013). The Chair of the Airports Commission (Sir Howard Davies) discussed the question directly with the Chair of the Committee on Climate Change (Lord Deben), who advised that the appropriate approach was not to assess or include non-$CO_2$ effects given the significant scientific uncertainty surrounding their scale. Furthermore, Mr Maurici submitted that, as part of its assessment of the ANPS, the Appraisal of Sustainability considered non-$CO_2$ emissions but set out that these were not able to be assessed because of levels of scientific uncertainty. It was acknowledged in the Appraisal of Sustainability (at para 6.11.11) that there are likely to be highly significant climate change impacts associated with non-$CO_2$ emissions from aviation, which are likely to be of a similar magnitude of the $CO_2$ emissions themselves, but which cannot be readily quantified due to the level of scientific uncertainty. Furthermore, submitted Mr Maurici, these matters were considered in the Government's response to the consultations on the ANPS (at paras 11.49 to 11.50); and in the Post Adoption Statement (at paras 4.4.49 to 4.4.50).

**258** Although those submissions have some force, in the end they do not persuade us. This is because, as Mr Wolfe submitted, the fact that there would be non-$CO_2$ effects was acknowledged and it was recognised that they would be more than twice the $CO_2$ effects. In line with the precautionary principle, and as common sense might suggest, scientific uncertainty is not a reason for not taking something into account at all, even if it cannot be precisely quantified at that stage.

**259** The core of that principle is reflected in principle 15 of the Rio Declaration (adopted at the UN Conference on Environment and Development in Rio de Janeiro on 14 June 1992 and endorsed by the UN General Assembly on 22 December 1992), which provides:

> "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

**260** The precautionary principle is well established in the jurisprudence of the Court of Justice of the European Union (see, for example, *Landelijke*

*Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij (Coöperatieve Producentenorganisatie van de Nerderlandse Kokkelvisserij UA intervening)* (Case C-127/02) [2005] All ER (EC) 353; [2004] ECR I-7405).

**261** Since the outcome of our decision is that the preparation and designation of the ANPS was unlawful, and the ANPS will be remitted to the Secretary of State for reconsideration in accordance with the law, this matter will need to be taken into account as part of that exercise.

*The test for the grant of permission*

**262** Mr Maurici submitted that the test for deciding whether to grant permission to apply for judicial review in a case of this kind is not the normal one—namely whether the grounds are arguable—but rather the heightened test set out by the Court of Appeal in *Mass Energy Ltd v Birmingham City Council* [1994] Env LR 298 (in particular at pp 307 to 308 in the judgment of Glidewell LJ), where he said: "in my view, the proper approach of this court, in this particular case, ought to be … that we should grant leave only if we are satisfied that Mass Energy's case is not merely arguable but is strong; that is to say, is likely to succeed."

**263** Glidewell LJ gave three reasons for reaching that conclusion. First, the court had the benefit of detailed argument between the parties of such depth that, if leave were granted, it was unlikely that the points would be canvassed in much greater depth at substantive hearing. Secondly, there would be a very considerable public disadvantage if there were delay to the project, the subject of that application for judicial review. Thirdly, the court had most, if not all, of the documents that would need to be considered at the substantive hearing.

**264** In our judgment, the test in *Mass Energy* is not appropriate in a case of this kind. That is because the practice has grown up, since the decision in *Mass Energy*, in which, in appropriate cases, the Administrative Court can order a "rolled-up" hearing, deferring the question of permission to be decided, with the substantive hearing to follow immediately if permission is granted. A similar practice has been developed in the Court of Appeal, as this case demonstrates. In such "rolled-up" hearings, there will be no further delay, if permission is granted, before a substantive hearing can take place. The considerations that led the Court of Appeal to set the heightened standard for the grant of leave which it did in *Mass Energy* do not therefore apply in this context.

**265** For those reasons we reject the submission made by Mr Maurici on the approach we should adopt in dealing with the application for permission to apply for judicial review.

**266** In any event, the issue is not in the end dispositive. This is because, even if the heightened test in *Mass Energy* were appropriate, we would conclude that it is met in this case. This is for the reasons we have already given in addressing the substantive grounds of challenge relating to the Paris Agreement, which we have concluded are well founded.

*Relief*

**267** It has long been established that, in a claim for judicial review, the court has a discretion whether to grant any remedy even if a ground of

challenge succeeds on its substance. It was established by Purchas LJ in *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [2017] PTSR 1041, 1060 (1988) that it is not necessary for the claimant to show that a public authority would—or even probably would—have come to a different conclusion. What has to be excluded is only the contrary contention, namely that the minister "necessarily" would still have made the same decision. The *Simplex* test, as it has become known, therefore requires that, before a court may exercise its discretion to refuse relief, it must be satisfied that the outcome would inevitably have been the same even if the public law error identified by the court had not occurred.

**268** The *Simplex* test has been modified by the amendments made to section 31 of the Senior Courts Act by section 84 of the Criminal Justice and Courts Act 2015. The new provisions apply to all claims for judicial review filed since 13 April 2015. They do not apply to applications for statutory review.

**269** On the question of relief, section 31 of the Senior Courts Act, as amended by section 84 of the Criminal Justice and Courts Act 2015, provides:

> "(2A) The High Court— (a) must refuse to grant relief on an application for judicial review, and (b) may not make an award under subsection (4) on such an application, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> "(2B) The court may disregard the requirements of subsection (2A) (a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> "(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

**270** The meaning of "conduct" for this purpose is defined by a new subsection (8), which provides: "In this section 'the conduct complained of', in relation to an application for judicial review, means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief."

**271** Similar provisions have been introduced into section 31 on the question whether permission to bring a claim for judicial review (still referred to in the statute as "leave") should be granted:

> "(3C) When considering whether to grant leave to make an application for judicial review, the High Court— (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and (b) must consider that question if the defendant asks it to do so.
>
> "(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.
>
> "(3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.

A "(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied."

**272** The new statutory test modifies the *Simplex* test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion B vested in the court nevertheless to grant a remedy on grounds of "exceptional public interest". Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely "highly likely". And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been "substantially different" for the claimant.

**273** It would not be appropriate to give any exhaustive guidance on C how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way D of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly E a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ, as he then was, in *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269, para 89).

**274** In this case, as we have said, the Secretary of State does not contend that relief should be refused by this court if otherwise the grounds F of challenge relating to the Paris Agreement succeed. In contrast, HAL does make that contention. On its behalf Mr Humphries submitted that it is unnecessary and inappropriate to grant a remedy in these proceedings because policy in the ANPS requires the applicant for development consent to provide evidence of the carbon impact of the project "such that it can be assessed against the Government's carbon obligations" (para G 5.76 of the ANPS) and that carbon emissions alone may be a reason to refuse development consent if they would be "so significant that it would have a material impact on the ability of Government to meet its carbon reduction targets, including carbon budgets" (para 5.82). Therefore, submitted Mr Humphries, the substance of the issues raised by the appellants can be considered by the Secretary of State at the stage of an application for development consent. And even that would not be the end of the matter. H Even if a decision to grant development consent would be in accordance with the ANPS, the Secretary of State would not be bound to grant consent if to do so would lead to the United Kingdom being in breach of any of its international obligations (see section 104(4) of the Planning Act). This would include compliance with the Paris Agreement. Mr Humphries also pointed out, and emphasised, that the Secretary of State has agreed to consider a

request from Plan B Earth to review the ANPS in light of the Committee on Climate Change's advice of 2 May 2019. That request is being considered under section 6(3) and (4) of the Planning Act. Mr Humphries submitted that this development renders Plan B Earth's proceedings academic.

**275** We do not accept those submissions on behalf of HAL. In essence, we are of the clear view that it is incumbent on the Government to approach the decision-making process in accordance with the law at each stage, not only in any current review of the ANPS or at a future development consent stage. The stages of the decision-making process are inter-dependent. The formulation of the ANPS sets the fundamental framework within which further decisions will be taken.

**276** We are unable to accept the suggestion that the terms of section 31(2A) are satisfied in this case. We find it impossible to conclude that it is "highly likely" that the ANPS would not have been "substantially different" if the Secretary of State had gone about his task in accordance with law. In particular, in our view, it was a basic defect in the decision-making process that the Secretary of State expressly decided not to take into account the Paris Agreement at all. That was a fundamentally wrong turn in the whole process.

**277** Furthermore, and in any event, this is one of those cases in which it would be right for this court to grant a remedy on grounds of "exceptional public interest". The nature and degree of that public interest hardly needs to be set out here. The legal issues are of the highest importance. The infrastructure project under consideration is one of the largest. Both the development itself and its effects will last well into the second half of this century. The issue of climate change is a matter of profound national and international importance of great concern to the public—and, indeed, to the Government of the United Kingdom and many other national governments, as is demonstrated by their commitment to the Paris Agreement.

**278** For those reasons, we have reached the firm conclusion that appropriate relief must be granted here, as normally it will be where unlawfulness in the conduct of the executive is established. In our view, therefore, it would not be appropriate to refrain from granting a suitable remedy at this stage to ensure, at least, that the ANPS does not remain effective in its present unlawful form pending the outcome of its statutory review—under section 6 of the Planning Act—in the light of the Paris Agreement (see para 39 above).

**279** We have given the parties the opportunity in the light of our draft judgment to agree the precise terms of the appropriate remedy. In the event, however, the parties have been unable to reach agreement on that matter. We have in mind that the relief we grant must properly reflect our conclusions on all the issues before us, in their entirety, and not merely the conclusions we have reached on the climate change issues. The Secretary of State, in his submissions in the light of the draft judgment, has not resisted the granting of relief, but has not suggested any particular form of remedy. HAL and Arora have contended for a stay of the ANPS and a mandatory order requiring the Secretary of State to undertake a review under section 6 of the Planning Act. Friends of the Earth and Plan B Earth have contended for a declaration and a quashing order. The Hillingdon claimants have also submitted that the ANPS should be quashed.

**280** In our view, in light of the submissions made to us, the appropriate form of relief to reflect our conclusions as a whole is a declaration, the effect

of which will be to declare the designation decision unlawful and to prevent the ANPS from having any legal effect unless and until the Secretary of State has undertaken a review of it in accordance with the statutory provisions, including the provisions of sections 6, 7 and 9 of the Planning Act. We do not consider that in the particular circumstances of this case, given our conclusions on the issues of the SEA Directive and the Habitats Directive, it is necessary or appropriate to quash the ANPS at this stage. Nor do we accept that it is appropriate to make a mandatory order requiring the Secretary of State to undertake a section 6 review, bearing in mind that the Secretary of State has a discretion under section 6(1) to decide to undertake a review "whenever [he] thinks it appropriate to do so". The declaration we make will ensure that the ANPS has no legal effect unless and until the Secretary of State decides to conduct a review. Any such review would have to be conducted in accordance with the judgment of this court. We should add finally that the initiation, scope and timescale of any review must and will be a matter for the Secretary of State to decide.

*Conclusion*

**281** At the beginning of this judgment we emphasised the long-established limits of the court's role when exercising its jurisdiction in claims for judicial review (see para 2 above). As an appellate court, we operate within the same limits. We have made it clear that we are not concerned in these proceedings with the political debate and controversy to which the prospect of a third runway being constructed at Heathrow has given rise. That is none of the court's business. We have emphasised that the basic question before us in these claims is an entirely legal question.

**282** As we have said, we are required—and only required—to determine whether the Divisional Court was wrong to conclude that the ANPS was produced lawfully. Our task therefore—and our decision—does not touch the substance of the policy embodied in the ANPS. In particular, it does not venture into the merits of expanding Heathrow by adding a third runway, or of any alternative project, or of doing nothing at all to increase the United Kingdom's aviation capacity. Those matters are the Government's responsibility and the Government's alone.

**283** To a substantial extent we agree with the analysis and conclusions of the Divisional Court. Like the Divisional Court, we have concluded that the challenges to the ANPS must fail on the issues relating to the operation of the Habitats Directive, and also on all but one of the issues concerning the operation of the SEA Directive. However, for the reasons we have given, we have concluded that in one important respect the ANPS was not produced as the law requires, and indeed as Parliament has expressly provided. The statutory regime for the formulation of government policy in a national policy statement, which Parliament put in place in the Planning Act, was not fully complied with. The Paris Agreement ought to have been taken into account by the Secretary of State in the preparation of the ANPS, but was not (see paras 222 to 238, and 242 to 261 above). What this means, in effect, is that the Government when it published the ANPS had not taken into account its own firm policy commitments on climate change under the Paris Agreement.

**284** That, in our view, is legally fatal to the ANPS in its present form. As we have explained, the normal result in a successful claim for judicial

review must follow, which is that the court will not permit unlawful action by a public body to stand. Appropriate relief must therefore be granted. We have formulated a declaration that is, in our view, appropriate, necessary and proportionate in the light of our conclusions as a whole (see paras 267 to 280 above). A declaration has binding effect.

**285** Our decision should be properly understood. We have not decided, and could not decide, that there will be no third runway at Heathrow. We have not found that a national policy statement supporting this project is necessarily incompatible with the United Kingdom's commitment to reducing carbon emissions and mitigating climate change under the Paris Agreement, or with any other policy the Government may adopt or international obligation it may undertake. That is not the outcome here. However, the consequence of our decision is that the Government will now have the opportunity to reconsider the ANPS in accordance with the clear statutory requirements that Parliament has imposed.

*Plan B Earth and Friends of the Earth cases: (i) order of Divisional Court set aside, (ii) permission to proceed with claim for judicial review granted, (iii) declaration that Secretary of State acted unlawfully in failing to take Paris Agreement into account when designating the policy statement in support of expanding Heathrow airport, with the statement having no effect until the Secretary of State reviewed the statement pursuant to the Planning Act 2008, (iv) Secretary of State to pay claimant's costs of hearing below and appeal costs to be assessed with each set of costs capped at £35,000 and (v) permission to appeal to Supreme Court refused. Hillingdon claimants' case: (i) appeal dismissed, (ii) claimants to pay Secretary of State's costs to be assessed if not agreed and (iii) permission to appeal to Supreme Court refused.*

6 May 2020. The Supreme Court (Lord Reed PSC, Lord Hodge DPSC and Lord Sales JSC) allowed an application by the interested parties for permission to appeal in the Plan B Earth and Friends of the Earth cases.

6 May 2020. The Supreme Court (Lord Reed PSC, Lord Hodge DPSC and Lord Sales JSC) refused an application by the claimants for permission to appeal in the Hillingdon case.

SCOTT MCGLINCHEY, Barrister

[HOUSE OF LORDS]

J. H. RAYNER (MINCING LANE) LTD. . . . APPELLANTS

AND

DEPARTMENT OF TRADE AND INDUSTRY AND OTHERS AND RELATED APPEALS . . . . . RESPONDENTS

MACLAINE WATSON & CO. LTD. . . . . APPELLANTS

AND

DEPARTMENT OF TRADE AND INDUSTRY . . RESPONDENTS

MACLAINE WATSON & CO. LTD. . . . . APPELLANTS

AND

INTERNATIONAL TIN COUNCIL . . . . . RESPONDENTS

1989 June 12, 13, 14, 15, 19, 20, 21, 22, 26, 27, 28, 29; July 3, 4, 5, 6, 10, 11, 12, 13, 17, 18, 19, 20, 24, 25; Oct. 26

Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Templeman, Lord Griffiths and Lord Oliver of Aylmerton

*International Law—Treaty—International organisation—International Tin Council formed by treaty between sovereign states including United Kingdom—Council established to trade in and control price of tin internationally—Principal offices in London—Council unable to meet liabilities to creditors—Whether member states liable for debts incurred by council—Whether sovereign immunity afforded to foreign sovereign states and E.E.C.—Whether proceedings against council and member states justiciable before English courts*

*Company—Receiver—International organisation—Organisation created by treaty—Headquarters of organisation in United Kingdom—Organisation insolvent—Whether jurisdiction in court to appoint receiver by way of equitable execution over organisation's rights against member states—Supreme Court Act 1981 (c. 54), s. 37(1)*

The International Tin Council ("I.T.C.") was an international organisation established by treaty in 1956 and was currently constituted by the Sixth International Tin Agreement ("I.T.A.6") made between a number of states, including the United Kingdom. Under I.T.A.6 its functions were to adjust world production and consumption of tin and to prevent excessive fluctuation in the price of tin. Although I.T.A.6 was never part of the law of England the I.T.C. had its headquarters and principal office in London pursuant to another agreement. The I.T.C. was recognised under English law by the International Tin Council (Immunities and Privileges) Order 1972. The Order endowed the I.T.C., for all relevant purposes of English law, with the legal character and status and legal capacities of a corporate body which enabled it to contract under the name I.T.C. The Order granted certain immunities to the I.T.C.

A when carrying out its activities defined in I.T.A.6, including the purchase and sale of tin on the London Metal Exchange, but such immunities did not extend to the enforcement of a valid arbitration award. In 1985 the I.T.C. ran out of money trying to support the world price of tin and was unable to meet its commitments. Its dealings on the Exchange were suspended and it ceased trading owing several hundred million pounds to its creditors. The appellants M.W. claimed certain sums due B under contracts made between them and the I.T.C. They obtained an arbitration award against the I.T.C. and on 3 December 1986 they issued a writ against the Department of Trade and Industry, representing the United Kingdom, claiming that each member state was jointly and severally liable in respect of any such arbitration award which remained unsatisfied. Alternatively, it was claimed that if such contracts were not C direct contracts by all the members acting jointly and severally under the name I.T.C. but were to be considered as contracts made by the I.T.C. as a separate legal entity from its members, then, on the true construction of the Order of 1972, each such contract was made by that separate legal entity not only on its own behalf but also on behalf of each of the member states jointly and severally. The other appellant brokers, having obtained arbitration awards, issued on 9 July 1986 and 3 D February 1987 writs against all the member states, making similar claims. In December 1986 the six banks who were owed money by the I.T.C. issued writs claiming from the member states the money lent and interest, or damages on account of money lent, breach of implied collateral contract and damages for negligence or negligent misrepresentation ("the direct actions").

E On 18 March 1987 the Department of Trade and Industry issued a summons seeking an order that M.W.'s statement of claim should be struck out under R.S.C., Ord. 18, r. 19, and under the inherent jurisdiction of the court on the grounds that it disclosed no reasonable cause of action against the department; that it was frivolous and vexatious and that it was an abuse of the process of the court. The summons sought, in the alternative, an order under Ord. 12, r. 8, that the writ and the F service thereof on the department and all subsequent proceedings should be set aside and/or for other appropriate relief on the ground that the facts and matters contained in the writ and in the statement of claim were not justiciable in the English courts and there was no jurisdiction in the court to determine the matters pleaded. On 29 July 1987 Millett J. struck out M.W.'s writ and statement of claim. The member states, including the department, also took out summonses to strike out in the other G actions on the main grounds that the claims were not justiciable and the appellants had no cause of action.

By a notice of motion M.W. sought the appointment, under section 37 of the Supreme Court Act 1981 and R.S.C., Ord. 51, r. 1, of a receiver by way of equitable execution over the relevant assets of the I.T.C., which consisted of the right which it was said to have to be indemnified by or demand contributions H from member states for its liabilities incurred to M.W. for the purpose of satisfying the amounts due to them under the judgment which they had obtained. The I.T.C. applied for the motion to be struck out on the ground, inter alia, that the court had no jurisdiction to determine the existence or otherwise

of the alleged assets over which receivership was sought, namely rights of action against the I.T.C.'s member states. Millett J. held that, while the court in principle had jurisdiction to appoint a receiver over the I.T.C.'s assets, M.W. had failed to make out an arguable case for contending that the I.T.C. had any cause of action against its members which was not derived from an international treaty and which was capable of being taken over by the receiver and entertained by the court. The Court of Appeal dismissed the appellants' appeals.

On the appellants' appeals in the direct actions and in receivership:—

*Held*, dismissing the appeals in the direct actions, (1) that the municipal courts were not competent to adjudicate upon or to enforce the rights arising from transactions entered into by independent sovereign states on the international law plane; that, on the domestic plane, the Crown's power to conclude treaties with other sovereign states was an exercise of the Royal Prerogative, the validity of which could not be challenged in municipal courts; but that the Royal Prerogative did not extend to altering domestic law or rights of individuals without the intervention of Parliament and a treaty was not part of English law unless and until it had been incorporated into it by legislation (post, pp. 476D, G—477A, 483C, 499F—500D).

*Rustomjee v. The Queen* (1876) 2 Q.B.D. 69, C.A.; *Cook v. Sprigg* [1899] A.C. 572, P.C. and *Blackburn v. Attorney-General* [1971] 1 W.L.R. 1037, C.A. applied.

(2) That I.T.A.6, as a treaty between sovereign states, continued in existence the I.T.C. as an international organisation charged with certain functions and that pursuant to I.T.A.6, the I.T.C. entered into the Headquarters Agreement with the United Kingdom; that by article 16 of I.T.A.6 and article 3 of the Headquarters Agreement the I.T.C. was given legal personality; that no part of those agreements was incorporated into the United Kingdom laws but article 5 of the International Tin Council (Immunities and Privileges) Order 1972 created the I.T.C. (which otherwise had no status under the United Kingdom law) a legal person in the United Kingdom in its own right independent of its members; and that, accordingly, the I.T.C., and not its members, was the contracting party in the contracts it entered into with the appellants (post, pp. 476D, 477B–E, 478H—479C, 483C–D, 506C–E).

*Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22, H.L.(E.) applied.

*Mackenzie-Kennedy v. Air Council* [1927] 2 K.B. 517, C.A. distinguished.

(3) That, given that the Order in Council of 1972 created the I.T.C. in English law as a separate legal person and given that it was that legal person which was the contracting party in the relevant contracts, a contract entered into by the I.T.C. did not involve any other entity and only the I.T.C. was liable on the contract and thus its members were under no liability (post, pp. 476D, 479D–E, G—480B, 483C, 508C–G).

(4) That, if in English private international law the liability of a foreign corporation's members for the corporation's debts was to be determined by the law of the place of its incorporation, where a foreign corporation was established in the United Kingdom as a limited company under the Companies Acts then the corporation's relevant liabilities were those created under

A English law, and there was nothing in English law which imposed liability on the members of a corporation for its debts; that there was no evidence establishing a rule of international law, before or at the time of I.T.A.6 or thereafter, imposing on sovereign states, who were members of international organisations, engaged in commercial transactions, joint and several secondary liability for the organisation's debts and that, even if such a liability existed, it could only be enforced in B international law and not by the United Kingdom courts (post, pp. 476D, 480B–D, 483C, 509B–F, 511B–C, 512E–G, 513B–C).

(5) That the question whether or not I.T.A.6 constituted the I.T.C. so as to act as an agent of the members as undisclosed principals raised the issue of construing I.T.A.6 which, since it was not incorporated into English law, was not justiciable by the United Kingdom courts and that even if the question were C entertained by the court the answer would be that since, under the Order in Council of 1972, the I.T.C. had a separate legal personality it was not, as an independent corporation, acting as an agent of its members; (*per* Lord Templeman) I.T.A.6 could only be considered by the United Kingdom courts for resolving any ambiguity in the meaning and effect of the Order in Council of 1972 but there was, here, no ambiguity (post, pp. 476D, D 481G–H, 483C, 515B–E).

*Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22, H.L.(E.) applied.

*Held further*, dismissing the receivership appeal, that the appellants' rights were, at all times, governed in the United Kingdom, by the Order in Council of 1972 and that Order offered no foundation in law for proceedings against the members of the I.T.C. and that any claim of the I.T.C. against E members for indemnity had ultimately to rest on I.T.A.6 and that was an issue which was not justiciable by the United Kingdom courts (post, pp. 476D, 482H—483A, C, 522D, E).

*Per curiam.* Where a treaty is directly incorporated into English law its terms become subject to the interpretative jurisdiction of the court in the same way as any other Act of the legislature. Also where parties have entered into a domestic F contract incorporating the terms of the treaty the court may be called upon to interpret the treaty to ascertain the parties' rights and obligations under their contract (post, pp. 476D, 483C, 500D–F).

*Phillippson v. Imperial Airways Ltd.* [1939] A.C. 332, H.L.(E.) and *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, H.L.(E.) considered.

G *Quaere.* Whether any such claim for indemnity would also be precluded by act of state non-justiciability (post, p. 522E).

*Per* Lord Templeman. The length of oral argument permitted in future appeals should be subject to prior limitation by the Appellate Committee (post. p. 483B–C).

*Per* Lord Griffiths. The obvious just solution is that the governments that contributed to the buffer stock should provide H it with funds to settle its debts in the same proportion that they contributed to the buffer stock. But that end must be pursued through diplomacy and an international solution must be found to an international problem. It cannot be solved through English domestic law (post. p. 484D–F).

Decisions of the Court of Appeal [1989] Ch. 72; [1988] 3 W.L.R. 1033; [1988] 3 All E.R. 257; [1989] Ch. 253; [1988] 3 W.L.R. 1169; [1988] 3 All E.R. 257 affirmed.

The following cases are referred to in their Lordships' opinions in respect of the direct actions appeals:

*Blackburn v. Attorney-General* [1971] 1 W.L.R. 1037; [1971] 2 All E.R. 1380, C.A.

*Bonsor v. Musicians' Union* [1956] A.C. 104; [1955] 3 W.L.R. 788; [1955] 3 All E.R. 518, H.L.(E.)

*Chaff and Hay Acquisition Committee v. J. A. Hemphill and Sons Proprietary Ltd.* (1947) 74 C.L.R. 375

*Cook v. Sprigg* [1899] A.C. 572, P.C.

*Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251; [1980] 3 W.L.R. 209; [1980] 2 All E.R. 696, H.L.(E.)

*Johnson Matthey & Wallace Ltd. v. Alloush* (1984) 135 N.L.J. 1012; Court of Appeal (Civil Division) Transcript No. 234 of 1984, C.A.

*Mackenzie-Kennedy v. Air Council* [1927] 2 K.B. 517, C.A.

*Philippson v. Imperial Airways Ltd.* [1939] A.C. 332; [1939] 1 All E.R. 761, H.L.(E.)

*Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740; [1967] 1 W.L.R. 1396; [1967] 3 All E.R. 679, C.A.

*Rustomjee v. The Queen* (1876) 2 Q.B.D. 69, C.A.

*Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22, H.L.(E.)

*Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116; [1966] 3 W.L.R. 36; [1966] 2 All E.R. 340

*Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859) 13 Moo. P.C.C. 22

*Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529; [1977] 2 W.L.R. 356; [1977] 1 All E.R. 881, C.A.

*Triquet v. Bath* (1764) 3 Burr. 1478

*Zoernsch v. Waldock* [1964] 1 W.L.R. 675; [1964] 2 All E.R. 256, C.A.

The following additional cases were cited in argument in the direct actions appeals:

*Adams v. National Bank of Greece S.A.* [1961] A.C. 255; [1960] 3 W.L.R. 8; [1960] 2 All E.R. 421, H.L.(E.)

*Adlerblum v. Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés* (Case 93/75) [1975] E.C.R. 2147, E.C.J.

*Alcom Ltd. v. Republic of Colombia* [1984] A.C. 580; [1983] 3 W.L.R. 906; [1984] 1 All E.R. 1, C.A.; [1984] A.C. 580; [1984] 2 W.L.R. 750; [1984] 2 All E.R. 6, H.L.(E.)

*Attorney-General for Canada v. Attorney-General for Ontario* [1937] A.C. 326, P.C.

*Basma v. Weekes* [1950] A.C. 441; [1950] 2 All E.R. 146, P.C.

*British Airways Board v. Laker Airways Ltd.* [1984] Q.B. 142; [1983] 3 W.L.R. 544; [1983] 3 All E.R. 375, C.A.; [1985] A.C. 58; [1984] 3 W.L.R. 413; [1984] 3 All E.R. 39, H.L.(E.)

*Brunswick (Duke of) v. King of Hanover* (1844) 6 Beav. 1; (1848) 2 H.L.Cas. 1, H.L.(E.)

*Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] A.C. 888; [1981] 3 W.L.R. 787; [1981] 3 All E.R. 616, H.L.(E.)

*Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* [1965] Ch. 525; [1964] 3 W.L.R. 905; [1964] 3 All E.R. 326, C.A.

A *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L.(E.)
*Charkieh, The* (1873) L.R. 4 Ad. & Ecc. 59
*Chatenay v. Brazilian Submarine Telegraph Co. Ltd.* [1891] 1 Q.B. 79, C.A.
*C.I.L.F.I.T. S.r.l. v. Ministry of Health* (Case 283/81) [1982] E.C.R. 3415, E.C.J.
*Civilian War Claimants Association Ltd. v. The King* [1932] A.C. 14, H.L.(E.)
B *Clark & Son v. Cullen* (1882) 9 Q.B.D. 355, D.C.
*Cockerell v. Aucompte* (1857) 2 C.B.N.S. 440
*Commercial and Estates Co. of Egypt v. Board of Trade* [1925] 1 K.B. 271, C.A.
*Congreso del Partido, I* [1983] 1 A.C. 244; [1981] 3 W.L.R. 328; [1981] 2 All E.R. 1064, H.L.(E.)
C *Conservators of the River Tone v. Ash* (1829) 10 B.& C. 349
*Cox v. Hickman* (1860) 8 H.L.Cas. 268, H.L.(E.)
*Davis & Son v. Morris* (1883) 10 Q.B.D. 436
*Douglas v. Phoenix Motors*, 1970 S.L.T.(Sh.Ct.) 57
*Dreyfus v. Inland Revenue Commissioners* (1929) 14 T.C. 560, C.A.
*Elve v. Boyton* [1891] 1 Ch. 501, C.A.
*Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A. (The Playa Larga and The Marble Islands)* [1983] 2 Lloyd's Rep. 171, C.A.
D *Fenton Textile Association Ltd. v. Krassin* (1921) 38 T.L.R. 259, C.A.
*Flemyng v. Hector* (1836) 2 M. & W. 172
*Forth Tugs Ltd. v. Wilmington Trust Co.*, 1987 S.L.T. 153
*Fred Drughorn Ltd. v. Rederiaktiebolaget Transatlantic* [1919] A.C. 203, H.L.(E.)
*Garnac Grain Co. Inc. v. H. M. F. Faure & Fairclough Ltd. (Note)* [1968] A.C. 1130; [1967] 3 W.L.R. 143; [1967] 2 All E.R. 353, H.L.(E.)
E *Godman v. Winterton* (1940) 11 I.L.R. 205, C.A.
*Gramophone and Typewriter Ltd. v. Stanley* [1908] 2 K.B. 89, C.A.
*Haegeman (R. & V.) v. Belgian State* (Case 181/73) [1974] E.C.R. 449, E.C.J.
*Higgins v. Senior* (1841) 8 M. & W. 834
*Holmes v. Bangladesh Biman Corporation* [1989] A.C. 1112; [1989] 2 W.L.R. 481; [1989] 1 All E.R. 852, H.L.(E.)
F *Humble v. Hunter* (1848) 12 Q.B. 310
*Inland Revenue Commissioners v. Dowdall, O'Mahoney & Co. Ltd.* [1952] A.C. 401; [1952] 1 All E.R. 531, H.L.(E.)
*International Tin Council, In re* [1987] Ch. 419; [1987] 2 W.L.R. 1229; [1987] 1 All E.R. 890
*Jackson v. John Litchfield & Sons* (1882) 8 Q.B.D. 474, C.A.
G *Krajina v. Tass Agency* [1949] 2 All E.R. 274, C.A.
*Liverpool Insurance Co. v. Massachusetts* (1871) 77 U.S. 566
*Maclaine Watson & Co. Ltd. v. Council of the European Communities* (Opinion) (Case 241/87) (unreported), 1 June 1989, E.C.J.
*Maclaine Watson & Co. Ltd. v. International Tin Council* [1988] Ch. 1; [1987] 3 W.L.R. 508; [1987] 3 All E.R. 787
*Maclaine Watson & Co. Ltd. v. International Tin Council (No. 2)* [1987] 1 W.L.R. 1711; [1987] 3 All E.R. 886; [1989] Ch. 286; [1988] 3 W.L.R. 1190; [1988] 3 All E.R. 257, C.A.
H *Mair v. Wood*, 1948 S.C. 83
*Malone v. Metropolitan Police Commissioner* [1979] Ch. 344; [1979] 2 W.L.R. 700; [1979] 2 All E.R. 620

*National Bank of Greece & Athens S.A. v. Metliss* [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608, H.L.(E.)
*National Union of General and Municipal Workers v. Gillian* [1946] K.B. 81; [1945] 2 All E.R. 593, C.A.
*Neilson v. Wilson* (1890) 17 R. 608
*Nissan v. Attorney-General* [1970] A.C. 179; [1969] 2 W.L.R. 926; [1969] 1 All E.R. 629, H.L.(E.)
*Pan-American World Airways Inc. v. Department of Trade* [1976] 1 Lloyd's Rep. 257, C.A.
*Piracy Jure Gentium, In re* [1934] A.C. 586, P.C.
*Pooley v. Driver* (1876) 5 Ch.D. 458
*Porter v. Freudenberg* [1915] 1 K.B. 857, C.A.
*President of India v. Lips Maritime Corporation* [1988] A.C. 395; [1987] 3 W.L.R. 572; [1987] 3 All E.R. 110, H.L.(E.)
*Puerto Rico v. Russell & Co.* (1933) 288 U.S. 476
*Redebiaktiebolaget Argonaut v. Hani* [1918] 2 K.B. 247
*Reg. v. Keyn* (1876) 2 Ex.D. 63
*Reg. v. Secretary of State for Social Services, Ex parte Wellcome Foundation Ltd.* [1988] 1 W.L.R. 635; [1988] 2 All E.R. 684, H.L.(E.)
*Reg. v. Secretary of State for the Home Department, Ex parte Thakrar* [1974] Q.B. 684; [1974] 2 W.L.R. 593; [1974] 2 All E.R. 261, C.A.
*Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 88; [1989] 2 W.L.R. 997; [1989] 2 All E.R. 692, H.L.(E.)
*Reparation for Injuries Suffered in the Service of the United Nations, In re* [1949] I.C.J.R. 174
*Risdon Iron and Locomotive Works v. Furness* [1906] 1 K.B. 49, C.A.
*Royal Bank of Australia, In re, Robinson's Executor's case* (1856) 6 De G. M. & G. 572
*Salaman v. Secretary of State in Council of India* [1906] 1 K.B. 613, C.A.
*Salford Corporation v. County Council of Lancashire* (1890) 25 Q.B.D. 384, C.A.
*Salomon v. A. Salomon & Co. Ltd.* [1895] 2 Ch. 323, Vaughan Williams J. and C.A.
*Salvesen or von Lorang v. Administrator of Austrian Property* [1927] A.C. 641, H.L.(Sc.)
*Schooner Exchange v. M'Faddon* (1812) 7 Cranch (U.S.) 116
*Sea Fire and Life Assurance Co., In re, Greenwood's Case* (1854) 3 De G. M. & G. 459
*Shearson Lehman Brothers Inc. v. Maclaine Watson & Co. Ltd. (No. 2)* [1988] 1 W.L.R. 16; [1988] 1 All E.R. 116, H.L.(E.)
*Shearson Lehman Hutton Inc. v. Maclaine Watson & Co. Ltd.* [1989] 2 Lloyd's Rep. 570
*Sheffield and South Yorkshire Permanent Building Society (In Liquidation), In re* (1889) 22 Q.B.D. 470, D.C.
*Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* [1901] A.C. 426, H.L.(E.)
*Von Hellfeld v. E. Rechnitzer* [1914] 1 Ch. 748, C.A.
*Wellington (Duke of), In re, Glentanar v. Wellington* [1947] Ch. 506
*Wenlock (Baroness) v. River Dee Co. (Note)* (1883) 36 Ch.D. 675, C.A.
*West Rand Central Gold Mining Co. Ltd. v. The King* [1905] 2 K.B. 391, D.C.
*Westland Helicopters Ltd. v. Arab Organisation for Industrialisation* (1984) 23 I.L.M. 1071; (unreported) 19 July 1988, Swiss Federal Court (First Civil Division)
*Williams v. Hursey* (1959) 103 C.L.R. 30
*Winfat Enterprise (HK) Co. Ltd. v. Attorney-General of Hong Kong* [1985] A.C. 733; [1985] 2 W.L.R. 786; [1985] 3 All E.R. 17, P.C.
*Wise v. Perpetual Trustee Co. Ltd.* [1903] A.C. 139, P.C.
*Worthing Rugby Football Club Trustees v. Inland Revenue Commissioners* [1985] 1 W.L.R. 409; [1987] 1 W.L.R. 1057, C.A.

The following cases are referred to in their Lordships' opinions in respect of the receivership appeal:

*Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] A.C. 888; [1981] 3 W.L.R. 787; [1981] 3 All E.R. 616, H.L.(E.)
*Dugdale v. Lovering* (1875) L.R. 10 C.P. 196, D.C.
*Naviera Mogor S.A. v. Société Metallurgique de Normandie ("Nogar Marin")* [1988] 1 Lloyd's Rep. 412, C.A.
*Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22, H.L.(E.)
*Sheffield Corporation v. Barclay* [1905] A.C. 392, H.L.(E.)
*Yeung Kai Yung v. Hong Kong and Shanghai Banking Corporation* [1981] A.C. 787; [1980] 3 W.L.R. 950; [1980] 2 All E.R. 599, P.C.

The following additional cases were cited in argument in the receivership appeal:

*Adams v. Adams (Attorney-General intervening)* [1971] P. 188; [1970] 3 W.L.R. 934; [1970] 3 All E.R. 572
*Attorney-General for Canada v. Attorney-General for Ontario* [1937] A.C. 326, P.C.
*Blackburn v. Attorney-General* [1971] 1 W.L.R. 1037; [1971] 2 All E.R. 1380, C.A.
*Blad v. Bamfield* (1673) 3 Swan. 604
*Bourne v. Colodense Ltd.* [1985] I.C.R. 291, C.A.
*British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58; [1984] 3 W.L.R. 413; [1984] 3 All E.R. 39, H.L.(E.)
*Brunswick (Duke of) v. King of Hanover* (1844) 6 Beav. 1; (1848) 2 H.L.Cas. 1, H.L.(E.)
*Congreso del Partido, I* [1983] 1 A.C. 244; [1981] 3 W.L.R. 328; [1981] 2 All E.R. 1064, H.L.(E.)
*Cook v. Sprigg* [1899] A.C. 572, P.C.
*Dunhill (Alfred) of London Inc. v. Republic of Cuba* (1976) 425 U.S. 682
*Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A. (The Playa Larga and The Marble Islands)* [1983] 2 Lloyd's Rep. 171, C.A.
*Hickman v. Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch. 881
*International Tin Council, In re* [1987] Ch. 419; [1987] 2 W.L.R. 1229; [1987] 1 All E.R. 890
*Maclaine Watson & Co. Ltd. v. International Tin Council (No. 3)* (unreported), 9 June 1988, Millett J.
*Nissan v. Attorney-General* [1970] A.C. 179; [1969] 2 W.L.R. 926; [1969] 1 All E.R. 629, H.L.(E.)
*Pan-American World Airways Inc. v. Department of Trade* [1976] 1 Lloyd's Rep. 257, C.A.
*Rustomjee v. The Queen* (1876) 2 Q.B.D. 69, C.A.
*Salaman v. Secretary of State in Council of India* [1906] 1 K.B. 613, C.A.
*Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859) 13 Moo. P.C.C. 22
*Shearson Lehman Brothers Inc. v. Maclaine Watson & Co. Ltd. (No. 2)* [1988] 1 W.L.R. 16; [1988] 1 All E.R. 116, H.L.(E.)
*Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529; [1977] 2 W.L.R. 356; [1977] 1 All E.R. 881, C.A.

APPEALS from the Court of Appeal.

J. H. RAYNER (MINCING LANE) LTD. v. DEPARTMENT OF TRADE AND INDUSTRY AND OTHERS ("the *Rayner* action")

By a writ dated 9 July 1986 the appellants, J. H. Rayner (Mincing Lane) Ltd., claimed £16,347,825.17 and interest arising from certain

contracts for the sale of tin between the appellants and the International Tin Council ("the I.T.C.") and from an arbitration award, from the respondents, (1) the Department of Trade and Industry, (2) the Commonwealth of Australia, (3) the Kingdom of Belgium, (4) Canada, (5) the Kingdom of Denmark, (6) the Commission of the European Communities, (7) the Republic of Finland, (8) the Republic of France, (9) the Federal Republic of Germany, (10) the Hellenic Republic of Greece, (11) the Republic of India, (12) the Republic of Indonesia, (13) the Republic of Ireland, (14) the Italian Republic, (15) Japan, (16) the Grand Duchy of Luxembourg, (17) the Federation of Malaysia, (18) the Kingdom of the Netherlands, (19) the Republic of Nigeria, (20) the Kingdom of Norway, (21) the Kingdom of Sweden, (22) the Swiss Confederation, (23) the Kingdom of Thailand and (24) the Republic of Zaire.

Between 9 October 1986 and 4 February 1987 the respondents issued summonses seeking (a) to set aside the proceedings and (b) declarations that the court had no jurisdiction. The Department of Trade and Industry sought the order on the ground that the appellants' claim was not justiciable by English courts and that the appellants had no cause of action. The Commission of the European Communities claimed that it had sovereign immunity, that the appellants' claim was not justiciable and that the appellant had no good arguable case. The other respondents sought (a) orders to set aside the proceedings and (b) declarations that the court had no jurisdiction on the ground of sovereign immunity.

AMALGAMATED METAL TRADING LTD. AND OTHERS v. DEPARTMENT OF TRADE AND INDUSTRY AND OTHERS ("the *Multi-Brokers* action")

On 3 February 1987 the appellants, Amalgamated Metal Trading Ltd., Boustead Davis (Metal Brokers) Ltd., Gerald Metals Ltd., Gill & Duffus Ltd., Henry Bath and Son Ltd., Holco Trading Co. Ltd., issued a writ claiming against all the respondents in the *Rayner* action and the I.T.C. and the European Economic Community ("the E.E.C.") rather than the Commission, £105m. or thereabouts and interest or damages arising from contracts for the sale of tin, arbitration awards, margin demanded, false representations made negligently or recklessly and breach of warranty.

On 9 March 1987 the Department of Trade and Industry issued a summons for an order that the proceedings be set aside, a declaration that the court had no jurisdiction or that the points of claim be struck out on the grounds that the claim was not justiciable and the appellants had no cause of action. The I.T.C. issued a summons on 11 March for an order that the proceedings be set aside and a declaration that the court had no jurisdiction on the grounds that the claim was not justiciable and that the I.T.C. was immune from suit. The E.E.C. issued a summons on 2 April seeking to have the proceedings set aside and a declaration that the court had no jurisdiction on the grounds that the E.E.C. had sovereign immunity and that the claim was not justiciable. The other respondents issued similar summonses as in the *Rayner* action.

A ARBUTHNOT LATHAM BANK LTD. v. COMMONWEALTH OF AUSTRALIA AND OTHERS

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD. v. COMMONWEALTH OF AUSTRALIA AND OTHERS

B BANQUE INDOSUEZ (A BODY CORPORATE) v. COMMONWEALTH OF AUSTRALIA AND OTHERS

HAMBROS BANK LTD. v. COMMONWEALTH OF AUSTRALIA AND OTHERS

KLEINWORT BENSON LTD. v. COMMONWEALTH OF AUSTRALIA AND OTHERS

C TSB ENGLAND & WALES PLC. v. COMMONWEALTH OF AUSTRALIA AND OTHERS

("the *Six Banks* actions")

On 18 December 1986 Arbuthnot Latham Bank Ltd., Australia and
D New Zealand Banking Group Ltd. and Kleinwort Benson Ltd. issued writs in their respective actions claiming from the respondents, as in the *Rayner* action above, respectively £4,463,382.17 and interest or damages on account of money lent, breach of implied collateral contract and damages for negligence or negligent misrepresentation, £2,333,023.71 and £8,473,267.51. On 30 December Banque Indosuez, Hambros Bank Ltd. and TSB England & Wales Plc. issued their writs claiming
E respectively £1,165,761.39, £7,113,025.79 and £5,985,175.65 and interest or damages under section 35A of the Supreme Court Act 1981, as inserted by Part I of Schedule 1 to the Administration of Justice Act 1982.

The Department of Trade and Industry took out a summons in each of the bank's actions for an order that the proceedings be set aside, a
F declaration that the court had no jurisdiction or that the points of claim be struck out on the grounds that the claim was not justiciable and the appellants had no cause of action. The E.E.C. issued a summons in each of the actions pursuant to R.S.C., Ord. 12, r. 8 for orders that the writ served on the E.E.C. and service thereof and all subsequent proceedings should be set aside, a declaration that the court had no jurisdiction over the E.E.C. in respect of the subject matter of the claim
G or the relief or remedy sought in the action and an order that the action be dismissed against the E.E.C. on the ground that it was immune from the jurisdiction of the court. The summons claimed further and in the alternative that, without prejudice to the immunity of the E.E.C., (a) the appellants' claims were not cognizable by the court, (b) the issues raised by the appellants' claims were not justiciable by the court
H and/or (c) there was no jurisdiction in the court to determine the matters pleaded in the points of claim. The other respondents also issued summonses on the grounds similar to those in the *Rayner* action.

Staughton J. [1987] B.C.L.C. 667 gave judgment and, inter alia, ordered in the *Rayner* action the striking out of the points of claim

sought to be struck out by the Department of Trade and Industry pursuant to Ord. 18, r. 19 and under the inherent jurisdiction of the court on the ground that they disclosed no reasonable cause of action and that the claim pleaded was not justiciable in the English courts. In the *Multi-Brokers* action Staughton J. made an order striking out the points of claim on the same grounds as in the *Rayner* action and adjourned the E.E.C.'s summons. The judge made similar orders in the *Six Banks* actions.

MACLAINE WATSON & CO. LTD. v. DEPARTMENT OF TRADE AND INDUSTRY

The appellants, Maclaine Watson & Co. Ltd., were the claimants in an arbitration reference set up in accordance with the rules and regulations of the London Metal Exchange in which the I.T.C. was the respondent. The appellants claimed that certain sums were due to them from the I.T.C. under certain contracts made between the appellants, as metal brokers and ring dealing members of the exchange, and the I.T.C. The contracts provided for arbitration in the event of a dispute. The I.T.C. defaulted in its obligation to the appellants.

On 6 November 1986 three arbitrators, Mr. A. M. R. Sylvester, Mr. G. J. Davey and Mr. L. Lubett, made an interim final award that the I.T.C. should pay to the appellants the sum of £6m. plus the costs of the award, which were taxed and settled as £7,116.25. Judgment was entered in terms of the award under section 26 of the Arbitration Act 1950 on 13 November 1986 pursuant to leave granted by Staughton J. On 3 December the appellants issued a writ against the respondents, the Department of Trade and Industry (representing the United Kingdom of Great Britain and Northern Ireland) claiming the debts due.

The department took out a summons on 18 March 1987 seeking an order that the appellants' statement of claim should be struck out under Ord. 18, r. 19 and/or under the inherent jurisdiction of the court on the ground that (i) it disclosed no reasonable cause of action against the department, (ii) it was frivolous and vexatious and (iii) it was an abuse of the process of the court and that the appellants' action against the department should be stayed or dismissed. The summons claimed in the alternative an order, under Ord. 12, r. 8, that the writ and the service thereof on the department and all subsequent proceedings should be set aside and/or for other appropriate relief on the grounds that the facts and matters contained in the writ and in the statement of claim were not justiciable in the English court and there was no jurisdiction in the court to determine the matters pleaded.

On 29 July 1987 Millett J. [1987] B.C.L.C. 707 ordered that the appellants' statement of claim should be struck out and their action dismissed.

All the appellants appealed from the judgments of Staughton and Millett JJ. On 27 April 1988 the Court of Appeal (Kerr, Nourse and Ralph Gibson L.JJ.) [1989] Ch. 72 dismissed the appeals and gave the parties leave to appeal.

The appellants appealed.

MACLAINE WATSON & CO. LTD. v. INTERNATIONAL TIN COUNCIL ("the receivership appeal")

This was an appeal by Maclaine Watson & Co. Ltd. from a judgment dated 27 April 1988 of the Court of Appeal (Kerr, Nourse and Ralph Gibson L.JJ.) [1989] Ch. 253, dismissing Maclaine Watson's appeal from the judgment dated 13 May 1987 of Millett J. [1988] Ch. 1. By his judgment the judge dismissed Maclaine Watson's application for the appointment of a receiver by way of equitable execution over those assets of the I.T.C. comprising its right to be indemnified by contributions from its members for liabilities incurred to Maclaine Watson, for the purpose of satisfying a judgment entered in favour of Maclaine Watson on 13 November 1986 in the sum of £6,024,376.40.

By their amended points of claim Maclaine Watson claimed, inter alia, that (a) when the I.T.C. entered into transactions with the authority, approval and/or acquiescence of the member states and, arising out of such transactions, suffered an award and subsequently a judgment to which article 6(1)(*c*) of the Order in Council of 1972 applied, it was entitled to make a call on each and every member state jointly and severally for payment to it of such sums as would enable it to satisfy such award and judgment and/or to recover such sums from each member state; (b) further, the I.T.C. was entitled to be indemnified by the member states jointly and severally on the ground that the I.T.C. entered into the contracts at the express or implied request of the member states and having incurred a liability was entitled by implication of law to be indemnified by the member states jointly and severally in respect of such liability; and (c) Maclaine Watson would, if necessary, contend that the trading being carried out by the buffer stock manager at all material times in 1985, was outside the scope of I.T.A.6, in that it involved the creation of a buffer stock far in excess of the 50,000 tonnes provided for in article 21 of I.T.A.6.

During the hearing before Millett J. the Attorney-General's application to intervene was granted.

The facts are set out in the opinion of Lord Oliver of Aylmerton.

*Sydney Kentridge Q.C.* and *Jonathan Hirst* for Rayners. The question is: could the defendant states come together to carry out trading at a substantial scale and raise debts and then walk away without meeting their liabilities? If that is right that can only be so under English law or under some established rule of international law which was part of English law. Failing that the states have the same liability as any other trader. The question is not: does the I.T.C. have a legal personality? The concept of legal personality is infinitely varied. The question is: has the United Kingdom conferred on the I.T.C. such a degree of legal personality as to confer on its members the privilege of raising liability and need not meet it?

It has to be examined what Parliament did when giving powers to the I.T.C. and other international organisations. Parliament has granted certain capacities to international organisations so that they could carry out their functions which they could not carry out otherwise: International Organisations Act 1968, preamble and section 1(2)(*a*) and (*b*), which

give legal capacities of a body corporate, and section 1(6), which provides that the privileges and immunities conferred by an Order in Council are not greater than conferred in agreements. Schedule 1 to the Act provides for immunity from suit and legal process.

The International Tin Council (Immunities and Privileges) Order 1972 grants capacities and immunities. It is common ground that the I.T.C. is not incorporated by Order in Council of 1972: *In re International Tin Council* [1987] Ch. 419, 443, and *Maclaine Watson & Co. Ltd. v. International Tin Council* [1988] Ch. 1, 16A–D. There is no question of conferring capacities of a body corporate on a body corporate.

In international law an international organisation has a degree of legal personality: *In re Reparation for Injuries Suffered in the Service of the United Nations* [1949] I.C.J.R. 174, 179–180. An international organisation does not possess all the personality as a state. All international organisations do not have the same capacities: *Nissan v. Attorney-General* [1970] A.C. 179, 223c. Therefore, the I.T.C. has international legal personality to some measure. It does not make it equivalent to, for example, the United Nations: see also I.T.A.6. The prima facie liability of the member states as members of an organisation trading in the market has not been displaced by any statute or any rule of private or public international law. Four basic submissions are as follows:

Submission A: In United Kingdom law the I.T.C. is an unincorporated association. It is the collective name under which its members operate. It is an unincorporated association which, by the Order in Council of 1972, has been given powers which it can exercise in the collective name in the United Kingdom for its convenience and the convenience of those who deal with it. The I.T.C. is able to sue or be sued in its own name. It can hold property in its collective name. Yet it remains unincorporated.

Submission B(i): Assuming that the Order in Council has endowed the I.T.C. in the United Kingdom with legal personality. That personality is not a corporate personality. It is not personality of a kind which renders the I.T.C. entirely separate from its members so as to screen them from liability for its debts. It is a mixed entity, i.e. an entity which does not, by its nature, exclude the concurrent or secondary direct liability of its members to the creditors of the organisation. If the Act and Order in Council intended to create a new legal entity, there is no need to infer more than an intent to create a mixed entity. Such a degree of legal personality would confer on the I.T.C. all the powers which it needs to carry out its purposes in the United Kingdom.

Submission B(ii): Under international law, which is part of United Kingdom law, the legal personality possessed by the I.T.C. is that of the mixed entity. Both the general principles of international law and the terms of I.T.A.6 lead to the conclusion that the liability of its members for its debts was not, and was not intended to be, excluded.

Submission C: If the I.T.C. is found to be an entirely separate legal personality, as if it were a United Kingdom body corporate, then in buying and selling tin to the appellant brokers it did so as the agent of the members. The members were the undisclosed principals on the contracts.

A The starting point on the authorities is a strong presumption of unlimited liability. Those trading together in any form cannot exclude their liability or limit it by giving themselves a certain name. As a matter of the United Kingdom law there has to be a statutory exclusion or limitation. The Order in Council of 1972 does not do either. The limited liability was a privilege not easily granted. In the United Kingdom statute law there was nothing inherently contradictory to have B corporations with unlimited liability: *Lindley on the Law of Partnership* 3rd ed. (1873), vol. 1, pp. 4–13, 16–17 and 388–389 and *Lindley on Partnership Act 1890* (1891), pp. 7–8. Unless a statute limits the liability and a corporate status is attributed to a body it is not incorporated and its members remain liable: *In re Sheffield and South Yorkshire Permanent Building Society (In Liquidation)* (1889) 22 Q.B.D. 470, 474, 476; *In re* C *Sea Fire and Life Assurance Co. (Greenwood's case)* (1854) 3 De G. M.& G. 459, 474–479 and *In re Royal Bank of Australia (Robinson's Executor's case)* (1856) 6 De G. M.& G. 572, 588. If an association is carrying on business its authority can only be limited if allowed by a statute. One way of achieving that was to incorporate the association under a statute: *Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22, *per* Lord Watson, at p. 38, and *per* Lord Hershell, at p. 45. It cannot be D assumed that there is necessarily a contradiction between incorporation and individual liability of the members of the association: *Pollock and Maitland, The History of English Law*, 2nd ed. (1923), vol. 1, pp. 486–487 and *Blackstone, Commentaries on the Laws of England*, pp. 472–473, 475–476. At p. 485 the dissolution of a corporation is dealt with. That shows that there are rules and regulations to dissolve corporations. E They do not just fade away. The position is similar in Scotland: *Erskine, Principles of the Law of Scotland*, 21st ed. (1911), p. 410 and *Encyclopaedia of the Laws of Scotland* (1927), pp. 541–542, paras. 1191–1193. In order to see whether Parliament intended to incorporate a given association one has to see clear intention to create a corporation: *Baroness Wenlock v. River Dee Co. (Note)* (1883) 36 Ch.D. 675, 684, *per* Bowen L.J. The test to decide whether Parliament intended to F create a body corporate was to see if a body needed to be incorporated. If a body is able to carry out its functions without corporation it is not to be treated as incorporated: *Salford Corporation v. Lancashire County Council* (1890) 25 Q.B.D. 384, *per* Lord Esher M.R., at p. 387, and *per* Lindley L.J., at p. 388; see also *Mackenzie-Kennedy v. Air Council* [1927] 2 K.B. 517, *per* Atkin L.J., at p. 529–533, esp. 534, Bankes L.J., G at p. 523 and Scrutton L.J., at p. 529. However, a possession of power or capacities of a body corporate does not make an association a separate juridical entity: *Krajina v. Tass Agency* [1949] 2 All E.R. 274, 277–279, 284 and 285. When Parliament creates a body corporate it gives it that status by granting it a perpetual succession and common seal: for example, the Architects (Registration) Act 1931, section 3; the Building Societies Act 1874, section 9; the China Indemnity (Application) H Act 1931, section 2; the Coal Industry Nationalisation Act 1946, sections 1 and 2 and the Companies Act 1985, section 13.

Historically, the International Tin Agreement (1954) ("I.T.A.1") by article 21 conferred such capacities as were necessary. That agreement

was made part of the United Kingdom law by the International Organisations (Immunities and Privileges of the International Tin Council) Order 1956 (S.I. 1956 No. 1214). That Order conferred the "legal capacities of a body corporate:" article 2, and certain exemptions, article 3. See also the Second International Tin Agreement (1960) ("I.T.A.2"), articles 22 and 23. Effect to that was given by the International Organisations (Immunities and Privileges of the International Tin Council) (Amendment) Order 1957 (S.I. 1957 No. 1365). But the Fourth International Tin Agreement (1970) ("I.T.A.4") used the words "legal personality" in article 14. It really meant that the I.T.C. was given such capacities as were necessary for it to carry out its functions and later on was granted capacities of a body corporate: see the International Tin Council (Immunities and Privileges) Order 1972 (S.I. 1972 No. 120). Thus treaties or agreements and the legislation to give effect to them have not been consistent. See also the Articles of Agreement of the International Bank for Reconstruction and Development (1945), articles II and VII. That was enacted in the United Kingdom law by the Bretton Woods Agreements Act 1945. Under that Act the Bretton Woods Agreements Order in Council 1946 (S.I. 1946 No. 36) was made. The Articles of Agreement of the International Finance Corporation took effect under the International Finance Corporation Act 1955 and the International Finance Corporation Order 1955 (S.I. 1955 No. 1954). Further, the Articles of Agreement of the International Development Association was enacted as the International Development Association Act 1960 and the International Development Association Order 1960: see also Chapter VIII, articles 41–42 of the Agreement establishing the African Development Fund (1972) enacted by the African Development Fund (Immunities and Privileges) Order 1973 (S.I. 1973 No. 958) made under section 10 of the International Organisations Act 1968.

Where by a treaty the United Kingdom undertakes to introduce domestic legislation to achieve a certain result within the country the treaty remains irrelevant unless it is made part of the law by legislation: *Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116, 143–144, *per* Diplock L.J. The inference to be drawn from the Diplomatic Privilege (Extension) Act 1944 and the Diplomatic Privilege (Extension) Act 1946 is that throughout this period the United Kingdom has been prepared to give international organisations such capacities as to enable them to function here. It was not intended to give them full juridical corporate personality. The United Kingdom has not broken any treaty obligations. It has never undertaken to grant such corporate personality: see also the Articles of Agreement of the International Finance Corporation: article III, section 8 and article VI, sections 1 and 2.

Where, however, there is an ambiguity a treaty cannot resolve it and alter the position: *Attorney-General for Canada v. Attorney-General for Ontario* [1937] A.C. 326, 347, *per* Lord Atkin. Parliament's opinion as to what the law is cannot change the law. Thus even if Parliament did believe that in various statutes since 1944 it was giving any legal personality it was wrong: *Inland Revenue Commissioners v. Dowdall,*

A *O'Mahoney & Co. Ltd.* [1952] A.C. 401, 416–417, 426, *per* Lord Reid and Lord Radcliffe: see also *Holmes v. Bangladesh Biman Corporation* [1989] A.C. 1112, 1126, *per* Lord Bridge of Harwich. [Reference was made to *Shearson Lehman Brothers Inc. v. Maclaine Watson & Co. Ltd. (No. 2)* [1988] 1 W.L.R. 16 to state that there was no difference between "archives" and "official archives."]

B On immunity, the defendants before the Court of Appeal said that up to the International Organisations Act 1968 and the Order in Council of 1972 the dominant doctrine was that states had absolute immunity. It was thus said to follow that if the states had immunity there was no point in saying that the I.T.C. was immune but not fully immune. The point was dealt with by Kerr L.J. [1989] Ch. 72, 172–173, who doubted whether there can be arbitration against somebody who has no legal C existence. But partnerships have no legal existence and yet arbitration can take place in respect of their matters. Ralph Gibson L.J. dealt with the matter at pp. 226c–227c. But to say that an organisation shall have immunity is like partnership having immunity in respect of its business. It is true that under the Order in Council of 1972 foreign member state might have immunity but the United Kingdom would not.

D Cases relating to trade unions help only to show that Parliament may create or recognise bodies which may have some capacities as bodies corporate although they were not full bodies corporate. *Bonsor v. Musicians' Union* [1956] A.C. 104 decided that a registered trade union is not a legal entity but it could be sued and damages could be awarded against it: Lord MacDermott, at pp. 134–135, 136, 139–140, 142–143, 145–146, Lord Keith of Avonholm, at pp. 149, 151, Lord Somervell of E Harrow, at pp. 155, 157–158, and Lord Porter, at p. 131.

In *Clarke & Son v. Cullen* (1882) 9 Q.B.D. 355 it was decided that the plaintiff may execute a judgment against a partnership firm against a member of the firm. But where a member denies being either a member or his liability the plaintiff would be entitled to obtain a declaration of his liability before proceedings against him: *Jackson v. John Litchfield & Sons* (1882) 8 Q.B.D. 474, 478, *per* Brett L.J. *Chaff and Hay Acquisition* F *Committee v. J. A. Hemphill and Sons Proprietary Ltd.* (1947) 74 C.L.R. 375 was cited as a decision to the contrary: *per* Latham C.J., at pp. 384–385, Williams J. 395–397, 399, as showing that members were not liable. But there were provisions in the Chaff and Hay (Acquisition) Act 1944 to the effect that its members will not be liable for its liabilities. It was thus distinguishable. [Reference was made to *Maclaine Watson & Co.* G *Ltd. v. International Tin Council (No. 2)* [1989] Ch. 286, 308.]

Club cases show that generally members are not liable: *Wise v. Perpetual Trustee Co. Ltd.* [1903] A.C. 139 but *Cockerell v. Aucompte* (1857) 2 C.B.N.S. 440 shows that even in the case of a club a member can be held liable for the club's debts.

Turning to submission B(i), it is to be assumed that submission A is not accepted, that the Act of 1968 and the Order in Council of 1972 are H to be interpreted as conferring legal personality on the international organisation and that the I.T.C. is held to be not merely the name of the association, not merely something in the nature of a partnership or association for gain but it is an entity with legal personality. The

question is: what is the nature of the legal personality and what are the consequences? If the United Kingdom has recognised an international organisation as having some personality in United Kingdom law, the nature of its personality in international law must be at least some guide to the sort of personality which Parliament wished to recognise. Even if English law, or even if the common law of England, recognises only on the one hand corporations and, on the other, unincorporated associations, Parliament may create or recognise a mixed entity. In other words, it may confer capacities on an association so as to make it a mixed entity. The Act here is a United Kingdom statute which deals with an international body. It must not be assumed that Parliament had in mind only such legal personality as is known to the English common law. One must bear in mind that the object of giving personality to the international organisation is still purely functional. It is simply to enable the I.T.C. to carry out its purposes.

English common law does not have special difficulty in understanding a concept of "mixed entity" which means that although there is a corporation the members remain liable. There is no contradiction between incorporation and member liability: *Bonsor v. Musicians' Union* [1956] A.C. 104, *per* Lord Porter; *Lloyd's the Law relating to Unincorporated Associations* (1938), pp. 217–218. The concept of partnership in Scotland shows that that law had had no difficulty in applying the concept of "mixed entity:" *Mair v. Wood*, 1948 S.C. 83, 86, where Lord President, Lord Cooper, said that a partnership is a legal person distinct from individuals who compose it. But partners are liable jointly and severally. They are "guarantors or cautioners for the firm's obligations." See also *Miller, The Law of Partnership in Scotland* (1973), pp. 14–16. The existence of such entities have been recognised by the courts of this country: *Von Hellfeld v. E. Rechnitzer* [1914] Ch. 748, 754–755, *per* Phillimore L.J. and *Dreyfus v. Commissioners of Inland Revenue* (1929) 14 T.C. 560, 565. That was so in the United States as well: *Puerto Rico v. Russell & Co.* (1933) 288 U.S. 476, 480, *per* Stone J. See also *Johnson Matthey & Wallace Ltd. v. Alloush* (1984) 135 N.L.J. 1012; Court of Appeal (Civil Division) Transcript No. 234 of 1984. Council Regulation (E.E.C.) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping ("E.E.I.G.") provides for groupings of businesses without mergers. It comes into force on 1 July 1989. But members of such groupings remain liable.

An international organisation has an international personality. It is capable of possessing international rights and duties and it has capacity to maintain its rights by bringing international claims. Personality is accorded to an international body under international law so as to enable that body to carry out its functions: *In re Reparation for Injuries Suffered in the Service of the United Nations* [1949] I.C.J.R. 174. *Westland Helicopters Ltd. v. Arab Organisation for Industrialisation* (1984) 23 I.L.M. 1071 shows that when dealing with a body corporate there is no need to assume that the members are not liable. Although that case was reversed by the Swiss Federal Court (First Civil Division) (unreported) 19 July 1988, the basic principle stated there remains untouched.

A The I.T.C. has no features which are found in a limited company. The Council of the I.T.C. is composed of all members: article 4 of I.T.A.6. There is no board of directors. Article 26.4 provides for the return of the share in the buffer stock to members on a winding up. That is not what a company's articles provide. Decisions of the Council are taken by simple majority and are binding: article 15.2. There is no such provision in company's articles.

B Historically, it was a matter of granting traders in this country to carry on business with limited liability of its members towards third parties: *Palmer's Company Law*, 23rd ed. (1982), vol. 1. and *Gower's Principles of Modern Company Law*, 4th ed. (1979), pp. 43, 48. Under section 1(6) of the International Organisations Act 1968 question of ultra vires might arise. It might be said that the Order in Council of C 1972 does what is required by the Headquarters Agreement. In order to decide that the Agreement has to be construed. One is, therefore, concerned with non-justiciability and the question of state immunity.

In the Court of Appeal Kerr and Nourse L.JJ. were both of the opinion that the doctrine of non-justiciability does not prevent the court from examining I.T.A.6 to ascertain whether under the I.T.C.'s constitution its members are liable for its debts. Ralph Gibson L.J. D disagreed.

The doctrine of non-justiciability of treaties is essentially as follows: (i) an English court will not decide whether a party to a treaty is in breach of its treaty obligations; (ii) the courts will not enforce treaty obligations as between parties to a treaty; (iii) an individual may not invoke treaty rights as a source of private rights whether against another E individual, the Crown or a foreign state and (iv) the court will not review the conduct of the Crown in relation to its obligations under a treaty: *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] A.C. 888.

It does not follow from these principles that the court is shut out from considering a treaty as part of the facts of the case and as necessary background material to a dispute between the parties before it. The court may examine the treaty to ascertain the true nature and F meaning of the transaction between the parties to the suit or the true relationship between them or the identity of a wrongdoer. The plaintiffs do not seek to enforce engagements founded on treaties. They are seeking to enforce rights arising from contracts entered into with the I.T.C.

In Scottish law a partnership, although a legal person, is not a full G corporation. A firm cannot hold in its own name heritable property. Such property can only be held in the partners' names. But a firm is capable of holding a leasehold: *Bell, Principles of the Law of Scotland,* 10th ed. (1899) p. 155, para. 357 and *Walker, Principles of Scottish Private law,* 2nd ed. (1975), vol. 1, p. 394.

The respondents accept that if submission A is right, that is to say the contract of the I.T.C. is simply the contract of the 24 member states, H then the member states have entered into commercial transactions and there is no question of state immunity: see sections 1, 2(1) and 3(1)(*a*) and (*b*) of the State Immunity Act 1978. The exception in section 3(1) relates to the nature of the proceedings. If the proceedings relate to a

commercial transaction which is entered into by the state there is no immunity.

*Jonathan Sumption Q.C.* and *Richard Field Q.C.* for the Multi-Brokers. Whether the I.T.C. was the agent of the members? That is the plaintiffs' submission C. The basis of the submission is that the I.T.C. has a legal personality, although it is not necessarily a corporation, and that it acted as an agent for its members. It is not necessary to establish a contract between the members and the I.T.C. The essential feature of agency is not a contract but consent of the principal. As Lord Pearson said in *Garnac Grain Co. Inc. v. H. M. F. Faure & Fairclough Ltd. (Note)* [1968] A.C. 1130, 1137, and quoted by Ralph Gibson L.J. in the Court of Appeal [1989] Ch. 72, 251: "They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it . . ." The proper inference to be drawn here is that the I.T.C., through the buffer stock manager, did what its members wanted it to do. The actual authority has to be implied from I.T.A.6 although there is nothing in that agreement which expressly provides for agency. Thus it is a constitutional agency.

There are three questions to be determined (1) Is the I.T.C. an agent on the facts and the true construction of I.T.A.6? (2) Is that claim non-justiciable? (3) If the members are liable is their liability excluded by the London Metal Exchange contracts?

On the first question, under I.T.A.6 the supreme control is vested in the assembly of members known as the council: article 4. The members of the council exercising control are not agents of the I.T.C. but they, as delegates of the states are the agents of their respective states. That is a different position from a company in that the management of a company's affairs is vested in its directors and those directors (even if they may also be majority shareholders) act, in the management of the company's affairs, as the agents of the company not in their personal capacities or on behalf of the body of the shareholders. Secondly, it is a central feature of the constitution of a limited company that its purposes are its own and not those of its shareholders: *Halsbury's Laws of England*, 4th ed., vol. 7 (1974), p. 426, para. 612 and *Gramophone and Typewriter Ltd. v. Stanley* [1908] 2 K.B. 89, *per* Cozens-Hardy M.R., at pp. 95–97, *per* Fletcher Moulton L.J., at pp. 97–100, 101 and *per* Buckley L.J., at pp. 104–106.

Under I.T.A.6 the I.T.C. is constituted differently. Its members are foreign states: article 3. The delegates of those states form a "council:" article 4. The council is also referred to as an assembly of delegates and that assembly controls the activities of the I.T.C.: article 7. The council is not in permanent session: article 12.1. There is a chain of responsibility up to the council: article 13. There are provisions made for the operation of buffer stock: articles 28 and 49. The council may meet to give direction for operation of the buffer stock. It is not a permanent official but the body of delegates which is responsible for buffer stock operations: article 29. The ordinary meaning of "delegates" is agents with no more power than those given to them by those appointing them. Thus the delegates are not agents of the I.T.C. The correct inference is that the

A I.T.C. exists as a separate entity to achieve the objects of its member states and not of itself: article 41.

In *Cockerell v. Aucompte*, 2 C.B.N.S. 440, the secretary of a club was held to be a mere servant of the general body of the members. Since the members gave him authority but did not furnish him with funds the contract was held to have been made by the members and the plaintiff, being a member, was held to be liable. Compare *Salomon v.* B *A. Salomon and Co. Ltd.* [1897] A.C. 22. It was held by the House of Lords that it was not possible to infer from the constitution of a limited company that the company was the agent of its shareholders, however much control those shareholders in practice exercise over its affairs. But this is because the management of a company's affairs is vested in its directors and the directors act in management of the company's affairs C as the agents of the company.

On the second question, of non-justiciability, the essential point is: who are liable under English law on contracts? That has to be decided on the proper law of the contract notwithstanding that it may involve considering the relations between one party to the contract and somebody else, his principal. When one has the position of the two persons, whose relationship between themselves is governed by international law, if one D of them brings the other into contact with a third party, say a tin trader, then whether those circumstances are such as to create a liability in English law is a matter which the English courts will answer purely by reference to English law: *Dicey & Morris, The Conflict of Laws*, 11th ed. (1987), vol. 1, pp. 1339, 1341–1342, rules 200 and 201 and *Chateney v. Brazilian Submarine Telegraph Co. Ltd.* [1891] 1 Q.B. 79, 82–84, *per* E Lord Esher M.R. In the instant case the proper law of the contract between the I.T.C. and brokers is English law. Where a question of relation between states or of treaty is relevant to decide the liability of a tortfeasor the courts are entitled to examine such agreements or treaties: *Nissan v. Attorney-General* [1970] A.C. 179, *per* Lord Reid, at p. 211c–G, *per* Lord Morris of Borth-y-Gest, at pp. 221E–222H, *per* Lord Pearce, at pp. 223–224 and *per* Lord Wilberforce, at p. 230B–G and *Zoernsch v.* F *Waldock* [1964] 1 W.L.R. 675, *per* Willmer L.J., at p. 682 and *per* Diplock L.J., at p. 690.

On the third question, all the tin contracts were made on the London Metal Exchange Contract B which is the standard tin form used when a metal exchange broker contracts with a non-member of the exchange. The form provides: "This contract is made between ourselves and G yourselves as principals, we alone being liable to you for its performance." "We" means the exchange broker. "You" is the I.T.C. Both parties are liable as principals but they do not provide that they are the only persons so liable. [Reference was made to *Shearson Lehman Hutton Inc. v. Maclaine Watson & Co. Ltd.* [1989] 2 Lloyd's Rep. 570.]

Liability as principal exists in any event. If the agent acts for an undisclosed principal that might mean that there will be an additional H liability. That will not amount to contradicting the contract: *Higgins v. Senior* (1841) 8 M. & W. 834, 843–844, *per* Parke B. That case was considered by the Privy Council in *Basma v. Weekes* [1950] A.C. 441 and was regarded as good law: see also *Redebiaktiebolaget Argonaut v.*

*Hani* [1918] 2 K.B. 247, 248–250, *per* Rowlatt J. However, merely by saying that the agents will be bound the liability of the principal cannot be excluded: *Fred Drughorn Ltd. v. Rederiaktiebolaget Transatlantic* [1919] A.C. 203, *per* Viscount Haldane, at pp. 206–208 and *per* Lord Sumner, at p. 209. In that case no decision was made about *Humble v. Hunter* (1848) 12 Q.B. 310 and *Redebiaktiebolaget Argonaut v. Hani*.

*Mark Littman Q.C.*, *Richard Aikens Q.C.*, *Richard McCombe Q.C.* and *Adrian Hughes* for Maclaine Watson adopted Mr. Kentridge's submissions on submissions A and B(i) emphasising the need for a purely statutory approach by treating the question as one of the construction of the International Organisations Act 1968 and the Order in Council of 1972. A summary of the points is as follows:

1. The liability or non-liability of the members for the debts of the I.T.C. depends on the true nature of the status or character of the I.T.C. under English law. 2. The nature of that status depends not only on the English common law but also on (i) English statutes and (ii) English rules of the conflict of laws. 3. Either statutes or conflict rules may require the English courts to recognise a status which produces different consequences with regard to liabilities from those which would emerge from the simple application of ordinary English common law rules, even though those consequences were arrived at by a process unknown to the English common law but known to other systems of law which are applicable. 4. Among the four rival candidates put forward for describing the status or character of the I.T.C. in English law (three for the appellants and one for the respondents) there is only one which would result in the non-liability of members and the failure of this appeal, namely, that the I.T.C. is a "body corporate in all but name" as was stated by Millett J. [1988] B.C.L.C. 707, 717. 5. The effect of the Order in Council of 1972 can only be assessed against an appreciation of what the position of the I.T.C. would have been under English law if the Order of 1972 had not been passed. This depends on whether English law, including English rules of the conflict of laws, will require recognition of the international status of the I.T.C. at the national level otherwise than by the intervention of statute. 6. If it does, that is to say, if English law requires recognition of the international status of the I.T.C. at the national level quite independently of statute, then the international status of the I.T.C. will prevail also at the national level unless the Order in Council of 1972 otherwise provides. This is "the international approach" broadly adopted by the Court of Appeal. 7. If it does not, in other words, if there be no statute the international status arising under the international treaty which would be an unincorporated treaty would not have passed into English law, then the effect of the Order of 1972 must be assessed on the basis that, but for the Order, the I.T.C. would, at a national level, have the status of being an unincorporated association of persons engaged in trade whose members were all jointly and severally liable for its debts; a position which remained after the Order of 1972 unless and to the extent that it is changed by the Order. That would be described as "the statutory approach." 8. Both of these approaches, when pursued, lead to the same conclusion, that is to say, that neither at the international level nor

A at the national level does the I.T.C. have the status of being "a corporation in all but name" and, therefore, the members are liable for the I.T.C.'s unpaid debts.

On point 1, in saying "English law" it should not be forgotten that the International Organisations Act 1968 and the Order in Council of 1972 apply to the United Kingdom as a whole and both I.T.A.6 and the Headquarters Agreement were made with the United Kingdom as a B whole. Indeed it would be very strange if a decision in this House as to the legal character or status of the I.T.C. would be one thing if it arose from proceedings taken in England and another if the proceedings had started in Scotland. At least some of the respondents' arguments would lead to that result, in particular the main ground on which Kerr L.J. and Ralph Gibson L.J. rejected submission B(i), namely that the mixed C entity was unknown to the common law of England. When one asks oneself, "What would be the position in England had there been no statute?" the answer would be that it would simply have been a plurality under English law. That is a plurality of members with headquarters here and trading. It would have been an unincorporated association. If one asked the same question in Scotland, it could be that the position would be like an English quasi partnership, if that is a possible D expression in Scotland. While bearing these matters in mind it is convenient to start with the English law. The proposition that the liability or non-liability of members depends on this question of status is not in dispute. It was certainly generally accepted by all the judges below.

The principle in point 2 is not likely to be in dispute. As to statute E both sides rely on the principle fully stated in *Bonsor v. Musicians' Union* [1956] A.C. 104 that Parliament can create new types of legal entity not known to the common law such as an entity which although it (i) possessed many of the main capacities of a body corporate, (ii) had sufficient legal personality, as does a trade union, to be capable of being sued by one of its own members for breach of a contract and (iii) was capable of enjoying privileges and immunities not enjoyed by its F members, was nevertheless not a separate juridical entity from its members. This supports submission A. Further, Lord Keith's observations, at pp. 150 and 152, support submission B(i) in that Parliament may have created something which was at one and the same time a separate juridical entity and also an unincorporated association of individuals, not standing separate and apart from the individuals of G which it was composed.

Alternatively, as to the rules of the conflict of laws, the possibility is that the status of the I.T.C. in English law is to be determined by the application of rule 174(1) in *Dicey & Morris, The Conflict of Laws*, 11th ed. (1987), p. 1134, that is to say: "The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the H transaction in question." *Risdon Iron and Locomotive Works v. Furness* [1906] 1 K.B. 49, 56, showed that although by the law of the State of California a remedy was given to a creditor of a company not only against the company contracting but also against the individual

shareholders in proportion to their holdings in the company that individual liability could not arise by reason merely that the person was a shareholder of the company. Such a shareholder could only be liable if he had given express authority to be made liable, because it was an essential fact of its incorporation as an English company that the liability of the members was limited. [Reference was made to *Dreyfus v. Inland Revenue Commissioners* (1929) 14 T.C. 560.] See also *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853, 972, *per* Lord Wilberforce and *Adams v. National Bank of Greece S.A.* [1961] A.C. 255, 273, *per* Viscount Simonds.

With regard to point 3, *Bonsor v. Musicians' Union* [1956] A.C. 104 establishes: first, that Parliament can create a mixed entity. Secondly, it is irrelevant whether such a concept is unknown to the English common law since statute can create a new creature. Thirdly, it is not a concept unknown to the law of the United Kingdom. Fourthly, if, as the Court of Appeal held, the rules of the conflict of laws are applicable here so that to understand and appreciate the nature of the legal character of the I.T.C. in English law it is necessary to refer to its status and character in international law under the treaties, then rule 174 in *Dicey & Morris, The Conflict of Laws*, 11th ed., p. 1134, would apply and one would look at the law of its creation and would accept that law: *National Bank of Greece and Athens S.A. v. Metliss* [1958] A.C. 509, *per* Viscount Simonds, at pp. 521–522, 524–525, *per* Lord Tucker, at pp. 528–529, and *per* Lord Keith of Avonholm, at pp. 530–531.

On point 4, under submission A the I.T.C. is an unincorporated corporation engaged in trade. It is analogous to an English partnership. Such a partnership itself, quite apart from the statutory provisions like R.S.C., Ord. 81, which enables it to sue and be sued in its firm's name, has a kind of legal personality: *Pooley v. Driver* (1876) 5 Ch.D. 458. If the I.T.C. is not held to be an unincorporated association its status can be regarded as that of a "mixed legal entity." Section 4(2) of the Partnership Act 1890 characterises the Scottish partnership which is a legal person distinct from the partners of which it is composed but where members are nevertheless liable ultimately for the debts. The third form of status is that of an agency. That has been called, "Constitutional agency." That point has been argued by Mr. Sumption under submission C and his submissions are adopted. As against that, the fourth is the view put forward by the respondents. Under that view the I.T.C. has full juridical personality in the sense that it exists as a separate legal entity distinct from its members: see Millett J. [1987] B.C.L.C. 707, 717.

The statutory approach is the correct approach. The status of the I.T.C. is to be found only in the Order in Council of 1972 made under the International Organisations Act 1968. Although I.T.A.6 and the Headquarters Agreement determine the status of the I.T.C. at international level they do not affect its position in the United Kingdom except to the extent determined by the Act of 1968 and the Order of 1972. In other words, apart from the statute, the treaties would be unincorporated treaties. The international status of the I.T.C. under international law, on this footing of being derived from an unincorporated

A treaty, would have no effect in English law. Rule 174 in *Dicey & Morris, The Conflict of Laws*, 11th ed., does not apply to an international organisation. The Act of 1968 is an enabling Act and does not of itself effect changes in the existing law. It gives powers to the Crown to make provisions to confer on the international organisation the legal capacities of a body corporate: section 1. It is intended to apply to various international organisations of which the United Kingdom is a member B together with one or more foreign powers: section 1(1). Also see section 1(6) under which privileges and immunities conferred are not greater than the agreement to which the effect is being given. Section 4 deals with an international organisation of which the United Kingdom is not a member. The same provisions apply to such organisations if they wish to set up a business within the United Kingdom. No doubt it is considered C desirable in the national interest to promote the setting up of the headquarters of international organisations in this country by offering these facilities. The long title of the Act emphasises that its purpose is to facilitate the operations and to grant facilities for such organisations. The Order in Council of 1972 reflects the same position: see articles 2(1) and (2), 4, 5, 7 and 8 and the Headquarters Agreement. The manifest D purpose of this legislation was to make it easier for this body to perform its function. The mischief is identified by the word "facilities" in the long title. It was that the I.T.C., the international organisations, under the existing law, required certain facilities to be given to them. [Reference was made to *Godman v. Winterton* (1940) 11 I.L.R. 205.] It was not the mission of the legislation to insert a corporate veil to protect the members from liability.

E Alternatively, the legal nature of the I.T.C. at the national level is determined by the provisions of the specific treaties, I.T.A. 6 and the Headquarters Agreement. Rule 174 of *Dicey & Morris, The Conflict of Laws*, 11th ed., essentially applies in this connection. It has been accepted by the Court of Appeal that the I.T.C.'s legal character under international law is that of a mixed entity. It is legitimate to look at the F treaties to establish its character. Under article 16 of I.T.A.6 the I.T.C. has a legal personality. There are capacities granted. Article 4 provides that the status, privileges and immunities of the I.T.C. in the territory of the host government shall be governed by a Headquarters Agreement between the host government and the I.T.C. That takes one to the Headquarters Agreement. Clause 3 repeats precisely the same words as G article 16 of I.T.A.6. There is then a reference to capacities. There is there a clearly expressed intention that there should be transferred into the municipal law of the host country precisely the same form of legal personality that it had in international law, no more no less: see also section 1(6) of the International Organisations Act 1968.

*Aikens Q.C.* following. There are two particular issues to be dealt with. First, a general issue on the question of how to decide the nature H or status of the I.T.C. Second, the international approach. For factual background and working of I.T.A.6 and the trading of the buffer stock manager see *Shearson Lehman Hutton Inc. v. Maclaine Watson & Co. Ltd.* [1989] 2 Lloyd's Rep. 570.

On the first issue, one starts with the premise that it is necessary to decide what is the status of the I.T.C. in order to decide who is liable for its contract debts. The phrase I.T.C. could mean one of the three things: (i) an association in the nature of an English partnership, (ii) an association in the nature of a civil law partnership, like a French sociétés in nom collectif, or (iii) a quasi-corporation. If the I.T.C. contracts with Maclaine Watson under each of those guises the results in terms of liability for the contract debts of the I.T.C. would be different. If it is an unincorporated association like an English partnership the results of the contract would be that all the members were, jointly and severally, liable for all the contract debts. If it is in the nature of a civil law partnership the consequence would be that the entity was primarily liable but that the members would nevertheless retain a secondary liability. If it is a quasi-corporation then the corporation itself only would be liable. The question, thus, arises: how is the nature or the status of the I.T.C. to be ascertained? If within the United Kingdom law (i.e. English and Scots law), either in statute or at common law, the organisation in question is made a corporation then that grants a particular status to that organisation under municipal law. If it has no such status then any liability on itself does not necessarily exclude the liability of its constituent parts. There is, here, nothing in the Order in Council of 1972 or elsewhere which confers on the I.T.C. the status of a corporation or that of a separate legal entity. So one has to look for inferences. There is an important difference between status and capacity. "Capacity" is nothing more than the ability to exercise rights: see Carlton Kemp Allen's article Status and Capacity (1930) 46 L.Q.R. 277, 279, 280–283 and *Graveson, Status in the Common Law* (1953), pp. 55–56. "Status" is a legal conception. It is a condition which is imposed as a matter of law by the authority of the state on a particular class of persons or non-natural entities: *Graveson, Status in the Common Law*, pp. 58–59 and *Salvesen or von Lorang v. Administrator of Austrian Property* [1927] A.C. 641, 653, *per* Viscount Haldane. Furthermore, status gives rise to capacities but the mere grant of certain capacities will not automatically give to the grantee the particular status or nature of a particular class as recognised by the state. That applies to both natural and non-natural entities: *Graveson, Status in the Common Law*, p. 73. Capacity, i.e. an ability to do something, is only one incident which flows from the status or nature of something. Others include nationality, domicile and perpetual succession and the like. Accordingly, the nature or status of the I.T.C. recognised by the Order in Council of 1972 is not determined solely by article 5. The Order has not granted, expressly or impliedly, the status of a corporation to the I.T.C. Any other status can only be "non-corporate" status. There is nothing to prevent the members of the non-corporate entity to be liable for its unpaid debts. However, if it is concluded that the I.T.C. must have some non-corporate status then this must be deduced from the Order in Council of 1972 and the Act of 1968 or by reference to I.T.A.6 and international law. The latter can be called the international law approach.

On the international law approach under submission B(ii), the I.T.C. is recognised for the United Kingdom municipal law by the Order of

A 1972 but the nature of the I.T.C. and the liability, if any, of its members for its debts are not expressly dealt with by that Order. It is, therefore, necessary to examine the instruments which created the I.T.C., namely I.T.A.6 and the Headquarters Agreement. One can proceed by analogy with the rules of English conflict of laws. Those rules establish that (a) the status of any organisation, (b) all matter concerning its constitution and (c) the liability of its individual members for its debts or B engagements is governed by the law by which the organisation was created. The I.T.C. was created under public international law. Thus, that law governs its status, its constitution and the liability of its members for its unpaid debts. I.T.A.6 is its constitution. The construction of I.T.A.6, therefore, is governed by public international law, the law of its creation. Under public international law the I.T.C. itself has "legal C personality." That is its status. But on the true construction of "legal personality" under public international law the I.T.C. is to be characterised as a "mixed" entity in the sense that the members are secondarily liable for its debts. The constitution does not exclude the liability of the members. In analysing I.T.A.6, which is a treaty, the court should have regard to the established principles of public international law as to the proper construction of treaties, as codified in D the Vienna Convention on the Interpretation of Treaties (1980): *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, *per* Lord Diplock, at p. 282, and *per* Lord Scarman, at p. 290. This course is also consistent with the principle that the courts should have regard to the relevant treaty, here I.T.A.6, as part of the full content or background to the law, even if not expressly or impliedly incorporated into English law, in E all circumstances when a court has to construe statutory words, or formulate legal principles in an area of the law where the Crown has accepted international obligations: *Pan-American World Airways Inc. v. Department of Trade* [1976] 1 Lloyd's Rep. 257, 261, *per* Scarman L.J. It is a general rule of public international law that treaties must be interpreted so as to exclude fraud and so as to make their operation consistent with good faith: *L. Oppenheim, International Law, A Treatise*, F 8th ed. (1955), vol. 1, p. 950, para. 553, and pp. 951–957, para. 554. That is how I.T.A.6 ought to be approached.

That status of the I.T.C. and the liability of its members will be recognised and given effect to under the United Kingdom law because the United Kingdom law will recognise the status and the attributes given to an entity by a foreign law and by public international law. Since G the status and attributes of the I.T.C. are governed by international law, once that has been ascertained, it must be recognised by the United Kingdom municipal law by virtue of the Order in Council of 1972. The English rule of law that a person cannot rely on an unincorporated treaty to create new private law rights enforceable in the municipal courts is not offended by the recognition and enforcement of the I.T.C.'s status.

H For the purposes of the United Kingdom municipal law the Order in Council of 1972 recognises the I.T.C. Without that Order the I.T.C. would have no municipal law status or capacities at all. To that extent the Order puts the I.T.C. on the municipal law plane. The Order,

however, does not grant the I.T.C. any new status for the United Kingdom municipal law purposes. It simply recognises a number of matters, including that (a) it is an organisation of which Her Majesty's Government and the governments of other foreign powers are members, i.e. it is an international organisation: see the titles of the International Organisations Act 1968; (b) the activities of the I.T.C. are those undertaken pursuant to I.T.A.4 and any succeeding treaty: article 2 of the Order; (c) the Order will come into force on the same day as the Headquarters Agreement: article 1; and (d) the I.T.C. will have immunity from suit and legal process except, inter alia, in respect of the enforcement of an arbitration award made under articles 23 and 24 of the Headquarters Agreement. The fact that article 5 of the Order confers on the I.T.C. "the legal capacities of a body corporate" does not confer any new or greater status on the I.T.C. than it had already under I.T.A.6 or the Headquarters Agreement. The Order is silent on status. Therefore, it is necessary to look at I.T.A.6 and the Headquarters Agreement to determine the proper nature of the I.T.C. Such nature is then recognised by the Order in Council for the purposes of the United Kingdom municipal law: C. W. Jenks' article "The Legal Personality of International Organisations" published in *The British Year Book of International Law* (1945), pp. 270–274, and F.A. Mann's article, "International Corporation and National Law" published in *The British Year Book of International Law 1967* (1969), pp. 145, 148–150, 151, 153–156, 157–158, 160–162, 164 and 174.

The conflict of laws rules, as applied to corporations or other entities known to different systems of law, is not in doubt: *Dicey & Morris, The Conflict of Laws*, 11th ed., rule 174, pp. 1134, 1135. *Risdon Iron and Locomotive Works v. Furness* [1906] 1 K.B. 49, 56–57, 58, 59, decided that, in the absence of any contrary agreement, the law of incorporation of a company governs the liability of the members of it for debts of the company and not the law under which the company was trading. See also *Johnson Matthey & Wallace Ltd. v. Alloush* (1984) 135 N.L.J. 1012 and *National Bank of Greece and Athens v. Metliss* [1958] A.C. 509, *per* Lord Tucker, at p. 529, and *per* Lord Keith of Avonholm, at p. 531.

The I.T.C. was created under public international law. Therefore, by analogy with rule 174 in *Dicey & Morris, The Conflict of Laws*, 11th ed., public international law governs the I.T.C.'s status, constitution and the liability of its members. The key point is that although the I.T.C. is recognised for the United Kingdom municipal law by virtue of the Order in Council of 1972, that is merely declaratory for the United Kingdom municipal law of the position of the I.T.C. and its members under the law which created it, namely international law. The English common law recognises corporation or other legal entities created under other systems of private law as existing so that they can sue and be sued in England: *Dicey & Morris, The Conflict of Laws*, 11th ed., rule 171, p. 1128. All that the Order of 1972 does is to put the I.T.C. in a similar position for the United Kingdom municipal law purposes. It cannot be assumed that, under the common law, the status of the I.T.C. by virtue of the law of its creation would be automatically recognised because it could be argued that otherwise it would be an attempt to create new private law

A rights for the I.T.C. by virtue of unenacted treaties, viz., I.T.A.6 and the Headquarters Agreement: see J. C. Collier's article "The Status of an International Corporation" published in *"Multum Non Multa" Festschrift Für Kurt Lipstein* (1980), pp. 21, 24–25, 27–28.

The liability of states for the unpaid debts of an international organisation of which they are members is as follows: (a) An international organisation means an organisation established by a treaty between B states, and possibly other bodies which can be subject to international law, e.g. the European Economic Community. The organisation has legal personality, i.e. is a distinct legal entity from its members. (b) The question of whether the members of the international organisation will be liable for its debts depends on the correct construction of the treaty creating the organisation. In the case of the I.T.C. this is I.T.A.6. C (c) I.T.A.6 must be construed in conformity with a rule of public international law that members of an international organisation are liable for the debts of the organisation on a secondary basis, in the absence of any clear limitation in the treaty or exclusion of liability. One reason for the rule is that, in the absence of any express limitation or exclusion of liability, creditors dealing with the organisation may or will be misled. This is especially so if any other construction could facilitate D fraud or bad faith. (d) The liability of the member states is joint and several. (e) The member states have a right of contribution inter se for debts of the I.T.C. which have been met by one or more members. The amount of the contribution which can be obtained from each member will depend on the terms of the treaty. In the absence of any express provision, the contribution will be in proportion to their respective E percentages of production or consumption as determined by the council of the I.T.C.

In construing I.T.A.6 as an international law document two questions have to be considered: (i) what is the nature of the "legal personality" of the I.T.C. and (ii) what is the effect of I.T.A.6 as to the liability of the members of the I.T.C. As to the first question the matter should be looked at from the point of view of civil lawyers who are familiar with F the civil law partnership. It is possible that the draftsmen of I.T.A.6 had the civil law concepts of legal personality in mind because only three of the member states are common law countries. Article 16(1) of I.T.A.6 states that the I.T.C. "shall have legal personality." The article is not using the language intended to create a corporation in the sense of the English law. It is the nature of a civil law partnership where the G partnership itself is a separate entity from the members. Article 4(1) of I.T.A.6, stating that the council "shall be composed of all the members" reads more naturally with article 16(1) as indicating a kind of partnership which for the present purposes is a civil law partnership: also see article 3 of the Headquarters Agreement which provides for the I.T.C. to have legal personality. Article 2 of the Headquarters Agreement states that it should be interpreted in the light of the functional objectives. That is H compatible with the idea of a civil law partnership. Thus the phrase "legal personality" in I.T.A.6 is more likely to mean civil law partnership or mixed entity than a corporate entity which excludes members' liability for the corporation's debts.

As to question (ii), I.T.A.6 contains no provisions excluding or limiting the liability of members of the I.T.C. for its unpaid debts. It is true that there are no express provisions for the payment by members to creditors of such debts. But that is a liability arising as a matter of law and such provisions are not found in partnership deeds. The financing of the buffer stock is provided for in article 22 of I.T.A.6. It is to be shared equally between producing and consuming members. The article indicates the liability of the whole of the membership towards financing generally. Note also article 26(4) which presupposes that individual members have shares in the buffer stock itself, i.e. property of the organisation. Article 24 permits borrowing of money for the purposes of the buffer stock. All members would be liable to meet any deficiencies in borrowing under that article. Article 28 shows how the buffer stock is to be operated. Article 41(1) provides for the members to use their best endeavours and co-operation to promote the attainment of the objectives of the I.T.A.6. That must include all necessary financing.

Under article 31(c) of the Vienna Convention it is necessary to consider the relevant principles of international law as an aid to the construction of I.T.A.6. The following principles are established on that point from the writings of jurists: (i) The general principles of law recognised by civilised nations are a source of international law. Thus, all relevant provisions and circumstances must be studied including any intention made known to third parties. (ii) In international law there is no positive rule that simply because an international organisation has separate legal personality that necessarily excludes liability of the member states for the unpaid debts of the organisation. (iii) The issue may turn on the capacity in which the international organisation is acting, namely jure imperii or jure gestionis. If the latter then it is more likely that the members of the organisation will remain liable for its debts unless there is an express provision in the treaty establishing the organisation making it plain that the members' liability is limited and that only the organisation itself will be liable for such debts. (iv) In the absence of express terms, international organisations with legal personality are in the nature of civil partnerships or mixed entities. That means that the members remain secondarily liable for the unpaid debts of the organisation. (v) Whether such liability can be maintained in the municipal courts must depend on how the organisation is to be treated by the relevant municipal law: see Charter of the United Nations and Statute of the International Court of Justice, 26 June 1945; *Hersch Lauterpacht, Collected Papers on International Law* (1970), pp. 58, 61, 68–70, 71–74, 75; *H.-T. Adam, Les Organismes Internationaux Spécialisés*, (1965), paras. 103, 107, 108, 109, 110, 111; Shihata's article, "Role of Law in Economic Development; The Legal Problems of International Public Ventures" in *Review Egyptienne de Droit International*, vol. 25 (1969), pp. 122–124; *Schermers, International Institutional Law*, (1980), ch. 11, p. 770, para. 1377, pp. 770–771, p. 772, paras. 1379, 1383, pp. 772, 774, para. 1386, p. 776, 1389, p. 778, para. 1392, p. 780, para. 1395, p. 782, para. 1399; *Seidl-Hohenveldern, Corporation in and under International Law* (1987), ch. 1, pp. 1–3, ch. 5, pp. 69, 72, 73, ch. 7, p. 90, ch. 9, pp. 100–101, ch. 10, pp. 110–112, 119–121; *Seidl-Hohenveldern,*

A *Responsibility of Member States of an International Organisation for Acts of the Organisation* (1987), pp. 432, 427; *Ebenroth, The Civil Liabilities of International Organisations and their Member States* (1988), pp. 3–4, 5–7, 8, 9–12, 13–28; *Seidl-Hohenveldern, General Course of Public International Law* (1986), pp. 193–194; Prof. Dr. H. C. Gerhard Hoffman "Recourse on the Member States of International Organisations on account of their Indebtedness"; F. A. Mann's article, "International B Corporation and National Law" in the *British Year Book of International Law 1967*. [Reference was made to *Westland Helicopters Ltd. v. Arab Organisation for Industrialisation* (1984) 23 I.L.M. 1070 and *In re Duke of Wellington, Glentanar v. Wellington* [1947] Ch. 506.]

*Stanley Burnton Q.C.* and *Mark Barnes* for the banks. The basic point is that if the I.T.C. were an organisation created under municipal C law, the fact that it is a distinct legal personality would not of itself exclude the liability of its members for the obligations it undertakes under contracts, and in particular contracts governed by English law in litigation in England. The rules of English conflict of laws require the court to refer to the constitution of the organisation. If, by that constitution, the member states are directly liable to third parties for its obligations, they will be so liable in an action on the contract. It is to be D noted that the action here, is on the contract. It is not an action, in the case of a foreign partnership, to enforce the foreign partnership deed. Where a plaintiff's rights arise by virtue of and under his contract with the organisation but in order to ascertain the parties liable under the rules of English conflict of laws, it is necessary to look at the constitution of the organisation: *National Bank of Greece & Athens S.A. v. Metliss* E [1958] A.C. 509. The same rule must apply to international organisations. In such cases, the constitution is the constituent treaty taking effect under public international law and it is to this system of law that the court must refer to determine those questions. Article 5 of the Order in Council of 1972 does not, and should not be construed to affect, this proposition. It would be highly anomalous if the rights and liabilities of the parties to contracts with international organisations were different in F the United Kingdom to their rights and liabilities elsewhere. Equally, it would be wrong to construe the United Kingdom legislation as depriving parties contracting and seeking to enforce their rights in the United Kingdom of rights they would otherwise enjoy against the members of an international organisation. The court should lean heavily against such a construction and such a result. No more needs to be read into the G legislation than is already there. It is not necessary to read words into the provision conferring the legal capacities of a body corporate on the organisation. The provision should not be read as if it said: "The organisation shall have the legal capacities of a body corporate" with the addition of "and no member of that organisation shall have any liability for its debts." Some treaties provide that no member of the organisation shall have any liability for its debts. Such provisions take effect because H they are expressed in the treaty, which is a sovereign act creating an organisation to bring about that end. The proper conclusion for the court to come to in a case such as the present is that unless the position is made manifest to third parties it ought to be at the risk of the

members of the organisation who have set it up, given it capital and enabled it to trade in such a way that at the end of the day, there are enormous liabilities beyond its means. Section 4(2) of the Partnership Act 1890 enacted the rule which already existed in Scotland that members of a partnership were to be treated in some respects as if they were guarantors. Section 9 imposes the substantial liability on the members of the partnership. They are jointly and severally liable: see *Mair v. Wood*, 1948 S.C. 83.

From the point of view of the banks there are following issues in the appeal: (1) Is the question of the members' liability to be decided, in accordance with the ordinary rules of English conflict of laws, by reference to the proper law of the organisation, i.e. international law including, in the instant case, I.T.A.6, or by reference to English law alone. That requires consideration of the defendants' arguments: (a) that the court cannot refer to international law or to I.T.A.6, because they are non-justiciable and (b) that there is no need for the court to do so because the question has in effect been answered by the Order in Council of 1972. (2) If the question is to be determined by reference to international law, how is the relevant rule of international law to be found, in the absence of any specific provision in I.T.A.6? (3) If the question is to be determined by reference to international law, what is the relevant rule, and how does it apply to this case? (4) If the matter is to be determined otherwise than by reference to international law, would the members of the I.T.C. be liable, apart from the Order in Council of 1972? (5) If so, does the Order in Council nevertheless have the effect of excluding any such liability? (6) Are the member states immune under or by virtue of article 6 of the Order in Council of 1972? (7) Are the foreign member states immune in respect of these claims? Are the claims within section 3 of the State Immunity Act 1978?

Two points arise on non-justiciability, first, whether the court is entitled to look at and construe a treaty such as I.T.A.6 at all. Secondly, whether, if the rights sought to be enforced against the member states are derived from a treaty and are based on a treaty, such rights are precluded under English law from being enforced as private law enforceable rights. It is clear that private rights or obligations can be derived from sources other than the laws of this country, notably the laws of other countries: *National Bank of Greece & Athens S.A. v. Metliss* [1958] A.C. 509. In English law there is a well-established rule that the making of a treaty is an executive act but where the performance of obligations under a treaty entails alteration of existing domestic law it requires legislation: *Attorney-General for Canada v. Attorney-General for Ontario* [1937] A.C. 326, 347, *per* Lord Atkin. But in certain circumstances the Crown can affect private rights and obligations without legislation and it can do so equally well by treaty: *Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740. Furthermore, the Crown can by treaty, without legislation, constitute itself an agent or trustee. That would affect the rights of private parties: *Civilian War Claimants Association Ltd. v. The King* [1932] A.C. 14, 27. Where a treaty is relevant to the issue before the court, in a proper case the court cannot be precluded from examining and construing it. The justiciable issue before the court

A would be: who are the parties liable under the contracts of loans? Since non-justiciability is an exception to the normal jurisdictional function of the court, in cases of doubt, the court should lean against concluding that it cannot determine an issue brought before it on the grounds of non-justiciability in the same way that the court leans against deciding that a sovereign state is not liable by reason of state immunity: *Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A. (The Playa* B *Larga and The Marble Islands)* [1983] 2 Lloyd's Rep. 171.

Article 5 of the Order in Council of 1972 shows that it carefully avoids incorporating the council of the I.T.C. or providing that it shall be treated as a body corporate. Further, article 7 is not making the official archives of the council into those of a diplomatic mission. It is using the immunities which attach to the official archives of diplomatic C missions as the model in order to describe those which are conferred on the I.T.C. Article 8 is adopting the same procedure in connection with relief and exemption from taxes. If reference can be made to international law and the treaty to determine such questions as the liability of member states, it is undesirable and unnecessary to read more into article 5 of the Order.

In the case of companies or associations formed under municipal law D the relevant rules are found in the constituent instrument of the organisation and in the legislative framework. If the same approach is followed in relation to organisations formed under public international law the first place to look would be the constituent treaty. If I.T.A.6 had expressly dealt with the question of members' liability to creditors in the event of deficiency or otherwise, then that would determine the E matter. In fact, I.T.A.6 does not deal with the matter expressly. To answer the question, therefore, the court not only can but must ascertain the rule of international law. If there is no clear rule the court should determine as to what the rule is from the material available before it and apply that rule. There is no general international convention or framework agreement covering the question. The development of international organisations is relatively recent and the legal consequences F are yet to be worked out: *Jenks, The Proper Law of International Organisation* (1962), p. 7. But there have been a number of cases in which the rules of public international law were in doubt and where the court did not decline to deal with the issues before it and determined them by arriving, as best it could, at the rule to be applied: *Duke of Brunswick v. King of Hanover* (1844) 6 Beav. 1, 45–48, *per* Lord G Langdale M.R.; (1848) 2 H.L.Cas. 1, H.L.(E.); *Schooner Exchange v. M'Faddon* (1812) 7 Cranch (U.S.) 116; *Reg. v. Keyn* (1876) 2 Ex.D. 63, 65–70, 81, 86, *per* Sir Robert Phillimore; *In re Piracy Jure Gentium* [1934] A.C. 586, 598, and *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529, 552, 556: see also *J. L. Brierly, The Law of Nations*, 6th ed. (1963), pp. 66–68 and *Lauterpacht, International Law* (1970), vol. 1, p. 75. [Reference was made to *Alcom Ltd. v.* H *Republic of Colombia* [1984] A.C. 580.]

Put shortly, the question is: whether the members of an international organisation are liable or not for its debts in the absence of express provision. Where no provision is made expressly excluding liability the

members are liable, irrespective of legal personality. The sources of law on this issue are numerous text books referred to: for example, Ebenroth's article, "The Civil Liabilities of International Organisations and their Member States" (English translation) (1988) and *H.-T. Adam, Les Organismes Internationaux Spécialisés* (1965), and the usage made by the states of international organisations which shows an implementation of the rule: see, for example, the World Bank (1945), the International Finance Corporation, International Development Association, African Development Bank, African Development Fund, Asian Development Bank, Caribbean Development Bank and East African Development Bank. Those are financial organisations aiming to achieve their public and international objects through commercial transactions with private persons. Broadly they are, by their constitutions, given status, immunities and privileges so as to enable them to perform their functions and liability on shares is limited to the unpaid portion of the issue price of the shares. See also the European Economic Interest Grouping Regulations 1989 and the Companies Act 1985, section 740. [Reference was made to *Douglas v. Phoenix Motors*, 1970 S.L.T.(Sh.Ct.) 57.] Legal personality is not of itself inconsistent with liability on the part of the members. So far as international law is concerned the International Court of Justice was at pains to emphasise in *In re Reparation for Injuries Suffered in the Service of the United Nations* [1949] I.C.J.R. 174 that the concept of legal personality was a variable concept. As a general rule, those who engage in transactions of an economic nature are deemed liable for the obligations which flow therefrom: *Westland Helicopters Ltd. v. Arab Organisation for Industrialisation* (1984) 23 I.L.M. 1070, 1083. The member states of an international organisation associate for public purposes. The costs and losses involved should, prima facie, be a charge on the public purse. Lord Pearce said of Royal Prerogative in *Nissan v. Attorney-General* [1970] A.C. 179, 227, that it is a prerogative to take and to pay. It is not a prerogative simply to take. The treaties deal with limitation of liability separately from the question of legal personality. That confirms the rule of international law that they are two different matters. The treaties do not state that the organisation shall have legal personality with the result that no member shall be liable by reason of its membership for obligations of the organisation. There are striking similarities between the relevant provisions of the treaties. In particular, in the commodity agreements, for example the Sugar Commodity Agreements, the International Cocoa Agreements and the International Natural Rubber Agreements, the similarities of wording are such that it is impossible not to come to the conclusion that at least, they were derived from the same precedent as I.T.A.6. There is a significant overlap of membership. It is legitimate to infer that the omission of a limitation or exclusion clause from I.T.A.6 was deliberate. If the members had intended to exclude or limit their liability, they would have been expressed.

Article 177 provides that the European Court shall have jurisdiction to give preliminary rulings concerning "(*a*) the interpretation of this Treaty; (*b*) the validity and interpretation of acts of the institutions of the Community; (*c*) the interpretation of the statutes of bodies established

A by an act of the council, where those statutes so provide." Then the article sets out the provisions for national courts to make references. A treaty entered into by an institution of the Community, and I.T.A.6 is such a treaty, is an act of that institution within the meaning of article 177(*b*); *R. & V. Haegeman v. Belgian State* (Case 181/73) [1974] E.C.R. 449. If it is accepted that there is, in I.T.A.6, no clear exclusion of liability such as is required under international law then there would not B be a need to refer the interpretation of the treaty to the European Court. If the decision is that there is an issue arising on the interpretation of the treaty, then it is accepted that article 177(*b*) applies. The interpretation given by the European Court would be binding on the parties before the court. If those parties include all the states, then all the states would be bound by that decision.

C The purpose of the International Organisations Act 1968 and the Order in Council of 1972 is no more than to give the I.T.C. the facility to contract, to hold property and to sue and be sued in its own name, subject to the immunities granted by article 6 of the Order. There is no reason to suppose that that legislation intended to exempt the members of the I.T.C. from liabilities that would otherwise attach. Article 6 confers qualified immunity on the I.T.C. None of the banks, except D Kleinwort Benson Ltd., has an arbitration clause in the contract. Therefore, none, except Kleinwort Benson Ltd., would be able to enforce judgment against the I.T.C. unless it waived its immunity. There are two effects of this: first, if the I.T.C. is to be treated as non-existent under English law then the immunities conferred by article 6 must have been conferred on the members who are entitled to take advantage of E them in the proceedings. It is not suggested that the I.T.C. is to be ignored for all purposes. Clearly Parliament has conferred many privileges and attributes on it, as it did with trade unions without thereby exempting the members from liability. The second effect is stated to be that, if the I.T.C. is treated as having some existence under English law, then any liability on the members will be a subsidiary liability arising only secondarily and contingently in the event of the F I.T.C. failing to honour its obligations. The liability of the member states involves liability on the part of the I.T.C. as a prerequisite. It is also stated that since by virtue of article 6 the I.T.C. cannot be held liable the secondary liability of the member states cannot arise. There are two confusions in the second point. First, it confuses practical and procedural questions with substantive liability. In practice, the creditors G of an association or company will normally look to the joint funds before looking to the individual members. That is a convenient practice. In municipal law it is sometimes reinforced by procedural rules: for example, the *French Commercial Code*, article 10; Scottish rules requiring the constitution by writing or decree against the partnership of disputed debts: *Neilson v. Wilson* (1890) 17 R. 608 and *Mair v. Wood*, 1948 S.C. 83. Such rules are not enforced by English courts. The second confusion H is between immunity from suit and immunity from substantive liability. Immunity under the Order in Council of 1972 is immunity from suit not from liability: *Zoernsch v. Waldock* [1964] 1 W.L.R. 675, 691–692. The I.T.C. remains liable to the banks. Its liability is undisputed.

If the members are liable as alleged the foreign states may be sued here by virtue of section 3(1)(*a*) and (*b*) of the State Immunity Act 1978. A

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*Patrick Talbot* for Canada. B

*Peter Leaver Q.C.* for Finland, Norway, Sweden and Switzerland.

*Richard Jacobs* for France, the German Federal Republic and the Netherlands.

*Gordon Pollock Q.C.* for India.

*Howard Page Q.C.* for Indonesia.

*Gordon Pollock Q.C.* This case is one of quite straightforward simplicity and involves a fairly straightforward question, namely: "What is the proper construction of the Order in Council of 1972 purely as a matter of English law? The starting point is with whom did Rayners contract? Who were the sellers of the tin in respect of which they are suing for payment? All the states are claiming in these proceedings is that (a) they were not parties to the contract sued on and (b) that there is no rule of law which imposes on the states liability of guarantors for the debts of a separate entity, namely the I.T.C. C D

The first proposition is that the capacities of a body corporate are the most extensive capacities which can be enjoyed by a persona ficta. The essential capacities include power to contract and to own property, to acquire and enjoy and dispose of property in its own name and in its own right so as to incur obligations and acquire rights in and for itself. It follows that it can sue and be sued. Secondly, the conferral by Parliament on an unincorporated body of such capacities must lead necessarily to the conclusion that for the purposes of English law that body is to be treated as a persona ficta. The same would be true in Scottish law. A persona ficta simply means a juridical person separate from those who compose the body. Parliament inevitably creates in the eyes of the law a separate and independent entity which, as Millett J. quite rightly put it, is a body corporate in all but name. The body is given everything which flows from the possession of corporate personality. The third proposition is that the exercise by an entity of the capacity to contract enjoyed by a body corporate results in the entity obtaining rights and incurring obligations in its own name and for its own account. Those rights and obligations are not of its members. That is the whole purpose of having a body corporate exercise the capacity. If the members wanted to incur rights and obligations jointly they would go out and enter into the obligations on their own account. The fourth proposition is that either the Order in Council of 1972 is ignored as meaningless when it talks about the capacities of a body corporate or it must necessarily lead to the conclusion that when the I.T.C. exercises the capacities of a body corporate, it does so in the way that a body corporate would, that is to say, incurring its own liabilities. That is enough to deal with the plaintiffs' submission A. E F G H

A There is a full range of international organisations in respect of which Orders in Council have been made. That shows that any decision as to the construction here will apply to them all equally. In *Halsbury's Laws of England*, 4th ed., vol. 18 (1977), p. 822, para. 1598, international organisations with privileges and immunities and status of body corporate are listed. The list covers a whole range of organisations including the World Health Organisation, the Universal Postal Union, the United B Nations and many of its subsidiary organisations and also the I.T.C. It covers jure imperii activities starting with the waging of war and going through to the preservation of peace with all activities in between, particularly those of an economic nature. Paragraph 1599 lists organisations on which "the legal capacities of a body corporate have been conferred." The point of distinction is that they are all international C organisations of which the United Kingdom is a member but for various reasons there is no requirement that immunity be granted. Therefore simply the legal capacities of a body corporate are given and no privileges and no immunities are conferred. The same formula has been used by Parliament from the outset. The first organisation which had to be dealt with was the United Nations Relief and Rehabilitation Administration. It was brought into existence on the international plane D by a treaty in 1943. Under the Diplomatic Privileges (Extension) Act 1944 an Order in Council was made providing for the legal capacities of a body corporate and granting immunity and privileges. There has been a wholly consistent pattern since. [Reference was made to 57 treaty organisations including the European Transport Organisation, the International Monetary Fund 1945; the North Atlantic Treaty Organis- E ation 1951, 1974; the Inter-American Development Bank, the International Bank of Reconstruction and Development 1945; the United Nations 1946, 1947; the International Finance Corporation 1955; the Sugar Organisation; the Caribbean Development Bank; the African Development Fund; the European Molecular Biology Laboratory; the European Patent Organisation; the European Organisation for the Safety of Air Navigation and the Commonwealth Secretariat.] That study F provides ample justification for saying that one sees a consistent and significant parallelism in the way in which the United Kingdom Parliament has treated those organisations, and that there is really a very powerful argument for the court to lean in favour of the view that the United Kingdom has fulfilled or wishes to fulfil its international obligations, and also for taking the view that the conferring of the legal G capacities of a body corporate on an otherwise unincorporated entity gives legal personality and a personality and capacities which are the fullest known to United Kingdom law. There is a general duty, arising from the nature of treaty obligations and from customary law, to bring internal law into conformity with obligations under international law. A treaty does not have to specify that a particular provision is to be given effect to in domestic law: *Brownlie, Principles of Public International* H *Law*, 3rd ed. (1979), p. 38.

*C. T. Carr, The General Principles of the Law of Corporation* (1905), pp. 1, 6–7, 130–131, states: "body politic known as a corporation possesses no physical being, but exists in the eye of the law." It is stated

to be a group composed of many individuals who are named corporators and yet it has a personality separate and distinct from those individuals and it has a continuous identity. "The test which distinguishes them from other groups . . . such as the partnership or the unincorporated firm, is the fact that corporations have a legal existence independent of their corporators. Contractual liability is the touchstone of associations." If the liability for contract attaches solely to the members of the group one is dealing with an unincorporated body. If one finds "that an invisible and impalpable entity, representing and consisting of the sum of the members, is bound by contracts entered into in the name of the association" one may be satisfied that one is dealing with a genuine corporation. Corporation can be sued simply means a body which has a separate existence in law from its members. In that sense, it is not common ground that Parliament did not incorporate or make of the I.T.C. a body corporate. It is, and has always been, the essential part of the states' argument on submission A that the effect of the Order in Council of 1972 was to produce just that effect, that is to say the I.T.C. is a persona ficta, separate and independent of its members. Millett J., therefore, rightly concluded that it would be indistinguishable from a corporation [1987] B.C.L.C. 707.

On the contractual touchstone, the true and simple issue on submission A is: who contracted? If, on the plaintiffs' submission, the contracts were made solely with the members, then there is no entity at all. There is nothing on which can have been conferred the capacities of a body corporate, unless one goes on to say that those capacities were conferred simply on the individual members who did not need them because they already had them. Millett J. rightly stated, at pp. 712–713, that as to the question whether or not the I.T.C. had a sufficient existence to contract in its own name and its own account one has to see whether it had sufficient capacities. If it has capacities, personality and existence follow and status really makes no difference. The capacities of a body corporate are the very antithesis of the capacities of the members who compose the body when one is looking at the relationship between them.

It has been suggested that a partnership has some of these capacities, or a partnership can act in some way. A partnership can do nothing in its own name and for its own right and as such does not incur any right, obligations or have any powers: *Lindley, An Introduction to the Study of Jurisprudence* (1855), p. 99, section 101, Legal Capacity; *Lindley, Law of Partnership*, 3rd ed., vol. 1, p. 4. There is quite a clear distinction drawn between a partnership and a corporation: *Palmer's Company Law based on a lecture delivered in the Inner Temple Hall, at the request of the Council of Legal Education* (1898), pp. 37–38. Partnership property, in the case of a partnership, is not property owned by anyone other than the partners. It is owned either jointly or it may be owned by individual partners or it may be owned by one or more partners on trust. "Partnership property" is merely a convenient term to describe property dedicated to the purposes of the partnership. It is not in any way intended to imply the existence of ownership separate from the individuals who are the partnership. R.S.C., Ord. 81, dealing with suing

A a firm in its name, simply regulates procedure; it cannot affect the existence of legal rights and duties.

It has been argued that the I.T.C. ought to be regarded as having limited capacities and that in various legal systems there are examples of almost anything being granted legal personality in this sense. But Dr. Mann's article, "International Corporations and National Law," in *The British Year Book of International Law* (1967), p. 145, states: "As B regards legal personality in particular, a body is a legal person if it exists as such, distinct and separate from its founders and members, independent of all persons or institutions other than its own organs. There is . . . no justification for speaking of the extent of legal personality, of complete or partial personality. A person that exists has personality and it would be tautologous to describe it as having full C personality. Less than 'full' personality is not known to the modern law." See D. P. Derham's article, "Theories of Legal Personality in Legal Personality and Political Pluralism" (1958), pp. 5–7, 10, 13–15.

Authorities demonstrate that the inter-connection between personality and capacities has been accepted by English courts. The equation for these purposes is simply this. The possession by a group or a body of capacity means that it has personality. Possession of personality will D imply the possession of capacity. In other words, a test of personality is capacity. There are a certain minimum number of capacities that one may have. If an entity has the capacity to contract and to acquire and own property, it has personality. It would have personality if it had only the power to contract but one refused to allow it to own property. All that means is that one would have created a personality which had E limited capacity. Further, there is a distinction between a chartered corporation and a statutory corporation. A chartered corporation has the power to do everything that a human being can do. The doctrine of vires does not apply to chartered corporations. That stems from common law. Anything that was corporated by charter was given all the powers of the human being without limitation. A statutory corporation is different. They generally have only the powers which are implicit in the F purpose for which they have been created or which they have been specifically given so one has problems with vires. See *National Union of General and Municipal Workers v. Gillian* [1946] K.B. 81; *Bonsor v. Musicians' Union* [1956] A.C. 104; *Chaff and Hay Acquisition Committee v. J. A. Hemphill and Sons Proprietary Ltd.* (1947) 74 C.L.R. 375 and *Williams v. Hursey* (1959) 103 C.L.R. 30. A trade union could be sued G in its own registered name but whether it was decided that it had a legal personality is doubtful. It was not regarded as an entity by the court: *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* [1901] A.C. 426, 436, 438, 439–440, 441–444.

Submission C starts from the assumption that the I.T.C. is a full legal person. In other words, the conferral of the capacities of a body corporate has led to the creation of a personality which, to the same H extent as a corporation, can contract on its own behalf. If that is so, one starts from the position that the metal contracts are contracts made on the one hand by the I.T.C. in its own name and, apparently for its own behalf and, on the other hand, by Rayners and other brokers. Thus

liability of the members in respect of those contracts can only be imposed by demonstrating the existence of an agency relationship between the members and the I.T.C. For that the plaintiffs have to go to I.T.A.6. But it is not permissible for domestic courts to construe an unincorporated treaty nor for a private litigant to found on it for the purpose of establishing or defeating a domestic cause of action. The establishment of constitutional agency, an agency created solely by the terms of I.T.A.6, offends both of those principles.

The normal method of creating the relationship of principal and agent is by contract: *Bowstead on Agency*, 15th ed. (1985), pp. 1–5. There are exceptional cases. Ratification is a sui generis rule. Agency of necessity and by relationship between husband and wife arise by operation of law. But effectively, the normal standard agency relationship is derived from an agreement between the agent and the principal. In the instant case one is not concerned with exceptional cases. One is only concerned with the normal situation. On the plaintiffs' case the agreement here is found only in I.T.A.6 for present purposes. They have an alternative and independent allegation of agency which has been characterised as factual agency. That depends on an allegation of the existence of certain actual facts which arose during the course of the operation of the I.T.C. But it is all governed by I.T.A.6 which is an international treaty governed purely by international law. As a matter of the rules of English conflict of laws, if it is necessary to determine whether the relationship of principal and agent exists as a result of a contract between the alleged principal and agent, the question whether that contract gives rise to that agency relationship is governed by the proper law of the contract. Here, the only contract referred to is I.T.A.6 and its proper law is plainly international law. Even if it is proper to use conflict of law principles and language in relation to treaties, the proper law is international law. No treaty is ever governed by the domestic law of an individual state. The rule of English law is that no individual derives any English law rights from a treaty or from international law and public international law is not something that can be invoked by the English conflict of laws rule. International law only imposes rights and obligations on its own subjects, namely sovereign states or international organisations. Therefore, it would never regard its own rules as giving rise to an enforceable domestic right against a subject of international law. It means that if it is intended by agreement between international subjects that a group of individuals in one particular state shall have a benefit it can only be enforced by means of action between states on the state level: *Brownlie, Principles of Public International Law*, 3rd ed. (1979), p. 48 and *Commercial and Estates Co. of Egypt v. Board of Trade* [1925] 1 K.B. 271, 295, *per* Atkin L.J.

The objective of the I.T.C. was not to go out in the market and buy and sell tin. Its objective, as shown by the preamble of I.T.A.6, was to maintain the price of tin in the interest of producing countries. It maintained a buffer stock and released it when the price rose: see article 14. It maintained export control. It was not a commercial organisation which had appointed an agent to carry out trade on its behalf. Its

A activities were analogous to the Bank of England. Profit played no part in those activities. It was not a trader and was not trading.

*Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] A.C. 888 explains the concept of non-justiciability. Lord Wilberforce put it as a long standing principle of English law, inherent in the very nature of the judicial process, that municipal courts would not adjudicate on the transactions of foreign states. Where such issues were raised in private B litigation the court would exercise judicial restraint and abstain from deciding those issues. Furthermore, that case illustrates the fallacy of the suggestion in submission C, that if the issue arises merely as a background fact to some justiciable issue between private parties before the English court, then the non-justiciability issue does not arise. Although *Buttes* does not specifically deal with treaties, running parallel C to that case are cases which deal with treaties specifically: see *Blackburn v. Attorney-General* [1971] 1 W.L.R. 1037; *Rustomjee v. The Queen* (1876) 2 Q.B.D. 69; *Pan-American World Airways Inc. v. Department of Trade* [1976] 1 Lloyd's Rep. 257 and *British Airways Board v. Laker Airways Ltd.* [1984] Q.B. 142; [1985] A.C. 58. There are exceptions to this general principle. There are circumstances in which English courts have looked at treaties and have interpreted them. They can be D categorised as follows: (1) Where the treaty is incorporated directly by re-writing the treaty into an Act or the treaty or parts of it can be scheduled to an Act, it being provided that the schedule will have the force of law. (2) Where English legislation is enacted to give effect to, or against the background of, treaty obligations. That point was made by Scarman L.J. in *Pan-American World Airways Inc. v. Department of* E *Trade* [1976] 1 Lloyd's Rep. 257. (3) Where the treaty provisions are incorporated into a domestic law contract by the will of the parties. In such circumstances the courts are no longer looking at the matter as a treaty but as part of the contract: *Philippson v. Imperial Airways Ltd.* [1939] A.C. 332, 345, *per* Lord Atkin. (4) Where it is permissible to look at the international convention because English legislation require the courts by express or implicit instruction to look at a treaty in order F to give effect to the terms of the legislation: *Zoernsch v. Waldock* [1964] 1 W.L.R. 675. (5) Where the Crown alters private domestic rights by the use of the prerogative in the form of a treaty. In such a case the court may look at the treaty to determine what the act of the Crown is: *Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740. It is not possible to derive, from those authorities, any general principle to the effect that it G is permissible to look at and construe unincorporated treaties in any circumstances whatsoever whenever an incidental issue arises in a case to which a treaty might be relevant. *Nissan v. Attorney-General* [1970] A.C. 179 was concerned with a treaty between the United Kingdom and Cyprus but neither side there argued that the treaty could be looked at. So the issue with which the instant case is concerned did not arise there for consideration. The appeal was only concerned with a preliminary H issue ordered to be tried. Therefore, the case is not authority for saying that a treaty can be looked at.

Where there is a domestic law contract made between two domestic entities then, prima facie, the rights of the parties to that contract and

any other party, if there is an agency, are to be decided on and derived from domestic law. If any additional rights are given or any rights are taken away and if an unincorporated treaty is brought into consideration, then such a treaty is affecting rights and is altering domestic law. That principle covers the case where the rights of particular parties in a particular situation will be different if the treaty is or is not taken into account: *Attorney-General for Canada v. Attorney-General for Ontario* [1937] A.C. 326. Here, there is no relationship or contract or agreement of agency which is cognizable by English law, by which not only agreements made in England, and pursuant to English law, are included but also those which arise under a foreign domestic system. If one looks no further than English law then submission C must fail in limine because the alleged agency simply cannot be made out. If that approach is based on the treaty then it also fails in limine because if the treaty is excluded there is nothing left which can give rise to constitutional agency. [Reference was made to *Flemyng v. Hector* (1836) 2 M. & W. 172.]

If that argument is accepted then one looks no further. The justiciability issue is one which ought to arise and be considered first because it is a hurdle over which the plaintiffs have to pass before they can get to the stage of actually looking at I.T.A.6. If the argument is not accepted then one passes to look at I.T.A.6 for determining whether or not one can derive the relevant agency. It is impossible to construe I.T.A.6 so as to conclude that the I.T.C. was automatically acting as agent for each and every member whenever it exercised its capacities to contract. So there is a presumption there is no agency. So in the absence of clear and express statement I.T.A.6 would not be construed to imply an agency: *Salomon v. A. Salomon and Co. Ltd.* [1987] A.C. 22, *per* Lord Halsbury L.C., at pp. 30–31, 32–34; *per* Lord Herschell, at pp. 42–44; *per* Lord Macnaghten, at pp. 53–54 and *per* Lord Davey, at pp. 55–56. That case, in terms of the development of English law, stands as the great case in which it was laid down that the simple jurisprudential consequence of giving to a corporate body a personality of its own is that on incorporation certain consequences flow, one of which is that the incorporated body does not act as agent for the controlling shareholders. [Reference was made to *Conservators of the River Tone v. Ash* (1829) 10 B. & C. 349.]

In this connection two short points are made in respect of I.T.A.6. First, one is concerned with the relationship of each member vis-a-vis the I.T.C. "The members" are not simply one person. I.T.A.6 is not an agreement which is simply brought into existence to provide a mechanism whereby the members can harmonise their individual activities. It is to bring into being an organisation which can act against the interests of individual members or groups of members from time to time. The members, by joining it, give up their freedom of action and agree to be bound by the I.T.C.'s decisions. For these purposes the I.T.C. is composed of the council and there has to be a certain majority. The delegates attending the meetings are states themselves. The presence of delegates is as though the country itself were sitting there, meeting and voting. As a result of vote decisions become decisions of the body which

A can be enforced on individual members, including those who voted against it. Secondly, the I.T.C. has a number of executives. The chairman has to be of complete independence, as do all the rest of the officers of the organisation. The officers are only answerable to the council. They cannot reveal information to any of the members: see article 13, paras. 7 and 8 and article 7(*f*) and (*g*) and article 19. Articles 27, 28 and 29 read together impose duties and grant powers to the B buffer stock manager. That executive is under an obligation by virtue of the constitution to exercise those powers as his rights unless and until the decision making organ of the I.T.C. decides otherwise. The decision making organs are like the board of directors of a company. Article 12 deals with meetings of the council and article 13 with the duties of the executive chairman. Those are not indications of an agency.

C However, assuming that there was an agency relationship here, the question is whether or not the liability of the undisclosed principal can be excluded by the contract which is made. It is common ground that there is a rule of English agency law to the effect that the liability of the undisclosed principal, on a contract made by the undisclosed agent, can be excluded: *Bowstead on Agency*, 15th ed. (1985), pp. 320–321 and *Humble v. Hunter* (1848) 12 Q.B. 310. It is a matter of construction in D any particular case whether or not it was the intention of the two visible parties to the contract that those two visible named parties should be treated as the principals. The London Metal Exchange Form B, in the instant case, has been produced by businessmen. It is, therefore, to be construed as a commercial document. It has been for use in a principal to principal market. [Reference was made to *Shearson Lehman Hutton* E *Inc. v. Maclaine Watson & Co. Ltd.* [1989] 2 Lloyd's Rep. 570.]

In connection with submission B(i), it is very important to bear in mind the difference between primary and secondary liability. The plaintiffs' constant refrain was that unless it was held to be the case that the I.T.C. was a kind of mixed entity, there would have been an unintended exclusion of the members' liability. But if there was a mixed entity a new form of liability on the members would be imposed. The F members are not excluded from liability. The moment there is a separate entity which contracts, ex hypothesi, the members do not. They never incur a direct liability, a primary liability, and, therefore, there is no exclusion of anything. The only relevant English law principle with regard to direct and secondary liability is that those who incur obligations are bound to discharge them. It is a fundamental principle of every legal G system that has ever been. One is concerned with the identity of the party who has incurred the obligation. In its early history English law only knew two forms of legal entities: the individual and the body corporate. If an individual contracted, he was liable. If a number of individuals associated themselves together for the purpose of making profits, then the question arose, if one contracted pursuant to the joint enterprise, on whose behalf did he contract? By the 18th century equity H had established that the legal position was that where there was such an association, each member was clothed with unlimited authority on behalf of each other member to contract or incur obligations on his behalf. That was partnership. See *Lindley on the Law of Partnership*, 3rd ed.,

vol. 1, bk. II, pp. 248, 252, 388. That work does not give credence to the plaintiffs' approach that one can have something that looks as though it might be a partnership and therefore ought to have the same rules, but is not a partnership. In other words, if there is an association not formed with the purpose of gain but, nevertheless, it undertakes some degree of trading activity, in some way there is something which falls within the same category. See also *Gower's Principles of Modern Company Law*, 4th ed. (1979), pp. 3–4, 265.

There are other organisations, such as corporations, which evolved in the usual historical way, out of medieval origins, and bit by bit the medieval lawyers grappled with what the consequences were of creating a persona ficta. Bit by bit, the courts recognised what the inevitable logical consequences were. No one ever sat down and declared what the result would be of creating a corporation. By the 15th century lawyers had worked out the logical consequences of incorporation. The reason why the members of a persona ficta, or a body corporate of any type, are not liable is simply because the body corporate is a separate personality. Their non-liability flows from that unless there is a positive rule to the contrary. Liability has to be imposed. It is not a question of excluding liability which would otherwise be there. It demonstrates that as far as English law was concerned, the concept of members of a corporation not being liable for its debts was not because the corporation was some particular form of persona ficta, but simply that it was a persona ficta. The non-liability simply flows from the fact of separate personality. See *Holdsworth, A History of English Law*, 5th ed., (1942), vol. III, pp. 469–487. *Gower's Principles of Modern Company Law*, 4th ed., pp. 97–104, deals with corporation in modern times in exactly the same way, that is to say, the fundamental attribute of corporate personality, from which all the other consequences flow, is that the corporation is a legal entity distinct from its members and that "perpetual succession" is simply a consequence of the artificial personality. See also *Halsbury's Laws of England*, 4th ed., vol. 9 (1974), p. 716, para. 1201 and *Elve v. Boyton* [1891] 1 Ch. 501, 507, *per* Lindley L.J.

Certain developments took place in the 18th and 19th centuries. At the beginning there were partnerships and corporations. Because charters were difficult to get, corporations were difficult to obtain. The Crown was jealous of incorporating. There had been the outgrowth of joint stock companies from the original small partnerships. But in joint stock companies there used to be very large numbers of people all of whom were personally liable for the acts of the managers and there were difficulties of suing and being sued. What should be done about that was a matter of economic and social policy. There were endless commissions, Parliamentary inquiries, articles and debates. It was a matter of passionate interest to a lot of people during the early part of the 19th century whether or not the situation should be altered. But none of that was a matter of legal reasoning or legal principle or legal policy. It was a matter of social and economic policy. Various experiments and half-way houses were tried. The Joint Stock Companies Act 1844 (7 & 8 Vict. c. 110) was one: see sections 25 and 66. That Act was amended by the Limited Liability Act 1855 (18 & 19 Vict. c. 133) which limited the

A liability of members of certain joint stock companies: see sections 7 and 8. The effect of that Act was that instead of the creditors having to claim from the company and the liquidator they had their direct right of action against shareholders for the unpaid portion of their shares. Seven years later, by the Companies Act 1862 (25 & 26 Vict. c. 89) that particular methodology was done away with and the modern method came in whereby the contributions of shareholders are entirely to the B company. Both *In re Sheffield and South Yorkshire Permanent Building Society (In Liquidation)*, 22 Q.B.D. 470, 473, 476, 480 and *In re Sea Fire and Life Assurance Co., Greenwood's Case*, 3 De G. M. & G. 459, support the defendants.

The other way the plaintiffs put submission B(i) is that if two or more individuals are members of a corporate body, a persona ficta, C which enters into a contract for the purpose of trade, those members incur a secondary guarantee liability which renders them liable for the body's unpaid contractual debts. In other words, the existence of a separate legal personality is not inconsistent with a secondary liability of the members. Scottish law and the civil law provide many examples. Parliament must be taken to have intended that the I.T.C., and indeed it would follow that all other international organisations, fitted into this D type of body which is characterised as a mixed entity. But Horn, Kotz and Leser in Ownership, Liability and Legal Personality from *German Private and Commercial Law: An Introduction* (1982), p. 241, state that the distinctive feature of a company as compared with a partnership is that it has legal personality. The partnership is not a persona in law. The partners are the proprietors of the enterprise, the joint co-owners of E the assets. They are jointly and severally liable for the debts incurred by the partnership. The liability of the limited partner is limited to the unpaid amount of his partnership contribution. That work is not just dealing with German lawyers but with continental lawyers generally. The natural consequence of juristic personality, not some particular form of corporation, is limited liability. But there can be created a hybrid. The Kommandit Gesellschaft Auf Aktien is given as an example F of that. But that is not the equivalent of a French société en nom collectif. It is in fact the equivalent of a limited partnership in which there are a number of sleeping or limited partners whose liability is limited to their shares, and the managers who actually run it are subject to an unlimited liability. It is given legal liability so that the limited partners are simply treated as shareholders in a corporate body and the G managers are treated as though they were ordinary partners. It is only in the French and the French family of systems that partnerships are given legal personality, namely the société en nom collectif. In the German system partnerships do not have legal personality. In the Tutonic systems, therefore, there is no equivalent of "mixed entities." Therefore, bearing in mind that the legal world is divided into three main families: Anglo-American common law system, the French system and the Tutonic H system, the only system where a mixed entity is found is the French system. It is, in fact, more of an exception rather than the rule: *J. Heenen, Encyclopaedia of Comparative Law*, vol. 13, Ch. 1 Business and Private Organisations, pp. 3, 8, 16, 75–76, 93, 127, 140.

Turning to submission B(ii), it has been established by *Reg. v. Keyn*, 2 Ex.D. 63, that an English court determined what international law was by proof that it had received the assent of nations. It was not merely people writing about what it should be, but that it could be demonstrated that it had actually been assented to. Lord Coleridge C.J. stated, at p. 153: "there is no common law-giver to sovereign states; and no tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilised states have agreed to observe in their dealings with one another." See also Sir Robert Phillimore, at pp. 68, 81–82; Amphlett J.A., at p. 122; Brett J.A., at p. 131; Kelly C.B., at p. 151 and Cockburn C.J., at pp. 202–203. See also *West Rand Central Gold Mining Co. Ltd. v. The King* [1905] 2 K.B. 391, 401, 406–408, *per* Lord Alverstone C.J.

However, here by the Order in Council of 1972 Parliament provided that for English law purposes this international organisation was to be a legal entity with the capacities of a body corporate. Parliament thereby created the persona ficta. It did not want to use the phrase "corporation." Before the Order in Council there was nothing, from the English law point of view, but an association whose existence that law did not recognise. There is nothing to suggest that an English court would recognise international personality granted purely by an unincorporated treaty. After the Order came into effect there came into existence the I.T.C. with legal personality. Thus the courts were intended to look at the Order in Council and no further.

[Lord Griffiths. If there is a treaty which states in express and clear terms that the members shall be liable for the debts of the organisation, why should not effect be given to that? Is international law to be regarded as a form of super law which overrides and which comes down and adds to English law?]

First, if effect is given to the stipulation for liability in the treaty the treaty would be treated as self-executing. In other words, a treaty would have direct effect for the purposes of domestic law without passing through any intervening legislative stage. But if a treaty purports to regulate rights and obligations or to grant rights or impose obligations which are to have effect on the domestic plane then, as a matter of classical analysis, that gives rise to an obligation on a state party to the treaty an obligation to bring its internal law into compliance with the promises that have been made in the treaty.

Secondly, the manner in which an individual state gives internal effect to its international promises undertaken in a treaty is entirely a matter for the individual state's own constitutional law. Some constitutions provide for self-execution: see, for example, article 25 of the constitution of the Federal Republic of Germany, which makes provision for the automatic incorporation of treaties into German law. In Italy treaties are self-executing as well. However, treaties are not self-executing under English law. The English theory is that the conduct of foreign relations lies within the Crown prerogative. The conduct of foreign relations includes the power to make treaties, to enter into inter-state contracts. But that power of the Crown does not extend to the ability to alter internal domestic law, in particular anything which concerns the grant of

A rights or the imposition of obligations enforceable in the domestic courts, without the concurrence and consent of Parliament: see *In re International Tin Council* [1987] Ch. 419, 443, *per* Millett J. Parliament can refuse deliberately or fail by accident to give effect to an obligation undertaken by the United Kingdom in a treaty. It is not open to the courts to substitute themselves for Parliament and to go directly to a treaty to give effect to an international obligation which, on the true B construction of the legislation, Parliament has not given effect to.

If treaties were self-executing they would become directly applicable. The European Convention on Human Rights, for example, would be directly applicable within the United Kingdom with far-reaching effects. But it is not, being a treaty, justiciable in England: *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344, 351–354, 378–379, *per* C Sir Robert Megarry V.-C.

International law is not a form of super law. It is simply another system of law which regulates the relations between states. Its fuller title is "the law of nations." It is that body of rules which regulates a particular area of conduct between particular entities, originally only sovereign states, and now expanded by decisions on the international plane to include international organisations which are treated as being D subjects of international law. That is its scope and no more. Individuals are not the subjects of international law and thus cannot derive rights from the rules of that law unless such rules have been transformed by some means into domestic law: *Reg. v. Secretary of State for the Home Department, Ex parte Thakrar* [1974] Q.B. 684, 701–702, *per* Lord Denning M.R.; *Commercial and Estates Co. of Egypt v. Board of Trade* E [1925] 1 K.B. 271, *per* Bankes L.J., at pp. 281–284 and Atkin L.J., at pp. 293–297; *Cook v. Sprigg* [1899] A.C. 572, 578–579, and *Salaman v. Secretary of State in Council of India* [1906] 1 K.B. 613, 625.

In relation to submission B(ii), assuming that international law should be looked at, is there a rule of international law? There are no decisions of any internationally recognised tribunals, such as the International Court of Justice, which give guidance on this. The plaintiffs have placed F the greatest degree of reliance on the views of a number of writers. But many of the writers lack analysis as to the type of liability about which they are writing at any particular moment. Many of them fail to draw any distinction between the various analytical possibilities. They simply talk about the liability of members of an organisation without in any way considering how that liability is to come about and what its legal G basis is. That makes it very difficult for the plaintiffs to assert the existence of a rule. Each writer who thinks that there should be a liability, does not exactly help unless he gives a particular technique by which he chooses to enforce it against a defendant in a domestic forum. Another problem is the question of the exclusion of the liability. The circumstances in which there is an exclusion are not clear. There is nothing as a matter of general principle of any system of law which H entitles one system to say that that one is obviously right as opposed to the other. It is all a matter of political choice and of procedure. Different writers adopt different solutions depending on what appeals to them personally. See Dr. Mann's article "International Corporations and

National Law," in *The British Year Book of International Law 1967* (1969), pp. 152–155. At the end of the day there is little which cannot simply be characterised as simply asserting the result which Dr. Mann wishes. J. C. Collier's article, "The Status of an International Corporation," *"Malum Non Multa," Festschrift Für Kurt Lipstein* is not relevant to the present case. There is no reference to the general principles of law in international law in H.-T. Adams' article, "The Specialised International Organisations: A Contribution to the General Theory of Public International Establishments" (Paris, 1965) (Les Organismes Internationaux Spécialisés (1965)), paras. 107, 109, 110. See also Shihata's article "Role of Law in Economic Development" in *The Legal Problems of International Public Ventures* (1969), pp. 122, 123, 125, 127; *Schermers, International Institutional Law* (1980), para. 1395, p. 780. *Seidl-Hohenveldern, Corporations in and under International Law* does not suggest that there are certain international law rules in existence and that they can be brought in domestic law. [Reference was made to *The Charkieh* (1873) L.R. 4 Ad. & Ecc. 59.] Seidl-Hohenveldern in "Responsibility of Member States of an International Organisation for acts of that Organisation from International Law at the Time of its Codification (Essay in honour of Roberto Ago)," (Milan, 1987), vol. 3, pp. 424, 426, 428, does not take the matter any further. See also the article "Problems of State Responsibility in International Economic Law from General Course of Public International Law," (1986), pp. 193–197; *Ebenroth, Civil Liability for International Organisations and their Member States*, (English translation), pp. 3, 5–6, 13; Dr. Hoffmann, "Recourse on the Member States of International Organisations on account of the Indebtedness" in *Neue Juristische Wochenschrift* (March 1988). *Westland Helicopters Ltd. v. Arab Organisation for Industrialisation* (1984) 23 I.L.M. 1070 shows that there was no supposed rule of international law on which the arbitrator relied. That case went to appeal (unreported) 19 July 1988, Swiss Federal Court (First Civil Division) but it made no difference to the point relevant here. See also *Maclaine Watson & Co. Ltd. v. Council of the European Communities* (Opinion) (Case 241/87) (unreported), 1 June 1989. In *D. P. O'Connell on International Law*, 2nd ed. (1970), vol. 1, pp. 8, 96–97, 99, the approach is similar to the approach of the defendants here and leads to the conclusion that the question here is that of the true construction of the Order in Council of 1972. See also *The International and Comparative Law Quarterly*, vol. 18 (1969), *J. W. Bridge, The United Nations and English Law*, pp. 689, 698, 702–706, 711; Dr. Mann's article "The Legal Personality of International Law: an Essay on the Law of International Organisation" in *International Law, Collected Papers of Hersch Lauterpacht* (1970), vol. 1, pp. 61–64, 68–71, 74–75 and *Oppenheim, International Law—A Treatise*, 8th ed., pp. 953–954. In *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529 there was a vast quantity of material which was available to the Court of Appeal to demonstrate the assent of states to what was held by the court in that case to be the new doctrine of international law of restrictive immunity: see pp. 555, 562, 575–576. Therefore, there is a contrast between that and the instant case.

A B C D E F G H

A The position on the treaties is that there is an analysis of the treaties which was referred to in the Court of Appeal judgments, the purpose of which was to deal with the question as to whether or not legal personality was given and that there was an impressive parallelism between what appeared in international treaties setting up organisations of which this country was a member and the way in which subsequent legislation always used the legal capacities of a body corporate. It was B from that that Kerr L.J. drew the conclusion that Parliament must be taken to have intended to have given legal personality within English law to these organisations by means of the phrase "capacities of a body corporate." The other purpose for which the treaties were looked at was Mr. Burnton's argument that there were a number of treaties which expressly stated that the members would not incur liability, that implied C the existence of a rule that if that was not in, there was liability.

However, there are some treaties, notably, the International Bank for Reconstruction and Development, where there is a share capital. There are subscriptions on the shares, operations and activities and then limitations or exclusions of liability and liability on shares is expressed to be limited to the unpaid portion of the issue price. There is, undoubtedly, a limitation which is concerned entirely with obligations of members to D the organisation. But it says nothing about liability to outsiders.

The International Finance Corporation also has a share capital and subscriptions and the like. There is then a different formula: "No member shall be liable by reason of membership for obligations of the corporation." The European Investment Bank has subscription and share capital and "The member states shall be liable only up to the E amount of their share of the capital subscribed and not paid up." That is consistent with liability of the members to the organisation. Those terms are consistent with the belief that there is no clear rule and therefore it is wise to put something in to avoid arguments, and that there was no liability but it was sensible, as a matter of prudence, to set it out as declaratory of the position. From these treaties nothing can be deduced as regards the existence of any rule of international law regarding direct F liability, primary or secondary, to outsiders.

In relation to the construction of I.T.A.6, on any fair reading of its terms the implication is plainly that as regards the funding of the buffer stock the members' obligations are limited to the contributions which they have to make expressly: see article 2 which defines "buffer stock" and "Government guarantees and undertakings." The power to borrow G is circumscribed and defined precisely. See also article 7. Part II starts with article 17 and goes through the budget. All of that implies that the obligations of the members to contribute are limited to the specific powers in relation both to the administrative budget and the buffer stock budget. Article 30 provides that if the manager has not got enough money he is authorised to sell tin stock to get it. It is not intended that he should go out and pledge the credit of the members. Article 41 states H the general obligations of the members. There is no mention anywhere of a general obligation to contribute at all. Article 60 deals with winding up. In article 60(2)(*b*) there is an express provision which allows the council to make a supplementary call on members for the purposes of

meeting any outstanding liabilities on the administrative account. There is nothing which matches that in relation to the buffer stock account. The intention clearly is that the I.T.C., which is going to operate as an independent and separate body from each of the members, is provided with sufficient means to carry on the buffer stock operations and that is provided by a large amount of tin against which the buffer stock manager can borrow if need be. The funds at his disposal are the money he has in the buffer stock account and what he can raise on the tin. His borrowing powers are limited to what he can borrow on the security of the tin or against government guarantees or undertakings. Thus, he is given an amount of capital and there is nothing which indicates that the members are liable to contribute beyond that.

The background to the State Immunity Act 1978 is that over the last 50 years it had become apparent that states were stepping outside their traditional role of acting jure imperii and becoming involved in ordinary commercial transactions. For example, in Eastern Europe there were a large number of state trading organisations whose sole function was to carry on economic activities for the benefit of the state. There was, therefore, a growing feeling in the international community that absolute immunity was being abused. That led to a shift away from absolute immunity: see, for example, *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529. What underlay that shift was that it was not right that a state could descend into the arena and by its own acts enter into domestic relationships and yet retain an immunity from the consequences thereof. Therefore, what underlay the idea of a restrictive approach to immunity was that the state, by its own acts, had waived its immunity. Against that background section 3 of the Act of 1978 is to be read to look for something that the state itself has done whereby it has entered into domestic legal relations within a context which makes it wrong that it should retain an immunity.

The Act provides a blanket immunity under section 1 subject to bits taken out of it by way of exceptions. Under section 2 a state is treated as having submitted to the jurisdiction under certain circumstances. Section 3 deals with commercial transactions and contracts to be performed in the United Kingdom. There are two issues under that section. First, a state only lost its immunity if it was demonstrated that it had entered into a commercial transaction within section 3(1)(*a*) and that the proceedings related to that commercial transaction. It is true that the contracts here are commercial transactions but the issue which had to be decided is had each state entered into the tin contracts. Secondly, whether the contract is to be performed wholly or partially within the United Kingdom. If a state entered into a contract which required the state to perform its obligations here then, whether it was a commercial transaction or not, the state could be sued because the state would have descended on any view to the domestic level and entered into a contract in which it promised to perform obligations here: section 3(1)(*b*). [Reference was made to *Forth Tugs Ltd. v. Wilmington Trust Co.*, 1987 S.L.T. 153.] None of the transactions in the instant case falls within that section.

A Section 3(2) provides that the section "does not apply if the parties to the dispute are states or have otherwise agreed in writing . . ." If the defendants are wrong on submission A, then there was no body called the I.T.C. and each of the metal contracts was made between each state and the broker. Those contracts agreed otherwise in writing because they contained arbitration clauses. In other words, if the parties to a commercial transaction have put in an arbitration clause, they have B inevitably agreed otherwise in writing that the state is not waiving its immunity to the adjudicative jurisdiction of the courts. Being hauled before the courts and sued is the absolute antithesis of arbitration. That produces no hardship because section 9 allows for the enforcement of an arbitration award. Therefore, as far as Rayners are concerned they cannot rely on section 3. They are confined to obtaining an award C against each of the states and then enforcing that award. They do not have awards against the states. Starting an arbitration against the I.T.C. and serving the buffer stock manager is not the way of starting an arbitration against the individual states who are said to be true principals. If the plaintiffs are right on submission A and they do not have awards against the states they have to get awards against the states. They cannot ask the court to give them judgment as an alternative because D then they are simply by-passing the arbitration procedure.

*Anthony Grabiner Q.C.*, *Nicolas Bratza Q.C.* and *David Richards* for the Department of Trade and Industry. In a nutshell the points are as follows: First, despite the length of this hearing, the real issues before the court are capable of being dealt with quite shortly. In fact this is a simple case and an unarguable one in law so far as the plaintiffs are E concerned. Secondly, for the purpose of complying with their international treaty obligations, successive United Kingdom Governments have used the machinery which is to be found in the International Organisations Act 1968 and its predecessors. This legislation contains a complete code for dealing with international organisations on the domestic law plane. Thirdly, since about 1944, and the best and clearest of the earliest examples is the Diplomatic Privileges (Extension) Act 1946 which dealt F with the United Nations, the United Kingdom Government has been regularly obliged to confer on numerous organisations legal personality as a matter of domestic law. Without domesticising the organisation or in any way detracting from its status as a subject of international relations, the United Kingdom Government has, through the Order in Council procedure, regularly conferred on such organisations the G capacities of a body corporate. The enabling legislation did not say, as it could have said, "The organisation shall enjoy domestically whatever capacities it enjoys by virtue of international law." Nor did it say, "The organisation shall have the capacities of a Scottish partnership or the equivalent of that form of legal association in France or Jordan" or anywhere else. If it had been intended as a matter of domestic law that the members of the I.T.C. should be liable for its debts, this could easily H have been provided for just as it was, for example, in the Joint Stock Companies Act 1844 by the express statutory provision declaring that the members of the company should be liable. Fourthly, the choice of a body corporate as the model for the status of the organisation as a

matter of domestic law leads inexorably to certain obvious conclusions both as a matter of English law or Scots law.

That leads to the conclusions: (i) the effect of the Order in Council is that the I.T.C. is a separate legal person as a matter of English or United Kingdom domestic law, (ii) it can own property and (iii) it is the subject of rights and duties in law in every sense. It follows that submission A is bound to fail. Once that conclusion is arrived at then, as a matter of legal analysis, logic and common sense, submission B fails also. In respect of submission B(i) it is unarguable to suggest that when an organisation endowed with the capacities of a body corporate contracts it can, without more, engage the liability of its members on a secondary or guarantee basis. It is impossible to derive such an argument from the Order in Council of 1972. As to submission B(ii), even if it was possible to identify the rules of international law for which the plaintiffs contend, the attempted resort to it is flatly inconsistent with the true construction of the Order in Council of 1972. In the absence of any clear indication in the domestic legislation international law is wholly irrelevant to the instant case.

In relation to submission C, reliance is placed on the doctrine of non-justiciability. Even apart from that doctrine, a casual perusal of I.T.A.6 will defeat the suggestion that I.T.A.6 evidences the intention of the member states that the I.T.C. should be appointed as their agent so as to pledge their credit in its daily dealings. No such common intention can be derived from I.T.A.6, either as a matter of pure construction or from its matrix. Furthermore, in *Salomon v. A. Salomon & Co. Ltd.* [1895] 2 Ch. 323, Vaughan Williams J., the Court of Appeal and also the House of Lords [1897] A.C. 22 decided that a company does not act as an agent of its shareholders.

There are treaties which have incorporated within them terms dealing with the express obligation on the part of the member states to make a contribution in order to wipe out a deficit which the particular organisation may then have been sustaining: see, for example, the European Launcher Development Organisation. Article 25 is headed "Dissolution" and appears to provide that as between the member states, inter se, there is an obligation upon them that they each respectively undertake to the other members of the organisation an obligation to share any deficit that there may be among or between themselves. That must be a purely international law relationship, wholly outside the purview of any domestic court. It is enforceable only by the members of the particular organisation. There are five other organisations which have either precisely the same or very similar provisions in them, namely, the European Space Research Organisation, the European Molecular Biology Laboratory, the European Centre for Medium Range Weather Forecasts, the European Space Agency and the European Organisation for the Exploitation of Meteorological Satellites. *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251 decided that there should be a cautious use of the work leading up to an international convention and it is only in very limited circumstances indeed that recourse would be had to travaux préparatoires.

A On the question of reference to the European Court, in an appropriate case the court can make an order under article 177 of the E.E.C. Treaty of its own motion. The position here is that nobody is asking for a reference. *R. & V. Haegeman v. Belgian State* (Case 181/73) [1974] E.C.R. 449 was concerned with the treaty of association between the E.E.C. and Greece which had become an associate member of the Community. It was essentially concerned with one of the fundamental B treaties of the Community and was not concerned with a multi-lateral treaty. The key function of the European Court and the article 177 procedure is to ensure, so far as possible, uniformity of interpretation of Community law throughout the European Community and the court is concerned with the interpretation of Community law: *C.I.L.F.I.T. Srl v. Ministry of Health* (Case 283/81) [1982] E.C.R. 3415. In the instant case C Community law is irrelevant. Final judgment can be pronounced without necessarily determining questions of Community law. If any question of Community law does arise it is a simple point and the answer is so plain and simple that it can be determined without a reference to the European Court. In so far as the question of English constitutional law arises the European Court has nothing to do with it. It is well established that the European Court will not receive questions of purely national D law: *Adlerblum v. Caisse Nationale d'Assurance Vieillesse des Travailleurs Salaries* (Case 93/75) [1975] E.C.R. 2147. In relation to submissions A and B(i), the questions are of English domestic law as to the true construction of the Order in Council of 1972 and can be dealt with exclusively by reference to English domestic law. As to submission B(ii), if it is decided that international law and the treaty are irrelevant, then E these would be exclusively matters of English or United Kingdom national law. If, on the other hand, it is decided that international law and the treaty should be taken into account and international law is examined but the alleged "rule" of international law is found to be non-existent on a reference to the European Court that court will have to go through the same process. Reference was made to *Salford Corporation v. County Council of Lancashire* (1890) 25 Q.B.D. 384. The place where F a possible reference to the European Court is most likely to arise is in relation to submission C. In essence that submission is that if I.T.A.6 is construed and is treated as Community law for these purposes, an appointment by the member states of the I.T.C. as their agent is to be found from it. However, that argument is wholly unsustainable. No agency relationship can be found in I.T.A.6. No court in the Community G would find such a relationship nor would the European Court. In any event these questions would arise only if the non-justiciability argument is also rejected. For examples of litigation involving article 177 of the E.E.C. Treaty see *Reg. v. Secretary of State for Social Services, Ex parte Wellcome Foundation Ltd.* [1988] 1 W.L.R. 635, 643, and *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 88, 153.

H *Bernard Eder* and *John Lockey* for the E.E.C. adopted the submissions of Mr. Pollock and Mr. Grabiner. So far as the E.E.C. and its nature and its involvement in I.T.A.6 is concerned there is really no dispute. The E.E.C. has its own separate legal personality: article 210 of

the E.E.C. Treaty and see also article 211. Those provisions are incorporated and given the force of law in English law: section 2 of the European Communities Act 1972. In the European Community terminology this is a mixed agreement and is an agreement where the Community becomes a party to an international treaty alongside its own member states and non-member states. That action has been taken pursuant to the Community's commercial policy by virtue of article 113 of the E.E.C. Treaty. The reason for the Community becoming a party to the treaty here is complex and is essentially political. In substance where a treaty concerns the Community's commercial policy as a whole, it is important for the Community to be a member alongside its member states to ensure that with regard to the treaty there is a common policy. Article 56 of I.T.A.6 shows how the E.E.C. is treated for voting purposes. But none of that matters here.

Looking at I.T.A.6 the question arises whether or not the Community contributes at all to the buffer stock. Both as a matter construction of the treaty and as a matter of practice the Community does not contribute to the buffer stock. If, therefore, the plaintiffs are right, especially on their submission C, the result would be astonishing in that the Community would be liable to contribute 100 per cent. on the basis that the objective intention of the parties was that the Community would be 100 per cent. a party and liable on that for those contracts.

The argument concerning the separate immunity of the E.E.C. is of tremendous importance to the Community and as far as English constitutional law is concerned. It concerns the external competence of the Community when it is acting externally pursuant to its own sovereign rights alongside its own member states and other states. If the plaintiffs' submission A is correct no question of separate immunity would arise. The effect of the submission is that there were direct contracts between each of the plaintiffs and each of the member of the I.T.C. including the E.E.C. The question of immunity might arise in the context of submissions B and C, if those submissions are correct depending on how they are held to be correct. If the immunity argument were to arise then article 177 would have to be considered. The first way to consider it is on the basis that the court is concerned specifically with the consequences of the act of the Community in becoming a party to an international treaty, and its effect in terms of acting on the international plane and whether the E.E.C. can ever be made liable before the courts of one of its own members and whether any of the courts of a member state have jurisdiction to determine that question. Article 5 of the Order in Council of 1972 supports immunity. The court will have to go into that question as well.

It is premature at this stage to decide whether or not this matter ought to be referred to the European Court. It would depend on whether a conclusion has been arrived at. It is recognised that on certain hypotheses it may be that a reference is inevitable. For instance, if submissions B and C are upheld.

At this stage, before a decision is arrived at and has been seen by the E.E.C., it is not proposed to argue the immunity point because it is

not certain whether arguing it is necessary. All the plaintiffs agree with that course.

*Burnton Q.C.* in reply cited *Porter v. Freudenberg* [1915] 1 K.B. 857 and *Fenton Textile Association Ltd. v. Krassin* (1922) 38 T.L.R. 259. The rule of international law for which the banks contend is: (a) member states of an international organisation are, subject to (b) below, directly liable to third parties on contracts entered into by the organisation: their liability is joint and several; (b) such liability may be excluded by the constituent treaty of the organisation by an express exclusion of such liability or by an express limitation of liability inconsistent with direct liability to third parties. Member states have rights of contribution inter se. The distribution of liability between states is a question of international law to be determined by the express or implied provisions of the treaty and does not fall for decision in these appeals.

*Sumption Q.C.* in reply cited *I Congreso del Partido* [1983] 1 A.C. 244, 268–269, and *Winfat Enterprise (HK) Co. Ltd. v. Attorney-General of Hong Kong* [1985] A.C. 733, 746.

*Littman Q.C.* in reply cited *President of India v. Lips Maritime Corporation* [1988] A.C. 395; *Worthing Rugby Football Club Trustees v. Inland Revenue Commissioners* [1985] 1 W.L.R. 409, 411–416, 417–419; [1987] 1 W.L.R. 1057, 1061–1063 and *Davis & Son v. Morris* (1883) 10 Q.B.D. 436.

*Aikens Q.C.* did not address their Lordships but submitted a written reply.

*Kentridge Q.C.* in reply cited *Liverpool Insurance Co. v. Massachusetts* (1871) 77 U.S. 566 and *Cox v. Hickman* (1860) 8 H.L. Cas. 268.

*Mark Littman Q.C.*, *Richard McCombe Q.C.* and *Adrian Hughes* for Maclaine Watson in the receivership appeal. This appeal is prosecuted only on the hypothesis that the direct action appeals fail. If they succeed, then this appeal may be treated as abandoned. For the purpose of this appeal it is assumed that the I.T.C. will have been found to be a distinct juridical entity from its members and that there is no direct right on the part of the creditors to have recourse against the members. Nevertheless the I.T.C., as a distinct legal personality, would have a right of indemnity from the members. Therefore, a receiver should be appointed so that he may, in the name of the I.T.C., make demands on all its members. Those demands may or may not be met voluntarily. If necessary the receiver should be in a position to bring proceedings.

One of the issues here is whether the I.T.C. has any cause of action against its members arising out of the facts as alleged in affidavit evidence and pleadings. The second issue is whether that cause of action is justiciable in English courts. At this stage, the second issue is the live issue because the Court of Appeal assumed, on the facts, that the I.T.C. would have causes of action.

The receiver, if appointed, would not have to bring his proceedings in English courts only. He could bring the proceedings in any court in the world. If he managed to get in some money he would keep it for Maclaine Watson to the extent of their debt. It would be open to any of

the other creditors to apply to the court and the court has power to impose any conditions, even to arrange for an ordinary distribution. The appointment of a receiver by way of equitable execution is made where legal execution is not available and where the creditor is seeking to satisfy his debt out of the assets of the debtor on which he can lay his hands. He can put in the bailiffs under a writ of fi. fa. or he goes for a garnishee. The court can impose a condition for fair distribution. Section 37 of the Supreme Court Act 1981 gives power to the court to appoint a receiver and the procedure is regulated by R.S.C., Ords. 30 and 51. Where as debtor has a seriously arguable claim against a third party and the debtor is unable or unwilling to pursue that claim the court would normally appoint a receiver: *Bourne v. Colodense Ltd.* [1985] I.C.R. 291. Even the plea of justifiability could be raised in any proceedings brought by the receiver against the members. So the appointment of a receiver itself would not be a final decision on that point.

In these circumstances the I.T.C. has a right in English law to claim from its members the funds required to meet the award and judgment which it is willing to enforce. That right is not a right which arises under I.T.A.6 but it arises by virtue of a very firmly established principle that if a person requires another to do something and, as a result of that, that other incurs a liability the law implies an obligation to indemnity against that liability: *Sheffield Corporation v. Barclay* [1905] A.C. 392. That case has been considered in *Yeung Kai Yung v. Hong Kong and Shanghai Banking Corporation* [1981] A.C. 787 and applied in *Naviera Mogor S.A. v. Société Metallurgique de Normandie* [1988] 1 Lloyd's Rep. 412. Where there is a contract of indemnity that contract, by its nature, is one by which one party agrees to make good a loss suffered by the other: *Halsbury's Laws of England*, 4th ed., vol. 20 (1978), pp. 164, 173, paras. 305, 307, 315. Further, the principle on which contract of indemnity applies is not confined to cases of principal and agent or employer and employee: *Dugdale v. Lovering* (1875) L.R. 10 C.P. 196. Part of the general principle is that the court is entitled to look at the general circumstances of the case and that it applies without any necessity for a pre-existing agreement containing an express or implied indemnity. Thus, English law is applicable here because the facts create in English law an obligation by the members to indemnify the I.T.C. The real question is whether or not that is a justiciable claim.

The matter, here, is justiciable because the I.T.C. has no claim against the members under I.T.A.6 and cannot have a claim against them under that treaty since, although I.T.A.6 is a constitutional document which created the I.T.C., it is not a contract between the I.T.C. and its members. The I.T.C. is not a party to the contract. The position is comparable to companies which are created by memoranda and articles of association but, apart from section 4 of the Companies Act 1985, are not parties to the instrument creating them: *Hickman v. Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch. 881. The actual claim to an indemnity is one implied by law on the facts and does not depend on I.T.A.6. But such claims are not beyond the cognisance of municipal courts merely because their origin is connected more or less directly with an act state: *Salaman v. Secretary of State in*

*Council of India* [1906] 1 K.B. 613. The fact that the treaty is in the background or that the I.T.C. would not exist but for the treaty and the Order in Council of 1972 refers to the treaty, does not mean that the receiver qua I.T.C. would be debarred from presenting a claim which did not depend on the treaty, especially as he could not present one which did depend on the treaty.

If a decision on the claim to indemnity would in some way involve the court in considering I.T.A.6 that would not make it non-justiciable because the right of indemnity arises from commercial transactions and such transactions are justiciable. They do not fall within Lord Wilberforce's test on non-justiciability in *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] A.C. 888, 933, 936–937, 938. See also *Alfred Dunhill of London Inc. v. Republic of Cuba* (1976) 425 U.S. 682. The *Dunhill* case was considered in *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529, 555–557; *I Congreso del Partido* [1983] 1 A.C. 244, 266, 267 and *Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A. (The Playa Larga and The Marble Islands)* [1983] 2 Lloyd's Rep. 171, 194–195.

In *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] A.C. 888 Lord Wilberforce referred to some old cases but those cases involved, without exception, political issues. There have been no commercial cases where the doctrine has been applied: *Blad v. Bamfield* (1674) 3 Swan. 604; *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1; (1848) 2 H.L. Cas. 1; *Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859) 13 Moo. P.C.C. 22; *Rustomjee v. The Queen* (1876) 2 Q.B.D. 69 and *Cook v. Sprigg* [1899] A.C. 572. Even though those cases must be taken to support the existence of the doctrine there is nothing in them to compel the view that they should be applied to commercial transactions. [Reference was made to *Maclaine Watson & Co. Ltd. v. International Tin Council (No. 3)* (unreported), 9 June 1988, Millett J.] The implied indemnity here was a commercial transaction because of its close connections with the contracts of purchase and because it is an indemnity which could have been given by a non-sovereign body.

There is no doubt that the transactions, here, were commercial transactions within the meaning of section 3 of the State Immunity Act 1978. It is relevant to consider the Act to show what Parliament has regarded as commercial transactions, not only in themselves and in relation to financial indemnities, but more specifically, how it has treated proceedings inside an international organisation. The general scheme of the Act is that a state is immune: section 1, but that there are certain exceptions. Section 3 provides an exception from immunity where proceedings are relating to "(*a*) a commercial transaction . . . or (*b*) an obligation . . . which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom." Here, the transactions are commercial transactions as defined by section 3(3). There is a specific reference to international organisations in section 8. Under section 8(1) a state is not immune in respect of proceedings "relating to its membership of a body corporate, an unincorporated body or a partnership which (*a*) has members other than states; and (*b*) is incorporated or constituted under the law of the

United Kingdom . . ." or its principal place of business is in the United Kingdom. Section 14 excludes the United Kingdom from immunities.

*McCombe Q.C.* following. The I.T.C., having asked, metaphorically speaking, Parliament to provide by statutory instruments that it should have the capacities of a body corporate, cannot, having had that privilege and having had that creation, then retreat onto Mount Olympus and ask the court to say that it is simply a creature of international law. By the Order in Council of 1972 it has been given the capacities of a body corporate which it cannot "don and doff" at its whim. In other words, the I.T.C. cannot ask the court to read the Order in Council as though it said that the I.T.C. has the legal capacities of a body corporate save for the capacity to sue its members. In the I.T.C.'s printed case, after stating the well known principle that treaties do not of themselves create legislation which can be treated as though it were part of English law, it is stated that the treaty itself cannot be relied on as a source of private rights or obligations. However, it is important to bear in mind, as a gloss on that, that it does not mean that acts done because there is a treaty, or in the context of a treaty, cannot give rise to private rights at all: *Nissan v. Attorney-General* [1970] A.C. 179, 217C–D, *per* Lord Morris of Borth-y-Gest. That passage paraphrased to the circumstances of the instant case would read: "The instructions of the states to the buffer stock manager of the I.T.C., which are in review in the present case, though they would not have taken place had there been no I.T.A.6, are far removed from the category of transactions which by reason of being part of, or in performance of, an agreement between states, are withdrawn from the jurisdiction of the municipal courts."

*Lord Alexander of Weedon Q.C.* and *Peter Irvin* for the I.T.C. The argument that is put is that because the I.T.C. incurred liabilities in English law, there is an arguable right of the I.T.C. in English law to claim an indemnity against all its members. If that basis of consideration was relevant, it has not been challenged at any stage. The case might be arguable and would have to be considered in the claim by the receiver. But that basis of consideration is irrelevant because the relationship between the I.T.C. and its members is governed by I.T.A.6, which is a treaty. It is trite law that the liability to indemnify depends on the proper law and the nature of the agreement that governs the relationship between the person claiming the indemnity and the person against whom it is claimed: *Dicey & Morris, The Conflict of Laws*, 11th ed. (1987), rules 200 and 201. The rights against the members of the I.T.C. are governed by such contract as exists between the I.T.C. and its members or are governed by the constitutional relationship between the I.T.C. and its members. [Reference was made to *Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22.]

It is an established principle of English law that the terms of a treaty do not, by virtue of the treaty alone, have the force of law in the United Kingdom. They cannot effect any alteration in English domestic law or diminish existing rights or confer new or additional rights unless and until enacted into domestic law by or under the authority of Parliament. When a treaty is so enacted, the courts give effect to the legislation and

A not to the terms of the treaty: *Attorney-General for Canada v. Attorney-General for Ontario* [1937] A.C. 326, 347–348; *Blackburn v. Attorney-General* [1971] 1 W.L.R. 1037, 1039, 1041; *Pan-America–World Airways Inc. v. Department of Trade* [1976] 1 Lloyd's Rep. 257, 261, and *In re International Tin Council* [1987] Ch. 419, 443. It is common ground that the terms of I.T.A.6 are not incorporated into English law by legislation. Therefore, it cannot itself be relied on as a source of private rights: B *Attorney-General for Canada v. Attorney-General for Ontario*. English courts cannot even interpret the terms of the treaty: *British Airways Board v. Laker Airways Ltd.* [1985] A.C. 58, 85–86.

Any obligations which the members may have to the I.T.C. to make contributions to its resources or to indemnify it in respect of claims by third parties depend exclusively on the provisions of its constitution, i.e. C the treaty, namely I.T.A.6. It is the treaty by which the I.T.C. has continued in being and which constitutes the agreement between its members. To enforce such obligations, which is what a receiver would be appointed and directed by the court to do, would require the court to interpret and enforce the provisions of I.T.A.6. The assumption of such jurisdiction by the court would transgress the general and basic principle of law stated by Lord Kingsdown in *Secretary of State in Council of* D *India v. Kamachee Boye Sahaba* (1859) 13 Moo. P.C.C. 22, 75. See also *Cook v. Sprigg* [1899] A.C. 572, 478; *British Airways Board v. Laker Airways Ltd.* and *In re International Tin Council*. The fact that the I.T.C. is not itself an independent state makes no difference. It is a subject of international law, being an international body corporate created by treaty and having legal personality in international law. The E legal relations between it and its constituent members exist exclusively on the international law plane and are governed exclusively by I.T.A.6. If one member attempted to sue another in English courts to enforce the obligations assumed by the other by its signature of I.T.A.6, the court would inevitably decline jurisdiction. The position would be no different if the I.T.C. were to seek, whether directly or through a receiver, to sue one or more of its members to enforce those obligations.

F *Anthony Grabiner Q.C., Nicolas Bratza Q.C.* and *David Richards* for the Attorney-General. The Attorney-General applied to intervene in the instant proceedings under the principles laid down in *Adams v. Adams (Attorney-General intervening)* [1971] P. 188, 197. The concern of the Attorney-General was that the proceedings were likely to affect the prerogative of the Crown in the conduct of foreign relations. The G particular concern which prompted the intervention was the effect on the international relations of the United Kingdom. If an officer of the court of the United Kingdom, that is to say, a receiver appointed by the court, were to be interposed between the I.T.C. and its members for the purpose of making and pursuing claims in the name of the I.T.C. against the members, that would amount to supplanting the arrangements concluded between the member states and contained in the international H treaty. The Attorney-General was allowed to intervene on terms that effectively he bore his own costs. The role played by the Attorney-General in the courts below was minimal. The position here is identical. The appeal concerns issues of principle only. At this stage the sufficiency

of the evidence adduced by Maclaine Watson in support of an application to appoint a receiver is not being investigated nor is the question of the exercise of discretion to appoint or not to appoint a receiver to be gone into. If Maclaine Watson's appeal is successful then the matter will go back to the judge at first instance to determine the question whether or not a receiver should be appointed and all the arguments on discretion and related matters can be deployed there. If, however, the appeal is dismissed then that would be the end of the matter. Technically, the Attorney-General would adopt the arguments put forward for the I.T.C. and is concerned not to trespass into the detail of the dispute between the I.T.C. and Maclaine Watson but to confine himself to the public interest issues that arise and provide justification, or the basis, for the intervention.

*Littman Q.C.* replied.

Their Lordships took time for consideration.

26 October. LORD KEITH OF KINKEL. My Lords, I have had the opportunity of considering in draft the speeches prepared by my noble and learned friends, Lord Templeman and Lord Oliver of Aylmerton. I am in entire agreement with the reasoning there set out and there is nothing which I can usefully add. I would accordingly dismiss all these appeals.

LORD BRANDON OF OAKBROOK. My Lords, for the reasons given in the speeches of my noble and learned friends, Lord Templeman and Lord Oliver of Aylmerton I would dismiss all these appeals.

LORD TEMPLEMAN. My Lords, these appeals raise a short question of construction of the plain words of a statutory instrument. The trial judges (Staughton J. and Millett J.) and the Court of Appeal (Kerr, Nourse and Ralph Gibson L.JJ.) rightly decided this question in favour of the respondents. Losing the construction argument, the appellants put forward alternative submissions which are unsustainable. Those submissions, if accepted, would involve a breach of the British constitution and an invasion by the judiciary of the functions of the Government and of Parliament. The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty.

A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes

A incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.

The Sixth International Tin Agreement ("I.T.A.6") was a treaty between the United Kingdom Government, 22 other sovereign states and the European Economic Community ("the member states"). I.T.A.6 B continued in existence the International Tin Council ("the I.T.C.") as an international organisation .charged with regulating the worldwide production and marketing of tin in the interests of producers and consumers. By article 16 of I.T.A.6, the member states agreed that:

> "1. The council shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of moveable C and immoveable property and to institute legal proceedings."

Pursuant to the provisions of I.T.A.6, an Headquarters Agreement was entered into between the I.T.C. and the United Kingdom in order to define "the status, privileges and immunities of the council" in the United Kingdom. Article 3 of the Headquarters Agreement provided that: D

> "The council shall have legal personality. It shall in particular have the capacity to contract and to acquire and dispose of movable and immovable property and to institute legal proceedings."

No part of I.T.A.6 or the Headquarters Agreement was incorporated into the laws of the United Kingdom but the International Tin Council E (Immunities and Privileges) Order 1972 (S.I. 1972 No. 120) made under the International Organisations Act 1968 provided in article 5 that: "The council shall have the legal capacities of a body corporate."

The I.T.C. entered into contracts with each of the appellants. The appellants claim, and it is not disputed, that the I.T.C. became liable to pay and in breach of contract has not paid to the appellants sums amounting in the aggregate to millions of pounds. In these proceedings F the appellants seek to recover the debts owed to them by the I.T.C. from the member states.

The four alternative arguments adduced by the appellants in favour of the view that the member states are responsible for the debts of the I.T.C. were described throughout these appeals as submissions A, B(1), B(2) and C.

G Submission A relies on the fact that the Order of 1972 did not incorporate the I.T.C. but only conferred on the I.T.C. the legal capacities of a body corporate. Therefore, it is said, under the laws of the United Kingdom the I.T.C. has no separate existence as a legal entity apart from its members; the contracts concluded in the name of the I.T.C. were contracts by the member states.

H Submission A reduces the Order of 1972 to impotence. The appellants argue that the Order of 1972 was only intended to facilitate the carrying on in the United Kingdom of the activities of 23 sovereign states and the E.E.C. under the collective name of "the International Tin Council." Legislation is not necessary to enable trading to take

place under a collective name. The appellants suggested that the Order of 1972 was intended to enable the member states to hold land in the United Kingdom in the name of a nominee. Legislation is not necessary for that purpose either. The appellants then suggested that the Order of 1972 was necessary to relieve the member states from a duty to register the collective name of the I.T.C. and from complying with the other provisions of the Registration of Business Names Act 1916. This trivial suggestion was confounded when, at a late stage in the hearing, the Act of 1916 (now repealed) was examined and found not to apply to an international organisation established by sovereign states. The Order of 1972 did not confer on 23 sovereign states and the E.E.C. the rights to trade under a name and to hold land in the name of the I.T.C. The Order of 1972 conferred on the I.T.C. the legal capacities of a body corporate. The appellants submitted that if Parliament had intended to do more than endow 23 sovereign states and the E.E.C. trading in this country with a collective name, then Parliament would have created the I.T.C. a body corporate. But the Government of the United Kingdom had by treaty concurred in the establishment of the I.T.C. as an *international* organisation. Consistently with the treaty, the United Kingdom could not convert the I.T.C. into an *United Kingdom* organisation. In order to clothe the I.T.C. in the United Kingdom with legal personality in accordance with the treaty, Parliament conferred on the I.T.C. the legal capacities of a body corporate. The courts of the United Kingdom became bound by the Order of 1972 to treat the activities of the I.T.C. as if those activities had been carried out by the I.T.C. as a body incorporated under the laws of the United Kingdom. The Order of 1972 is inconsistent with any intention on the part of Parliament to oblige or allow the courts of the United Kingdom to consider the nature of an international organisation. The Order of 1972 is inconsistent with any intention on the part of Parliament that creditors and courts should regard the I.T.C. as a partnership between 23 sovereign states and the E.E.C. trading in the United Kingdom like any private partnership. The Order of 1972 is inconsistent with any intention on the part of Parliament that contracts made by the I.T.C. with metal brokers, bankers, staff, landlords, suppliers of goods and services and others, shall be treated by those creditors or by the courts of the United Kingdom as contracts entered into by 23 sovereign states and the E.E.C. The Order of 1972 conferred on the I.T.C. the legal capacities of a body corporate. Those capacities include the power to contract. The I.T.C. entered into contracts with the appellants.

The appellants submitted that if there had been no Order of 1972, the courts would have been compelled to deal with the I.T.C. as though it were a collective name for an unincorporated association. But the rights of the creditors of the I.T.C. and the powers of the courts of the United Kingdom must depend on the effect of the Order of 1972 and that Order cannot be construed as if it did not exist. An international organisation might have been treated by the courts of the United Kingdom as an unincorporated association if the Order of 1972 had not been passed. But the Order of 1972 was passed. When the I.T.C. exercised the capacities of a body corporate, the effect of that exercise

A was the same as the effect of the exercise of those capacities by a body corporate. The I.T.C. cannot exercise the capacities of a body corporate and at the same time be treated as if it were an unincorporated association. The Order of 1972 brought into being an entity which must be recognised by the courts of the United Kingdom as a legal personality distinct in law from its membership and capable of entering into contracts as principal. None of the authorities cited by the appellants B were of any assistance in construing the effect of the grant by Parliament of the legal capacities of a body corporate to an international organisation pursuant to a treaty obligation to confer legal personality on that organisation. In my opinion the effect is plain; the I.T.C. is a separate legal personality distinct from its members.

The second argument of the appellants, which is known as submission C B(1), accepts that the I.T.C. enjoys a separate legal existence apart from its constituent members but contends that a contract by the I.T.C. involves a concurrent direct or guarantee liability on the members jointly and severally. This liability is said to flow from a general principle of law, that traders operating under a collective name incur a liability to third parties which can only be excluded by incorporation; the I.T.C. has not been formally incorporated and therefore, it is said, D the member states are liable concurrently. No authority was cited which supported the alleged general principle. On the contrary, there is ample authority for the general proposition that in England no one is liable on a contract except the parties thereto. The only parties to the contracts between the appellants and the I.T.C. were the appellants and the I.T.C. Members of a body corporate are not liable for the debts of a E body corporate because the members are not parties to the corporation's contracts. The member states are not liable for the debts of the I.T.C. because the members were not parties to the contracts of the I.T.C. It was said on behalf of the appellants that under the laws of Scotland, Germany, France, Puerto Rico and Jordan and elsewhere, recognition is accorded to "mixed entities," a description of associations which are legal entities but whose engagements, notwithstanding the separate legal F personality of the associations involve some form of liability of the members. Authorities were produced which demonstrate that by custom or by legislation the members of some corporations in some countries are not free from personal liability. But no such custom exists in the United Kingdom as a general rule and section 4 of the Partnership Act 1890 which preserves for a Scottish partnership some of the benefits of G incorporation and some of the attributes of an unincorporated association, does not prove the existence of any general custom in any part of the United Kingdom that members of a corporation or of a body analogous to corporations shall be liable for the debts of the corporation. Parliament, of course, may provide that members of a corporation shall bear liability for or shall be bound to contribute directly or indirectly to payment of the debts of the corporation to a limited or to an unlimited H extent in accordance with express statutory provisions. The history of the Companies Acts illustrates the power of Parliament, if it pleases, to impose some liability on shareholders as a condition of the grant of incorporation. Parliament could have imposed some liability for the

debts of the I.T.C. on the member states. But Parliament passed the Order of 1972 which imposed no such liability. The Order of 1972 conferred on the I.T.C. the capacities of a body corporate. Those capacities included the power to enter into contracts. In the absence of express parliamentary provision a contract entered into by the I.T.C. does not involve any liability on any person who was not a party to the contract.

The third argument described as submission B(2) is that a rule of international law imposes on sovereign states, members of an international organisation, joint and several liability for the default of the organisation in the payment of its debts unless the treaty which establishes the international organisation clearly disclaims any liability on the part of the members. No plausible evidence was produced of the existence of such a rule of international law before or at the time of I.T.A.6 in 1982 or thereafter. The appellants submitted that this House was bound to accept or reject such a rule of international law and should not shrink from inventing such a law and from publishing a precedent which might persuade other states to accept such law.

My Lords, if there existed a rule of international law which implied in a treaty or imposed on sovereign states which enter into a treaty an obligation (in default of a clear disclaimer in the treaty) to discharge the debts of an international organisation established by that treaty, the rule of international law could only be enforced under international law. Treaty rights and obligations conferred or imposed by agreement or by international law cannot be enforced by the courts of the United Kingdom. The appellants concede that the alleged rule of international law must imply and include a right of contribution whereby if one member state discharged the debts of the I.T.C., the other member states would be bound to share the burden. The appellants acknowledge that such right of contribution could only be enforced under international law and could not be made the subject of an order by the courts of the United Kingdom. This acknowledgement is inconsistent with the appellants' submission B(2). An international law or a domestic law which imposed and enforced joint and several liability on 23 sovereign states without imposing and enforcing contribution between those states would be devoid of logic and justice. If the present appeal succeeded the only effective remedy of the appellants in this country would be against the United Kingdom. This remedy would be fully effective so that in practice every creditor of the I.T.C. would claim to be paid, and would be paid, by the United Kingdom the full amount and any interest payable to the creditor by the I.T.C. The United Kingdom Government would then be embroiled, as a result of a decision of this House, in negotiations and possibly disagreements with other member states in order to obtain contribution. The causes of the failure of the I.T.C. and liability for its debts are disputed. Some states might continue to deny the existence of any obligation, legal or moral, municipal or international, to pay the debts of the I.T.C. or to contribute to such payment. Some states might be willing to contribute rateably with every other state, each bearing one-twentythird. A state which under I.T.A.6 was only liable to contribute one per cent. of the capital of the I.T.C. might, on

A the other hand, only be prepared to contribute one per cent. to the payment of the debts. The producing states which suffered more from the collapse of the I.T.C. than the consuming states might not be willing to contribute as much as the consuming states. Some member states might protest that I.T.A.6 shows an intention that member states should only be liable to contribute to the activities of the I.T.C. a buffer stock of metal and cash intended to be worth £500m. and lost as a result of B the fall in tin prices on the metal exchanges which the I.T.C. strove to avoid and which resulted in the collapse of the I.T.C.

The courts of the United Kingdom have no power to enforce at the behest of any sovereign state or at the behest of any individual citizen of any sovereign state rights granted by treaty or obligations imposed in respect of a treaty by international law. It was argued that the courts of C the United Kingdom will construe and enforce rights and obligations resulting from an agreement to which a foreign law applies in accordance with the provisions of that foreign law. For example, an English creditor of a Puerto-Rican corporation could sue and recover in the courts of the United Kingdom against the members of the corporation if, by the law of Puerto Rico, the members were liable to pay the debts of the corporation. By analogy, it was submitted, an English creditor of D an international organisation should be able to sue in the courts of the United Kingdom the members of the international organisation if by international law the members are liable to pay the debts of the organisation. But there is no analogy between private international law which enables the courts of the United Kingdom to resolve differences between different laws of different states, and a rule of public E international law which imposes obligations on treaty states. Public international law cannot alter the meaning and effect of United Kingdom legislation. If the suggested rule of public international law existed and imposed on a state any obligation towards the creditors of the I.T.C., then the Order of 1972 would be in breach of international law because the Order failed to confer rights on creditors against member states. It is impossible to construe the Order of 1972 as imposing any liability on F the member states. The courts of the United Kingdom only have power to enforce rights and obligations which are made enforceable by the Order.

The fourth argument, described as submission C, asserts that by I.T.A.6 the I.T.C. was only authorised to contract as agent for the member states. Even if this assertion were correct, I.T.A.6 could only G be considered by the courts of the United Kingdom for the purpose of resolving any ambiguity in the meaning and effect of the Order of 1972. There is no ambiguity. The Order of 1972 authorised the I.T.C. to contract as principal because the Order of 1972 conferred on the I.T.C. the legal capacities of a body corporate without limitation. The treaty, I.T.A.6, has not been incorporated into the laws of the United Kingdom and the provisions of I.T.A.6 cannot be employed for the purpose of H altering or contradicting the provisions of the Order of 1972.

Finally, one of the appellants appealed against the refusal of the courts below to appoint a receiver. The appellant is a judgment creditor of the I.T.C. and seeks the appointment of a receiver by way of

equitable execution. The receiver is intended to receive and enforce a chose in action belonging to the I.T.C. The chose in action is an alleged right vested in the I.T.C. to be indemnified by the member states against the debts payable by the I.T.C. and incurred as a result of carrying out the instructions of the member states contained in I.T.A.6. My Lords, in English law the members of a corporation are not liable to indemnify the corporation against debts incurred by the corporation. The Order of 1972 made no provision for the member states to indemnify the I.T.C. No doubt the debts of the I.T.C. were incurred in exercise of powers which by I.T.A.6 the member states agreed between themselves should be exercisable and which they instructed the I.T.C. to exercise. However, powers contained in I.T.A.6 are treaty powers and any indemnity obligation expressly or impliedly imposed on the member states by virtue of I.T.A.6 is a treaty obligation which cannot be enforced by the courts of the United Kingdom by the appointment of a receiver or otherwise because the obligation is not to be found in the Order of 1972.

Your Lordships were urged to discern or invent and apply some rule of municipal law or international law which would render the member states liable to discharge the debts of the I.T.C. because, so it was said, the member states have behaved badly. These proceedings cannot however be decided by criticism of the conduct of the member states for establishing the I.T.C., or by attaching blame to the member states for the failure of the I.T.C. to prevent the recurring glut and scarcity of tin metal or by condemning the management of the I.T.C. by the member states or by attributing to the operations of the metal exchanges the fall in tin prices which bankrupted the I.T.C., inflicted a loss of the buffer stock which should have been worth up to £500m. on the member states and caused poverty and unemployment to the producing states. The courts possess neither the evidence nor the authority to pronounce judgment on these matters. International diplomacy and national policy will decide whether the debts of the I.T.C., an international organisation established by treaty, shall be discharged by the member states and, if so, in what manner the burden should be shared. English judges cannot meddle with unincorporated treaties. The result of these appeals follows inexorably from the fact that the appellants contracted with the I.T.C. which by the Order of 1972 had been clothed with the legal capacities of a body corporate. In *Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22, Lord Halsbury L.C. pointed out, at p. 30:

> "once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

Since *Salomon's* case, traders and creditors have known that they do business with a corporation at their peril if they do not require guarantees from members of the corporation or adequate security. At all times the rights of the appellants, who do not lack legal advice, have been governed in the United Kingdom by the Order of 1972 which

A offers no foundation in law for proceedings against the member states. These appeals must be dismissed.

For the conduct of these appeals, there were locked in battle 24 counsel supported by batteries of solicitors and legal experts, armed with copies of 200 authorities and 14 volumes of extracts, British and foreign, from legislation, books and articles. Ten counsel addressed the Appellate Committee for 26 days. This vast amount of written and oral
B material tended to obscure three fundamental principles—that the capacities of a body corporate include the capacity to contract, that no one is liable on a contract save the parties to the contract and that treaty rights and obligations are not enforceable in the courts of the United Kingdom unless incorporated into law by statute. In my opinion the length of oral argument permitted in future appeals should be subject to
C prior limitation by the Appellate Committee.

LORD GRIFFITHS. My Lords, I have had the advantage of reading the speeches of Lord Templeman and Lord Oliver of Aylmerton. I agree that for the reasons they give the appellants can obtain no redress through English law and that these appeals must be dismissed. I reach this conclusion with regret because in my view the appellants have
D suffered a grave injustice which Parliament never envisaged at the time legislation was first enacted to enable international organisations to operate under English law.

If during the passage of the Diplomatic Privileges (Extension) Bill through Parliament the Minister of State had been asked by a member what would happen if an international organisation refused to honour a
E contract on the ground that it had no money I believe that the answer would have been that such a state of affairs would be unthinkable because the governments that had set up the organisation would provide the funds necessary to honour its obligations. We do not, as yet, have resort to the parliamentary history of an enactment as an aid to statutory interpretation and I quote the following passage from the Minister of State on the second reading of the Diplomatic Privileges (Extension) Bill
F not for that purpose but to support my views of the answer that the Minister of State would have given to such a question:

> "Hon. Members were very fearful less an organisation such as U.N.R.R.A., or any international organisation, would enter into a contract and repudiate that contract and then the contractor, who in this case would be a British subject, would have no redress in the
G courts, and therefore no redress at all. I would like to assure the House that that is simply not the case, and that it is inconceivable that things should work out in that way.
>
> "I have tried to explain that immunity from legal process is essential to organisations of this kind but I would like to add that the Government fully recognise that there are classes of cases where it is necessary to provide for the settlement of legal disputes
H between private citizens in this country and organisations which are operating here, and that an organisation obviously must have the power to conclude contracts. The Attorney-General told the House on Second Reading that he had satisfactory assurances from

U.N.R.R.A. as regards cases of this kind. U.N.R.R.A. will insert in all its contracts—we have that promise—arbitration clauses which have been approved by the Law Officers of the Crown. If a dispute arises out of one of these contracts, U.N.R.R.A. will arbitrate in accordance with those clauses, and if, as sometimes happens, it is desired to have recourse to the courts for the determination of points of law, or other similar matters, U.N.R.R.A. will not prevent such recourse to the courts by relying on its general immunity from suit. If, at the end of the legal process or arbitration, if there is one, U.N.R.R.A. is found liable to pay, U.N.R.R.A. will comply with the award. It is our intention, if we make an Order in Council to cover any other international organisation that may be set up, to obtain from it exactly those assurances, and I have not the faintest doubt that those assurances will be given purely as a matter of course. Of course, it is possible to argue that even with those assurances an organisation might break its word, but in that case I can assure the House that His Majesty's Government would not be without resources to deal with the situation which would arise, and the House really need have no qualms at all on that point:" Hansard, 13 October 1944, columns 2090–2091.

I can only hope that the assurance given on behalf of the Government in 1944 still holds true because it seems to me that the obvious just solution is that the governments that contributed to the buffer stock should provide it with funds to settle its debts in the same proportion that they contributed to the buffer stock. But this end must be pursued through diplomacy and an international solution must be found to an international problem; it can not be solved through English domestic law.

Lord Oliver of Aylmerton. My Lords, these appeals arise from the failure of the International Tin Council ("the I.T.C.") in 1985 to meet the substantial obligations which it had incurred during that year in dealings on the London Metal Exchange conducted with a view to supporting the world price of tin. The circumstances in which the claims of the individual appellants arose differ in certain material respects, but the principal question raised by all the appeals is the same, that is to say, can the members of the I.T.C. be held responsible in law for the debts which the I.T.C. has incurred? Although, therefore, it will be necessary to indicate in relation to each of the appeals how the matter comes before your Lordships' House, it will be convenient, first, to say something about the history and constitution of the I.T.C. since these are fundamental to the question which requires to be answered.

*History and constitution of the I.T.C.*

The I.T.C. is one of a number of international organisations established by treaties entered into after the Second World War in an endeavour to regulate the market in relation to particular commodities. It has been the subject of a series of treaties commencing with the First International Tin Agreement (I.T.A.1) which was signed on 1 March

A 1954 and came into operation on 1 July 1956. Although your Lordships are concerned primarily with the Sixth International Tin Agreement (I.T.A.6) it is not irrelevant to consider some of the terms of the earlier treaties in particular in relation to the borrowing powers conferred on the I.T.C. I.T.A.1 was entered into for a period of five years from its entry into force and was effected for the broad purposes of avoiding the difficulties likely to arise from maladjustments between supply of and B demand for tin, of stabilising tin prices, of ensuring adequate supplies at reasonable prices and generally of promoting the economic production of tin. Article IV established an International Tin Council and provided for its seat to be in London. Participating countries were divided into producing countries and consuming countries according to their election at the time of ratification, acceptance or accession and each contracting C government was to be represented on the council by a delegate. Provision was made for an equality of voting power between delegates of the consuming countries and those of the producing countries, the votes being distributed in agreed proportions. Article IV.21. provided:

> "The council shall have in each participating country, to the extent consistent with its law, such legal capacity as may be necessary for D the discharge of its function under this agreement."

Initial finance was to be provided in the same way as is provided in the I.T.A.6, to whose provisions it will be necessary to refer in some detail. It is only necessary, at this stage, to note the broad framework of the financial provisions. Although the individual participating members were made responsible for the expenses of their own delegates E to the council, the administration and office expenses of the council, including the remuneration of the various officers and staff appointed for the purposes of the agreement, were to be a collective responsibility and were to be brought into a separate account ("the administration account") which was to be fed by contributions from the participating governments as determined annually by the council in proportion to the votes held by them respectively.

F The critical part of the agreement, for present purposes, is to be found in articles VIII and IX which contained the essential machinery for fulfilling the objects of the agreement by the establishment and operation of a buffer stock of tin which was to be made the subject matter of a separate account, was to be under the control of a manager and was to be financed by fixed contributions in cash or in tin by the G producing countries, although provision was also made for voluntary contributions by any participating country. Broadly the manager's function was to employ the buffer stock as the machinery for stabilising tin prices by buying or selling in accordance with a formula devised by reference to the price of cash tin on the London Metal Exchange, for which initial floor and ceiling prices were set by article VI of the agreement, such prices to be reviewable from time to time by the H council during the currency of the agreement. A notable feature of these provisions is that although the buffer stock manager was expressly authorised to buy or sell forward, the agreement conferred no power to borrow either upon him or upon the council. The council was

empowered to authorise the manager, if his funds proved inadequate to meet operational expenses, to sell tin out of the stock in order to meet current operational expenditure, but the possibility that the fixed contributions to the buffer stock provided for in the agreement might not be adequate and that the buffer stock account might go into deficit does not appear to have been contemplated. Indeed, the provisions for the liquidation of the buffer stock on the termination of the agreement were framed on the basis that there would always be a surplus of value in cash or in tin, so that any outstanding obligations could, if necessary, be met out of sales from stock.

I.T.A.2 was concluded on 1 September 1960, was to endure for a further five years and came into force on 1 July 1961. It followed broadly the same pattern as I.T.A.1. There was, however, one significant difference. Article VIII, which established the buffer stock, contained a provision conferring on the council the power to borrow in the following terms:

> "6(*a*) The council may borrow for the purposes of the buffer stock and upon the security of tin warrants held by the buffer stock such sum or sums as it deems necessary, provided that the maximum amount of such borrowing and the terms and conditions thereof shall have been approved by a majority of the votes cast by consuming countries and all the votes cast by producing countries and further provided that no obligation shall be incurred by any consuming country in respect of such borrowing. (*b*) The council may by a two-thirds distributed majority make any other arrangements as it thinks fit for borrowing for the purposes of the buffer stock, provided that no obligation shall be laid upon any participating country under this sub-paragraph without the consent of that country."

The "two-thirds distributed majority" referred to was defined in this, as in all other agreements, as a two-thirds majority of the votes cast by the producing and consuming countries respectively counted separately. Once again, the provisions for the liquidation of the buffer stock on termination of the agreement were framed on the basis that any cash required to meet outstanding obligations would be met by sales of tin from stock and that there would be a surplus value for distribution to the contributing countries. I.T.A.3, which came into force on 1 July 1966, followed the same pattern save that, instead of establishing a new I.T.C. as had been done by I.T.A.2, it provided for the continuation in being of the existing I.T.C., a feature which was thereafter reproduced in each successive agreement. It is unnecessary to refer to any of the provisions of this agreement or of I.T.A.4 or I.T.A.5 , which followed a similar pattern, save to note that I.T.A.4 contained a new provision relating to the seat of the council. This was contained in article 14 and was in the following terms:

> "(*d*) The member in whose territory the headquarters of the council is situated (hereinafter referred to as the host member) shall, as soon as possible after the entry into force of the agreement, conclude with the council an agreement to be approved by the

A council relating to the status, privileges and immunities of the council, of its executive chairman, its staff and experts and of representatives of members while in the territory of the host member for the purpose of exercising their functions."

Pursuant to this provision a Headquarters Agreement was entered into between the United Kingdom and the I.T.C. on 9 February 1972, to the B terms of which it will be necessary to refer in a little more detail.

*Sixth International Tin Agreement*

The operative agreement with which your Lordships are concerned is I.T.A.6 which was signed in New York in 1981 and 1982 following the United Nations Tin Conference of 1980. As will appear, one of the questions much debated before your Lordships is that of the extent to C which (if at all) it is open to your Lordships to take account of the terms of this treaty in considering the rights and obligations of the parties to this litigation, but, on any analysis, it forms part of the essential background to these appeals and it will be convenient at the outset to refer to its material provisions. It is not, I think, necessary for present purposes to refer to the preamble or to article 1 which sets out in extenso the objectives of the treaty, which simply reflect in rather more D detail those set out in the previous agreements. Article 2 contains a number of definitions of which, at this point, it is necessary to note only that a "member," is defined as a country whose government has ratified, accepted, approved or acceded to the treaty or as an organisation meeting the requirements of article 56. That article, in terms, applies the term "government" to include, inter alia, the European Economic E Community. Article 3 continues the I.T.C. established under the previous I.T.A.s and provides that, unless otherwise determined by the council by a two-thirds distributed majority, the seat of the council should be in London. Article 4 provides that the council shall be composed of all the members and that each member shall be represented in the council by one delegate. Article 5 provides for the categorisation of members as producing or consuming members. The powers and F functions and procedures of the council are contained in articles 7 and 8 which, so far as material, provide as follows:

"Article 7

"The council: (*a*) shall have such powers and perform such functions as may be necessary for the administration . . . of this agreement; G (*b*) shall have the power to borrow for the purposes of the administrative account established under article 17, or of the buffer stock account in accordance with article 24; (*c*) shall receive from the executive chairman, whenever it so requests, such information with regard to the holdings and operations of the buffer stock as it considers necessary to fulfil its functions under this agreement; . . . (*e*) shall establish buffer stock operational rules which shall include, H inter alia, financial measures to be applied to members which fail to meet their obligations under article 22; (*f*) shall publish after the end of each financial year a report on its activities for that year; (*g*) shall publish after the end of each quarter, but not earlier than

three months after the end of that quarter, unless the council decides otherwise, a statement showing the tonnage of tin metal held in the buffer stock at the end of that quarter; . . .

"Article 8

"The council: (*a*) shall establish its own rules of procedure; . . . (*c*) may at any time: (i) by a two-thirds distributed majority, delegate to any of the subsidiary bodies referred to in article 9 any power which the council may exercise by a simple distributed majority, other than those relating to:—assessment and apportionment of contributions under articles 20 and 22 respectively;—floor and ceiling prices under articles 27 and 31; . . ."

Article 9 provides for the continuation of various subsidiary bodies established under the previous treaties, the composition and terms of reference of which are determined by the council. These include a Buffer Finance Committee. Articles 11 and 12 provide for the appointment of an executive chairman and two vice-chairmen, for the holding of four sessions of the council annually and for the calling of additional meetings. Article 13 provides for the administration and operation of the agreement by the executive chairman and is, so far as material in the following terms:

"1. The executive chairman appointed under article 11 shall be responsible to the council for the administration and operation of this agreement in accordance with the decisions of the council. . . . 3. The council shall appoint a buffer stock manager (hereinafter referred to as the manager) and a secretary of the council (hereinafter referred to as the secretary) and shall determine the terms and conditions of service of those two officers. 4. The council shall give instructions to the executive chairman as to the manner in which the manager is to carry out his responsibilities laid down in this agreement. . . . 7. In the performance of their duties, neither the executive chairman nor the members of the staff shall seek or receive instructions from any government or person or authority other than the council or a person acting on behalf of the council under the terms of this agreement. They shall refrain from any action which might reflect on their position as international officials responsible only to the council. Each member undertakes to respect the exclusively international character of the responsibilities of the executive chairman and the members of the staff and not to seek to influence them in the discharge of their responsibilities. 8. No information concerning the administration or operation of this agreement shall be revealed by the executive chairman, the manager, the secretary or other staff of the council, except as may be authorised by the council or as is necessary for the proper discharge of their duties under this agreement."

Voting at sessions of the council is regulated by article 14 which provides for producing members and consuming members respectively to have 1,000 votes, such votes to be distributed between them in proportion to

percentages of production and consumption specified in tables established by the council. The status, privileges and immunities of the I.T.C. are regulated by article 16 which requires to be set out in full and is in the following terms:

"Article 16
"Privileges and Immunities

"1. The council shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings. 2. The council shall have in the territory of each member, to the extent consistent with its law, such exemption from taxation on the assets, income and other property of the council, as may be necessary for the discharge of its functions under this agreement. 3. The council shall be accorded in the territory of each member such currency exchange facilities as may be necessary for the discharge of its functions under this agreement. . . . 4. The status, privileges and immunities of the council in the territory of the host government shall be governed by a Headquarters Agreement between the host government and the council."

Part II of the treaty contains provisions dealing with accounts, currency of payments and audit. As in the previous treaties a clear distinction is drawn between the administration account and the buffer stock account.

Article 17 provides:

"1(*a*) There shall be kept two accounts—the administrative account and the buffer stock account—for the administration and operation of this agreement. (*b*) The administrative expenses of the council, including the remuneration of the executive chairman, the manager, the secretary and the staff, shall be entered into the administrative account. (*c*) Any expenditure which is solely attributable to buffer stock transactions or operations, including expenses for borrowing arrangements, storage, commission and insurance, shall be entered into the buffer stock account by the manager. (*d*) The liability of the buffer stock account for any other type of expenditure shall be decided by the executive chairman."

So far as the administrative account is concerned, article 20 provides for the approval by the council of a budget for administration expenses, the assessment by the council of the members' contributions and a sanction of deprivation of rights on any member which fails to provide its assessed contribution. The critical provisions, however, in the context of these appeals are those related to the establishment, financing and operation of the buffer stock. These differ to some extent from the provisions of the previous agreements, in particular by departing from the previous principle of compulsory contributions only from producing members. They are contained in articles 21 to 30 and are, for relevant purposes, as follows:

"Article 21

"In order to achieve the objectives of this agreement there shall be established, inter alia, a buffer stock consisting of a normal stock of 30,000 tonnes of tin metal to be financed from government contributions, and an additional stock of 20,000 tonnes of tin metal to be financed from borrowing, using as security stock warrants and, if necessary, government guarantees/government undertakings."

The reference in this article to "government guarantees/government undertakings" is significant in the light of the appellants' submissions. This expression is defined in article 2 of the treaty as follows:

"'Government guarantees/government undertakings' means the financial obligations to the council which are committed by members as security for financing the additional buffer stock in accordance with article 21. They may, when relevant, be provided by the appropriate agencies of the members concerned. Members shall be liable to the council up to the amount of their guarantees/undertakings; . . ."

"Article 22

"1. The financing of the normal buffer stock shall at all times be shared equally between producing and consuming members. Such financing may, where relevant, be provided by the appropriate agencies of the members concerned. 2. An initial contribution amounting to the cash equivalent of 10,000 tonnes of tin metal shall be due on entry into force of this agreement. Subsequent contributions amounting to the cash equivalent of the remaining 20,000 tonnes of tin metal shall become due on such date or dates as the council may determine. 3. The contributions referred to in paragraph 2 of this article shall be apportioned by the council among members in accordance with their respective percentages of production or consumption as set out in the tables established or revised by the council in accordance with paragraph 3 or paragraph 4 of article 14 which are in effect at the time of the apportionment of contributions. 4. The amounts of the contributions referred to in paragraph 2 of this article shall be determined on the basis of the floor price in effect at the date when the contributions are called. 5. The initial contribution of a member due in accordance with paragraph 2 of this article may, with the consent of that member, be made by transfer from the buffer stock account held under [I.T.A.5]. 6. If at any time the council holds cash assets in the buffer stock account the total amount of which exceeds the cash equivalent of 10,000 tonnes of tin metal at the prevailing floor price, the council may authorise refunds out of such excess to members in proportion to the contributions they have made under this article. At the request of a member the refund to which it is entitled may be retained in the buffer stock account. . . ."

"Article 23

"1. If a member does not fulfil its obligations to contribute to the

A buffer stock account by the date such contribution becomes due, it shall be considered to be in arrears. A member in arrears for 60 days or more shall not count as a member for the purpose of a decision by the council under paragraph 2 of this article." (Paragraph 2 contains provisions for suspending the voting rights of a member who is in arrears). "3. The council may call for coverage of arrears by other members on a voluntary basis."

B

"Article 24

"1. The council may borrow for the purposes of the buffer stock and upon the security of tin warrants held by the buffer stock such sum or sums as it deems necessary. The terms and conditions of any such borrowings shall be approved by the council. 2. The council may, by a two-thirds distributed majority, make any other C arrangements it sees fit in order to supplement its resources. 3. All charges connected with these borrowings and arrangements shall be assigned to the buffer stock account."

Article 27 provides for the fixing of floor and ceiling prices in the same way as in the previous treaty and article 28 regulates the way in which the buffer stock is to be operated. The manager is to be D responsible to the executive chairman and the article goes on to provide for what he is to do in the event of the market price of tin reaching the ceiling price or falling below the floor price. Since the insolvency of the I.T.C. resulted from operations undertaken to support the price of tin after it had fallen below the floor price, paragraphs 3(*e*) and 5 of article 28 should be set out in full:

E "3. If the market price of tin . . . (*e*) is equal to or less than the floor price, the manager shall, unless instructed by the council to operate otherwise, if he has funds at his disposal and subject to articles 29 and 31, offer to buy tin on recognised markets at the market price until the market price of tin is above the floor price or the funds at his disposal are exhausted. . . . 5. The manager may engage in forward transactions under paragraph 3 of this article only F if these will be completed before the termination date of this agreement or before some other date after the termination of this agreement as determined by the council."

Articles 29 and 31 referred to in article 28(3)(*e*) confer on the council power to restrict or suspend forward transactions or operations of the buffer stock generally. Again, one finds in article 30, the assumption G that any shortage in liquid cash in the buffer stock account will be capable of being met out of the proceeds of the sale of tin held to the account. That article provides:

"2. Notwithstanding the provisions of articles 28 and 29, the council may authorise the manager, if his funds are inadequate to meet his operational expenses, to sell sufficient quantities of tin at the current H price to meet expenses."

Article 32 enables the council in certain circumstances to control the export of tin. These provisions do not need to be referred to in any detail, but article 32(4) is of some significance. It provides:

"It shall also be the duty of the council to adjust supply to demand so as to maintain the price of tin metal between the floor and ceiling prices. The council shall also aim to maintain available in the buffer stock tin metal and cash adequate to rectify discrepancies between supply and demand which may arise."

Finally, in relation to the fasciculus of articles dealing with the buffer stock there should be noted the provisions of article 26 relating to the liquidation of the buffer stock account. So far as material, these are:

"1. On the termination of this agreement, all buffer stock operations under article 28, article 29, article 30 or article 31 shall cease. The manager shall thereafter make no further purchase of tin and may sell tin only as authorised by paragraph 2, paragraph 3 or paragraph 8 of this article. 2. Unless the council substitutes other arrangements for those contained in this article, the manager shall, in connection with the liquidation of the buffer stock, take the steps set out in paragraphs 3, 4, 5, 6, 7, 8 and 11 of this article. 3. As soon as possible after the termination of this agreement, the manager shall set aside from the balance remaining in the buffer stock account a sum which, in his estimation, is sufficient to repay any borrowings which may be outstanding under article 24, and to meet the total expenses of liquidation of the buffer stock in accordance with the provisions of this article. Should the balance remaining in the buffer stock account be inadequate for these purposes, the manager shall sell sufficient tin over such period and in such quantities as the council may decide in order to provide the additional sum required. 4. Subject to and in accordance with the terms of this agreement, the share of each member in the buffer stock shall be refunded to that member."

The steps set out in paragraphs 5, 6, 7, 8 and 11 relate to the ascertainment of the value of the stock and of the members' contributions and a distribution according to whether that value exceeds or is less than the members' contributions. It contains no provisions regulating the position which might arise should obligations to third parties exceed the value of the buffer stock.

The only other articles of the treaty to which reference needs to be made are article 41 (which deals with the general obligations of members) and article 60 (which deals with the procedure on termination). Paragraphs 1 and 2 of article 41 provide:

"1. Members shall during the currency of this agreement use their best endeavours and co-operate to promote the attainment of its objectives. 2. Members shall accept as binding all decisions of the council under this agreement."

Article 60 is of some relevance inasmuch as, in contradistinction to the provisions relating to the buffer stock account, it both contemplates and provides for the possibility that there may be outstanding obligations on the administrative account which cannot be met out of funds in the account. So far as relevant it provides as follows:

A "1. The council shall remain in being for as long as may be necessary for the carrying out of paragraph 2 of this article, for the supervision of the liquidation of the buffer stock and any stocks held in accordance with article 39 and for the supervision of the due performance of conditions imposed under this Agreement by the council or under the Fifth Agreement; the council shall have such of the powers and functions conferred on it by this Agreement as may B be necessary for the purpose. 2. On termination of this agreement: (*a*) The buffer stock shall be liquidated in accordance with the provisions of article 26; (*b*) The council shall assess the obligations into which it has entered in respect of its staff and shall, if necessary, take steps to ensure that, by means of a supplementary estimate to the administrative account raised in accordance with C article 20, sufficient funds are made available to meet such obligations; (*c*) After all liabilities incurred by the council, other than those relating to the buffer stock account, have been met, the remaining assets shall be disposed of in the manner laid down in this article; . . ."

D *Headquarters Agreement*

As has already been mentioned, a Headquarters Agreement was executed by the United Kingdom pursuant to I.T.A.4. It continued in force for the purposes of I.T.A.5 and 6. Its purpose was recited as being that of defining "the status, privileges and immunities of the council." Article 2 provides:

E "This agreement shall be interpreted in the light of the primary objective of enabling the council at its headquarters in the United Kingdom fully and efficiently to discharge its responsibilities and fulfil its purposes and functions."

Article 3 is entitled "Legal Personality" and provides:

F "The council shall have legal personality. It shall in particular have the capacity to contract and to acquire and dispose of movable and immovable property and to institute legal proceedings."

Articles 4 and 5 provide for the inviolability of the council's archives and premises. Article 8 provides for its immunity from jurisdiction and is, so far as material, in the following terms:

G "(1) The council shall have immunity from jurisdiction and execution except: (*a*) to the extent that the council shall have expressly waived such immunity in a particular case; . . . (*c*) in respect of an enforcement of an arbitration award made under either article 23 or article 24. (2) The council's property and assets wherever situated shall be immune from any form of requisition, confiscation, expropriation, sequestration or acquisition. They shall also be immune from any form of administrative or provisional judicial H constraint . . ."

The agreement goes on to provide for exemption from duties and taxes and for the privileges and immunities of officials and staff and the only

other articles which require mention in the context of these appeals are articles 23 and 24. Article 24 provides for submission to arbitration of disputes arising from non-contractual responsibilities and article 23 is in the following terms:

> "Where the council enters into contracts (other than contracts concluded in accordance with staff regulations) with a person resident in the United Kingdom or a body incorporated or having its principal place of business in the United Kingdom and embodies the terms of the contract in a formal instrument, that instrument shall include an arbitration clause whereby any disputes arising out of the interpretation or execution of the contract may at the request of either party be submitted to private arbitration."

*United Kingdom legislation*

The establishment, towards the end of the Second World War and thereafter, of substantial numbers of international organisations to which the United Kingdom became a party and which were invested in international law with legal personality distinct from that of the constituent members necessitated the enactment of domestic legislation to regulate the immunities, privileges and capacities of such bodies. The Diplomatic Privileges (Extension) Act 1944 made provision for immunities and privileges scheduled to the Act and section 1(1) applied its provisions

> "to any organisation declared by Order in Council to be an organisation of which His Majesty's Government in the United Kingdom and the government of one or more foreign sovereign powers are members."

Section 1(2)(*a*) empowered His Majesty, by Order in Council, to provide that any such organisation

> "shall, to such extent as may be specified in the Order, have the immunities and privileges set out in Part I of the Schedule to this Act, and shall also have the legal capacities of a body corporate."

An amending Act in 1946 (the Diplomatic Privileges (Extension) Act 1946) conferred the same powers in relation to the United Nations. The power to confer immunities and privileges by Order in Council was somewhat curtailed by the Diplomatic Privileges (Extension) Act 1950 and the legislation was then consolidated in the International Organisations (Immunities and Privileges) Act 1950. This reproduced in substance the provisions of section 1(1) and (2)(*a*) of the Act of 1944 and was the Act in force at the date of I.T.A.1. The provision in that agreement that the council should have in every participating country "such legal capacity as may be necessary for the discharge of its functions under this agreement" was met by an Order in Council (the International Organisations (Immunities and Privileges of the International Tin Council) Order 1956 (S.I. 1956 No. 1214)) which provided that the council "shall also have the legal capacities of a body corporate." In 1968, the Act of 1950 was repealed and replaced by the International Organisations Act 1968, the long title of which described it as "An Act to make new provision . . . as to privileges, immunities

A and facilities to be accorded in respect of certain international organisations . . ." Section 1(1) applied the Act, as in the previous legislation, to any organisation declared by Order in Council to be an organisation of which the United Kingdom, or Her Majesty's Government in the United Kingdom and one or more foreign sovereign powers or the government or governments of one or more such powers, are members. Section 1(2) provides:

B

> "Subject to subsection (6) of this section, Her Majesty may by Order in Council made under this subsection specify an organisation to which this section applies and make any one or more of the following provisions in respect of the organisation so specified (in the following provisions of this section referred to as 'the organisation'), that is to say—(*a*) confer on the organisation the
C legal capacities of a body corporate; (*b*) provide that the organisation shall, to such extent as may be specified in the Order, have the privileges and immunities set out in Part I of Schedule I to this Act; . . ."

Subsection (6) imposes a limitation on the grant of privileges and immunities of no relevance in the context of these appeals. Section 3
D empowers Her Majesty by Order in Council to make, in relation to the Commission of the European Communities, any such provision as could have been made under section 1(2) as if the Commission were an organisation to which that section applies. Section 10 provides that no recommendation shall be made to Her Majesty in Council to make an Order under the Act other than an Order under section 6 (which is
E irrelevant to the present appeals) unless a draft Order has been laid before Parliament and approved by a resolution of each House.

I.T.A.4, in contradistinction to its predecessors, provided in terms, in article 14, that the I.T.C. was to have legal personality and legal capacity in the same terms as article 16 of I.T.A.6. This provision and the provisions of the Headquarters Agreement were given effect to by the International Tin Council (Immunities and Privileges) Order 1972
F (S.I. 1972 No. 120) made under the Act of 1968 which provided, in article 5, in the same terms as the previous Order in Council, simply that "The council shall have the legal capacities of a body corporate." Article 6(1) reflected the provisions of the Headquarters Agreement by providing that the council should have immunity from suit and legal process except:

G

> "(*a*) to the extent that the council shall have expressly waived such immunity in a particular case; . . . (*c*) in respect of the enforcement of an arbitration award made under article 23 or article 24 of the Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Tin Council."

H This Order continues to regulate the capacities, privileges and immunities of the I.T.C. under I.T.A.6.

The only other legislative provision which it is convenient to refer to at this stage is the State Immunity Act 1978, which confirms the common

law rule that a sovereign state is immune from the jurisdiction of the courts of the United Kingdom but establishes a number of important exceptions. For present purposes the relevant exception is that contained in section 3(1) which provides:

> "A state is not immune as respects proceedings relating to—(*a*) a commercial transaction entered into by the state; or (*b*) an obligation of the state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom."

Section 9(1) provides:

> "Where a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the state is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

*The litigation*

So much for the conventional and legislative background and I turn to the history of the litigation giving rise to these appeals.

On 24 October 1985, when the I.T.C. announced that it was unable to meet its obligations, it had incurred debts running into many millions of pounds. Some arose out of contracts entered into with ring-dealing members of the London Metal Exchange ("the brokers") for the purchase or sale of tin, others out of loans made to the I.T.C. by various banks to enable it to conduct buffer stock operations. On 9 July 1986, one of the brokers, J. H. Rayner (Mincing Lane) Ltd., having obtained an arbitration award against the I.T.C. which remained unsatisfied, commenced proceedings in the Commercial Court for recovery of the amount of the award (some £16m.) against the Department of Trade and Industry (representing the United Kingdom) and the 23 other members of the I.T.C., including the Commission of the European Economic Community, representing the Community (the "E.E.C.").

On 12 December 1986, other brokers, Maclaine Watson, issued parallel proceedings in the Chancery Division against the Department of Trade and Industry alone ("the D.T.I."), representing the United Kingdom, claiming a sum of some £6m. awarded to them against the I.T.C. and for which they had obtained leave to enter judgment. On 9 December 1986, in the action against the I.T.C. on the award, they moved for the appointment of a receiver by way of equitable execution.

Also in December 1986, Arbuthnot Latham Bank Ltd. and five other banking organisations which had lent money to the I.T.C., each commenced separate proceedings ("the *Six Banks* actions") in the Commercial Court against the 24 members of I.T.A.6, claiming repayment of the sums due to them respectively from the I.T.C. These actions differed from the *Rayner* action in an important respect. Contrary to the provisions of article 23 of the Headquarters Agreement, none of the loan contracts, with one exception, contained an arbitration clause, so that the claim had to be based on a direct liability which was not capable of being pursued against the I.T.C. itself. The one

A exception was the agreement with Kleinwort Benson, whose loan contract did contain an arbitration clause but in respect of which no arbitration proceedings had been prosecuted.

In the meantime, on 12 November 1986, a broking concern, Amalgamated Metal Trading Ltd., which had obtained an arbitration award in a sum of some £5m., petitioned to wind up the I.T.C. as an unregistered company. That petition was struck out by Millett J. on 22 B January 1987 and on 3 February 1987 the petitioner and eight other brokers commenced an action ("the *Multi-Brokers'* action") in the Commercial Court directly against the 24 members of the I.T.C. and the I.T.C. itself basing themselves, as in the *Rayner* action, on arbitration awards.

The defendants in the *Rayner* action issued a summons under R.S.C., C Ord. 12, r. 8 to set aside service and, so far as the D.T.I. is concerned, also under Ord. 18, r. 19 to strike out the points of claim. A date for the hearing having been fixed before Staughton J., application was made for similar summonses to be issued in the *Six Banks* action and the *Multi-Brokers* actions to be heard before Staughton J. at the same time. That application was acceded to but only on the footing that the issues to be dealt with were confined to those raised on the summonses in the D *Rayner* action. An application to amend in order to widen those issues by raising also factual issues raised in the *Six Banks* and *Multi-Brokers* actions was granted by Staughton J. but his further decision to permit the scope of the issues to be addressed at the hearing to be widened by including those raised in the amendments was subsequently reversed by the Court of Appeal.

E On 24 June 1987, Staughton J. set aside service on the member states of the I.T.C. and on the E.E.C. and struck out certain paragraphs of the points of claim as against the D.T.I. as disclosing no reasonable cause of action. Allegations not struck out related to claims in tort and to claims based upon an assertion that certain contracts had been entered into by the I.T.C. as agent for some or all of the member states with their express authority. The hearing before Staughton J. was not F concerned with these allegations, which were made the subject matter of separate applications and they do not figure in the present appeals. Leave to appeal was granted to all the plaintiffs.

A summons to strike out was likewise issued in the *Maclaine Watson* action before Millett J. On 29 July 1987, Millett J. made an order striking out the statement of claim and dismissing the action with costs. G Prior to this, on 13 May 1987, he had dismissed the application for the appointment of a receiver against the I.T.C. on the ground of non-justiciability.

Appeals against the judgment of Staughton J. and against Millett J.'s judgments in the *Maclaine Watson* action, in the receivership application and in the winding up petition, were heard together and dismissed by the Court of Appeal on 27 April 1988. From those dismissals (save for H that in relation to the winding up petition, against which there is no further appeal) the appellants now appeal to this House.

*The issues*

Before addressing in detail the arguments advanced by the appellants, it is, I think, convenient to set out in outline the three principal submissions upon which the appellants' cases rest.

The primary submission is that, so far as English law is concerned, the I.T.C. is simply a collective trading name under which the members found it convenient to trade. It has no separate existence as a legal entity apart from its members and the buffer stock manager was, therefore, simply acting as the agent of the members who are thus jointly and severally liable for the obligations entered into in the name of the I.T.C. At the hearing before your Lordships, this has been referred to, for the sake of convenience, by the same description as that by which it was referred to in the Court of Appeal, that is to say, "submission A."

Should that submission be rejected, the appellants fall back on an alternative submission (submission B) that, even accepting that the I.T.C. enjoys a separate legal existence apart from its constituent members, its legal personality is such as to involve a concurrent secondary direct or guarantee liability on the members, jointly and severally, in respect of all the engagements of the I.T.C. This is supported in two ways, conveniently referred to as submission B(1) and submission B(2).

Submission B(1) looks entirely to English law and is itself put in two different ways. First, it is said that persons who band together as an organisation and trade in England in a collective name incur a direct joint and several liability to third parties which can be excluded only by incorporation. The Order in Council of 1972 confers legal capacities but it does not actually incorporate the I.T.C., even though it is accepted for the purposes of the submission that it confers legal personality. Accordingly, the argument runs, nothing has occurred to displace the basic starting position that the members of the organisation remain liable on the organisation's engagements, either primarily or secondarily. Secondly, and in any event, it is said that English law recognises as a jurisprudential possibility the existence of what Kerr L.J. in the Court of Appeal called, "mixed entities" (that is to say, entities whose engagements, notwithstanding their separate legal personality, involve a concurrent secondary liability of the members). It is then submitted that there can be deduced from the circumstances in which the Order in Council was made and from its terms a parliamentary intention that the Order should create a mixed entity of this type.

Submission B(2) which, although adopted by the other appellants, was advanced primarily on behalf of the banks, seeks to arrive at the same result by a different route. What is said that there is an established and recognised general principle of international law that when there is established by treaty an international organisation which has a separate legal persona in international law and which is contemplated as entering into engagements with third parties, then, in the absence of an express and clear provision in the treaty exonerating the member states from liability or limiting their liability, they are and remain, jointly and severally liable in international law by way of guarantee for the organisation's obligations to third parties. English private international

law, it is said, recognises that where a persona ficta constituted abroad enters into engagements subject to English law, an English court will attach to those engagements the same incidents as are attached thereto by the law of the place in which that persona is constituted. Thus, by analogy, the court will attach to the domestic engagements of an international organisation constituted by treaty the same incidents as are attached thereto in international law. It follows that since I.T.A.6, which constitutes the I.T.C., contains no limitation of liability of the member states, those states are secondarily liable in English law for the obligations of the I.T.C.

Submission C is alternative to and independent of submissions A and B and it proceeds on the postulate that the I.T.C. is a separate legal persona which is solely liable on contracts into which it enters unless it can be demonstrated that it also contracted on behalf of its members as undisclosed principals. The appellants contend that the constitution of the I.T.C. is such that there can be deduced from its terms a general authority in the I.T.C. to contract as agent for its members and each of them in the conduct of buffer stock operations.

It will be necessary to consider each of these submissions in a little detail, but before embarking upon this there is the preliminary question, which to some extent affects all three submissions, of how far (if at all) it is open to your Lordships to take into account the terms of I.T.A.6 and the Headquarters Agreement in determining the rights of the parties. The question of justiciability is not only relevant to submissions A and B(1) but lies at the very threshold of submissions B(2) and C and of the appeal in the receivership application. It is, therefore, convenient, I think, that some consideration should be given to it as this stage.

*The principle of non-justiciability*

There is, as indeed there can be, little contest between the parties as to the general principles upon which that which has been referred to as the doctrine of non-justiciability rests, though they approach it in rather different ways. The contest lies not so much as to the principle as to the area of its operation.

It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law. That was firmly established by this House in *Cook v. Sprigg* [1899] A.C. 572, 578, and was succinctly and convincingly expressed in the opinion of the Privy Council delivered by Lord Kingsdown in *Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859) 13 Moo. P.C.C. 22, 75:

> "The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."

On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law: see *Blackburn v. Attorney-General* [1971] 1 W.L.R. 1037. The Sovereign acts

"throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts:" *Rustomjee v. The Queen* (1876) 2 Q.B.D. 69, 74, *per* Lord Coleridge C.J.

That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

These propositions do not, however, involve as a corollary that the court must never look at or construe a treaty. Where, for instance, a treaty is directly incorporated into English law by Act of the legislature, its terms become subject to the interpretative jurisdiction of the court in the same way as any other Act of the legislature. *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251 is a recent example. Again, it is well established that where a statute is enacted in order to give effect to the United Kingdom's obligations under a treaty, the terms of the treaty may have to be considered and, if necessary, construed in order to resolve any ambiguity or obscurity as to the meaning or scope of the statute. Clearly, also, where parties have entered into a domestic contract in which they have chosen to incorporate the terms of the treaty, the court may be called upon to interpret the treaty for the purposes of ascertaining the rights and obligations of the parties under their contract: see, for instance, *Philippson v. Imperial Airways Ltd.* [1939] A.C. 332.

Further cases in which the court may not only be empowered but required to adjudicate upon the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation (as in *Zoernsch v. Waldock* [1964] 1 W.L.R. 675) or the very rare case in which the exercise of the Royal Prerogative directly effects an extension or contraction of the jurisdiction without the constitutional need for internal legislation, as in *Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740.

It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do

so as part of the factual background against which a particular issue arises may seem a statement of the obvious. But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one. Which states have become parties to a treaty and when and what the terms of the treaty are are questions of fact. The legal results which flow from it in international law, whether between the parties inter se or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts.

How this very limited competence of the court to take cognisance of and to construe treaty obligations entered into by the United Kingdom is to be applied in the context of the issues raised by these appeals is perhaps best dealt with as each separate issue falls to be considered. But generally and by way of introduction it can be said that there are two fundamental questions which require to be answered. These are:

(1) On the true construction of the Order in Council of 1972 is the I.T.C. as a matter of English domestic law invested with a separate personality distinct from its constituent members?

(2) If it is, to what extent (if at all) does liability, whether primary or secondary, for the I.T.C.'s obligations attached to its constituent members?

In relation to the first question, the sole issue is the correct construction of the Order in Council and the principle of non-justiciability becomes relevant only in relation to the extent to which it is either necessary or convenient to refer to I.T.A.6 and the Headquarters Agreement as aids to construction. In relation to the second, the competence of your Lordships to consider and construe the treaties lies at the very threshold of the bank's case under submission B and of submission C.

*Submission A*

This has already been stated in outline. More specifically it reduces to four propositions, viz.:

(1) Persons who join together in trade in the United Kingdom are, prima facie, jointly and severally liable for the debts which they incur and they cannot exclude this liability by agreement between themselves. (2) States engaging in collective trading are no different from other traders. (3) Their prima facie liability can be displaced only by incorporation (either by statute or by charter), by express statutory provision or by demonstrating the creation of an association under foreign law having a status which excludes liability of the membership. (4) The Order in Council does not incorporate the I.T.C. but merely confers capacities and immunities.

Thus the contention is advanced that I.T.C. is no more than a trading name under which the member states trade in their own right so that they incur direct and primary liability for the debts and obligations incurred in the name of the I.T.C.

It is common ground that the status of the I.T.C. in the United Kingdom depends upon the true construction and the effect of the Order in Council of 1972 and it is also common ground that that Order did not create the I.T.C. as a corporation in the technical sense of that term. The contest is as to whether it nevertheless created what, for want of a

compendious expression, may be described as a persona ficta having a legal personality apart from its members.

Article 5 of the Order of 1972 provides in terms that the I.T.C. "shall have the legal capacities of a body corporate" and, speaking for myself and without resort to any extraneous aids, I find difficulty in seeing what possible purpose Parliament could be thought to be serving by conferring in terms the widest capacities available to any artificial legal persona if there was to be no single legal persona capable of exercising them. I am, therefore, in agreement with my noble and learned friend, Lord Templeman, that purely as a matter of construction of the Order standing alone, submission A must be rejected.

But if there is any equivocation or obscurity in the terms of the Order, it is, as it seems to me, entirely dispelled when reference is made, as indeed the Order in Council invites if it does not compel, to the terms of I.T.A.6 and the Headquarters Agreement. The Order in Council was brought into being to give effect to the United Kingdom's treaty obligations and whatever else may be unclear in relation to the application of the principle of non-justiciability of an international treaty, it is entirely clear and it is not disputed that it may be referred to to explain any obscurity in domestic legislation intended to implement the treaty obligations: see *Salomon v. Commissions of Customs and Excise* [1967] 2 Q.B. 116. The status of the I.T.C. in international law is clearly established by article 16(1) of I.T.A.6 (reproducing the substance of the earlier corresponding provision in article 14 of I.T.A.4) which provides: "The council shall have legal personality" and goes on in article 16(4) to provide that (inter alia) the status of the I.T.C. in the territory of the host government shall be governed by a Headquarters Agreement between that government and the council. These provisions were given effect to in the Headquarters Agreement article 3 of which reproduced article 16(1) of I.T.A.6. It is relevant to note that in this article that which is to have legal personality is also to have "in particular" the capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings, which are thus described merely as facets of legal personality. Such was the obligation assumed by Her Majesty's Government and it was to give effect to this obligation that the Order in Council was made. To construe it so as to produce the effect that no legal personality was conferred has the result that the United Kingdom is and has ever since 1972 been in breach of its treaty obligations. That, of course, is not an impossible conclusion if the court is compulsively driven to reach it, but it is not one which should be embraced with any enthusiasm if a contrary construction is open.

Your Lordships have been presented with a lengthy and ingenious series of arguments in support of the appellants' central and primary submission that all that the legislature was seeking to do by the Order in Council was to provide a convenient framework within which the member states could trade in partnership under the collective name of the I.T.C. I hope that I may be forgiven if I rehearse them only in summary form, for with deference to the labour and research which went into their formulation and the earnestness and ability with which they were pursued, I was, for myself, left in the end in no doubt at all that both Millett J. and Staughton

A J. at first instance, and all three members of the Court of Appeal, were entirely correct in concluding that the effect of the grant of the legal capacities of a body corporate was that, in United Kingdom law, the I.T.C., though not formally incorporated, was invested with a legal personality distinct from its members, with the consequence that, when it entered into engagements, it and not the membership was the contracting party.

B The appellants' primary argument is based on article 2 of the Headquarters Agreement which, it is said, indicates the exclusive purpose of the Order in Council. This, it will be recalled, designates the "primary objective" of the agreement as that of "enabling the council . . . fully and efficiently to discharge its responsibilities and fulfil its purposes and functions." For this purpose, it is argued, it was no doubt necessary to C provide a convenient method of, for instance, engaging in legal proceedings, but this could conveniently be done by conferring on the unincorporated members in association certain capacities so as to enable them to function in the name of the I.T.C. It was not necessary to invest the I.T.C. with a separate legal persona. But there are a number of difficulties in the way of the suggestion that article 5 did no more than confer capacities on the members. In the first place, the members were sovereign states recognised D in English law and having already capacities as such, so that an Order in Council which conferred on them capacities (for instance, to contract, to hold property or to engage in litigation) served no useful purpose. That objection is not answered by saying that it conferred capacities to act in a collective name. That simply does not fit with the wording of article 5, which does not purport to confer a capacity on member states to act in a E collective name, but confers capacities directly on the recognised international organisation itself. More importantly, such a construction necessarily involves the conclusion that, in making the Order in Council, Parliament was intending to produce a result which did not accord with its treaty obligations to confer legal personality on the organisation as such. It is no answer to this to say that "legal personality" in the Headquarters Agreement means legal personality in international law (which had already F been conferred by article 14 of I.T.A.4) for the purpose of the Headquarters Agreement was to regulate the status of the I.T.C. in the territory of the host state, that is, as a matter of the domestic law of that state. Nor is it an answer to say—as is the fact—that the earlier Orders in Council made under the Act of 1950 to give effect to I.T.A.1, 2 and 3, used precisely the same formula even though there was no express requirement in those G agreements that the I.T.C. should have legal personality and no requirement of a Headquarters Agreement. The formula was, it was argued, a familiar one, sanctioned by a series of statutes prior to 1968 and nothing can be deduced from its use to give effect to this particular treaty. That the formula is one which is sanctioned by the relevant statutes for use, as it were, "off the shelf" in appropriate cases, is indisputable, but the significance lies in the fact that it is one which has been devised and used H over a number of years, without amendment to the statutory provisions, to provide not only for those cases where treaties do not provide in terms for particular international organisations to enjoy legal personality but also for a substantial number of treaties that do so provide. The legislative history

is admirably set out in the judgments of Kerr and Ralph Gibson L.JJ. in the Court of Appeal, and I do not propose to take time by repeating it. Perhaps, however, in ascertaining Parliament's intention in devising this formula, the most significant feature is that, although initially the Act of 1944 was passed at a time when there were no relevant treaties in which the United Kingdom came under an express obligation to confer legal personality, when it came to amend the Act in order to provide for the privileges and immunities in domestic law of the United Nations (the Convention governing which provided in terms that the United Nations should possess "juridical personality"), Parliament used exactly the same formula. It is quite clear from this that Parliament regarded the formula as sufficient to enable the Crown to confer legal personality on international organisations.

Then, it is said, that in according this effect to the Order in Council, the courts below and Millett J. in particular, have confused status with capacity.. Your Lordships' attention was directed to a number of jurisprudential works in which the distinction is drawn and explained. Speaking again entirely for myself, it was not for lack of interest that I did not find this discursus helpful. It was unhelpful not because the distinction does not exist as a matter of jurisprudential theory and analysis. Clearly it does. A minor has status but he lacks certain capacities. It was unhelpful simply because it did not meet the point which was being made by the respondents that the undoubted existence of capacities may lead and, in some circumstances, must lead to a necessary inference of the status of the person upon whom they are conferred. Whether that is expressed, as Millett J. expressed it, by saying that the status is the sum total of the capacities or that the status may be deduced from the capacities, is really a question of purely academic interest and does not affect the ultimate result.

In this context, reliance was placed by the appellants upon the passages in the speech of Lord MacDermott in *Bonsor v. Musicians' Union* [1956] A.C. 104, a case in which this House, by a majority, concluded that a trade union did not, by virtue of the Trades Unions Act 1871, constitute a legal entity apart from its members despite being invested by the legislature with some of the characteristics of the legal person. But, as was pointed out by Millett J. in his judgment in the *Maclaine Watson* action, the powers and capacities conferred on a trade union by the Act of 1871 were extremely limited and, for my part, I do not think that any useful lesson can be learned from *Bonsor's* case in the context of a case where the legislature has conferred upon a body the fullest possible legal capacities, including the capacity to contract in its own right as a principal and the capacity to hold a legal estate in land. A mere trading name cannot hold a legal estate. Yet the holding of a legal estate in land is undoubtedly one of the capacities of a body corporate and for my part I think that the status of a legal personality, separate from the members, is a necessary corollary of the unlimited capacities which are conferred by the Order.

> "A body which, as distinct from the natural persons composing it, can have rights and be subject to duties and can own property must be regarded as having a legal personality, whether it is or is not called a corporation:" *Chaff and Hay Acquisition Committee v. J. A. Hemphill*

A *and Sons Proprietary Ltd.* (1947) 74 C.L.R. 375, 385, *per* Latham C.J.

But, it is asked forensically, if Parliament intended to confer a legal personality on international organisations, why did it refrain from conferring on the Crown the power to invoke the well-established method of incorporation? Reliance is placed upon the judgment of Atkin L.J. in *Mackenzie-Kennedy v. Air Council* [1927] 2 K.B. 517, where the Court of
B Appeal declined to infer incorporation from the powers and capacities conferred by statute on the Air Council. Atkin L.J. observed, at p. 534:

> "If it had been intended to incorporate the Air Council one would have expected the well known precedents to be followed with express words of incorporation, and express definition of the purposes for which the department was incorporated."

C For my part, I cannot find any useful parallel between this case and the present. To begin with, Atkin L.J.'s conclusion was expressed as a provisional view only, reached without the benefit of full argument and in the context of the purely domestic body in respect of which there was no discernible policy reason why, if it wished to confer legal personality, Parliament should not have adopted the formula of expressing corporation
D which it had already adopted in the case of other departments of state to which Atkin L.J. referred. Here, by contrast, there was not only what Kerr L.J., in the course of his judgment ([1989] Ch. 72, 169E) referred to as a "consistent parallelism" between treaties creating international organisations on the one hand and the consequential domestic statutes and Orders in Council on the other. But there were also, as he remarked, good reasons why Parliament should not have thought it right to resort to
E the expedient of creating a domestic corporation as opposed merely to the conferment of separate legal personality. These organisations are organisations of sovereign states and one can readily understand a reluctance to submit the internal workings of such a body to the domestic jurisdiction of one of the member states and to subject the body to a domestic winding up jurisdiction.

F All other considerations apart, the entire framework of the Order in Council, read as a whole, militates against the conclusion that the I.T.C. was to be regarded in law simply as an association of the member states having no separate legal existence. The difficulties in the way of such a conclusion become particularly apparent when reference is made to article 6 and consideration is given to the results if the appellants are correct in their contentions. Article 4 contains the declaration (rendered necessary
G by section 1(1) of the Act of 1968) that the I.T.C. is an organisation "of which Her Majesty's Government in the United Kingdom and the governments of foreign sovereign powers are members," so that right from the outset a distinction is made between the organisation and its members. Article 5 confers the capacities of a body corporate on "the council," not on the members, while article 6 likewise confers immunity from suit and legal process not on the members but on the council. If the immunity is to
H be waived it is to be waived by the council not by the members. This is to be contrasted with article 14 which deals with the immunity of representatives of "the member countries of the council and of inter-governmental organisations participating in the International Tin Agreement" and provides

for the immunity to be waived by "the member country or by the inter-government organisation whom they represent." That apart, article 6 has to be looked at in the context of the law as it stood when the Order in Council was made. The modification to the doctrine of sovereign immunity contained in the Act of 1978 had not yet been introduced, so that the member states enjoyed at that time complete immunity from legal process. Thus, if the appellants are right, the effect of article 6(1), qualifying (in sub-paragraph (*c*)) the immunity in respect of an arbitration award, was to diminish the sovereign immunity of member states in relation to contracts made by them in the name of the I.T.C. whilst, at the same time, it conferred on the United Kingdom an immunity in relation to such contracts which, having regard to the provisions of the Crown Proceedings Act 1947, it did not previously enjoy. That Parliament could have intended to bring about such consequences without any express words and without any apparent necessity to do so transcends the bounds of credibility.

For all these reasons, I conclude that the effect of the Order in Council was to create the I.T.C. (which, as an international legal persona, had no status under the laws of the United Kingdom) a legal person in its own right, independent of its members. In engaging in the contracts on which the claims of the brokers and the banks are based, it was the contracting party. Its members were not. It was to the I.T.C. and not to its members that credit was extended and it is elementary that the only persons liable and entitled under a contract, in the absence of trust or agency, are the parties to the contract. The decision of this House in *Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22 is as much the law today as it was in 1896. I am left in no doubt, therefore, that submission A was rightly rejected in the courts below and that if a contractual claim against the member states is to be established, it has to be found either by postulating a concurrent primary or secondary liability either arising by independent contract (or possibly as a matter of law) or through the doctrine of agency.

*Submission B(1)*

The appellant's submissions under this head accept that the Order in Council created the I.T.C. as an independent legal persona but go on to assert that the legal persona is one which, as a matter of law, is of such a nature that, in entering into engagements, it imposes liability, whether primary or secondary, on its constituent members or, alternatively, does not exclude such liability. Taking the latter of these alternatives first, the argument starts from the same initial proposition as submission A, namely, that persons (including states) engaging in activities in the nature of trade in the United Kingdom in association are liable jointly and severally for the debts incurred in the name of the association. Granted, it is said, that the I.T.C. was invested with legal personality, it was not a legal personality of a type, such as a company incorporated under the Companies Acts, which excludes the liability of the constituent members. The object of conferring personality was merely to enable the I.T.C. to carry out its functions and it was unnecessary for this purpose to exclude the liability attaching to the member states in engaging in business transactions in association. Accordingly, it is argued, the mere creation of a legal personality without incorporation does not displace the prima facie liability which arises from

A the engagement of member states collectively in transactions in the nature of trade.

This argument, as Mr. Pollock has pointed out, falls down at two points. In the first place, the proposition from which it starts, that an activity in the nature of trade engaged in in the name of an unincorporated association results in the joint and several liability of all the members of the association, is not only unsupported by authority but is demonstrably B inaccurate as a general proposition. That, of course, may be the result if a partnership is established but the result then flows from the equitable rule that each partner is the agent for the other partners in matters within the scope of the partnership business. But, secondly and more importantly, it fails because it assumes what it seeks to demonstrate, namely that there is an existing state of liability and that the only question to be answered is C whether that is affected by the creation of the legal personality brought into being by the Order in Council. That is simply not the case. The I.T.C. as a matter of English law owes its existence to the Order in Council. That is what created the I.T.C. in domestic law and it was the I.T.C. which entered into the relevant contracts. It is simply a matter of identifying the contracting party and it is idle to inquire what the position would have been if the member states had chosen to engage in activities as D an unincorporated association and otherwise than through the I.T.C. They did not do so or, to be more accurate, it is certainly not demonstrated that they ever did at any time material to these appeals.

It is argued, however, that there is no necessary reason why, in law, there should not be created a legal entity one of the incidents of which is that there is imposed on its members a secondary liability for its obligations. E Such bodies exist in the law of the United Kingdom and the example is cited of the Scottish partnership which, both at common law and by statute (the Partnership Act 1890, section 4(2)), enjoys a legal personality as a firm, apart from the partners, who nevertheless remain jointly and severally liable for the firm's debts. Such bodies did, indeed, once exist in English law for section 25 of the Joint Stock Companies Act 1844 expressly provided for the corporators to be liable for the company's debts. There is F no reason, therefore, why, if it chose to do so, Parliament should not create such a "mixed entity."

That, of course, is irrefutable, but the question is, did it do so by article 5 of the Order in Council? Various grounds are advanced for suggesting that it did. First, it is said that the Act of 1968 is a United Kingdom statute and positing that section 1 of the Act was intended to enable the G Crown to confer legal personality, it should not be assumed that Parliament necessarily had in mind a legal personality analogous to that of an English body corporate. There is, it is said, a presumption against an interpretation which would confer on the members an immunity from liability of the legal entity without safeguards for the creditors. Thus, it is argued, the likelihood is that Parliament, in enacting section 1 of the Act of 1968, had in mind the creation of an entity analogous to a Scottish partnership, since H the object of the section was purely the functional one of enabling international organisations to function in the United Kingdom. An alternative route to the same result is suggested by reference to the presumed intention of the member states in entering into I.T.A.6. The

concept of a legal entity accompanied by a secondary liability in the natural persons who compose it is one which is well known in continental systems of law—for instance, the société en nom collectif in the law of France. In providing in I.T.A.6 that the I.T.C. should have legal personality, it is, so it is said, "probable" that the members were contemplating a legal personality of this type. In entering into the Headquarters Agreement the parties contemplated the creation of a legal personality of the same type as that contemplated in I.T.A.6 and, since the Order in Council was made to give effect to the Headquarters Agreement, there must be attributed to Parliament the intention to provide for that type of personality.

My Lords, neither of these arguments appears to me to be in the least tenable. Once given the existence of the I.T.C. as a separate legal person and given that it is that legal person which was the contracting party in the transactions upon which the appellants claim—the postulate from which these submissions start—there is no room for any further inquiry as to what type of legal person the contracting party is. The persons who can enforce contracts and the persons against whom they can be enforced in English law are the parties to the contract and in identifying the parties to the contract there are no gradations of legal personality. The I.T.C. as the contracting party is the only person liable on the contract, unless there can be found some positive provision in the law imposing liability on somebody else. The presumption upon which the appellants rely against an interpretation which does not provide for liability of the members is entirely unsupported by authority. Indeed, the very analogy relied upon in support of the submission—that is to say, section 25 of the Act of 1844—in fact demonstrates the fallacy of it. As a legal personality the joint stock company created under the Act was the sole contracting party in the engagements into which it entered and it was necessary for the legislature to impose liability on the corporators by express statutory provision. By the Order in Council, Parliament conferred on the I.T.C. the capacities of a body corporate, not the capacities of a Scottish partnership. One searches in vain for anything in the Order which would even suggest the imposition of liability for the I.T.C.'s engagements on the member states and, speaking for myself, I find it fanciful that such want can be supplied by reference to the "probabilities" of the members' intentions in entering into I.T.A.6 and the United Kingdom's intentions in entering into the Headquarters Agreement. Quite apart from the fact that the argument involves directly founding individual rights in domestic law upon the intentions of sovereign states in entering into the treaty and so infringes the principle of non-justiciability, the appellants were unable to point to any provision of I.T.A.6 or of the Headquarters Agreement which remotely suggested any such intention and, indeed, there are numerous indications pointing to an entirely opposite conclusion.

Submission B(1) has met with universal rejection both at first instance and in the Court of Appeal. I would likewise reject it.

*Submission B(2)*

Submission B(2), which is the primary submission of Mr. Burnton on behalf of the banks but which was adopted and expounded also as a secondary submission by Mr. Aikens for Maclaine Watson, seeks to arrive

A at the same result but by the route of public international law. The starting point is the principle established in English private international law that the liability of members of a foreign corporate body for the debts of the corporation is to be determined by the law of place of incorporation. The principle is encapsulated in rule 174 of *Dicey & Morris, The Conflict of Laws*, 11th ed. (1987), vol. 2, p. 1134:

B

> "(1) The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question. (2) All matters concerning the constitution of a corporation are governed by the law of the place of incorporation."

The "matters concerning the constitution of a corporation" extend, C according to the comment which follows (p. 1136), to an "an individual member's liability for the debts or engagements of the corporation."

The next step in the argument is the submission that the Order in Council of 1972, by articles 4 and 5, did no more than recognise the existing international entity known as the I.T.C. and confer upon it the capacities and domestic status of a legal persona. It does not purport to define the attributes of the personality thus conferred and for those one D has to look, in accordance with rule 174 already referred to, to the law of the I.T.C.'s creation, i.e. international law. That, it is submitted, is a legitimate and, indeed, a necessary exercise for a municipal court to undertake and an examination of the provisions of I.T.A.6, when considered in the light of international law, demonstrates that the I.T.C. is a body so constituted as to involve a direct liability of its members (either E concurrent or secondary) for the I.T.C.'s debts to third parties.

These submissions were rejected by Kerr L.J. and Ralph Gibson L.J. in the Court of Appeal, albeit on different grounds, but were accepted by Nourse L.J. who would have held the respondents liable in the *Maclaine Watson*, *Rayner* and *Multi-Brokers'* actions. They have been exhaustively and attractively put by Mr. Burnton and Mr. Aikens and appeared to me initially to offer not only the only possible but also a sustainable route to F the appellants' goal. In the end, however, I have been persuaded that, however attractive, they do not bear close examination and cannot succeed.

The authorities cited in *Dicey & Morris, The Conflict of Laws*, for the starting proposition on which the argument is founded are, as Kerr L.J. remarked, somewhat exiguous but the proposition is, I think, a logical one G and can be accepted. At any rate, for present purposes, it can be assumed to be correct. The first difficulty, however, is in applying it to a case where the body concerned is not one which owes its existence to a foreign system of law but one which is created by the United Kingdom legislation. No doubt, for instance, a Jordanian company whose constitution provides for the personal liability of its general partners will, by its contracts in England, engage the liability of those persons if it chooses to trade here: H see *Johnson Matthey & Wallace Ltd. v. Alloush* (1984) 135 N.L.J. 1012. But the same result would not, of course, follow if, instead of trading here as a Jordanian company it established a limited company under the Companies Acts and traded through the medium of that company. There

is then no room for looking at the constitution of the foreign entity and one is concerned only with the liabilities incurred by the entity which is created under English law.

That is the initial difficulty. Let it be assumed, for the moment, that the international entity known as the I.T.C. is, by the treaty, one for the engagements of which the member states become liable in international law, that entity is not the entity which entered into the contract relevant to these appeals. Those contracts were effected by the separate persona ficta which was created by the Order in Council. The appellants seek to overcome this difficulty by the submission that all that the Order in Council does is to *recognise* an entity which has already been created on the plane of international law by I.T.A.6 and to confer on it the capacities of a corporation. That, it is said, tells us nothing about the nature of the body and the liability of its members. For that one has to go back to the instrument of creation of the I.T.C. in international law and, when one does, one finds that the constitution of the I.T.C. as an international body is such as to engage the liability of the member states. Accordingly, that constitutional consequence is imported into English law by the principle of private international law enshrined in rule 174 of *Dicey & Morris, The Conflict of Laws*.

Speaking for myself, I have not felt able to accept even the initial step of this submission. Whilst it is, of course, not inaccurate to describe article 4 of the Order as one which "recognises" the I.T.C. as an international organisation, such "recognition" is of no consequence in domestic law unless and until it is accompanied by the *creation* of a legal persona. Without the Order in Council the I.T.C. had no legal existence in the law of the United Kingdom and no significance save as the name of an international body created by a treaty between sovereign states which was not justiciable by municipal courts. What brought it into being in English law was the Order in Council and it is the Order in Council, a purely domestic measure, in which the constitution of the legal persona is to be found and in which there has to be sought the liability of the members which the appellants seek to establish, for that is the act of the I.T.C.'s creation in the United Kingdom.

But even if this can be surmounted, there is, in my judgment, an even more compelling reason why the submission cannot succeed. Whether it is said that Parliament, in creating the legal persona of the I.T.C. by the Order in Council intended to create, on the domestic plane, a legal persona of the same type and having the same attributes in all respects as the legal persona created in international law, or whether it is said, as the appellants argue, that Parliament, in conferring capacities on a domestic legal persona, merely recognised and received into English law the international persona brought into existence by the treaty made between sovereign states, the result is the same, namely, that the rights and liabilities arising as a matter of English law in and against the member states are founded, created and regulated in and can be ascertained only by reference to I.T.A.6.

It is at this point that the members of the Court of Appeal diverged, Kerr L.J. and Nourse L.J. taking the view that justice and good sense

dictated a reference to the treaty and that the principle of non-justiciability must give way, Ralph Gibson L.J. holding (as Staughton J. had held in the court below) that such a reference was a direct infringement of the principle and was impermissible. For my part, I am persuaded that Ralph Gibson L.J. and Staughton J. were correct.

As previously mentioned, the consequence in English law of the creation of an artificial person, separate from the members who compose it, is that that artificial person alone is answerable for the debts which it incurs in its own name and for its own benefit. Agency apart, there is nothing in English law which imposes liability on the members. If the member states and the Crown in right of the United Kingdom are to be made liable on the engagements into which the I.T.C. has entered, that liability arises solely from the provisions of I.T.A.6 as it falls to be construed in international law, so that the English private law rights and obligations of the creditors and the member states will be directly altered and new rights and obligations not otherwise existing created by the provisions of an international treaty which have never been incorporated into English law.

Both Kerr L.J. and Nourse L.J. felt able to contemplate the derivation of rights and the imposition of obligations in this way because of internal references in the Order in Council, although they relied upon different provisions. Nourse L.J. discerned in article 4, which recites simply that the I.T.C. is an international organisation, a mandatory requirement to consider the nature of the I.T.C. in international law and thus, in effect, the incorporation of I.T.A.6 into English law. Kerr L.J., by contrast, deduced from the express references of the I.T.A. in articles 2 and 14 (which refer respectively to the "official activities . . . undertaken pursuant to" I.T.A.4 and to membership of inter-governmental organisations under article 50 of that agreement) and from the express references to the Headquarters Agreement in articles 1 and 6(*c*) that this was an unprecedented hybrid situation between an unincorporated treaty and an expressly incorporated treaty which justified a departure from the principle of non-justiciability. For my part, I have not felt able to accept either approach. Article 4 imposes no necessary or mandatory requirement to jettison the general rule of non-justiciability of an unincorporated treaty and to consider the nature of the I.T.C. in international law. It is merely the formal declaration rendered necessary by section 1(1) of the Act of 1968 as the condition precedent to the making of the provisions envisaged in section 1(2) and it entails no more than a recognition that there is an international organisation, created by treaty, of which the United Kingdom is a member. As regards the references to the treaty provisions, these are made for the very limited purposes of defining the official activities of the I.T.C. and the inter-governmental organisations whose representatives are qualified for the immunities conferred by the Order. It cannot be deduced from this that Parliament was opening the door for the reception into English law of all the terms of the treaty and the creation, sub silentio, of rights and duties not grounded upon domestic law but created solely by the treaty provisions.

It is argued, however, that if one supposes, for example, that I.T.A.6 contained an express declaration that the member states agreed to underwrite all the liabilities of the I.T.C., it would be absurd that no cognisance of such a provision should be taken by a domestic court. For my part, I do not think so and, indeed, this is an excellent example of the operation of the non-justiciability principle. If the treaty contained such a provision and Parliament had not seen fit to incorporate it into municipal law by appropriate legislation, it would not be for the courts to supply what Parliament had omitted and thus to confer on the Crown a power to alter the law without the intervention of the legislature. The remedy, if there be one, lies in international law, not in the domestic courts.

It is said that it is illogical to permit reference to the terms of the treaty in order to resolve an ambiguity in domestic legislation passed to give effect to it but to deny it for the purpose of ascertaining the nature in international law of the body to which the legislation relates. I do not in fact think that there is any ambiguity in the legislation but, in any event, there is a world of difference between seeking to construe what the legislature has said and seeking to supply provisions of which the legislation contains not the slightest hint on the basis of a preconceived notion that such rights "ought" to be there.

A third avenue of approach to the appellants' objective is the suggestion that international law is "part of English law:" see *Triquet v. Bath* (1764) 3 Burr. 1478, *per* Lord Mansfield C.J.; *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529, 554, *per* Lord Denning M.R. It is contended that there is a rule of international law that where sovereign states by treaty bring into being an international organisation which is intended to engage in commercial transactions, the member states are liable, secondarily, for the organisation's debts to third parties (whether states or individuals) unless (a) the treaty expressly excludes such liability and (b) the exclusion is brought to the notice of third parties. Now assuming that such a rule could be established, I can see that it might be said that it forms part of English law and that reference to the treaty would not be precluded by the non-justiciability rule inasmuch as such reference would be solely for the purpose of seeing whether it contained an express exclusion of liability and thus of determining whether the rule—on this hypothesis now part of domestic law—applies. Such an argument cannot run, nor indeed has it, I think, been advanced in precisely these terms. If such a rule exists, it is at highest a rule of construction, and however the matter is looked at, the question of liability or no liability stems from an unincorporated treaty which, without legislation, can neither create nor destroy rights under domestic law.

I accordingly concur in the reasoning of Ralph Gibson L.J. and would hold that submission B(2) falls at the first hurdle. But even if this were wrong, I am clearly of opinion that the majority of the Court of Appeal were right to reject it for the other reasons which they gave.

First and foremost, the "authorities" to which your Lordships were referred, which consisted in the main of an immense body of writings of distinguished international jurists, totally failed to establish any generally

A accepted rule of the nature contended for. Such writings as tended to support the supposed rule were in publications taking place since the affairs of the I.T.C. came before the courts in 1986 and express simply the views of particular jurists about what rule of international law ought to be accepted. They were, in any event, unclear as to whether the liability suggested was primary or secondary, whether it was joint or several, and whether it was to be contributed to equally or in some B other proportions. It was indeed submitted that it was not only open to your Lordships but was your Lordships' duty to decide these points as, indeed, Nourse L.J. had opined in the Court of Appeal. For my part, I cannot accept this. A rule of international law becomes a rule—whether accepted into domestic law or not—only when it is certain and is accepted generally by the body of civilised nations; and it is for those C who assert the rule to demonstrate it, if necessary before the International Court of Justice. It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.

In an endeavour to establish acceptance of the supposed rule, attention was drawn to some 16 treaties establishing international organisations which contained provisions expressly excluding liability on D the part of the members, but there was a very large number of similar treaties which did not and the Court of Appeal found it impossible to make any useful deduction from them. So do I.

Equally—although for the reasons given I do not think that the question arises—I have been unable to accept the suggestion that there can be found in the terms of the treaty itself indications of an intention E that the member states should assume liability for the I.T.C. debts. Indeed, such indications as there are seem to me to point in the contrary direction and to indicate that any liability assumed was merely to the I.T.C. itself and existed only to the extent prescribed. In relation to the buffer stock, the assumption is throughout that any commitments will be met out of cash or sales of tin (see particularly article 26) whilst articles 60 and 21 (read in conjunction with the definition of "government F guarantees/government undertakings" in article 2) are concerned with defining and limiting the obligations of the member states to the I.T.C. itself. For all these reasons, I am left in no doubt that submission B(2) must be rejected.

*Submission C*

G This submission, which was ably advanced by Mr. Sumption on behalf of the *Multi-Brokers*, relies upon the provisions of I.T.A.6 as establishing that, as a matter of the constitution of the I.T.C., it acted and was so constructed as to act as the agent of the member states as undisclosed principals. This has been referred to as "constitutional agency" and it does not rely upon the proof of any facts as to an authority expressly conferred by the members upon the buffer stock H manager. There are allegations in the proceedings of such an express authority but they are not the subject matter of the striking out applications from which these appeals arise and your Lordships are not concerned with them. The distinction is, however, important because it

has, I think, a bearing on the application of the non-justiciability principle which constitutes the first hurdle that Mr. Sumption has to surmount. As has already been mentioned, the existence and terms of the treaty are matters of fact and I can well understand that if there be a contest as to whether A, B and C have expressly authorised D to act as their agent, the fact that, in a contract to which D was not a party, A, B and C had agreed that they would so employ him might well be powerful evidence in support of an allegation that that is precisely what they did. What is said—and as I read their judgments both Kerr L.J. and Ralph Gibson L.J. were prepared to entertain the submission on this basis—is that the existence of an authority constituting the legal relationship of principal and agent is a matter of fact. If such a relationship exists, then it gives rise to certain justiciable consequences in domestic law and it is therefore permissible, without infringing the principle of non-justiciability, to have regard to the terms of I.T.A.6 in order to see whether, as a matter of fact, the legal relationship existed. In the end, the answer to the question does not, in my opinion, matter so far as concerns the result of these appeals, because I am left in no doubt at all that the agency submission fails on other grounds which are fully dealt with in the judgments under appeal. I have, however, found myself unable, with deference, to concur in the reasoning of the Court of Appeal in relation to this issue. The justiciable issue of the consequences in domestic law of the creation of the relationship of agency between the member states and the I.T.C. arises and arises only if there is first determined as a matter of law what are the rights between the member states and the I.T.C. The mere fact that the respondents are members of the I.T.C. and that the I.T.C. has entered into engagements creates of itself no rights against the members in creditors of the I.T.C. The rights of creditors against the members, if any, depend solely on the creation between the members and the I.T.C. of the rights and duties which, in domestic law, are created by the authority which, as a matter of law, is conferred on the I.T.C. Now whether one says that the rights and duties arising from that relationship arise from a contract stricto sensu between principal and agent or whether one treats them as arising by implication of law from the fact of an authority conferred, the effect, if the submission is accepted, is that, as a matter of domestic law, a person who is not a party to a domestic contract is subjected to the liabilities arising out of it. The obligations thus imposed and the rights thus created in the other party to the contract are created by a document or act in the law which is relied upon as creating the authority—in this case I.T.A.6. It is that which defines the scope of the authority conferred and it is that which alters the legal position in domestic law of the alleged principal and agent. However one approaches the problem, the obligations sought to be imposed on the respondents by this argument stem from the treaty and have no separate existence in domestic law without it. Again, Mr. Pollock was presented with the logical consequence, which Kerr L.J. in particular felt unable to accept, that even if the treaty between the member states had said in terms that they agreed to the organisation which they were creating acting as their agent, a domestic tribunal

A would be precluded by the non-justiciability principle from taking cognisance of it as the source of the obligation asserted. Mr. Pollock accepted this consequence and, in my judgment, he was right to accept it, however startling it may at first appear. One has only to envisage a dispute, possibly between the member states and the I.T.C. or possibly between the member states inter se, as to the scope and consequence of the authority so agreed to be granted. This must necessarily be a B question of the effect of the treaty on the plane of international law and a domestic court has not the competence so to adjudicate upon the rights of sovereign states. That, of course, is not this case. The submission here is that when the provisions of I.T.A.6 are examined, it can be seen that the provision for the constitution and management of the I.T.C. and the way it is envisaged that it will conduct its operations C have the effect of constituting it the agent for the members. Thus your Lordships are invited directly to embark upon the exercise of interpreting the terms of the treaty and ascertaining, on the basis of that determination, the rights of the members in international law and the consequences in municipal law of the rights so determined. I see no escape from Mr. Pollock's submission that this directly infringes the D principle of non-justiciability. For my part, therefore, like Staughton J., I would reject submission C on the short and simple ground that it raises an issue which is not justiciable by an English court.

Even were it open to your Lordships to entertain the submission, however, I find myself entirely persuaded by the reasoning of the Court of Appeal in rejecting it on the merits. Once given the creation of a separate legal personality by the Order in Council, there appears to me E to be no escape from the principle established by this House in *Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22, where the suggestion that Salomon and Co. Ltd. carried on business as agent for the corporators was firmly and decisively rejected. Mr. Sumption has sought to distinguish the case on the ground that the I.T.C. was brought into existence to carry out the purposes of its members and not for its own F purposes and that it is "composed" of its members and operates under their immediate direction. An analysis was made of the provisions of articles 4 to 8, article 13 and articles 21 and 28 of I.T.A.6 in order to support the suggestion that, unlike a board of directors, the council owes no duties to the I.T.C. but acts entirely for its own benefit. From this it was argued that the I.T.C., as a body, was simply the agent of the G members. It is, perhaps, enough for me to say that, speaking for myself, I can find no relevant distinction here between the governance of a limited company and the governance of the I.T.C. That they are differently constituted is irrelevant. As Kerr L.J. [1989] Ch. 72, 189, pointed out in the course of his judgment, whether a corporation acts directly on the instructions of its members, who constitute the directorate, or indirectly because of the members' control in general meeting, makes H no difference in principle. The existence of a board of directors in *Salomon's* case played no part in the decision. An examination of the constitution of the I.T.C., even if permissible, does not support the suggestion of "constitutional agency."

So far as the brokers' actions are concerned, the claim fails in any event on the further ground, accepted by Staughton J. and upheld by the Court of Appeal, that the terms of the standard form B contract of the London Metal Exchange, which governs the transactions sued upon, preclude any suggestion of agency. These terms unambiguously specified that the contract is between "ourselves and yourselves as principals" and the words which follow—"we alone being liable to you for its performance"—cannot reasonably be construed as importing that the words "as principals" refer only to the "ourselves" (the brokers) and not also to the "yourselves" (the I.T.C.). Mr. Sumption's further submission that "as principals" does not mean "as sole principals" was described by Kerr L.J. as commercially implausible. With that I agree.

It follows from what I have said that submission C must suffer the same fate as submissions A and B and I would accordingly dismiss these appeals. I would add only this. The rejection of the underlying submissions which form the whole basis of the appellants' case makes it unnecessary to consider the respondents' further objections—and in particular the question of immunity which the respondents raised in the courts below and which were necessarily dealt with by the Court of Appeal. In particular, that court heard and rejected arguments on behalf of the E.E.C. that it was, in any event, entitled to immunity in the same way as a sovereign state. Your Lordships found it unnecessary to trouble Mr. Eder, who appeared for the E.E.C., at the stage of the appeals in which the main arguments were presented, but reserved to him liberty to address his submissions at a later stage should your Lordships' decision on the principal points render such a course necessary. In the event, it has not proved necessary but it should, I think, be stressed, in fairness to Mr. Eder's clients, that they desired to submit (as their printed case states) that the Court of Appeal, in rejecting the claim to immunity, had misunderstood the argument upon which that claim was based. Their Lordships have not heard the argument and have not therefore had the occasion to form or express any view as to correctness or otherwise of the Court of Appeal's decision. It should also be mentioned that Mr. Eder would, had he been heard, have wished to submit that the issue of the E.E.C.'s immunity is one which might require to be referred, pursuant to article 177 of the E.E.C. Treaty, to the European Court of Justice. In the event, that does not arise.

*The receivership appeal*

I turn finally to the appeal of Maclaine Watson against the dismissal in the proceedings against the I.T.C. of their application for the appointment of a receiver. The basis of this claim is that the I.T.C. is possessed of an asset in the form of a right to be indemnified by the respondents in the direct action appeals against the liabilities incurred by the I.T.C. buffer stock manager in the name of the I.T.C. and that a receiver by way of equitable execution ought to be appointed for the purpose of pursuing that claim in the name of the I.T.C. Your Lordships are not concerned on this appeal with the question whether, assuming that the appellants can demonstrate a justiciable cause of

A action against the members of the I.T.C., a receiver by way of equitable execution ought, as a matter of the court's discretion, to be appointed. Your Lordships are concerned only with the question—or rather the two questions—upon which the claim foundered in the courts below, namely, (i) does the I.T.C. have any cause of action against the member states arising out of the transactions of the buffer stock manager, and (ii) if so, is it a cause of action which is justiciable by an English court?

B Millett J. held that there was no arguable cause of action in the I.T.C. against its members which did not involve a reliance upon I.T.A.6 and accordingly he dismissed the application on the ground of non-justiciability. In the Court of Appeal, a number of issues argued before Millett J., which had been defined in points of claim prior to the hearing before him, had dropped away and the appeal was argued, as it C has been argued before your Lordships, on the basis of amended points of claim to which it may be convenient to refer at this stage.

After setting out the establishment of the I.T.C. and the history of the proceedings leading to the entry of judgment against the I.T.C., the nub of the case is pleaded in paragraphs 21 to 24. Paragraph 21, which rests upon the absence of juridical personality in the I.T.C., is now no longer material and I can confine myself to paragraphs 22 to 24 which D are in the following terms:

> "22. Further or alternatively, the I.T.C. is entitled to be indemnified by the member states jointly and severally upon the ground that the I.T.C. entered into the contracts at the express or implied request of the member states and having incurred a liability is entitled by implication of law to be indemnified by the said member states E jointly and severally in respect of such liability.
>
> "23. Further or alternatively, the plaintiffs will if necessary contend that the trading being carried out by the buffer stock manager of the I.T.C. (the 'B.S.M.') at all material times in 1985, of which the contracts form part, although carried out with the full knowledge, authority and at the request of the member states, was outside the scope of the Sixth International Tin Agreement 1981 F ('I.T.A.6'), in that it involved the creation of a buffer stock far in excess of the 50,000 tonnes provided for in article 21 of I.T.A.6.
>
> "24. In support of the contentions in paragraphs 21, 22 and 23 above the plaintiffs will rely inter alia on the matters pleaded in the particulars in the schedule hereto."

G The particulars are of some importance. They plead that the I.T.C. entered into contracts through its officers, who were, by the articles of the I.T.C. there enumerated, authorised to manage the I.T.C.'s buffer stock under the supervision of the executive chairman who, in turn, was responsible to the council; that the council was composed of the members and decisions taken by simple distributed majority. Paragraph 4 is important and is in the following terms (with emphasis supplied):

H > "Further, the *members acting in council* did in fact know and approve of, and authorise the actions of the I.T.C. officers including the making of contracts for the purchase of tin in particular the contracts referred to in paragraph 3 above (referred to in these

particulars as 'the Maclaine Watson contracts'). Further or alternatively, the same were adopted, ratified and acquiesced in by the *members in council*. The best particulars the plaintiffs can give prior to discovery or discovery in proceedings brought by the receiver are as follows . . ."

There then follow lengthy particulars in 16 sub-paragraphs directed to establishing that the I.T.C.'s financial position was known to the members through reports rendered pursuant to Buffer Stock Operational Rules made pursuant to I.T.A.6 and that they were aware of and allowed a continuation of trading despite warnings that a continuation of trading was a gamble which would lead to disaster. Sub-paragraph (xvi) and paragraph 5 are in the following terms:

"(xvi) Nonetheless the members acting through the council ordered and/or allowed the I.T.C. officers to continue to trade in tin until 24 October 1985.

"5. The court will be invited to infer from the above facts that the member states expressly or impliedly authorised and/or requested the I.T.C. officers to enter transactions including the Maclaine Watson contracts on their behalf."

I have stressed the way in which the case is pleaded because these allegations (which must, for present purposes, be assumed to be true) demonstrate that throughout the members are not alleged to have acted individually but are alleged to have acted only as and through the council of the I.T.C.

Basing themselves on these pleadings, the appellants argue that there is a general principle of English law (to be found in the submissions of Mr. Cave in *Dugdale v. Lovering* (1875) L.R. 10 C.P. 196, 197, and approved by this House in *Sheffield Corporation v. Barclay* [1905] A.C. 392) that

"when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done."

That right, it is argued, may arise without the necessity for any pre-existing agreement between the parties and is a right governed by English law which is justiciable in an English court.

This contention was met by Lord Alexander on behalf of the respondent, in two ways. Speaking for myself, I confess to more than a few reservations with regard to the question of whether a principle enunciated in the context of a request by A to B to carry out an act which turns out to be tortious or otherwise wrongful and so subjects B to a liability in damages can be applied to the case of a body which enters into a contract for its own purposes at the instance of its directorate. Directors of limited companies would be both astonished and alarmed to learn of such a hitherto unsuspected peril which they might have thought to have been successfully laid to rest years ago by *Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22. But your

A Lordships need not take up time on this, for, as I understand it, Lord Alexander is content to concede that, given the facts pleaded, there might at least be an arguable case for the establishment of such a liability. He takes his stand on the two different facets of non-justiciability. Adopting the reasoning of Ralph Gibson L.J. he argues, that, supposing that such a liability can theoretically exist, the pleadings demonstrate that everything that was done was done in purported B pursuance of the provisions of I.T.A.6 by sovereign foreign states in circumstances in which it could not possibly be contended with any colour of conviction that their transactions were to be submitted to the jurisdiction of the municipal courts of this country.

He adopts and accepts—although he submits that it is strictly unnecessary to decide the point—the primary ground relied upon by C Ralph Gibson L.J. for rejecting the appellants' claim, which may be described as the act of state limb of the principle of non-justiciability and which may be summarised simply by saying that issues arising from such transactions between sovereign states are not issues upon which a municipal court is capable of passing. It is neither competent nor equipped to do so. To quote from the speech of Lord Wilberforce in *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] A.C. 888, 938:

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> "Leaving aside all possibility of embarrassment in our foreign relations . . . there are . . . no judicial or manageable standards by which to judge these issues, or to adopt another phrase . . . the court would be in a judicial no-man's land . . ."

The creation and regulation by a number of sovereign states of an E international organisation for their common political and economic purposes was an act jure imperii and an adjudication of the rights and obligations between themselves and that organisation or, inter se, can be undertaken only on the plane of international law. The transactions here concerned—the participation and concurrence in the proceedings of the council authorising or countenancing the acts of the buffer stock manager—were transactions of sovereign states with and within the F international organisation which they have created and are not to be subjected to the processes of our courts in order to determine what liabilities arising out of them attached to the members in favour of the I.T.C. In the Court of Appeal both Kerr and Nourse L.JJ. entertained reservations upon the question whether, in relation to a claim based upon agreements concluded by sovereign states in a commercial context, G it was right to decline to adjudicate upon such a claim on the ground of what was conveniently described by Kerr L.J. as "act of state non-justiciability." But both Lords Justices were at one with Ralph Gibson L.J. in rejecting the appellants' application on the same ground as that relied upon by Millett J. at first instance, that is to say, that I.T.A.6 is an unincorporated treaty and there is simply no way in which the case can be put for a claim by the I.T.C. against its members for an H indemnity or contribution which does not, in the ultimate analysis, involve a reliance upon and the interpretation of its provision, so that the claim is equally incapable of adjudication under this limb of the principle of non-justiciability. If this is right, then it really matters very

little, save on a purely academic level, whether the appellants' claim is equally incapable of adjudication in a municipal court by virtue of act of state non-justiciability and it is unnecessary for your Lordships to resolve or reconcile the views of the members of the Court of Appeal on this aspect of the case.

Since the ground expressed by Millett J. for his decision represents Lord Alexander's primary submission, it will be convenient to examine this first. The general principle of indemnity expounded in *Dugdale v. Lovering*, L.R. 10 C.P. 196, is advanced by the appellants as the route by which they can avoid reliance upon the provisions of I.T.A.6 and thus escape the difficulty created by the principle of non-justiciability. In essence, this submission is that in exercising the capacities conferred upon it by the Order in Council the I.T.C. becomes subject to municipal principles of common law and equity and that those principles govern the right of the I.T.C. against its members. If, it is argued, English municipal law confers, as the automatic result of an English law transaction, a right of indemnity against the persons (be they states or individuals) at whose instance the transaction was undertaken, it matters not what private or public agreement there may be between the latter and the person effecting the transaction, the right attaches as an incident of English municipal law and involves no necessary resort to the terms of that agreement. To say, the appellants argue, that acts are done *because* of a treaty is not the same as saying that they are done *under* a treaty, so that the mere existence of the treaty as a background or even a motivating factor in the transaction provides no reason why a claim by the actor against the instigator of the act should be regarded as resting on the treaty and so be non-justiciable. It was expressed thus by Mr. McCombe in the course of an able and helpful argument:

> "The instructions of the state to the buffer stock manager of the I.T.C., which are in review in the present case, though they would not have taken place had there been no I.T.A.6, are far removed from the category of transactions which by reason of being part of, or in performance of, an agreement between states, are withdrawn from the jurisdiction of the municipal courts."

I feel two difficulties about accepting this argument in the context of the present appeal. In the first place, it ignores what I apprehend to be the basis for the general principle relied upon, which is implied contract and nothing but implied contract. Secondly, it ignores the pleaded case upon the basis of which your Lordships are invited to find an arguable claim.

It is quite clear from the authorities which have been drawn to your Lordships' attention as establishing or supporting the general principle of indemnity upon which the appellants rely that indemnity is not the automatic consequence of a request to do an act. Such a right of indemnity arises only where the circumstances justify the implication of a contract to indemnify. The necessity for the implication of a contractual obligation to indemnify is stated in *Dugdale v. Lovering*, L.R. 10 C.P. 196, itself, by this House in *Sheffield Corporation v. Barclay* [1905] A.C. 392, and in subsequent cases in which the principle

has been applied: see *Yeung Kai Yung v. Hong Kong and Shanghai Banking Corporation* [1981] A.C. 787; *Naviera Mogor S.A. v. Société Metallurgique de Normandie ("Nogar Marin")* [1988] 1 Lloyd's Rep. 412. Now it is elementary that where the relationship between the parties is regulated by express agreement, there is no room for implication save for some term necessary for giving business efficacy to their agreement. Thus, whilst it may be that in the absence of some governing document regulating the terms upon which a particular transaction or series of transactions is undertaken, the law will, according to the circumstances, imply an obligation in one party to indemnify another, where there is such a governing document there simply is no room for that implication. Whichever way one looks at it, the existence of the governing document in the form of I.T.A.6 has to be faced and is indeed faced in the pleading on which the appellants rely. Whence, then, do the appellants derive the implied contract upon which they necessarily have to rely to support their case?

I have already drawn attention to the points of claim and to the particulars and I stress again that these are particulars of the acts of the members "acting in council" and that the constitutional basis for the members to act in council and for the officers of the I.T.C. to act under the supervision of the council is set out in paragraphs 1 to 3 of the pleading. So that one is thrown back immediately to I.T.A.6 and the request of the member states which forms the foundation of the claim in paragraph 5 is one which, throughout, is to be inferred from that which was done or omitted by the council of the I.T.C. acting under its constitutional document, I.T.A.6. There is here no room for any implication and if an obligation to indemnify is to be found, it is to be found only in or after consulting the terms of I.T.A.6. That involves the municipal court immediately in interpreting I.T.A.6 in order to see whether it contains provision for such an indemnity or whether, within its terms, there is room for one to be implied. The ascertainment and enforcement of such an indemnity is not a justiciable issue.

It is, of course, true that the I.T.C., although the creation of the treaty on an international level, is not itself a party to the treaty, but that cannot, in my judgment, make any difference in principle. I do not feel that I can express it better than it was expressed by Millett J. [1988] Ch. 1 in the course of his judgment, at p. 23:

> "Mr. Littman submitted that the I.T.C.'s rights of indemnity or contribution from its members cannot derive from the Agreement because the I.T.C. is not a party to the treaty, and because in fact no such rights can be found in it. The Agreement is, of course, not only the agreement between the members which established the I.T.C., but also the I.T.C.'s constitutional instrument. Whether it creates rights between the members only, or whether it creates rights also between the I.T.C. and the members, and if so whether its express provisions need to be augmented by further implied terms, are questions upon which, as a judge of the national courts of one of the member states only, I have no authority to pronounce. But let it be assumed that, for whatever reason, no right of indemnity or contribution, express or implied, is given to the I.T.C.

by the treaty. What follows? What follows is not that the right must derive from some other source, but that there is no such right."

It is argued that, if one postulates first of all a claim based on a request to the buffer stock manager and the implication of a purely domestic contract to indemnify arising from that request, I.T.A.6 is brought into the issue only by way of defence. The respondents cannot, it is said, have it both ways. If I.T.A.6 cannot be referred to for the purpose of supporting the direct actions, it equally cannot be referred to by way of defence by the I.T.C. Accordingly, it is said, it is the I.T.C. which is seeking to rely upon the treaty as a defence to a justiciable claim in domestic law. A non-justiciable defence is no defence. This argument has a certain attraction, but it is specious because it misunderstands the respondents' submission. I.T.A.6 is not relied upon as a defence. This is a striking out application and it is for the appellants to establish an arguable case. The case which they seek to establish is one which requires an implied contract in pleaded circumstances in which the express terms of I.T.A.6 are themselves relied upon as part of the essential background giving rise to the very implications sought to be made. Within the confines of the pleaded case, the implication cannot be made in vacuo and as if I.T.A.6's constitutional provisions did not exist. If an implication is to be made at all, it has to be made within the framework of I.T.A.6 and it is the terms of I.T.A.6 which have to be referred to and construed in order to found the implied contract upon which the claim rests.

I agree with Millett J. and with the Court of Appeal that, however the matter is approached, any claim of the I.T.C. against the member states for indemnity must ultimately rest upon I.T.A.6. This is an issue which is not justiciable by your Lordships and it is therefore unnecessary to decide whether, in any event, any such claim would also be precluded by act of state non-justiciability. I would accordingly dismiss this appeal also.

*Appeals dismissed with costs.*

*Solicitors: Clyde & Co.; Allen & Overy; Elborne Mitchell; Slaughter and May; Clifford Chance; Treasury Solicitor; Travers Smith Braithwaite; Boodle Hatfield; Nabarro Nathanson; Lovell White Durrant; Stocken & Lambert; Macfarlanes; Clifford Chance.*

*Solicitors in the receivership appeal: Elborne Mitchell; Cameron Markby; Treasury Solicitor.*

A. R.

[HOUSE OF LORDS] A

# REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* BRIND AND OTHERS

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| 1989 | Nov. 20, 21, 22; Dec. 6 | Lord Donaldson of Lymington M.R., Ralph Gibson and McCowan L.JJ. |
| 1990 | Nov. 19, 20, 21, 22; | Lord Bridge of Harwich, Lord Roskill, B |
| 1991 | Feb. 7 | Lord Templeman, Lord Ackner and Lord Lowry |

*Crown—Minister—Statutory powers—Statutory discretion to restrict broadcasting—Minister directing broadcasters to refrain from broadcasting direct speech by persons representing terrorist and other specified groups—Whether decision reasonable—Whether* C *European doctrine of proportionality applicable—Broadcasting Act 1981 (c. 68), s. 29(3)*

*Statute—Construction—International convention—As aid to construction—Convention to which United Kingdom signatory not incorporated into domestic law—Whether recourse to convention permissible—Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969), art. 10* D

By directives issued under section 29(3) of the Broadcasting Act 1981[1] and clause 13(4) of the licence and agreement made with the British Broadcasting Corporation and approved by Parliament, the Secretary of State required the Independent Broadcasting Authority and the B.B.C. respectively to refrain from broadcasting "any matter" consisting of or including words spoken by persons appearing or being heard on programmes E where such persons represented organisations proscribed under the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978 and certain other specified groups, or where the words spoken supported or invited support for such organisations. The directives were expressly not applicable to proceedings in Parliament or to parliamentary and local electoral campaigns. By way of clarification the Secretary of State indicated that they F only referred to statements made directly by the relevant persons and that no restriction was imposed on the broadcasting of film or still pictures of such persons speaking the words together with a voice-over account of them in paraphrase or verbatim. In proceedings for judicial review, the applicants, who were concerned in the broadcasting of programmes relating to news and current affairs, sought, inter alia, a declaration that G the Secretary of State's decision to issue the directives was ultra vires and unlawful. They claimed that in contravening article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in conflicting with the broadcasters' duties, in particular to preserve due impartiality under section 4 of the Act of 1981 and under the licence and agreement, the directives were outside the Secretary of State's powers under section 29(3) and clause 13(4). They further H claimed that the directives were disproportionate to the mischief at which they were aimed, namely to prevent intimidation by,

[1] Broadcasting Act 1981, s. 29(3): see post, p. 716E.

A or undeserved publicity and an appearance of political legitimacy for, such organisations, and were unreasonable so as to amount to an unlawful exercise of the Secretary of State's powers. The Divisional Court of the Queen's Bench Division dismissed the application, and the Court of Appeal dismissed an appeal by the applicants.

On appeal by the applicants:—

*Held*, dismissing the appeal, that the European Convention B for the Protection of Human Rights and Fundamental Freedoms was not part of English domestic law and, although the presumption that Parliament had intended to legislate in conformity with it might be resorted to in order to resolve ambiguity or uncertainty in a statutory provision, there was no such ambiguity or uncertainty in the wording of section 29(3) of the Broadcasting Act 1981 and there was no presumption that C the Secretary of State's discretion thereunder had to be exercised in accordance with the Convention; that to apply the doctrine of "proportionality" would involve the court in substituting its own judgment of what was needed to achieve a particular object for that of the Secretary of State on whom that duty had been laid by Parliament; and that, while any restriction of the right of freedom of expression could only be justified by an important competing public interest, it was impossible to say that the D Secretary of State, in concluding that the modest restrictions imposed by the directives were justified by the important public interest of combating terrorism, had exceeded the limits of his discretion or acted unreasonably in making them (post, pp. 747G–748C, 748H–749B, 749F–750A, 750E, 751A–G, 759B–D, 760C–D, 761E–F, G–762B, 763A–B, 764E–F, 766G–H).

*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, C.A. applied.

E Decision of the Court of Appeal, post, pp. 711B et seq; [1990] 2 W.L.R. 787; [1990] 1 All E.R. 469 affirmed.

The following cases are referred to in their Lordships' opinions:

*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

F *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161, C.A.

*Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935, H.L.(E.)

*Fernandes v. Secretary of State for the Home Department* [1981] Imm.A.R. 1, C.A.

*Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751; [1982] 2 W.L.R. 918; [1982] 2 All E.R. 402, E.C.J. and H.L.(E.)

G *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, C.A. and H.L.(E.)

*Rayner (J. H.) (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 A.C. 418; [1989] 3 W.L.R. 969; [1989] 3 All E.R. 523, H.L.(E.)

*Reg. v. Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979; [1976] 3 All E.R. 843, C.A.

H *Reg. v. Secretary of State for the Environment, Ex parte Nottinghamshire County Council* [1986] A.C. 240; [1986] 2 W.L.R. 1; [1986] 1 All E.R. 199, H.L.(E.)

*Reg. v. Secretary of State for Transport, Ex parte de Rothschild* [1989] 1 All E.R. 933, C.A.

*Reg. v. Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd.* [1988] 1 W.L.R. 990; [1989] 2 All E.R. 481

*Rex v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, P.C.

*Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116; [1966] 3 W.L.R. 1223; [1966] 3 All E.R. 871, C.A.

*Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014; [1976] 3 W.L.R. 641; [1976] 3 All E.R. 665, C.A. and H.L.(E.)

*Sunday Times, The v. United Kingdom* (1979) 2 E.H.R.R. 245

The following additional cases were cited in argument in the House of Lords:

*Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303; [1980] 3 W.L.R. 109; [1980] 3 All E.R. 161, H.L.(E.)

*Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248; [1987] 3 All E.R. 316, Sir Nicolas Browne-Wilkinson V.-C., C.A. and H.L.(E.)

*Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109; [1988] 2 W.L.R. 805; [1988] 3 All E.R. 545, Scott J. and C.A.; [1990] 1 A.C. 109; [1988] 3 W.L.R. 776; [1988] 3 All E.R. 545, H.L.(E.)

*Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027; [1972] 2 W.L.R. 645; [1972] 1 All E.R. 801, H.L.(E.)

*Chung Chi Cheung v. The King* [1939] A.C. 160; [1938] 4 All E.R. 786, P.C.

*Cinnamond v. British Airports Authority* [1980] 1 W.L.R. 582; [1980] 2 All E.R. 368, C.A.

*Commercial and Estates Co. of Egypt v. Board of Trade* [1925] 1 K.B. 271, C.A.

*Cytechno Ltd. v. Republic of Cyprus* (1979) 3 C.L.R. 513

*Edmonton Journal v. Attorney-General for Alberta* (1989) 64 D.L.R. (4th) 577

*Findlay, In re* [1985] A.C. 318; [1984] 3 W.L.R. 1159; [1984] 3 All E.R. 801, H.L.(E.)

*Golder v. United Kingdom* (1975) 1 E.H.R.R. 524

*Groppera Radio A.G. v. Switzerland* (1990) 12 E.H.R.R. 321, E.C.H.R.

*Hand v. Dublin Corporation* [1989] I.R. 26

*Ireland, Republic of v. United Kingdom* (1978) 2 E.H.R.R. 25

*Johnston v. Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] Q.B. 129; [1986] 3 W.L.R. 1038; [1986] 3 All E.R. 135, E.C.J.

*K.D. (A Minor) (Ward: Termination of Access), In re* [1988] A.C. 806; [1988] 2 W.L.R. 398; [1988] 1 All E.R. 577, H.L.(E.)

*Le Compte v. Belgium* (1981) 4 E.H.R.R. 1

*Lingens v. Austria* (1986) 8 E.H.R.R. 407

*Lock International Plc. v. Beswick* [1989] 1 W.L.R. 1268; [1989] 3 All E.R. 373

*Madras, State of v. Row* [1952] S.C.R. 597

*Markt Intern and Beermann v. Germany* (1989) 12 E.H.R.R. 161, E.C.H.R.

*Ncube v. The State* [1988] L.R.C. (Const.) 442

*Rangarajan v. P. Jagivan Ram* (1989) 1 S.C.J. 128

*Raymond v. Honey* [1983] 1 A.C. 1; [1982] 2 W.L.R. 465; [1982] 1 All E.R. 756, H.L.(E.)

*Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052; [1976] 3 All E.R. 452, C.A.

*Reg. v. Board of Visitors of H.M. Prison, The Maze, Ex parte Hone* [1988] A.C. 379; [1988] 2 W.L.R. 177; [1988] 1 All E.R. 321, H.L.(N.I.)

A *Reg. v. Brent London Borough Council, Ex parte Assegai* (unreported), 11 June 1987, D.C.
*Reg. v. Miah* [1974] 1 W.L.R. 683; [1974] 2 All E.R. 377, H.L.(E.)
*Reg. v. Oakes* (1986) 26 D.L.R. (4th) 200
*Reg. v. Secretary of State for the Home Department, Ex parte Bhajan Singh* [1976] Q.B. 198; [1975] 3 W.L.R. 225; [1975] 2 All E.R. 1081, C.A.
*Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay*
B [1987] A.C. 514; [1987] 2 W.L.R. 606; [1987] 1 All E.R. 940, H.L.(E.)
*Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar* [1976] Q.B. 606; [1975] 3 W.L.R. 322; [1975] 3 All E.R. 497, C.A.
*Reg. v. Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd.* [1988] A.C. 858; [1988] 2 W.L.R. 654; [1988] 1 All E.R. 961, H.L.(E.)
*Shelton v. Tucker* (1960) 364 U.S. 479
C *State (Lynch) v. Cooney* [1982] I.R. 337
*Thakur v. Union of India*, A.I.R. 1987 S.C. 2386
*Thomas v. Chief Adjudication Officer* [1991] 2 W.L.R. 886
*Times Newspapers Ltd. v. United Kingdom* (Application No. 13166/87) (unreported), 12 July 1990, E.C.H.R.
*W. v. United Kingdom*, 8 July 1987, Series A No. 121, E.C.H.R.
*West Rand Central Gold Mining Co. Ltd. v. The King* [1905] 2 K.B. 391
D *Wheeler v. Leicester City Council* [1985] A.C. 1054; [1985] 3 W.L.R. 335; [1985] 2 All E.R. 1106, H.L.(E.)

The following cases are referred to in the judgments of the Court of Appeal:

*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948]
E 1 K.B. 223; [1947] 2 All E.R. 680, C.A.
*Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303; [1980] 3 W.L.R. 109; [1980] 3 All E.R. 161, H.L.(E.)
*Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109; [1988] 2 W.L.R. 805; [1988] 3 All E.R. 545, Scott J. and C.A.; [1990] 1 A.C. 109; [1988] 3 W.L.R. 776; [1988] 3 All E.R. 545, H.L.(E.)
*Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161, C.A.
F *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935, H.L.(E.)
*Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751; [1982] 2 W.L.R. 918; [1982] 2 All E.R. 402, E.C.J. and H.L.(E.)
*Ireland, Republic of v. United Kingdom* (1978) 2 E.H.R.R. 25
*K. D. (A Minor) (Ward: Termination of Access), In re* [1988] A.C. 806; [1988] 2 W.L.R. 398; [1988] 1 All E.R. 577, H.L.(E.)
G *Lithgow v. United Kingdom* (1986) 8 E.H.R.R. 329
*Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, H.L.(E.)
*Raymond v. Honey* [1983] 1 A.C. 1; [1982] 2 W.L.R. 465; [1982] 1 All E.R. 756, H.L.(E)
*Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052; [1976] 3 All E.R. 452, C.A.
H *Reg. v. Board of Visitors of H.M. Prison, The Maze, Ex parte Hone* [1988] A.C. 379; [1988] 2 W.L.R. 177; [1988] 1 All E.R. 321, H.L.(N.I.)
*Reg. v. Brent London Borough Council, Ex parte Assegai* (unreported), 11 June 1987, D.C.

*Reg. v. Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd.* [1988] 1 W.L.R. 990; [1989] 2 All E.R. 481

*Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116; [1966] 3 W.L.R. 1223; [1966] 3 All E.R. 871, C.A.

*State (Lynch) v. Cooney* [1982] I.R. 337

*Waddington v. Miah* [1974] 1 W.L.R. 683; [1974] 2 All E.R. 377, H.L.(E.)

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*Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027; [1972] 2 W.L.R. 645; [1972] 1 All E.R. 801, H.L.(E.)

*Fernandes v. Secretary of State for the Home Department* [1981] Imm.A.R. 1, C.A.

*Lock International Plc. v. Beswick* [1989] 1 W.L.R. 1268; [1989] 3 All E.R. 373

*Reg. v. Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979; [1976] 3 All E.R. 843, C.A.

*Reg. v. General Medical Council, Ex parte Colman* (unreported) 25 November 1988, D.C.

*Reg. v. Secretary of State for the Home Department, Ex parte Bhajan Singh* [1976] Q.B. 198; [1975] 3 W.L.R. 225; [1975] 2 All E.R. 1081, C.A.

*Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] A.C. 514; [1987] 2 W.L.R. 606; [1987] 1 All E.R. 940, H.L.(E.)

*Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar* [1976] Q.B. 606; [1975] 3 W.L.R. 322; [1975] 3 All E.R. 497, D.C. and C.A.

*Silver v. United Kingdom* (1983) 5 E.H.R.R. 347

*Sunday Times, The v. United Kingdom* (1979) 2 E.H.R.R. 245

APPEAL from the Divisional Court of the Queen's Bench Division.

By a notice of application for judicial review dated 24 January 1989 the applicants, Donald Brind, Fred Emery, Alexander Graham, Victoria Leonard, Scarlett McGwire, Thomas Nash and John Pilger, sought (1) a declaration that the decision of the Secretary of State for the Home Department given by directives dated 19 October 1988 requiring the British Broadcasting Corporation and the Independent Broadcasting Authority to refrain from broadcasting specified matter were ultra vires and void, and (2) an order of certiorari to quash the decision. The grounds on which relief was sought were, inter alia, (1) that the directives were in breach of article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1953 in that there was no pressing social need for such an interference with free speech, and in empowering the Secretary of State to make directives, Parliament could not have intended to authorise him to contravene article 10 of the Convention; (2) the directives were disproportionate to the mischief at which they were aimed; and (3) they were perverse in that no reasonable Secretary of State properly directing himself could have made them; further or in the alternative (4) that section 29(3) of the Broadcasting Act 1981 and clause 13(4) of the B.B.C. licence did not empower the

A Secretary of State to give directives which prevented or hindered the Independent Broadcasting Authority and the British Broadcasting Corporation from fulfilling their duties under the Act of 1981 or the charter and licence, in particular in preserving due impartiality.

On 26 May 1989 the Divisional Court (Watkins L.J., Roch and Judge JJ.) dismissed the application. By a notice of appeal dated 20 June 1989 the applicants appealed on the grounds, inter alia, that the B Divisional Court had erred in the following respects: (1) that having accepted that where, as here, Parliament had conferred a discretionary power in section 29(3) of the Act of 1981, article 10 of the Convention (which guaranteed freedom of speech) constituted an implied limitation on the exercise of that power since Parliament could not have intended to authorise the minister to act in breach of the Convention, the court C erred in failing to consider whether the Secretary of State was in breach of article 10, which only permitted interferences with freedom of speech where there was a pressing social need in order to advance one of a number of defined objectives; the court wrongly confined itself to considering whether it was perverse for the Secretary of State to conclude that there existed a pressing social need; (2) the court failed to conclude that the decision was in breach of article 10 in that there D was no pressing social need for the restriction of expression; (3) the court erred in law in relation to the concept of proportionality, wrongly concluding that it was not a ground of judicial review that the decision of the Secretary of State was out of proportion to the benefit to be obtained or the mischief to be avoided; (4) that the court erred by failing to find that the decision was perverse; (5) the court erred in E failing to find a breach of article 10, a lack of proportionality and perversity by reason of the following: (a) the directives removed an important aspect of editorial control from broadcasters to the government, impeding the performance of their duties to report current affairs impartially, and (b) the Independent Broadcasting Authority had statutory duties under section 4(1)(*a*) to (*f*) of the Act of 1981 to ensure that nothing was included in broadcast programmes offensive to good F taste or decency or was likely to be offensive to public feeling, and to ensure that due impartiality was preserved. Similar duties arose under the British Broadcasting Corporation's Charter, licence and agreement. There had been no suggestion by the Secretary of State that such duties had been breached.

By a respondent's notice dated 31 July 1989 the Secretary of State G indicated that he intended to contend that the judgment should be affirmed on the following additional grounds, that (1) the Divisional Court ought to have held that section 29(3) of the Broadcasting Act 1981 conferred a discretionary power on the Secretary of State whose exercise as a matter of English law was limited only by the principles set out in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 and *Padfield v. Minister of Agriculture,* H *Fisheries and Food* [1968] A.C. 997; (2) that the Divisional Court should accordingly also have held that article 10 of the Convention did not constitute an implied limitation on the exercise of the Secretary of State's power, in accordance with binding authority, namely *Reg. v.*

*Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979; *Fernandes v. Secretary of State for the Home Department* [1981] Imm.A.R. 1 and *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161; (3) that the Divisional Court wrongly relied on *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751 and *Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303 as authority for the propositions that regard might be had to the Convention when deciding the limitations to be placed on the Secretary of State's power. Those decisions were only authority not for the propositions stated by the Divisional Court but for the proposition that the Convention could be regarded to resolve ambiguities in domestic law and in particular in domestic statute law; (4) to look at the Convention to decide what limits were to be imposed as a matter of domestic public law on the use of discretionary power under a statute was in effect to erect the Convention into a principle of English law to be applied directly by the English courts in a manner conceptually identical to their application of received principles such as those enunciated in the *Wednesbury* and *Padfield* cases; that was not a legitimate exercise since it could not stand with the uncontroverted proposition that the Convention was not part of English law; (5) it was illegitimate to look at the Convention to ascertain the reach of the discretionary power under section 29(3); (6) the Secretary of State in fact had regard, in deciding whether and how to exercise his power, to matters akin or identical to those expressed in article 10. Such considerations were material to his decision as matters which a reasonable Secretary of State invested with such power would take into account. In reaching his decision in the light of such matters he made no error of law, and in taking a reasonable view as to the need for and manner of the exercise of his power, he also took a proportionate view thereof, proportionality being no more and no less than a function or aspect of *Wednesbury* reasonableness.

The facts are stated in the judgment of Lord Donaldson of Lymington M.R.

*Anthony Lester Q.C.* and *David Pannick* for the applicants. The appeal raises issues of considerable general interest and importance in respect of free speech in a democratic society. The applicants neither are, nor represent, the persons or bodies whose statements are the subject of the directives issued by the Secretary of State. The applicants are journalists and a member of the public and their concern is that without reasonable justification the directives interfere with the rights and duties of broadcasters to inform and with the right of the public to be informed about current affairs so that they can thereby form their own view on matters of public moment.

The directives, made under section 29(3) of the Broadcasting Act 1981 in respect of the Independent Broadcasting Authority, and clause 13(4) of the licence and agreement, in respect of the B.B.C., represent an unprecedented interference with free speech in peace time. They involve the prior censorship by the state of the content of television and radio programmes broadcast in the United Kingdom and overseas. They remove an important aspect of editorial control from broadcasters to

A the government, yet do not result from any criticisms levelled against the broadcasters by the government or Parliament. The effect of the directives is to deprive the public of being shown information which might assist them about current affairs in Northern Ireland. They impose difficult decisions on the broadcasters in determining what material falls within the scope of the directives, and what lies outside, so that the performance of the broadcasters' duties to report current affairs B impartially is impeded.

The directives are sweepingly broad, the ban on broadcasting covers any subject matter and is not confined to terrorism or the threat of terrorism. The Secretary of State relies on the very wide powers conferred on him by Parliament, which, if taken literally, are absolute and unlimited. Although on their face the words of section 29(3) are C clear they cannot be taken as conferring so wide a power. It is the constraints which should be placed on their construction which is in issue. Section 29(3) and clause 13(4) are ambiguous and unclear in that each is arguably capable of bearing the following interpretations: (1) "matter" relates to specific information and there is no power to impose a blanket ban on the broadcasting of all information from a particular source; (2) there is no power to ban broadcasting of D information for reasons which are covered by section 4 of the Act, and by analogous provisions in the licence, in particular to prevent crime or to prevent offence to the public. The mischief at which the section is directed must have been one for which the Act provides no other remedy. If the matter fell within section 4, there is no power to use either section 29(3) or clause 13(4). Any other construction would E frustrate the policy and objects of the statutory scheme. Section 29(3) is not intended to confer power on a minister to impose a ban on anything said in relation to a particular group or section of the community. It is only available to meet a compelling public interest where that is necessary. It is because of this ambiguity that the court can and should narrowly define the scope of the relevant powers so as to ensure consistency with both the statutory objects and with the Convention for F the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969).

In the alternative, in defining the scope of the relevant powers, Parliament must have intended to confine the minister to acts which were consistent with the Convention. As in *Raymond v. Honey* [1983] 1 A.C. 1, the court should here construe a statutory discretion broad on G its face so as to deny power unjustifiably to interfere with fundamental rights. If the Secretary of State has acted in breach of the Convention he has no power to make the directives.

Parliament in empowering the Secretary of State to act under section 29(3), and clause 13(4), cannot have intended to authorise him to act in breach of an international treaty obligation of the United Kingdom government, namely article 10 of the Convention. It is a principle of H statutory construction that the words of a statute passed after a treaty to which the United Kingdom was a party and dealing with the subject matter of the international obligation are to be construed, if they reasonably can be, as intended to carry out the obligation, and not to be

inconsistent with it: see *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751, 771, *per* Lord Diplock. The Convention is such a treaty, signed by the United Kingdom in 1950 and ratified by the United Kingdom on 8 March 1951.

There are three international obligations contained in the Convention which are relevant for present purposes. First, article 10(1) guarantees the right to freedom of expression, subject to exceptions in article 10(2) allowing interferences by public authorities for specified purposes and on the basis of the pressing social need test of necessity. Section 29(3) and clause 13(4) deal therefore with the subject matter of the international obligation contained in article 10, and must therefore be construed, if they are reasonably capable of bearing such a construction, as intended to carry out those obligations, and not to be inconsistent with them. The second relevant obligation is contained in article 1 of the Convention which obliges the United Kingdom to secure, inter alia, the right and freedom contained in article 10 to everyone within its jurisdiction: see *Republic of Ireland v. United Kingdom* (1978) 2 E.H.R.R. 25. The choice of means of giving effect to the obligation contained in article 10 is to be made by the United Kingdom, but this must be achieved by whatever appropriate means in the domestic law, whether by the common law or by statute, and in the administrative practices of the government and of public authorities, within the meaning of article 10(2). The third relevant obligation is contained in article 13 providing that there should be an effective national remedy for those whose rights under the Convention have been violated: see *Lithgow v. United Kingdom* (1986) 8 E.H.R.R. 329. The United Kingdom is therefore obliged by the Convention directly to "secure" the right of freedom of expression guaranteed by article 10 to everyone within its jurisdiction. Effective national remedies must be available except where the alleged violation is required by statute, in which event the Convention provides remedy only on the international plane, before the European Commission and Court of Human Rights.

The rights and freedoms of the Convention have not been expressly incorporated by statute into domestic law, because it has been considered unnecessary to do so, successive governments correctly assuming that the existing arrangements within the domestic legal system comply with its obligations pursuant to the Convention. This has been achieved first by the general common law principle of statutory interpretation that an Act of Parliament should if possible be construed so as to further the international obligations of the United Kingdom, and not so as to be inconsistent with them: see *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751; see also the practical application of the principle in *Waddington v. Miah* [1974] 1 W.L.R. 683, 694, *per* Lord Reid.

The House of Lords has also had regard to the Convention for the purpose of judicial review of ministerial powers: see *Raymond v. Honey* [1983] 1 A.C. 1, 10, *per* Lord Wilberforce. Similarly in *Reg. v. Board of Visitors of H.M. Prison, The Maze, Ex parte Hone* [1988] A.C. 379 the House of Lords held that English law was harmonious with article 6(3)(*c*) as interpreted by the European Court of Human Rights, but implied that a mismatch between English law and the Convention might

A be resolved in accordance with the Convention: see in particular, at pp. 392–394, *per* Lord Goff of Chieveley. In *In re K.D. (A Minor) (Ward: Termination of Access)* [1988] A.C. 806 the House of Lords similarly sought to ensure that the common law, as well as statute law, was consistent with the Convention as interpreted by the European Court of Human Rights: see, at pp. 823–828, *per* Lord Oliver of Aylmerton, where it is implicit that if there had been inconsistency, it B would have called for an "alteration in the basic approach in order to conform with the Convention." The same approach was adopted in the context of contempt of court, freedom of expression and article 10 in *Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303, 352, *per* Lord Fraser of Tullybelton and, at p. 354, *per* Lord Scarman: see also *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] C 1 A.C. 109, 156–158, *per* Scott J.; at p. 178 *per* Sir John Donaldson M.R.; at p. 203 *per* Dillon L.J.; at pp. 218–220 *per* Bingham L.J.; at p. 256 *per* Lord Keith; at p. 273 *per* Lord Griffiths and at p. 283, *per* Lord Goff of Chieveley.

The case law demonstrates that English courts now refer to the relevant provisions of the Convention and to judgments of the European Court interpreting those provisions, for the purpose of ensuring where D possible that the domestic law is in conformity with the Convention. That is the approach whether the court is construing legislation, reviewing the exercise of administrative discretion, or declaring and applying the common law. Where however an Act of Parliament cannot be construed so as to be consistent with the Convention, then the English courts must apply the statute and leave the complainant to seek E redress on the international plane.

In construing article 10, the European Court has emphasised certain basic principles. It is applicable, for example, even though the relevant material may be such as to offend, shock or disturb the state or a sector of its population: see *The Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245. That proposition is central to a democratic way of life. Freedom of speech is vital, because without the free flow of information F about the political process people are less well equipped to decide the important issues of the day. The present directives conflict with this principle and impede the functioning of the democratic process.

If the state is to justify such interference with freedom of speech it must satisfy the test of whether the interference corresponds to a pressing social need and is proportionate to the legitimate aim pursued, G and of whether the reasons given for it are sufficient justification under article 10(2): see *The Sunday Times v. United Kingdom*, 2 E.H.R.R. 245, 277–278, 280. Article 10(2) makes it clear that any exceptions to the principle of freedom of expression must be narrowly interpreted. European case law shows that failure by English courts to apply the principle of necessity, would in addition be a separate breach of article 13: see *Silver v. United Kingdom* (1983) 5 E.H.R.R. 347.

H In the context of judicial review of ministerial powers under the Immigration Act 1971 a stricter scrutiny is involved where fundamental rights are at stake: see *Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] A.C. 514, 531, *per* Lord Bridge

and, at p. 537, *per* Lord Templeman. That "more rigorous examination" or "special responsibility" on the Crown, which arises in such cases, involves applying the pressing social needs test to decide whether the interference by a public authority is reasonably proportionate to the aim or aims pursued by the decision maker: see also *Reg. v. Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979; *Fernandes v. Secretary of State for the Home Department* [1981] Imm.A.R. 1; *Reg. v. Secretary of State for the Home Department, Ex parte Bhajan Singh* [1976] Q.B. 198 and *Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar* [1976] Q.B. 606.

The court will therefore review the minister's purported exercise of power on the basis of proportionality, which is a principle of English public law. If, as here, the minister has used a sledgehammer to crack a nut, when a set of nutcrackers, in the form of section 4, were available, without any pressing social need, he cannot satisfy the test of proportionality. Alternatively, he has acted perversely whether or not proportionality is an element of *Wednesbury* unreasonableness. The court should here apply the heightened scrutiny test applicable because the case concerns fundamental freedoms. To use his powers disproportionately or unnecessarily to interfere with freedom of speech would defy logic and accepted moral standards: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410, *per* Lord Diplock.

For the Court of Appeal to say that the Convention is irrelevant to the judicial review of ministers' powers is incompatible with *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751 and the other decisions of the House of Lords, and is wrong in principle. The Divisional Court correctly accepted that where as here Parliament has conferred a discretionary power, namely section 29(3), then article 10 is an implied limitation on the exercise of that power. The Divisional Court however was wrong in failing to consider whether the Secretary of State's decision was in breach of the pressing social need principle under article 10. That court wrongly confined itself to considering whether the decision was perverse. It should have concluded that there was no pressing social need and that accordingly the decision was in breach of article 10.

Apart from the Convention, if the minister acts disproportionately, he acts ultra vires: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410, *per* Lord Diplock; *Halsbury's Laws of England*, 4th ed., vol. 1 (1989), pp. 144–145, para. 78; *Reg. v. Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd.* [1988] 1 W.L.R. 990, 1001, *per* Schiemann J.; *Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052; *Reg. v. Brent London Borough Council, Ex parte Assegai* (unreported), 11 June 1987 and *Lock International Plc. v. Beswick* [1989] 1 W.L.R. 1268. The Divisional Court's decision in *Reg. v. General Medical Council, Ex parte Colman* (unreported), 25 November 1988 should not be followed in so far as it rejects proportionality as a separate head of challenge.

The courts are wrong to consider that the application of the doctrine of proportionality will cause chaos in litigation. That is to misunderstand

A the principle, which involves no usurpation by the judiciary of the decision maker's functions. The Divisional Court therefore should not have dismissed the doctrine. While imposing a stricter standard of review than perversity, it does not substitute the discretion of the court for that of the executive. Alternatively, the decision of the Secretary of State in issuing the directives is perverse within the *Wednesbury* principle: see *Associated Provincial Picture Houses Ltd. v. Wednesbury* B *Corporation* [1948] 1 K.B. 223. The evidential material demonstrates that there has been a breach of article 10, disproportionality and perversity.

The directives were unlawful because they conflicted with the duties of the I.B.A. and the B.B.C. to preserve due impartiality in accordance with section 4(1)(*f*) of the Act, and the provisions of the licence and C agreement. The I.B.A.'s duty under section 4 is to ensure that nothing is included in broadcast programmes which offends against good taste or decency or is likely to be offensive to public feeling, or to incite crime. It has a further duty to ensure that due impartiality is preserved. The Secretary of State cannot validly use his powers so as to frustrate the purpose of the Act or of the licence: see *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997. The directives do here D conflict with those duties, in particular with the duty to preserve due impartiality in relation to news and current affairs. They therefore conflict with the purpose of the Act to ensure fairness and balance in news reporting. Parliament cannot have intended to authorise the Secretary of State to make directions under section 29(3) which would so conflict with the broadcasters' duties under section 4. Rather, the E mischief at which the provisions are in fact directed is the absence of a power to intervene in the public interest in circumstances not covered by other provisions in the Act and the licence and agreement. Were it otherwise, it would conflict with their policy and objects. There is accordingly no room for the exercise of the Secretary of State's powers in areas where provision is made by section 4.

*John Laws* and *Robert Jay* for the Secretary of State. The questions F for the court in reviewing the purported exercise of discretionary power conferred on a public authority by statute are (1) has the Secretary of State misinterpreted the statute? (2) has he used his powers to frustrate not to promote the objects of the Act? (3) has he acted perversely in the *Wednesbury* sense? Proportionality is not an independent concept to be distinguished from that of *Wednesbury*. The ascertainment of the G objects and policy of a statute is not a process of resolving ambiguities in the Act. It is perceiving and asserting the Act's goal, according to a true construction of its individual provisions. That exercise arises therefore only after any ambiguity has been resolved. However, apart from "matter" there is no ambiguity in section 29. It confers a power without limit. But it is wrong to say that because that is so it must be ambiguous.

H The policy and objects of the Act of 1981 are not hard to find, namely to set in place and maintain a system or régime by which television and radio are provided to the public by independent broadcasters under the general aegis of the I.B.A. That is the effect of

sections 1 to 4. Within that frame it is the general responsibility of the I.B.A. to monitor and safeguard the quality of programmes: see section 2(1) and (2) and section 4(10). From that it follows that the policy of the statute would be frustrated if the powers conferred by section 29 were used by the Secretary of State to arrogate to himself that overall responsibility and to take on the burden cast by statute on the I.B.A.

It follows that the section 29 powers are to be used specifically in relation to matters concerning the public or the national interest, care for which is the particular responsibility of the government, where the Secretary of State takes the view that action under section 29 is called for. That approach to the construction of the statute correctly shows a balance between the general responsibility of the I.B.A. and occasional governmental intrusion. There could therefore in appropriate circumstances be an overlap with section 4 where the situation is sufficiently grave to require and justify his taking action.

There being no ambiguity in the Act, there is no room for recourse to the Convention. The Divisional Court accepted the applicants' approach that it was appropriate to have recourse to international treaty obligations to resolve ambiguities in domestic law, and regarded that approach as a proper basis for its own view as to the extent to which the Convention might be engaged in the judicial review process. However that approach cannot be supported. It proceeded on the premise that there exists a perceived ambiguity either in the terms of the Act or in the nature and extent of the applicable public law principles: namely those established in *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 and *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223.

There being no ambiguity in the Act, the question must therefore have been whether there was any ambiguity in the common law principles, which the Secretary of State accepted imposed limits on his otherwise apparently unfettered powers under the Act. However that was never asserted by the applicants. Rather they suggested that as a matter of judicial policy those common law rules should be developed so as to embrace article 10 as constituting a distinct limit on the Secretary of State's power, operating alongside the accepted limits of reasonableness and compliance with statutory purpose since the Act of 1981 engages the same subject matter as does article 10. To rely on obligations imposed by the Convention in support of their argument that Parliament is to be presumed not to have intended to confer a power to transgress the Convention, begs the question. The proposition contended for is that the existence of those obligations necessarily limits a statutory power. But that would only be so if the law recognised a principle that the municipal public law court would quash a decision made under an unambiguous statutory power, not only if it offends the customary *Padfield* and *Wednesbury* principles, but if also it is not conformable to the Convention. To assume that is to assume what the applicants seek to establish.

It is accepted that the Convention is not incorporated into domestic law: see *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm. A.R. 161; *Fernandes v. Secretary of State for the Home Department*

A [1981] Imm.A.R. 1 and *Reg. v. Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979. The applicants' argument cannot stand in the light of such case law, nor can their contention that the decision maker must have regard to the Convention. It is important to note that the Convention is not part of the domestic law because Parliament has not enacted that it should be, and that it is a constitutional principle that a treaty obligation, undertaken by the B Crown as a matter of prerogative power, can only be woven into the domestic law if Parliament so decrees. It follows that the court cannot itself purport to incorporate an obligation since it would be arrogating to itself the exercise of an authority only vested in the legislature.

*Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248 and *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] C 1 A.C. 109, on which the applicants relied in the Divisional Court, are distinguishable. That was a private law claim for breach of confidence in which the common law coincided with article 10 as regards the prevention of disclosure of information received in confidence. The case was not authority for the proposition that in a public law context where the limits of discretionary power were sought to be identified recourse might be had to the Convention to supply those limits. If that were permissible, D the Convention would, ipso facto, be incorporated into the common law. In the present case as the Parliamentary debates make clear the Secretary of State did have regard to the need to strike a balance between freedom of expression in the broadcasting media and his public responsibility to take measures against terrorist interests.

It is therefore illegitimate to have recourse to the Convention where, E as here, there is no ambiguity in the primary legislation. Ambiguity in secondary legislation does not provide a legitimate reason for the court to have regard to the Convention. Either the secondary legislation is intra vires or it is not.

The applicants wrongly assert that the courts must police the Convention and the Divisional Court went too far in seeking to erect a half-way house whereby regard might be had to it to ascertain the limits F of a power, but thereafter it became a matter of review on a *Wednesbury* basis. The cases cited by the applicants for the purpose of pointing to authority in support of judicial application of the Convention in fact indicate examples of situations where the common law is comparable with the Convention. Those cases, taken compendiously, do not suggest applications of the Convention, but merely comparisons. There is no G question of the rule of stare decisis being involved. They are in truth irrelevant for present purposes.

The word "matter" in section 29 of the Act of 1981 is a term of wide application, apt to cover the present directives. In proceedings in Ireland, an analogous prohibition made pursuant to similar statutory wording was held to be within the proper ambit of the term: see *State (Lynch) v. Cooney* [1982] I.R. 337.

H With regard to the merits, the evidence demonstrates that the Secretary of State did not stray outside the parameters set by the policy and objects of the statutory provisions. He discerned the public interest in an area peculiarly within the responsibility of government, namely to

respond to terrorists deploying broadcasting media for their own ends. Nor could his decision be characterised as perverse. There is no restriction on reporting what is said by the proscribed organisations, it is only the distinct quality of viva voce interviews which is caught. The decision to make the directives in the present terms is a matter of political judgment. While two views may reasonably be held on the subject, it is impossible to assert that one of them can appropriately be challenged for perversity.

It is not accepted that proportionality is a separate head of challenge, despite dicta of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410. The courts will not decide on the merits of an act of executive power save within the well established rules of public law. If proportionality were such a head, the courts might be required to enter the arena to determine due and appropriate remedy. That the courts will traditionally not do. Alternatively, if there be such a head of challenge, it is not sustainable in the present case.

*Lester Q.C.* in reply. If the Secretary of State's power is as wide as he contends, he could regulate almost all aspects of broadcasting subject to a challenge on *Wednesbury* grounds. That would amount to a radical alteration of the whole structure of broadcasting rendering it dependent on the government. Given the objects and policy of the Act that cannot be correct.

To bring in consideration of the Convention, there is no need to demonstrate that a particular provision is ambiguous, only that it is arguably so. In the present case, the applicants do surmount that hurdle, and recourse may therefore properly be had to article 10. The case law shows applications, not comparisons, of the Convention. The common law right to freedom of speech is anchored in article 10: see *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027, 1133, *per* Lord Kilbrandon.

Powers must be construed so as not to remove rights so that the courts should in the present case derive the principle of free speech from both the common law and the Convention. In administrative law the categories of challenge are not closed and can develop in accordance with European law, as Lord Diplock suggested in *Council of Civil Service Unions v. Minister of the Civil Service* [1985] A.C. 374, 410. Proportionality is, as it should be, therefore already part of the domestic law.

The Secretary of State has not sufficiently answered the challenge of perversity. In particular he has not explained why, in the absence of any criticism in respect of past behaviour, he did not request the broadcasting authorities to deal with the matter under their own statutory powers, nor why, applying the heightened scrutiny test, as he should have, he has used powers to remove the fundamental right of freedom of speech.

The policy and objects of the statutory scheme include the maintenance of a broadcasting system which protects and encourages freedom of expression without unnecessary government interference or control. The responsibility for regulating programme content rests with the broadcasters, independent of intervention save in the most pressing circumstances. They have the responsibility of ensuring that programmes

A do not offend against good taste or decency, are not likely to incite crime or lead to disorder or to be offensive to public feeling. Theirs is the responsibility for the preservation of due impartiality. Given that statutory policy and structure, the Secretary of State's directives cannot amount to a proper exercise of his powers within the framework of the Act and the licence and agreement.

B

*Cur. adv. vult.*

6 December. The following judgments were handed down.

LORD DONALDSON OF LYMINGTON M.R. The applicants, who are journalists, sought judicial review of directives to the British Broadcasting C Corporation ("the B.B.C.") and the Independent Broadcasting Authority ("the I.B.A.") issued by the Secretary of State for the Home Department on 19 October 1988. A Divisional Court consisting of Watkins L.J., Roch and Judge JJ. dismissed their application on 26 May 1989 and the applicants now appeal.

D *The directives*

The directives were in identical terms, save that in the case of that addressed to the B.B.C. the Secretary of State purported to act in pursuance of clause 13(4) of the licence and agreement between him and the B.B.C. dated 2 April 1981, whilst in the case of that addressed to the I.B.A. the Secretary of State purported to act in pursuance of section 29(3) of the Broadcasting Act 1981.

E The text common to both directives was:

> "to refrain from broadcasting any matter which consists of or includes—any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where—(a) the person speaking the words represents or purports to represent an F organisation specified in paragraph 2 below, or (b) the words support or solicit or invite support for such an organisation, other than any matter specified in paragraph 3 below. 2. The organisations referred to in paragraph 1 above are: (a) any organisation which is for the time being a proscribed organisation for the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978; and (b) Sinn G Fein, Republican Sinn Fein and the Ulster Defence Association. 3. The matter excluded from paragraph 1 above is any words spoken—(a) in the course of proceedings in Parliament, or (b) by or in support of a candidate at a parliamentary, European parliamentary or local election pending that election."

H *The elaboration of the directives*

The B.B.C. expressed doubt as to the exact scope of the directive and Mr. C. L. Scoble, an assistant under-secretary in the Home Office and head of the broadcasting department, wrote to the B.B.C. on 24

October 1988, sending a copy to the I.B.A. That letter, which had been seen and approved by the Home Secretary, was in the following terms:

"As you know, when I met B.B.C. officials on 20 October to discuss the notice which the Home Secretary sent to the B.B.C. the previous day, a number of points were raised concerning its interpretation on which the B.B.C. had doubts. We explained the Home Office approach to the drafting on these points and the scope of the restrictions which it was intended should be imposed on broadcast programmes. I promised to put what we said in writing so that the B.B.C. would be left in no doubt as to the effect of the notice.

"It was asked whether the notice applied only to direct statements by representatives of the organisations or their supporters or whether it applied also to reports of the words they had spoken. We confirmed, as the Home Secretary has made clear in Parliament, that the correct interpretation (and that which was intended) is that it applies only to direct statements and not to reported speech, and that the person caught by the notice is the one whose words are reported and not the reporter or presenter who reports them. Thus the notice permits the showing of a film or still picture of the initiator speaking the words together with a voice-over account of them, whether in paraphrase or verbatim. We confirmed that programmes involving the reconstruction of actual events, where actors use the verbatim words which had been spoken in actuality, are similarly permitted.

"For much the same reason, we confirmed that it was not intended that genuine works of fiction should be covered by the restrictions, on the basis that the appropriate interpretation of "a person" in paragraph 1 of the notice is that it does not include an actor playing a character.

"The B.B.C. also asked whether a member of an organisation or one of its elected representatives could be considered as permanently representing that organisation so that all his words, whatever their character, were covered by the notice. We confirmed that the Home Office takes the view that this is too narrow an interpretation of the word 'represents' in paragraph 1(a) of the text. A member of an organisation cannot be held to represent that organisation in all his daily activities. Whether at any particular instance he is representing the organisation concerned will depend upon the nature of the words spoken and the particular context. Where he is speaking in a personal capacity or purely in his capacity as a member of an organisation which does not fall under the notice (for example, an elected council), it follows, from that interpretation, that paragraph 1(a) will not apply. Where it is clear, from the context and the words, that he is speaking as a representative of an organisation falling under the notice, his words may not be broadcast directly, but (as mentioned above) can be reported. (He may, of course, come within the scope of paragraph 1(b), if his words contain support for the organisation.) Although there may be borderline occasions when this distinction will require a careful

exercise of judgment, we believe that the great majority of broadcast material will fall clearly within one case or the other.

"We confirmed that direct broadcast coverage of statements in court would be subject to the present notice, but that this did not raise practical issues since broadcast coverage of court proceedings is not currently permitted in this country. Statements falling within the notice that were made in court proceedings in countries where direct broadcast coverage was permitted could not be broadcast directly here, but, again, the words could be fully reported. Similarly, the exemption under paragraph 3(*a*) of the notice applies only to proceedings in Parliament at Westminster, and not to the European Parliament or Parliaments in other countries.

"I hope that this statement, which constitutes what the Home Office believes to be the correct interpretation of the notice and which represents the Home Secretary's intentions in issuing it, will be of help to you in providing advice to the corporation's staff."

*The Secretary of State's reasons for issuing the directives*

These I take from his statement made to both Houses of Parliament on 19 October 1988:

"For some time broadcast coverage of events in Northern Ireland has included the occasional appearance of representatives of paramilitary organisations and their political wings, who have used these opportunities as an attempt to justify their criminal activities. Such appearances have caused widespread offence to viewers and listeners throughout the United Kingdom, particularly just after a terrorist outrage. The terrorists themselves draw support and sustenance from access to radio and television—from addressing their views more directly to the population at large than is possible through the press. The government have decided that the time has come to deny this easy platform to those who use it to propagate terrorism. Accordingly, I have today issued to the chairmen of the B.B.C. and the I.B.A. a notice, under the licence and agreement and under the Broadcasting Act 1981 respectively, requiring them to refrain from broadcasting direct statements by representatives of organisations proscribed in Northern Ireland and Great Britain and by representatives of Sinn Fein, Republican Sinn Fein and the Ulster Defence Association. The notices will also prohibit the broadcasting of statements by any person which support or invite support for these organisations. The restrictions will not apply to the broadcast of proceedings in Parliament, and in order not to impair the obligation on the broadcasters to provide an impartial coverage of elections the notices will have a more limited effect during election periods. Copies of the notices have today been deposited in the Library, and further copies are available from the Vote Office so that hon. members will be able to study their detailed effect. These restrictions follow very closely the lines of similar provisions which have been operating in the Republic of Ireland for some years. Representatives of these organisations are prevented from appearing on Irish television, but because we have had no equivalent

restrictions in the United Kingdom they can nevertheless be seen on B.B.C. and I.T.V. [Independent Television] services in Northern Ireland, where their appearances cause the gravest offence, and in Great Britain. The government's decision today means that both in the United Kingdom and in the Irish Republic such appearances will be prevented. Broadcasters have a dangerous and unenviable task in reporting events in Northern Ireland. This step is no criticism of them. What concerns us is the use made of broadcasting facilities by supporters of terrorism. This is not a restriction on reporting. It is a restriction on direct appearances by those who use or support violence. I believe that this step will be understood and welcomed by most people throughout the United Kingdom. It is a serious and important matter on which the House will wish to express its view. For that reason, we shall be putting in hand discussions through the usual channels so that a full debate on the matter can take place at an early date."

In addition, I should refer to an affidavit sworn by Mr. Scoble in opposition to this application in which he said:

"9. The Secretary of State's reasons for taking the action complained of are set out in the reports of those debates. [See: Hansard, 19 October, 2 November, 8 December 1988] I would draw attention to four matters which influenced him in reaching his decision. The first was that offence had been caused to viewers and listeners by the appearance of the apologists for terrorism, particularly after a terrorist outrage. Secondly, such appearances had afforded terrorists undeserved publicity, which was contrary to the public interest. Thirdly, these appearances had tended to increase the standing of terrorist organisations and create the false impression that support for terrorism is itself a legitimate political opinion. Fourthly, the view was taken that broadcast statements were intended to have, and did in some cases have, the effect of intimidating some of those at whom they were directed. For example, following the bomb attack on the home of Sir Kenneth Bloomfield, head of the Northern Ireland Civil Service, Mr. Gerry Adams warned that civil servants employed in the role of "military advisers" in the Six Counties ran the risk of attack. 10. As appears from the reports of the parliamentary debates, the purpose of the notices is to deny direct access to radio and television to those who support or seek to promote terrorism. The notices do not restrict the secondhand reporting of events; the activities of terrorist organisations and the statements of their apologists may still be reported, as they are in the press; but such persons are prevented from making the statements themselves on television and radio. This point was made clear in my letter of 24 October 1988 to the secretary of the B.B.C., in which I also indicated that it was not intended that genuine works of fiction should be covered by the restrictions. 11. In framing the restrictions the Secretary of State was careful to ensure that the notices went no further than was necessary to provide that air time was denied to terrorists, para-military

organisations and those who support them. In this respect it is noteworthy that the notices contain express exceptions for words spoken in the course of proceedings in Parliament or by, or in support of, a candidate at a parliamentary, European parliamentary or local election pending that election. This is because the Secretary of State considered that it was right, in a parliamentary democracy, that the verbatim coverage of candidates' speeches at an election and of parliamentary proceedings should not be restricted. In this respect the notices do not go as far as the equivalent notice issued in the Republic of Ireland, which contains no exception for elections and parliamentary proceedings. . . . 12. Finally, I should make it clear that the decision to issue notices to the broadcasters in October 1988 should not be taken as implying that the government considered that the broadcasting authorities had failed in the past to observe their duties in relation to the contents of broadcasts. Rather there was a recognition that, in relation to the particular concerns about the direct access of terrorists, para-military organisations and those who support them to radio and television, the government should itself for the reasons I have given use its powers in the public interest to act to prevent such access."

*Parliamentary approval*

On 2 November 1988 a motion:

"That this House approves the Home Secretary's action in giving [directives] to the B.B.C. and I.B.A. to restrict the broadcasting of statements made by Northern Ireland terrorist organisations and their apologists"

was carried by 243 votes to 179. On 8 December 1988 a motion to take note of the Secretary of State's action was debated and agreed to without a division in the House of Lords.

*The relationship between Parliament and the courts*

It will undoubtedly strike some people as strange that, the directives having been approved by Parliament, the courts should be prepared to entertain applications to judicially review them, since Parliament is supreme under our constitution. I can well understand such a reaction and it is very important that it should be answered and dispelled.

Parliament is indeed supreme, subject to immaterial exceptions stemming from European Community law which does not include the European Convention for the Protection of Human Rights and Fundamental Freedoms. If Parliament had passed an Act containing the restrictions imposed by the Secretary of State's directives, the courts could and would have had nothing to consider or say. However, where Parliament authorises ministers to take executive action, it is the duty of the courts in appropriate cases to consider whether ministers have exceeded that authority. This is such a case so far as the I.B.A. directive is concerned. The Secretary of State's authority being derived from Parliament and contained in an Act of Parliament.

When Parliament debated the directive it was not concerned to ratify the Secretary of State's actions, that is to say to give lawful authority to something which was unlawful when it was done. Indeed, under our unwritten constitution Parliament could not have done so by a simple motion in each House. It would have required a statute. Nor was Parliament considering whether the Secretary of State's action was or was not lawful, the matter with which we are concerned. Instead, it was considering whether, assuming the Secretary of State's action was lawful, it approved of such action. Unlike Parliament, it is not for the courts to approve or disapprove of ministers' actions. The proceedings in Parliament do indeed show quite clearly that reasonable men and women can take two quite different views on whether the Secretary of State *should* have issued the directives, but what matters to us is something quite different, namely, had he the power to do so?

Precisely the same point—had the Secretary of State the necessary power—arises in the context of the directive to the B.B.C., but in that case it depends not upon the extent of his authority under an Act of Parliament, but the extent of the authority which he reserved to himself under the licence and agreement dated 2 April 1981. However, in both cases the answer to the question is to be found in the true construction of similar words and accordingly, for present purposes, there is no practical distinction between the two directives. If one is authorised, so is the other. If one is unauthorised, so is the other.

*The Secretary of State's authority*

The crucial words of section 29(3) of the Broadcasting Act 1981 are:

> "the Secretary of State may at any time by notice in writing require the Authority to refrain from broadcasting any matter or classes of matter specified in the notice; and it shall be the duty of the Authority to comply with the notice."

The crucial words of clause 13(4) of the licence and agreement dated 2 April 1981 are:

> "The Secretary of State may from time to time require the Corporation to refrain at any specified time or at all times from sending any matter or matters of any class specified in such notice; . . ."

*Grounds of challenge*

In this court, as in the Divisional Court, the applicants sought judicial review upon four main grounds: (1) Parliament, in empowering the Secretary of State to act under section 29(3) of the Act and, by a parity of reasoning, clause 13(4) of the B.B.C. licence and agreement, cannot have intended to authorise a breach of article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which relates to freedom of expression and, to the extent that the Secretary of State has acted in breach of article 10, he has exceeded his powers. (2) The Secretary of State acted ultra vires his powers to the extent that the directives were disproportionate to the mischief which he

A was seeking to control. (3) The directives were perverse and therefore unlawful. (4) The directives were unlawful because they conflicted with the duties of the I.B.A. and the B.B.C. to preserve due impartiality in accordance with section 4(1)(*f*) of the Act of 1981 and with the resolution of the Board of Governors which underlies the B.B.C.'s licence.

However, in this court other grounds were added on the footing that
B nothing appeals to judges quite as much as something which they have thought of themselves. This is no doubt a sound basis, provided that it is remembered that judges are aware of the very real dangers of self-induced enthusiasm. Despite their origin, these additional grounds deserve consideration and I add them as: (5) "Matter" in section 29(3) and in clause 13(4) relates to specific information and there is no power
C to impose a blanket ban on the broadcasting of all information from a particular source. (6) The mischief at which these provisions are aimed is the absence of a power to intervene in the public interest in situations not covered by other provisions of the Act or licence and agreement and that these provisions must be restrictively construed, since to do otherwise would frustrate the policy and objects of the Act and of the licence and agreement. This is a *Padfield* approach: see *Padfield v.*
D *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.

*The European Convention for the Protection of Human Rights and Fundamental Freedoms*

There have been a number of cases in which the European Convention for the Protection of Human Rights and Fundamental
E Freedoms has been introduced into the argument and has accordingly featured in the judgments. In most of them the reference has been fleeting and usually consisted of an assertion, in which I would concur, that you have to look long and hard before you can detect any difference between the English common law and the principles set out in the Convention, at least if the Convention is viewed through English
F judicial eyes. However, in this case we are invited to grapple with the fundamental question of the effect of the Convention as distinct from any common law to the like effect. Indeed, this was in the forefront of the argument of Mr. Lester appearing for the applicants, and of the counter-argument of Mr. Laws, appearing for the Secretary of State.

The Convention is contained in an international treaty to which the United Kingdom is a party and, by article 1, binds its signatories to
G "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." The United Kingdom Government can give effect to this treaty obligation in more than one way. It could, for example, "domesticate" or "patriate" the Convention itself, as has been done in the case of the treaties mentioned in the European Communities Act 1972, and there are many well-informed supporters of this course. Their view has not, as yet, prevailed. If it had
H done so, the Convention would have been part of English domestic law. Alternatively, it can review English common and statute law with a view to amending it, if and in so far as it is inconsistent with the Convention, at the same time seeking to ensure that all new statute law is consistent

with it. This is the course which has in fact been adopted. Whether it has been wholly successful is a matter for the European Court of Human Rights in Strasbourg and not for the English courts. By contrast, the duty of the English courts is to decide disputes in accordance with English domestic law as it is, and not as it would be if full effect were given to this country's obligations under the Treaty, assuming that there is any difference between the two.

It follows from this that in most cases the English courts will be wholly unconcerned with the terms of the Convention. The sole exception is when the terms of primary legislation are fairly capable of bearing two or more meanings and the court, in pursuance of its duty to apply domestic law, is concerned to divine and define its true and only meaning. In that situation various prima facie rules of construction have to be applied, such as that, in the absence of very clear words indicating the contrary, legislation is not retrospective or penal in effect. To these can be added, in appropriate cases, a presumption that Parliament has legislated in a manner consistent, rather than inconsistent, with the United Kingdom's treaty obligations.

The same view of the law was expressed much earlier in the judgment of Diplock L.J. in *Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116, 143, in a passage which is set out verbatim in *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161, 173. As Lord Diplock, he expressed the same view in *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751, 771.

Thus far I have referred only to primary legislation, but it is also necessary to consider subordinate legislation and executive action, whether it be under the authority of primary or secondary legislation. Mr. Lester submits that, where there is an ambiguity in primary legislation and it may accordingly be appropriate to consider the terms of the Convention, the ambiguity may sometimes be resolved by imputing an intention to Parliament that the delegated power to legislate or, as the case may be, the authority to take executive action, shall be subject to the limitation that it be consistent with the terms of the Convention. This I unhesitatingly and unreservedly reject, because it involves imputing to Parliament an intention to import the Convention into domestic law by the back door, when it has quite clearly refrained from doing so by the front door.

Whatever the width of the authority conferred by section 29(3) of the Act and by clause 13(4) of the agreement and licence, matters to which I must return, there is in my judgment no ambiguity in either. It follows that, whilst the Secretary of State, in deciding whether or not to issue a directive and the terms of that directive, is free to take account of the terms of the Convention, as at some stage he undoubtedly did, he was under no obligation to do so. It also follows that the terms of the Convention are quite irrelevant to our decision and that the Divisional Court erred in considering them, even though, in the end, it concluded that it derived no assistance from this consideration.

*The definition of "matter"*

It is convenient to dispose of this ground before considering the other grounds, both because, if sound, it would be decisive and because

A the true construction of the section and of the clause is an essential foundation for any consideration of whether the directives are open to attack on any of the other grounds which are advanced.

It is quite clear that "matter" refers to what is broadcast, i.e. sounds or sounds and pictures, including writing transmitted as a picture. To this extent the word can indeed be said to relate to specific information, using that word in its widest sense. However, information can be B classified not only in terms of content or subject matter, but also in terms of its source. Accordingly, a directive in the terms of these directives would constitute a requirement that the broadcasting authority refrain from broadcasting a particular class of matter.

The same point was urged upon, and rejected by, the Supreme Court of Ireland in *The State (Lynch) v. Cooney* [1982] I.R. 337. That C court was construing section 31(1) of the Broadcasting Authority Act 1960, which provides:

> "Where the Minister is of the opinion that the broadcasting of a particular matter or any matter of a particular class would be likely to promote, or incite to, crime or would tend to undermine the authority of the state, he may by order direct the Authority to refrain from broadcasting the matter or any matter of the particular D class, and the Authority shall comply with the order."

O'Higgins C.J. held, at p. 364:

> "The word 'matter' which is used in the subsection is wide enough to cover a broadcast made on behalf of a named political party (irrespective of its contents) or any broadcast (however described) by any person or group of persons representing a named political E party. It is such a matter which is prohibited and the order is not directed against a broadcast by a particular person as an individual, or against any group of individuals as such. It is directed against a broadcast on behalf of Sinn Fein or by any person or persons purporting to represent that organisation. It seems to me that such a prohibition is fully contemplated by the subsection."

F

*The "Padfield" ground of challenge*

Mr. Lester submits that the policy and objectives of the Act of 1981, also embodied in the B.B.C.'s licence, include the following: (a) maintaining a broadcasting system which protects and encourages freedom of expression without unnecessary government interference or G control; (b) hence vesting responsibility for regulating programme content in the broadcasting organisations, independent of government interference or control, save in the most exceptional and pressing circumstances; (c) hence conferring responsibility upon the independent broadcasting organisations for ensuring that programmes do not offend good taste or decency, are not likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling, and that due H impartiality is preserved.

This I largely accept. Section 4(1) of the Act gives the Independent Broadcasting Authority instructions on how independent broadcasting is to be conducted and similar provisions apply to the B.B.C. It provides:

"It shall be the duty of the Authority to satisfy themselves that, so far as possible, the programmes broadcast by the Authority comply with the following requirements, that is to say—(*a*) that nothing is included in the programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling; (*b*) that a sufficient amount of time in the programmes is given to news and news features and that all news given in the programmes (in whatever form) is presented with due accuracy and impartiality; (*c*) that proper proportions of the recorded and other matter included in the programmes are of British origin and of British performance; (*d*) that the programmes broadcast from any station or stations contain a suitable proportion of matter calculated to appeal specially to the tastes and outlook of persons served by the station or stations and, where another language as well as English is in common use among those so served, a suitable proportion of matter in that language; (*e*) in the case of local sound broadcasting services, that the programmes broadcast from different stations for reception in different localities do not consist of identical or similar material to an extent inconsistent with the character of the services as local sound broadcasting services; and (*f*) that due impartiality is preserved on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy. In applying paragraph (*f*), a series of programmes may be considered as a whole."

Against this background it is reasonably clear that the reserve powers contained in section 29(3) and clause 13(4) are not intended to be used frequently and indeed this is the first occasion upon which they have ever been used. But I do not think that this answers the question of whether those powers are all-embracing or whether they are limited to situations in which the broadcasting authorities would not themselves be bound to refrain from broadcasting in pursuance of their duty under section 4.

Quite clearly, the narrower construction would be consistent with the policy and objectives of the Act. But so, subject to some important qualifications, would the wider construction. This qualification is that the Secretary of State could not lawfully require the broadcasters to broadcast matter which would involve them in a breach of their duties under section 4 or its equivalent or to refrain from broadcasting a notice calling attention to the fact that a directive had been given, this being an entrenched right under section 29(2) and (4).

I should have hesitated for long before holding that Parliament intended the Secretary of State to have authority either covertly to censor programmes or to require the broadcasting authorities to present news programmes otherwise than with due accuracy and impartiality, but I do not so read the power. That being so, I see no reason why the words of section 29(3) should not be given their natural meaning and, so read, the power is quite clearly all-embracing, subject only to the qualification which I have noted.

A *Proportionality*

In *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410, Lord Diplock classified under three heads the grounds upon which administrative action was subject to judicial control. These were illegality, irrationality and procedural impropriety. However, he added:

B "That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; . . ."

C Even at that time, the principle that administrative action could be quashed if it was disproportionate to the mischief at which it was aimed had been accepted by the courts, albeit not as a classified ground for judicial review: see *Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052, 1057H and 1063B. Encouraged by Lord Diplock's speech, the concept surfaced again in *Reg. v. Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd.* [1988] D 1 W.L.R. 990, where Schiemann J. accepted a submission that it was but an aspect of irrationality and, at p. 1001, asked himself the question: "Is there here such [*Wednesbury*] total lack of proportionality or lack of reasonableness?:" see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. It also made a fleeting appearance in *Reg. v. Brent London Borough Council, Ex parte Assegai* E (unreported), 11 June 1987, where Woolf L.J., with the agreement of McCullough J., sitting as a Divisional Court, said that the council's action was

"wholly out of proportion to what Dr. Assegai had done. Where the response is out of proportion with the cause to this extent, this provides a very clear indication of unreasonableness in a *Wednesbury* F sense."

In the instant case the Divisional Court held that ground 2 (proportionality) and ground 3 (*Wednesbury* unreasonableness) were identical. Watkins L.J. continued:

"The contention arising from them is that the principle of proportionality in the law of the United Kingdom being one test or G tool to be used in resolving the question, was the decision under consideration unreasonable in the sense that the decision was one which no reasonable minister properly directing himself as to the law could have taken? Applying that test, if, for example, a sledge hammer is taken to crack a nut when there are a pair of efficient nut crackers readily available, that is a powerful indication that the decision to use the sledge hammer was absurd—unreasonable. Our H response to that is, in our view, the law of the United Kingdom has not developed so that a decision, which is neither perverse nor absurd and which is one which a reasonable minister properly taking into account the relevant law could take, becomes unlawful

simply because it can be shown that it was not in proportion to the benefit to be obtained or the mischief to be avoided by the taking of the decision. In our opinion the application of such a concept of proportionality would result in the courts substituting their own decisions for that of the minister, and that is something which the courts of this country have consistently declined to do. The court will not arrogate to themselves executive or administrative decisions which should be taken by executive or administrative bodies."

For my part, I think that Lord Diplock's speech in the *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 has been misunderstood. He was providing three chapter headings for a review of the grounds upon which, in the reported cases, judicial review had been granted. He was not, as I think suggesting that there were three separate grounds. Rather he was saying that in due time, and under the influence of European law and lawyers, there might be enough cases in which decisions had been quashed upon the ground that the administrative action was disproportionate to the mischief at which it was aimed, for this to be treated as a separate chapter.

The reality is that judicial review is a jurisdiction which has been developed and is still being developed by the judges. It has many strands and more will be added, but they are and will always be closely interwoven. But however the cloth emerges from the loom, it must never be forgotten that it is a *supervisory* and not an *appellate* jurisdiction. As Watkins L.J. pointed out, acceptance of "proportionality" as a separate ground for seeking judicial review rather than a facet of "irrationality" could easily and speedily lead to courts forgetting the supervisory nature of their jurisdiction and substituting their view of what was appropriate for that of the authority whose duty it was to reach that decision.

I therefore propose to consider the submission that the directives were disproportionate to the needs of the situation as being an aspect of the submission that the directives were "perverse" or, as I would put it, "*Wednesbury* unreasonable" or, as Lord Diplock would have put it, "irrational."

*Due impartiality*

The applicants submit that the directives are unlawful, because they conflict with the duty of the B.B.C. and the I.B.A. to preserve "due impartiality." In so submitting it seems to me that they misappreciate the nature of the duty in at least two respects.

The first is that it operates in the real world in which there will always be obstacles to giving every shade of opinion equal air time. This is well recognised in the context of parliamentary by-elections, where it is quite impossible to treat all candidates alike if the programme is not either to be wholly uninformative or of inordinate length. In the result, the principal contenders are rightly given more air time than others and some fringe candidates receive only a mention, whose length is dictated largely by the length of the official description of their candidature. The directive is simply another obstacle of the existence of which account

A has to be taken by the broadcasting authorities when giving effect to their duty to preserve due impartiality.

The second is that the duty is to preserve *due* impartiality. It is for the broadcasting authorities to determine what constitutes the appropriate degree of impartiality, but they will not, I am sure, lose sight of their further obligation not to include in their programmes matter which is likely to encourage or incite to crime or to be offensive to public B feeling. Furthermore, it is not self-evident that any impartiality is due to those who support or excuse attempts to achieve political change by terrorism.

This submission is quite unarguable.

*Irrationality*

C Under this head I include *Wednesbury* unreasonableness, perversity and lack of proportionality.

A decision whether or not to give directives under section 29(3) of the Act and under clause 13(4) of the licence and agreement and, if so, in what terms, involves the Secretary of State in making a delicate and difficult political judgment. In the nature of things it is likely that there D will be more than one tenable decision. But it is a judgment to be made by the Secretary of State and not by the courts, whose right and duty to intervene only arises in the event that the Secretary of State reaches an untenable decision in the sense that he can be shown to have taken account of matters which are irrelevant or failed to take account of matters which were relevant or in which the decision is manifestly wrong as falling outside the wide spectrum of rational conclusions.

E Perhaps the most startling feature of the directives is how little they restrict the supply of the "oxygen of publicity" to the organisations specified in the directives. They have no application in the circumstances mentioned in paragraph 3 (proceedings in the United Kingdom Parliament and elections) and, by allowing reported speech either verbatim or in paraphrase, in effect put those affected in no worse a F position than they would be if they had access to newspaper publicity with a circulation equal to the listening and viewing audiences of the programmes concerned. Furthermore, on the applicants' own evidence, if the directives had been in force during the previous 12 months, the effect would have been minimal in terms of air time. Thus, Independent Television News ("I.T.N.") say that eight minutes twenty seconds (including repeats) out of 1200 hours, or 0.01 per cent., of air time G would have been affected. Furthermore, it would not have been necessary to omit these items. They could have been recast into a form which complied with the directives.

If, therefore, the directives are to be criticised at all, it must be on the basis that any use of the power will or may damage the reputation of the British broadcasting authorities for total independence from the government of the day and that this price was not worth paying for so H small an effect. To this the applicants would add, although it is inherent in the use of the power, that making sure of compliance with the directives adds a further complication to the preparation and presentation of programmes which the broadcasting authorities could well do without.

For my part, I am quite unable to hold that the Secretary of State's decision was one which was not fully open to him in the exercise of his judgment. Accordingly, it is not one which should or can be reviewed by the courts.

For these reasons, I would dismiss the appeal.

RALPH GIBSON L.J. I agree that this appeal should be dismissed. The first ground of appeal was based upon the European Convention for the Protection of Human Rights and Fundamental Freedoms. The relevance of the Convention, according to the submission by Mr. Lester, was as follows. In exercising his discretion under section 29(3) of the Act of 1981, and in exercising his powers under clause 13(4) of the licence and agreement, the Secretary of State is obliged not to act in breach of article 10 of the Convention because Parliament, in enacting section 29(3), and the B.B.C., in agreeing to clause 13(4), and Parliament in approving that licence and agreement, cannot have intended to authorise the Secretary of State to act in breach of an international obligation of the United Kingdom. For that proposition reliance was placed upon *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751, 771A–B, *per* Lord Diplock. Since section 29(3) and clause 13(4) authorise interference by the Secretary of State with the right to free speech, they therefore deal with the subject matter of the international obligations imposed on the United Kingdom by article 10 and are to be construed, in accordance with Lord Diplock's words in *Garland's* case, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligations and not to be inconsistent with them. Next, article 1 of the Convention obliges the United Kingdom to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention," including the rights and freedoms guaranteed by article 10. Reference was made to *Republic of Ireland v. United Kingdom* (1978) 2 E.H.R.R. 25, 103, para. 239.

Therefore, it was submitted, there is an international obligation imposed upon the United Kingdom by article 1 directly to secure the rights and freedoms set out in Section 1, including article 10, to everyone within the jurisdiction of the United Kingdom. The choice of means of giving effect to that obligation is to be made by the United Kingdom; but, it was submitted, the United Kingdom is obliged to achieve the aim by whatever appropriate means, of securing those rights and freedoms in the domestic law of this country, whether common law or statute law, and in the administrative practices of the United Kingdom Government and of public authorities within the meaning of article 10(2) of the Convention.

Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in this Convention [i.e. including article 10] are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Mr. Lester referred to *Lithgow v. United Kingdom* (1986) 8 E.H.R.R. 329, 397, paras. 205–206.

Mr. Lester acknowledged that the obligation of the United Kingdom to secure the right to freedom of expression, as guaranteed by article 10, and to secure that right under the domestic legal order, cannot be effected in the courts of this country where the alleged violation is required by Act of Parliament, because the Convention does not require the availability of a domestic remedy to challenge the compatibility of the statute with the Convention. In such a case, Mr. Lester also acknowledged, the Convention provides a remedy for a violation only on the international plane, i.e. before the European Commission and Court of Human Rights.

It was next submitted that the rights and freedoms of the Convention have not been expressly incorporated by statute into the domestic law of this country because successive governments have considered that it was unnecessary to take that step so as to comply with the obligations imposed by the Convention. Successive governments must be taken, it was said, to have assumed that the existing arrangements within our domestic legal order comply with those obligations so that the Convention rights and remedies are directly secured and so that there are effective national remedies.

In law that effect is achieved, according to this submission, by the general common law principle of statutory interpretation as declared by the House of Lords in *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751. Reference was also made to *Waddington v. Miah* [1974] 1 W.L.R. 683; *Raymond v. Honey* [1983] 1 A.C. 1; *Reg. v. Board of Visitors of H.M. Prison, The Maze, Ex parte Hone* [1988] A.C. 379; *In re K.D. (A Minor) (Ward: Termination of Access)* [1988] A.C. 806; *Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303, and in the Spycatcher litigation, *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109.

Thus the courts of this country now refer—and must now refer—to the relevant provisions of the Convention, and to the judgments of the European Court of Human Rights, interpreting those provisions, for the purpose of ensuring, where possible, that our domestic law is in conformity with the Convention. That must be done when construing legislation as when reviewing the exercise of administrative discretion or declaring and applying the common law. Only if an Act of Parliament cannot be construed so as to be consistent with the Convention must the courts of this country apply the statute and leave the complainant to seek redress in Strasbourg.

Mr. Lester acknowledged, in the course of argument, that, upon applying those principles to this case, the consequence would be that the court must imply into section 29(3) of the Act of 1981 words substantially to the following effect: "Provided that no such notice may be given as constitutes a breach of the Convention in respect of any person affected by it within the United Kingdom."

The Act of 1981 is a consolidation Act. It is not in dispute that the original enactment of section 29(3) was made after ratification of the Convention by the United Kingdom on 8 March 1951. A substantially identical power was enacted by section 9 of the Television Act 1954. The responsible minister was then the Postmaster-General and the

potential recipient of a notice was the Independent Television Authority. It may be noted that section 3 of that Act contained general provisions as to programmes similar to those now contained in section 4 of the Act of 1981. The authorities relied upon by Mr. Lester are all after the date of the first enactment but his contention, as I understand it, is that Parliament enacted the original provision by reference to the common law of this country as to the construction of statutes and the following cases are no more than the development of the known principles of that law.

Before giving consideration to the cases relied upon by Mr. Lester it is necessary, I think, to define the point of constitutional principle which Mr. Laws has raised against the applicants' main argument on this point. It is uncomplicated. An international treaty such as the Convention for the Protection of Human Rights and Fundamental Freedoms is made by the executive government. It does not directly affect the domestic law of this country, which can be changed only by Parliament. It is not within the powers of the court, by application of a rule of statutory construction, to import into the laws of this country provisions of a treaty for direct application by the court. Only Parliament can do that. It would be usurpation of the legislative power of Parliament for the court to do more than to construe the legislation which Parliament has passed in order to establish its meaning. To do that it may, and must, apply the rules of construction of statutes established in our law and by reference to which Parliament legislates. The court will, therefore, construe the primary legislation in that way. The court may have regard to a relevant treaty obligation in that process of construction. Thereafter, the court must apply the law of this country in deciding whether the act of the minister under the legislation is lawful or not. The court cannot, said Mr. Laws, decide whether an act of the minister, which is lawfully within the power given by Parliament, is a breach of the obligation of the United Kingdom under the Convention.

For my part, I approach consideration of the authorities in the belief that the submission of Mr. Laws is apparently correct in principle. There must, I think, be clear binding authority before I could be persuaded that a common law principle of statutory construction has had the effect, as contended for by Mr. Lester, of incorporating provisions of the Convention into the law of this country to the extent described in his submission.

None of the cases to which Mr. Lester referred us constitutes, in my judgment, authority for the proposition which he advances. In none of those cases was the question, which is now raised, addressed by the court. In *Garland's* case [1983] 2 A.C. 751, 771, in the context of considering section 6(4) of the Sex Discrimination Act 1975, having regard to article 119 of the E.E.C. Treaty, Lord Diplock said:

> "it is a principle of construction of United Kingdom statutes . . . that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it."

To use the principle there stated by Lord Diplock for the purpose of construing primary legislation, where there is ambiguity, is to perform what has always been the proper task of the court, namely to determine the meaning of the legislation passed by Parliament. To use that principle to justify the reviewing by the court of the substantial validity of the action of the minister, which is otherwise lawful as within the powers given by Parliament, is, in my judgment, to misapply the principle for a purpose for which it was plainly not intended. None of the other cases carries the argument any further forward.

I would dismiss the appeal for the reasons given by Lord Donaldson of Lymington M.R.

McCowan L.J. Mr. Lester argued before this court that recourse to article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms can be had because there is an ambiguity in the language of the relevant statutory provision, section 29(3) of the Broadcasting Act 1981. That reads (and the words of clause 13(4) of the licence and agreement between the Secretary of State and the B.B.C. sufficiently correspond for it to be unnecessary to consider them separately):

> "Subject to subsection (4), the Secretary of State may at any time by notice in writing require the Authority to refrain from broadcasting any matter or classes of matter specified in the notice; and it shall be the duty of the Authority to comply with the notice."

On the face of it, Mr. Lester conceded, the words appear clear. However, he submits, they cannot mean what they say because if they did the power given by them to the Secretary of State would be unrestricted, whereas there clearly ought to be some restriction.

I turn to consider what the Divisional Court made of this aspect of the case. Giving the judgment of the court, Watkins L.J. said:

> "Next, Mr. Laws submits that recourse to article 10 can only be had if there is some ambiguity in the language of the statute, and in this case there is no ambiguity in the language of section 29(3). For that contention Mr. Laws relies on such cases as *Reg. v. Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979. We do not accept that submission. In our judgment, where Parliament has created for a minister a statutory power in terms which place no limitation on that power but where it is accepted, as in this case, that there must be and are limitations upon that power, then reference may be made to article 10 by a court when deciding what are the limitations to be placed on the use of that power."

I regret that I am unable to agree with the Divisional Court on this aspect. In *Saloman v. Commissioners of Customs and Excise* [1976] 2 Q.B. 116, 143, Diplock L.J. said:

> "If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations . . ."

In *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161 the Court of Appeal relied on those words in concluding that in the absence of ambiguity in the relevant provisions of the Immigration Act 1971 the European Convention for the Protection of Human Rights and Fundamental Freedoms had no place as a guide to their interpretation.

I conclude, therefore, that Mr. Laws has rightly submitted before us, as he did before the Divisional Court, on the basis of binding authority, that recourse to article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms can only be had if there is some ambiguity in the language of section 29(3).

As to Mr. Lester's prime argument on ambiguity (and the only one he addressed to the Divisional Court), I cannot for my part accept it. On its plain wording section 29(3) gives a power without limit and I see no force in the argument that, because on the face of it it is unlimited but ought to be limited, therefore it is ambiguous. In fact, it is of course limited in the sense that it is subject to the established restriction upon the exercise of a power given by Parliament to a minister that it must not be unreasonable in the *Wednesbury* sense: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223.

However, in the course of his argument to us Mr. Lester suggested two further ambiguities in section 29(3). The first is that "matter" relates to specific information, and no power is given by the section to impose a blanket ban on the broadcasting of all information from a particular source. I am wholly unable to accept that argument. The words "any matter" are plain and all-embracing and I see no ground for putting any gloss upon them.

Next, Mr. Lester advanced an argument on ambiguity which placed reliance on the words of section 4(1) of the Act. These, in so far as they are relevant, read:

> "It shall be the duty of the Authority to satisfy themselves that, so far as possible, the programmes broadcast by the Authority comply with the following requirements, that is to say—(*a*) that nothing is included in the programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling; (*b*) that a sufficient amount of time in the programmes is given to news and news features and that all news given in the programmes (in whatever form) is presented with due accuracy and impartiality. . . . (*f*) that due impartiality is preserved on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy."

Mr. Lester argued that the mischief at which section 29(3) was directed must have been one for which the Act otherwise provided no remedy. If it is a matter which section 4(1) covers, there is no power to use section 29(3).

In defending his direction under section 29(3) in the House of Commons, the then Secretary of State for the Home Department, Mr. Hurd, said:

A "The broadcasters have had a whole series of individually difficult decisions to take and I am glad that they have recently taken some which illustrate the point that I have been making. From their point of view it is more clear and straightforward for them to operate under a notice of this sort, for which I take responsibility and which this House will debate, than to have to operate at their discretion, sometimes in difficult circumstances."

B

Mr. Lester submitted that, however well-intentioned the Secretary of State may have been in this respect, he had no power to give a direction under section 29(3) telling the broadcasters to do what they are required to do under section 4(1).

If the intention of the legislature had been to remove from the ambit C of section 29(3) anything covered by section 4(1) it would have been very easy for them to have provided so expressly. I see nothing in the terms of the Act to cause me to infer such a restriction. As we can see in the present case, what the Secretary of State is requiring the broadcasters to do under his direction, the broadcasters were plainly not prepared to do pursuant to section 4(1) without such a direction.

Mr. Lester sought to counter this argument by saying that the D Secretary of State could have gone to the courts for an order of mandamus requiring the broadcasting authorities, pursuant to their duties under section 4(1), to do the very things which are contained in his direction under section 29(3). Had he taken this course, however, he could well have been met by the answer that he had another remedy which he should pursue, namely, a direction under section 29(3). To my E mind, the words I have quoted from the Secretary of State well illustrate why there may be good reasons for the Secretary of State to intervene and give direction under section 29(3) in a matter which falls within the scope of section 4(1). In any event, I am in no doubt that he is so empowered by the statute.

Accordingly, I am unpersuaded by Mr. Lester that there is any ambiguity in the language of section 29(3). It follows, in my judgment, F that article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has no part to play in the determination of this case. It is to be noted that the Divisional Court, which thought otherwise, having looked at article 10, did not find that it assisted the applicants' case.

Next, Mr. Lester argued that proportionality, that is to say that G administrative action must not be disproportionate to the mischief at which it is aimed, or as he more colourfully put it, a sledge hammer must not be used to crack a nut, is a principle of English public law. I do not accept that. In my judgment, it is simply one aspect of the question of reasonableness. If the Secretary of State has in this case taken a sledge hammer to crack a nut, that may well demonstrate that he has acted as no reasonable Secretary of State would.

H I turn, therefore, to consider whether his direction was unreasonable in the *Wednesbury* sense. His reasons for giving it have been set out by Mr. Scoble in his affidavit in opposition to this application. They are four-fold and can be summarised as follows: the offence caused to

viewers and listeners by the appearance on a programme of an apologist for terrorism, particularly after a terrorist outrage; the undeserved publicity given to terrorists by such appearances; the tendency of those appearances to increase the standing of terrorist organisations and to create the false impression that support for terrorism is itself a legitimate political opinion; and that broadcast statements were intended to have and sometimes had the effect of intimidating some of those at whom they were directed.

These reasons were amplified by the Secretary of State in a speech he made to the House of Commons on 2 November 1988, reliance upon which was placed by the applicants. In pointing out the difference between "direct access" and "report," he said:

> "It is not simply that people are affronted—we can live with affront—by the direct access of men of violence and supporters of violence to television and radio. That direct access gives those who use it an air and appearance of authority which spreads further outwards the ripple of fear that terrorist acts create in the community. The terrorist act creates the fear and the direct broadcast spreads it. The men of violence and their supporters have used this access with skill. They do not hope to persuade—this is where we get into the cosy luxury of discussion which is unreal—but to frighten. So far from being outlaws hunted by the forces of law and order and pursued by the courts, they calmly appear on the screen and, thus, in the homes of their victims and the friends and neighbours of their victims."

No obvious irrationality is to be discerned in those reasons. What then are the criticisms of them made by the applicants and their supporters? These are not, I am bound to say, always wholly consistent. Thus, one of the applicants, Donald Malcolm Brind, a news producer for B.B.C. television news and current affairs programmes, says in his affidavit:

> "part of the process of returning Northern Ireland to 'normal politics,' is to draw nationalist supporters back into the political process, which would be achieved by greater consideration and expression of their views rather than less."

On the other hand, the applicants rely on an affidavit from Jonathan Dimbleby, who has worked both for the B.B.C. and Independent Television, in which he says:

> "How much better it would be if the electorate were permitted to hear the weasel words, the half-baked logic, the mealy-mouthed falsehoods of the terrorists; how much better to see them subjected to thorough cross-examination in the full and merciless glare of the television lens . . ."

Mr. Dimbleby's view, as a journalist, is of course a perfectly tenable one. But I find it quite impossible to hold that the Secretary of State's political judgment, that the appearance of terrorists on programmes increases their standing and lends them political legitimacy, is one that no reasonable Secretary of State could hold. It is, it should be noted,

A also the political judgment of the terrorists, or they would not be so anxious to be interviewed by the media or so against the Secretary of State's ban.

The Government case is that the direction in question is not a restriction on reporting but only on direct appearances of those who use or support violence. The applicants argue that the inevitable consequence will be to hinder the communication of ideas and information about
B Northern Ireland to the public. But how, I ask myself, can that be, when the B.B.C. and I.T.N. continue to be permitted to report what a member of a proscribed organisation has said? Or is the answer that the ideas of such a member have much more impact when he is seen or heard expressing them, which is indeed the very point being made by the Government? In a letter from Sir David Nicholas, the editor of
C I.T.N., relied on by the applicants, he points to the small incidence of Sinn Fein interviews before the ban, only amounting to a total running time of slightly less than 4½ minutes on 16 days over the space of a year. Yet, he is not suggesting for a moment that I.T.N. was unable before the ban to do its job of reporting what was going on or being said in Northern Ireland. I find it difficult, therefore, to believe that the loss of those four and a half minutes of direct appearances would have seriously
D detracted from the accuracy and informative nature of their reporting.

Cold water is poured by the applicants on the Secretary of State's fear of intimidation, when there is nothing to stop reporting of the fact that these things have been said. A newspaper article is relied on by the applicants written by Mr. John Birt, the Deputy Director-General of the B.B.C., in which he says:

E > "The notice means that the cold words of statements by members of listed organisations can be broadcast verbatim—whatever their content. But there can be no actuality of those speaking on behalf or in support of the listed organisations."

It seems to me not unreasonable to anticipate that terrorists would seek to use the media for purposes of intimidation. Moreover, this is the very
F context in which I would expect direct appearance to make a crucial difference. If the B.B.C. or I.T.N. saw fit to report a terrorist threat at all, they would no doubt do so in their customary dead-pan style—Mr. Birt's "cold words." I should have thought it was obvious that that would indeed have very much less impact on the viewers than the passion and menace that one could expect from a terrorist supporter
G delivering the same message.

Finally, the applicants argue that the Secretary of State is by his direction interfering with the broadcasting authorities' duty under section 4(1) to present all news and news features with "due impartiality" and to preserve "due impartiality" in the provision of programmes as respects matters of political controversy. In the second of the reasons given by Mr. Scoble for the directions, he speaks of the "undeserved publicity"
H given to terrorists by such appearances. If the applicants' point on "due impartiality" means anything, it must mean that such publicity is not undeserved. The applicants have, however, in my judgment, failed to give proper weight to the qualification of "impartiality" by the word

"due." "Due," as defined in the dictionary, means not merely "owing" but also "merited, appropriate, rightful." I quite accept that it is appropriate to show impartiality between two extremes of terrorism; and indeed the Home Secretary's direction is aimed at both Sinn Fein and the Ulster Defence Association. But I cannot believe that it was the intention of the legislators in passing the Broadcasting Act 1981 that the I.B.A. must be impartial between the terrorists and the terrorised.

If, indeed, the B.B.C. and the I.T.N. believe that such impartiality is called for by them, this would serve to show how necessary it is for the Government to have power to give a direction such as the one in question here. However, I cannot imagine that they believe any such thing or that they practise it. Such is plain, indeed, from a letter from Sir David Nicholas, Editor of I.T.N., relied on by the applicants, in which he proclaims with pride the ability which his organisation has shown "to demonstrate the true mercilessness of terrorism."

For all those reasons I am unpersuaded that the Secretary of State has been guilty of any irrationality in issuing the direction in question. I too would therefore dismiss the appeal.

*Appeal dismissed with costs.*
*Leave to appeal.*

*Solicitors: Stephens Innocent; Treasury Solicitor.*

D. E. C. P.

The applicants appealed.

*Anthony Lester Q.C.* and *David Pannick* for the applicants. One vital question that the appeal raises is whether our developing system of public law recognises that administrative decisions may be reviewed by reference to two principles: (1) that administrative decisions should not, without a pressing social need, interfere with fundamental rights and freedoms, including the right to freedom of expression, as recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) and in the common law; (2) that a lawful power should not be used in an excessive manner (the principle of proportionality).

It is common ground between the parties that, for the purposes of judicial review, nothing turns on the fact that the relevant power is statutory in the case of the I.B.A. and non-statutory in the case of the B.B.C.

The Secretary of State relies on the very wide powers that have been conferred upon him by Parliament. Although the provisions conferring these powers are expressed in unlimited terms, there is no dispute that the decision of the Secretary of State to make the directives is subject to judicial review on public law principles. What is in dispute is the nature and extent of those public law principles and the appropriate legal test

to be applied in reviewing the Secretary of State's exercise of his public powers.

Parliament must have intended that the discretionary power contained in section 29(3) of the Broadcasting Act 1981 (and clause 13(4) of the licence and agreement of 2 April 1981) should be exercised only to advance the purposes for which they were conferred: see *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, 1030 and *Reg. v. Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd.* [1988] A.C. 858, 872–873. Parliament cannot have intended to confer power on the Secretary of State to make directives that conflict unnecessarily with the common law principle of freedom of expression and with the obligations imposed on public authorities of the United Kingdom by article 10 (read with articles 1, 6 and 13) of the Convention to respect freedom of expression: see *Wheeler v. Leicester City Council* [1985] A.C. 1054, 1073, 1077, 1078 and the Copenhagen Agreement (Document of the Copenhagen Meeting of the Conference on the Human Dimensions of the C.S.C.E. (Conference on Security and Co-operation in Europe), Copenhagen, 29 June 1990), paras. (1), (2), (3), (4), (9.1) and (24).

It is a constitutional principle that, if Parliament has legislated and the words of the statute are clear, the statute must be applied even if its application is in breach of international law. However, it does not follow that the provisions of the Convention, which is not incorporated into the domestic law, are irrelevant when interpreting the width of powers that are incomplete in the sense that principles or standards of public law limitation must be applied to them. International law is not a part of English law, but it is a source of English law: see *Commercial and Estates Co. of Egypt v. Board of Trade* [1925] 1 K.B. 271, 283; *Chung Chi Cheung v. The King* [1939] A.C. 160, 167–168 and *West Rand Central Gold Mining Co. Ltd. v. The King* [1905] 2 K.B. 391, 406–407. The common law recognises everything in article 10, subject to the exceptions, so there is no reason to regard it as a source of common law.

It is the practice of the United Kingdom to consider, before ratifying a treaty, whether the domestic law adequately fulfils the obligations it is about to assume or whether the domestic law should be altered so that it conforms to those obligations: see paragraph 1.45 of the counter-memorial of the United Kingdom Government to the European Court of Human Rights of 28 October 1976 (Publications of the European Court of Human Rights, Series B, vol. 23–II (1976–1978), pp. 121–122) in *Republic of Ireland v. United Kingdom* (1978) E.H.R.R. 25. The domestic law is in conformity with article 10 because the common law principles of public law are no less effective than it in protecting freedom of expression against unnecessary interference by public authorities. The citizens of this country have a legitimate expectation based on the United Kingdom's ratification of the Convention that each of the three branches of government will comply with the provisions of the Convention. The court should look at the Convention to ensure that the common law develops along the same lines. The touchstone is the

same, whatever the route (the common law, the Convention, *Wednesbury*, proportionality, etc.).

It is well established that the common law recognises a constitutional right to freedom of expression: see *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027, 1133A; *Attorney-General v. Guardian Newspapers Ltd.* (the *Spycatcher* case) [1987] 1 W.L.R. 1248, 1286B–H, 1296F–1297F, 1307C–E and *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 156E–159D, 178C–H, 203F–G, 218H–220C, 256G–H, 273C, 283F–284A. In the *Spycatcher* case the common law was unclear or incomplete regarding the appropriate test for the grant of an interlocutory injunction. The House of Lords had regard to article 10 to resolve the ambiguity or fill the gap. Because of this common law right to freedom of expression, the House of Lords will, where possible, declare the common law so that it accords, rather than conflicts, with the right to freedom of expression recognised in article 10 and with the principle that only necessary interferences with freedom of expression are acceptable: see the cases cited above and *Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303, 352, 354; *Reg. v. Board of Visitors of H.M. Prisons, The Maze, Ex parte Hone* [1988] A.C. 379, 392H–394F and *In re K. D. (A Minor) (Ward: Termination of Access)* [1988] A.C. 806, 823E–825F, 827H. The decision whether a restriction of freedom of expression in a free and democratic society is necessary is a judicial one. In exercising his discretionary powers the Secretary of State has to have regard to the Convention. The test is the *Padfield* test: the objective test of whether the minister *is* using statutory power to advance one of the statutory purposes, not whether he reasonably thinks that he is: i.e., it is a question of legality, not of rationality.

Further, the House of Lords will, where possible, construe legislation so that it accords, rather than conflicts, with international treaties entered into by the United Kingdom: see *Reg. v. Miah* [1974] 1 W.L.R. 683 and *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751, 771A–B. The Act of 1981 was passed after the ratification by the United Kingdom of the Convention in 1951. It deals with the subject matter of article 10. Accordingly, it should be assumed, in the absence of clear and unequivocal language to the contrary, that when the executive introduced and Parliament approved section 29(3) both branches of government intended to further and not frustrate or impair the right to free expression. There is nothing in section 29(3) that is not reasonably capable of being construed so as to further article 10 and not to be inconsistent with it.

The House of Lords has power to construe an apparently broad power narrowly on the basis that Parliament cannot have intended to confer power to interfere unreasonably with fundamental civil rights: see *Raymond v. Honey* [1983] 1 A.C. 1, 10E–G, in which Lord Wilberforce had regard to the decision of the European Court in *Golder v. United Kingdom* (1975) 1 E.H.R.R. 524, which he regarded as being of strong persuasive authority.

The House of Lords has already held, in the context of judicial review of ministerial powers under the Immigration Act 1971, that anxious or rigorous scrutiny is involved where fundamental human rights

A are at stake: see *Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] A.C. 514, 531E–G, 537H. That case involved the right to life and liberty. In the present case, the interference with the fundamental right to freedom of expression calls for similarly anxious or rigorous scrutiny (more rigorous than in other contexts or the ordinary public law case), with an appropriately stringent test of necessity for the interference complained of. It is for the Secretary of State in the first B instance to decide what is necessary, and he has a "margin of appreciation:" see *The Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245, 275. The courts only come into play where the Secretary of State has acted disproportionately in a manner that exceeds the margin of appreciation: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 and *Reg. v. Secretary of State for* C *the Environment, Ex parte Nottinghamshire County Council* [1986] A.C. 240, 247.

It is the unique character of the Convention that gives it special relevance to the development and application of English public law principles. As the European Court observed in *Golder v. United Kingdom* (1975) 1 E.H.R.R. 524, 535, para. 34, one reason why the signatory governments ratified the Convention was because of their D "profound belief in the rule of law." Unlike normal treaties, the Convention confers enforceable rights on individuals against contracting states in respect of misuse of power by public authorities: see article 25. By article 1 there is a clear and unambiguous international obligation imposed on the United Kingdom, including the judiciary as well as the legislature and the executive, directly to secure the rights and freedoms E set out in section 1 (including article 10) to everyone within the jurisdiction of the United Kingdom.

The courts ensure compliance with article 13 to the extent permitted by the sovereign legislature, that is to say, except where Parliament has made clear that it is authorising conduct in breach of the Convention. It follows that the United Kingdom is obliged by the Convention directly to "secure" the right to freedom of expression guaranteed by article 10 F and to secure that right under the domestic legal order, in some form or another, to everyone within the jurisdiction of the United Kingdom.

The House of Lords should adopt a similar approach to the well established case law of the European Court regarding the Convention as a source of Community law and as providing standards by reference to which fundamental principles of Community law should be interpreted G and applied, even though the Convention has not been incorporated into Community law: see, for example, *Johnston v. Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] Q.B. 129, 147H.

There is nothing novel or startling about the proposition that the courts should have regard to the relevant provisions of the Convention when construing the proper scope of public powers. [Reference was made to *Halsbury's Laws of England*, 4th ed., vol. 8 (1974), p. 550, H para. 830 and *Wade, Administrative Law*, 5th ed. (1982), p. 371; 6th ed. (1988), p. 415.]

Other Commonwealth courts have had regard to the European Convention and its case law for the purpose of construing national

legislation, even though their states have not ratified the Convention: see, e.g., *Rangarajan v. P. Jagivan Ram* (1989) 1 S.C.J. 128, 149, para. 49 (Supreme Court of India) and *Ncube v. The State* [1988] L.R.C. (Const.) 442, 463–465 (Supreme Court of Zimbabwe). There is no justification for Lord Donaldson of Lymington M.R.'s distinction (ante, p. 718D–F) between subordinate legislation and executive action.

The case law in the Court of Appeal as to the relevance of the Convention in public law is confused and inconsistent: see *Reg. v. Secretary of State for the Home Department, Ex parte Bhajan Singh* [1976] Q.B. 198, 207B–208A; *Reg. v. Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979, 984D–985B, 985H–986G, 988B–C; *Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar* [1976] Q.B. 606; *Fernandes v. Secretary of State for the Home Department* [1981] Imm.A.R. 1 and *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161, 165–168.

It is well established from the case law of the European Court of Human Rights that "freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the state or any sector of the population:" see *The Sunday Times v. United Kingdom*, 2 E.H.R.R. 245, 280, para. 65. In order to justify an interference with freedom of speech, a state must satisfy the test of "whether the 'interference' complained of corresponded to a 'pressing social need,' whether it was 'proportionate to the legitimate aim pursued,' whether the reasons given by the national authorities to justify it are 'relevant and sufficient under article 10(2):'" see *The Sunday Times* case, at pp. 277–278, 280, paras. 62, 65; *Lingens v. Austria* (1986) 8 E.H.R.R. 407, 418, para. 39–41, and *Times Newspapers Ltd. v. United Kingdom* (Application No. 13166/87) (unreported), 12 July 1990, paras. 66–67. Under article 10(2), the European court "is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted:" the *Sunday Times* case, p. 281, para. 65.

Irrespective of the Convention point, the Secretary of State acts ultra vires his powers if he acts in a disproportionate manner: see *Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052, 1057H, 1063B; *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410E; *Halsbury's Laws of England*, 4th ed., vol. 1(1) reissue (1989), p. 144, para. 78; *Reg. v. Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd.* [1988] 1 W.L.R. 990, 1001C–G; Recommendation No. R(80)2: Concerning the Exercising of Discretionary Powers by Administrative Authorities (adopted by the Committee of Ministers of the Council of Europe on 11 March 1980); and the Copenhagen Agreement, para. 24.

In several cases, the European Court of Human Rights has held that the narrow scope of English judicial review does not satisfy the requirements of article 6(1) of the Convention: see, e.g., *W. v. United Kingdom*, 8 July 1987, Series A no. 121, para. 82. In the absence of a

principle of proportionality, our administrative law would be inconsistent with the Convention. The "right to a court," and to a judicial determination of the dispute, guaranteed by article 6(1) covers questions of fact just as much as questions of law: *Le Compte v. Belgium* (1981) 4 E.H.R.R. 1, 18, para. 49. Unless public law includes the principle of proportionality, to be developed by the courts, articles 6 and 13 require the United Kingdom to legislate so to provide.

There is a clear distinction between an appeal on the merits and a review based on whether the principle of proportionality has been satisfied. The principle of proportionality is well established in Community law and is applied without creating an appeal on the merits of the decision in question: see *Halsbury's Laws of England*, 4th ed., vol. 51 (1986), p. 363, para. 2.296 and *Johnston v. Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] Q.B. 129, 151, paras. 38–39. The principle has recently been applied by the Court of Appeal in *Thomas v. Chief Adjudication Officer* [1991] 2 W.L.R. 886.

Courts in other common law jurisdictions have recognised the principle of proportionality: see, e.g., *Reg. v. Oakes* (1986) 26 D.L.R. (4th) 200, 227; *Edmonton Journal v. Attorney-General for Alberta* (1989) 64 D.L.R. (4th) 577, 612–615; *Shelton v. Tucker* (1960) 364 U.S. 479, 488; *Hand v. Dublin Corporation* [1989] I.R. 26, 30–32; *State of Madras v. Row* [1952] S.C.R. 597, 607; *Thakur v. Union of India*, A.I.R. 1987 S.C. 2386, 2392 and *Cytechno Ltd. v. Republic of Cyprus* (1979) 3 C.L.R. 513, 534–536.

The directives are also ultra vires as being perverse: see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410. They defy logic (having no rational purpose) and breach accepted moral standards (which include the principle of free speech as stated in article 10). Even if proportionality is not a separate head of challenge in public law, it is an aspect of *Wednesbury* unreasonableness. If the directives are wholly disproportionate to any mischief identified by the Secretary of State, then it is difficult to see how it can be reasonable to have adopted and applied them.

The directives are an unprecedented interference with free speech in this country in peacetime. They involve the prior censorship by the state of the content of television and radio programmes broadcast here and overseas. It is clear on the evidence that the directives (a) remove an important aspect of editorial control from the broadcasters to the Government, (b) prevent the public from being shown material that may assist to inform them as to current affairs in Northern Ireland and (c) oblige broadcasters to make difficult decisions as to whether the material to be broadcast falls within or without the directives. The inevitable consequence of the directives will be to hinder the communication of ideas and information about Northern Ireland to the public and to deter broadcasters from reporting Northern Ireland politics.

It is true that the directives have been discussed in Parliament, but if, on analysis, the Secretary of State has acted ultra vires his powers the fact that Parliament has approved of his actions is no defence.

On judicial review, it is necessary for the court to consider the arguments presented in defence of the ban and to assess whether it

passes muster under the applicable legal standards. None of the reasons advanced by the Secretary of State comes anywhere near to showing a pressing social need for the ban. Nor can the reasons advanced meet the test of proportionality. In the light of the absence of any evidence of a mischief (that is, that reprehensible items had been broadcast in the past and that the B.B.C. and I.B.A. had declined responsibility to respond to expressions of concern by the Secretary of State), and in the light of the absurdly broad terms of the ban that has been imposed, the directives fail even to satisfy the test of *Wednesbury* reasonableness.

In summary, the questions to ask and answer are: (1) has the Secretary of State's decision interfered with a common law right or freedom (recognised by the European Court)? (2) Has it been taken for a legitimate objective, purpose or aim? If not, it is ultra vires. If it has, then (3) has the decision-taker used means that are reasonably necessary having regard to the scope of his discretionary powers, the nature of those powers, his reasons for the decision and any other relevant circumstances? If that is the common law approach, then, subject to legislation to the contrary, it would satisfy the European Court. Any other formulation amounts to *Wednesbury*. It is not the same approach as on an appeal. There is a distinction between an appeal and judicial review, but where human rights are involved proportionality comes in, with an appropriate margin of appreciation.

*Pannick* following. The standard of judicial review is not now limited to cases of absurdity or perversity. The court should ask whether the decision is an abuse of power because it is unreasonable or disproportionate in all the circumstances. It is accepted that the standard is of review, not appeal, that the applicant cannot simply ask the court to disagree with the minister and substitute its own decision, that the minister has a discretion as to how he deals with relevant factors and that there is no appeal against the substance of his decision, but, at the very least, it is incumbent on him to take account of all relevant matters, and here the Convention is one of those matters. It is not sufficient for the Secretary of State to show that a reasonable person (not taking the Convention into account) could have made the decision. Where, as in the present case, the Convention is relevant, and the Convention permits an interference with free speech only where necessary, the test to be applied is whether a reasonable minister could regard the directive as necessary. The House of Lords here could interfere with the Secretary of State's decision if it concluded that, although he had had regard to the Convention, his decision was disproportionate in that it was outside the margin of appreciation that Parliament intended the decision-maker to have. This does involve a need to go to some extent into the merits: see, for example, *Wheeler v. Leicester City Council* [1985] A.C. 1054. The court measures the margin of appreciation primarily having regard to the context. It is much narrower in the case of article 10 of the Convention than in relation to, for example, a planning decision, where fundamental human rights are not involved.

What *Wade, Administrative Law*, 6th ed., says, at pp. 407–409, should be recognised as having hitherto been the reality and the good

A sense of the matter: judicial review is concerned with abuse of power, both as to substance and procedure, with a flexible standard of review applied, according to the context.

The margin of appreciation doctrine has been expressly recognised by the European Court of Human Rights when applying the Convention: see *Markt Intern and Beermann v. Germany* (1989) 12 E.H.R.R. 161, 174, para. 33. The House of Lords may adopt an approach similar to B that in *Markt* provided that "reasonable grounds" do include having regard to the margin of appreciation and the doctrine of proportionality. [Reference was made to *Groppera Radio A.G. v. Switzerland* (1990) 12 E.H.R.R. 321, 343, para. 72.]

*John Laws* and *Robert Jay* for the Secretary of State. It is common ground that the Convention is not incorporated into the municipal law: C see *Reg. v. Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979; *Fernandes v. Secretary of State for the Home Department* [1981] Imm.A.R. 1 and *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161. The reasoning of those cases defeats the two propositions that the domestic court should enforce the Convention and that the decision-maker (or the court on an application for judicial review) must have regard to it. The juridical D basis of this jurisprudence is that the Convention is not part of domestic law because Parliament has not enacted that it should be: contrast the incorporation of directly effective Community law by the European Communities Act 1972. Underlying this is a constitutional principle that a treaty obligation, which is undertaken by the Crown as a matter of prerogative power, can only be woven into the law of the land if E Parliament so decrees, and so for the court itself to purport to incorporate the obligation is to exercise an authority that is vested only in the legislature.

In the Divisional Court, the applicants relied on the *Spycatcher* litigation: *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248 and *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109. That case involved a private law claim for breach F of confidence in which the common law coincided with article 10 as regards the prevention of disclosure of information received in confidence. The majority of the House of Lords in the final appeal held that there was no reason why the common law should take a different approach from that enshrined in the Convention: see *per* Lord Griffiths, at p. 273c and Lord Goff of Chieveley, at pp. 283E–284A. That case is not authority G for the proposition that, in a public law context like the present where the limits of a discretionary power are sought to be identified, recourse may be had to the Convention to supply those limits. Similarly, it is not authority for the proposition that article 10 may be directly applied by the municipal court. If either of these recourses were permitted, the Convention would ipso facto be incorporated into the common law rather than be merely consistent with it.

H It is in principle impossible to treat the Convention as a factor that, under the *Wednesbury* ([1948] 1 K.B. 223) rule, a public body invested with discretionary power by statute must take into account as being relevant in the exercise of the power. The Convention is not a fact or a

piece of evidence: it is an obligation undertaken by the United Kingdom as a matter of international law. Thus, while a reasonable decision-maker must call his attention to all relevant facts, the weight that he attaches to any particular fact is for him to decide: this is the ordinary *Wednesbury* approach. The Convention cannot be applied analogously to this: the only basis on which it could be asserted that the Secretary of State should have regard to it is that the United Kingdom is bound to comply with it. It is as incoherent to suggest that *Wednesbury* requires him to take into account, but leaves him free to attach much, little or no weight to it, as it would be to suggest that an obligation to comply with a mandatory statutory requirement is only a matter of weight. It confuses fact with law. Either the duty to comply with the Convention falls to be enforced by our domestic courts in the context of public law powers or it does not, and the applicants' position on analysis goes to the effect that it does.

Nor can this result be avoided by recourse to the Strasbourg concept of "margin of appreciation." The suggestion would be that, while the court will require to be satisfied that the decision-maker has "had regard" to article 10, the balance to be struck between the right to freedom of expression guaranteed by article 10(1) and the interests referred to in article 10(2) nonetheless falls within a discretion allowed to contracting states by the Convention jurisprudence; so, it might be said, reliance on the Convention can be fitted into a *Wednesbury* frame. The "margin of appreciation" does not confer a power to attach varying degrees of weight to article 10; at most it means that the European Court will pay a degree of respect, within limits, to the contracting state's own assessment of the article 10(2) interests. That is, however, merely one aspect of that court's approach to the task of supervising the Convention; if the domestic court undertakes the same exercise, then it is engaging in a direct application of the Convention as surely as if the European Court recognised no "margin of appreciation;" it would be requiring the Secretary of State to account municipally for his compliance with obligations imposed by the Convention. The fact that it would do so in the light of Strasbourg decisions as to the nature of those obligations, far from diminishing this conclusion, actually supports it, since the court would be performing the very function carried out by the European Court. Conceptually, such an exercise is wholly different from the application of *Wednesbury* principles. To conflate the two is to confuse fact with law.

In support of their case on the Convention the applicants rely on the authorities that show that recourse may be had to international treaty obligations in order to resolve ambiguities in domestic law: see *Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116, 143; *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751, 771 and *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161, 173. The Court of Appeal considered this to be the sole purpose for which the Convention might properly be deployed. The Divisional Court regarded it as a proper basis for their own view as to the extent to which the Convention might be engaged in the judicial review process. This latter approach cannot, however, be supported; it proceeds on the

premise that there exists a perceived ambiguity either in the terms of the Act of 1981 or in the nature or extent of the applicable public law principles: see *Padfield* [1968] A.C. 997 and *Wednesbury*. No ambiguity as such in the words of the Act was found either by the Divisional Court or the Court of Appeal.

The question, therefore, must have been whether there was any ambiguity in the common law principles, which the Secretary of State accepted imposed limits on his otherwise apparently unfettered powers under the Act. It was not, however, the applicants' case that there existed the least uncertainty in the *Padfield* and *Wednesbury* rules. Rather, their case was that as a matter of judicial policy those rules should be developed to embrace article 10 as constituting a distinct limit on the Secretary of State's power, operating alongside the accepted limits of reasonableness and compliance with statutory purpose, since the Act of 1981 engages the same subject matter, freedom of expression, as does article 10. In submitting that Parliament must be presumed to have intended not to confer a power to transgress the Convention, the applicants advanced an argument conceptually identical to the proposition that Parliament is presumed not to have conferred a power to act irrationally or so as to frustrate the statutory purpose. To rely, however, on the obligations imposed by the Convention in support of such an argument begs the question: the proposition contended for is that the exercise of those obligations necessarily constitutes a limit on the statutory power, but that would only be so if our law recognised a principle to the effect that the municipal public law court would quash a decision made under an unambiguous statutory power not only if it offended *Padfield* or *Wednesbury* but also if it was not conformable to the Convention obligations. To assume such a principle, however, is to assume what has to be established. Article 10 does not constitute an implied limitation on the Secretary of State's power to act under section 29(3) of the Act of 1981 and clause 13(4) of the licence and agreement, and its alleged breach is not justiciable in the English courts.

In the present case, as the Parliamentary debates in particular show, the Secretary of State did have regard, in deciding whether and how to exercise his power, to the need to give due weight to freedom of expression in the broadcasting media. The consideration of whether measures against terrorist interests were required in the public interest as a restriction on such freedom was integral to the approach that he, as a reasonable Secretary of State, adopted to his decision-making process under the Act of 1981, given in particular sections 2(2) and 4(1).

The concept of "proportionality" has featured in a number of cases including *Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052, 1057H, 1063B; *Reg. v. Brent London Borough Council, Ex parte Assegai* (unreported), 11 June 1987; *Reg. v. Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd.* [1988] 1 W.L.R. 990 and *Lock International Plc. v. Beswick* [1989] 1 W.L.R. 1268, 1281C–D. All those cases are authority only for the proposition that "proportionality" is but one aspect of irrationality in the *Wednesbury* sense. This was the view, which is correct, of the Divisional Court and the Court of Appeal. With reference to what Lord Diplock

said in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410, it would not be consonant with authority or principle to elevate "proportionality" to a free-standing ground of judicial review beyond regarding it as a component of *Wednesbury* unreasonableness; such recognition would entail according to the judicial review court a fact-finding or appellate, rather than a supervisory, jurisdiction.

As to *Wednesbury* unreasonableness, although the Secretary of State's directives have been approved by both Houses of Parliament, the jurisdiction of the court to scrutinise their merits on a traditional *Wednesbury* basis is not by any means curtailed or circumscribed. Regard may, however, be had to the Parliamentary debates for the purpose of demonstrating the range of views in favour of and against the directives. The four critical matters that influenced the Secretary of State were that offence had been caused to viewers and listeners by the appearance of the apologists for terrorism, particularly after a terrorist outrage; that such appearances had afforded terrorists undeserved publicity, which was contrary to the public interest; that those appearances had tended to increase the standing of terrorist organisations and to create the false impression that support for terrorism was itself a legitimate public opinion; and that broadcast statements were intended to have, and did in some cases have, the effect of intimidating some of those at whom they were directed. None of those reasons is remotely capable of being characterised as *Wednesbury* unreasonable: indeed, the Secretary of State's decision was one that he was quite entitled to take in the exercise of his political judgment. Parliamentary debates demonstrate that the Secretary of State's case has received a considerable corpus of well-marshalled and reasoned argument, as well as a number of eminent supporters.

The I.B.A.'s duty under section 4(1)(*f*) of the Act of 1981 is to comply, so far as possible, with the requirement "that due impartiality is preserved on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy." The B.B.C. owes a similar duty under the resolution of its board of governors. The Secretary of State's section 29(3) directives are not inconsistent with those duties. The section 4(1)(*f*) obligation is to preserve "due impartiality," which imports the concept of that which is appropriate or merited. No such impartiality is owed to the supporters of or apologists for terrorism. The directives do not frustrate the I.B.A.'s section 4(1)(*f*) obligation of the B.B.C.'s equivalent duty: they merely constitute one factor, amongst others, of which account has to be taken in exercising the broadcaster's general duties.

For the definition of "matter" in section 29(3) of the Act of 1981 and clause 13(4) of the licence and agreement, see the reasoning of Lord Donaldson of Lymington M.R., ante, pp. 718H—719E, and the decision of the Supreme Court of Ireland in *State (Lynch) v. Cooney* [1982] I.R. 337, 364. The term is wide enough to accommodate the type of prohibition imposed by the directives.

A As to the policies and objects of the Act of 1981, section 4(1), the Secretary of State's powers under section 29(3) of the Act of 1981 and clause 13(4) of the licence and agreement fall to be characterised as "reserve" powers in the sense that they are to be used infrequently; they have in fact been used only once. Nonetheless, those "reserve" powers are wide indeed, and there is no warrant for the proposition that, on *Padfield* grounds, they cannot be exercised in cases where the I.B.A. B has specific duties to refrain from broadcasting under section 4(1)(*a*) to (*f*) of the Act of 1981 or the B.B.C. under the resolution of its board of governors. The policies and objects of section 4(1) are not in any way frustrated by the Secretary of State's exercise of his complementary power under section 29(3): the duties of the I.B.A. and the power of the Secretary of State are not mutually contradictory. Section 29(3) is at C least apt to empower the Secretary of State to act in relation to matters that touch the interests of the state and where he bears a particular constitutional responsibility: the state's proper response to terrorism is a paradigm of such concerns. In short, the words of section 29(3) should be given their natural and ordinary meaning according to traditional canons of statutory interpretation. Thus construed, the section 29(3) power is all-embracing.

D This is a review of an exercise of discretionary power by the Secretary of State; the only question, therefore, is whether he has exceeded the power conferred on him by the Act of 1981 or by the B.B.C. charter. The decision thus depends on the application of conventional public law principles unless the applicants' argument is otherwise persuasive. The application of conventional principles, E enshrined in English law, shows that the Secretary of State's decision was intra vires. There is no question of illegality and no question of procedural impropriety. As for irrationality, one could not find a clearer instance of a political balance to be struck as to which reasonable people might take different views.

English common law provides as good a safeguard as the Convention. The question in English law is whether the Secretary of State has had F regard to the matters to which he has to have regard, including the curtailment of freedom of speech. The House of Lords is, however, concerned with the correct juridical approach to the Convention. As a free-standing legal instrument, it is not properly in play in, and, not relevant to, these proceedings. The applicants' primary case regarding it invokes a proposition unknown to the law: that the review court should G directly require the Secretary of State as a condition of the legality of his action to justify what he does by demonstrating that it complies with the Convention. They have to assert that, albeit the Convention aside his decisions were lawful, nevertheless they are rendered unlawful by reference to it. If that is correct, the question arises: by what proper jurisprudential route can the Convention render unlawful a decision that is otherwise lawful? The applicants cannot say that the Secretary of H State has unlawfully failed to comply with the Convention, since they have conceded that it is not part of the law of England. It follows that any duty to comply with the Convention is not a duty arising under the law of England. It is not a legitimate route to say that, if the Act is

ambiguous, the courts would interpret it in accordance with the Convention whereas, if it is not ambiguous, it should be presumed that Parliament had the Convention in mind. There is no legitimate route open for incorporating the Convention into English law de facto. The court would be using the Convention as a test pro tanto of the legality of the decision. That would be tantamount to incorporating it into English law.

There is an important distinction between the proposition on the one hand that the Convention as an instrument of law should be had regard to, and the proposition on the other hand that the matters with which it deals are necessarily involved in the making of a reasonable, and therefore lawful, decision in an area such as the curtailment of free expression. The Secretary of State denies the first and accedes to the second. The question is whether his view as to what this policy required was one that a reasonable minister could take; if he had not concerned himself with the same matters as those to which article 10(2) is directed there might be ground for a *Wednesbury*, or perhaps *Padfield*, challenge. What the House of Lords should not do is to regard the Convention as a legal touchstone as to what is permissible under the law of England. The applicants' test inevitably involves the court policing the Secretary of State's decision in quite a different way, whatever they say about the margin of appreciation. The court on an appeal against an injunction would not regard the Convention as a legal restraint to which the judge had to have regard.

*Fernandes v. Secretary of State for the Home Department* [1981] Imm.A.R. 1 and *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161 are not distinguishable from the present case. If one cannot import the family life criterion (article 8(1) of the Convention) into that discretionary area, it is hard to see how one can import article 10 into *this* discretionary area. There is all the difference in the world between ascertaining what is meant by a piece of ambiguous legislation and applying the Convention for the purpose of seeing the limits of a statutory discretion. One is an act of construction; the other is a judicial determination that the Convention is to be applied to any discretionary power conferred by statute provided only that it is in an area of which the Convention speaks. No question arises in relation to discretion of whether Parliament intended pro tanto to incorporate the Convention. That is not a legitimate exercise. [Reference was made to *Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar* [1976] Q.B. 606.]

As to an international treaty arousing expectations that the Secretary of State will be loyal to it, it is not for our courts to ask whether he has been: see *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 A.C. 418, 480C–D, 481B–F, 499F–500D, etc. The applicants say that he should have had regard to it as a relevant consideration in *Wednesbury* terms. That is misconceived, for two reasons: first, it is conceded that he did have regard to it; secondly, in any event, the Convention cannot be treated as a *Wednesbury*-relevant consideration because it is an obligation, not a fact to which weight should be given. There is confusion here between these. It is coherent

A to say that the Secretary of State must comply with an obligation, but not to say that it is a fact to which he must give weight. The applicants do not say that the Secretary of State should have had regard to the Convention: they say that he should have followed it and applied its provisions.

As to the construction of section 29(3), the applicants say that the court should look at it and imply into it an obligation: Parliament has B incorporated it pro tanto, exactly as if a proviso had been added to it. The answer is that there is no principle of statutory construction that gives rise to such an implication: that it should be implied because Parliament must have approved the Convention. To say that an unfettered discretion is in itself ambiguous is not a proper use of the doctrine of ambiguity.

C All that Lord Wilberforce said in *Raymond v. Honey* [1983] 1 A.C. 1, 10, referring to *Golder v. United Kingdom* (1975) 1 E.H.R.R. 524, was that the principle in question had been affirmed by the European Court. *Reg. v. Miah* [1974] 1 W.L.R. 683 was a plain case of the application of the presumption against retrospectivity.

The only way in which a presumption that Parliament intended to D transpose the Convention pro tanto from the international to the domestic plane could be carried into effect would be by a judicial decision that vis-à-vis such a statutory power Parliament has conferred the right and duty to supervise the Convention as a matter of English law. That correctly draws the true indication of what is put against the Secretary of State, and it is wholly contrary to what Lord Diplock said in *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751. If an E international treaty is not part of the law of England, it follows that the remedy for breach of it is on the international plane. There is no juridical basis for saying that a statutory discretion in an area that overlaps a Convention area is subject to judicial supervision unless Parliament has enacted the contrary, not least since Parliament well knows that executive action may be scrutinised in Strasbourg if it is said F to breach a Convention obligation. The presumption called for would be a general one: it would apply to compulsory purchase (breach of article 1 of the first protocol to the Convention), immigration and town planning. For a compulsory purchase case, see *Reg. v. Secretary of State for Transport, Ex parte de Rothschild* [1989] 1 All E.R. 933. The corollary of the applicants' submissions is that decisions of the European G Court should become at least tools of the trade in the English courts. If one introduces the Convention in any guise, one introduces the jurisprudence on it as well. It must involve policing it. There can be no difference in principle between a statute that confers a discretionary administrative power and one that confers a rule-making power.

The applicants' case requires the House of Lords to validate the proposition that, at least to an extent, the judges must decide on the H merits whether the minister's action is justified: *Wednesbury* and irrationality are not enough. No doctrine of "margin of appreciation" can escape that fact. This is unorthodox and involves a constitutional solecism. It usurps the distribution of power. It is not for the courts to

decide whether a programme should be banned. That can only be done by upsetting settled constitutional arrangements.

Nor are the applicants assisted by *Padfield*: they said that the common law went further than *Wednesbury* under the *Padfield* rule. That confuses two things: the purposes for which, on its true construction, a statute confers power (*Padfield*) and the quite different proposition that a statute may confer power on the court to decide the merits of questions. Whether it does the latter is not a *Padfield* "purposes" question but a question of whether as a matter of construction the statute has conferred that power. Where an Act does not confer power on the court to decide merits questions, to a greater or smaller degree, then no appeal to the *Padfield* principle can avail to confer that power.

As to the distinction between appeal and judicial review, no court has jurisdiction to listen to a merits appeal unless positive authority to do so is conferred by statute. Whatever is said about the margin of appreciation, what is being called for by the applicants is a merits decision. The court would be calling on the minister not just to say why he has done a thing but to put forward reasoned justification of it. [Reference was made to *In re Findlay* [1985] A.C. 318.]

The Court of Appeal were correct in the way in which they dealt with the Convention. [Reference was made to *Cinnamond v. British Airports Authority* [1980] 1 W.L.R. 582.]

*Lester Q.C.* in reply. The Convention has a distinguished English legal pedigree. The idea behind it was derived from English constitutional law. The concepts are not peculiarly Continental concepts but English ones. However, the inadequacy of common law remedies has two consequences. (1) The United Kingdom has been held to be in breach of the Convention more frequently than any other state. The judicial approach of the English courts has much less influence than that of other European courts, because the English courts have insufficient regard to the Convention. (2) In view of that, it is no usurpation of the powers of Parliament for our courts to interpret the powers conferred by the Act of 1981 consistently with the object of the legislation, including the object not to authorise unnecessary interferences with free speech in a manner contrary to the Convention.

To put forward the Convention as a source of law is consistent with *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751. Where a statute specifically requires particular conduct, there is no room for the Convention. It is difficult to think of any public law question that could arise where English law did not provide an adequate standard.

The ambiguous words in the Act of 1981 are "the Secretary of State may . . . require:" section 29(3). They are ambiguous because they appear to be unfettered but *Wednesbury* tells us that they are not. The ambiguity is in defining the limits of the fetter. The *Garland* principle entitles the court to have regard to the Convention to construe the ambiguous words. In any event, it is plainly a relevant factor in judicial review because it provides a useful touchstone of accepted moral standards accepted by the United Kingdom as an international obligation in areas where English public law is unclear or not fully developed. That is exactly what the House of Lords did in the *Spycatcher* litigation.

A There is a need, under *Wednesbury*, for some substantive standards. In a case concerning fundamental human rights, the test is stricter than absurdity or perversity, and in declaring and applying the test helpful standards are provided by article 10. This is not incorporation, judicial or otherwise, but looking to the Convention as a source of standards or principles of the civilised world with its common heritage of democracy and the rule of law: see the preamble to the Convention.

B The test that the House of Lords should declare on the substantive issue is: did the Secretary of State have reasonable and justifiable grounds for concluding that the restriction on freedom of expression was necessary, having regard to the appreciation appropriate to a case where the minister's action impinges on a fundamental right? The test is objective. The court has to assess the acceptability (using the judicial C standard) of what the minister has done. It is not enough for the minister to show that he had regard to the relevant factors and that he did not have regard to those that were irrelevant. He must also show that the result passes muster on reasonable and justifiable grounds. Where the means employed to achieve a legitimate aim are not reasonably necessary (applying the proportionality test) the decision will be ultra vires. It may be that this test would not satisfy the Convention, D but it is acceptable as an English judicial approach. The Secretary of State says that the applicants are confusing obligation with a fact, but an obligation is a fact.

Their Lordships took time for consideration.

E 7 February 1991. Lord Bridge of Harwich. My Lords, this appeal has been argued primarily on the basis that the power of the Secretary of State, under section 29(3) of the Broadcasting Act 1981 and under clause 13(4) of the licence and agreement which governs the operations of the B.B.C., to impose restrictions on the matters which the I.B.A. and the B.B.C. respectively may broadcast may only be lawfully F exercised in accordance with article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). Any exercise by the Secretary of State of the powers in question necessarily imposes some restriction on freedom of expression. The obligations of the United Kingdom, as a party to the Convention, are to secure to every one within its jurisdiction the rights which the Convention defines including both the right to freedom of expression G under article 10 and the right under article 13 to "an effective remedy before a national authority" for any violation of the other rights secured by the Convention. It is accepted, of course, by the applicants that, like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts H must nevertheless enforce it. But it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament

intended to legislate in conformity with the Convention, not in conflict with it. Hence, it is submitted, when a statute confers upon an administrative authority a discretion capable of being exercised in a way which infringes any basic human right protected by the Convention, it may similarly be presumed that the legislative intention was that the discretion should be exercised within the limitations which the Convention imposes. I confess that I found considerable persuasive force in this submission. But in the end I have been convinced that the logic of it is flawed. When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it. If such a presumption is to apply to the statutory discretion exercised by the Secretary of State under section 29(3) of the Act of 1981 in the instant case, it must also apply to any other statutory discretion exercised by the executive which is capable of involving an infringement of Convention rights. When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.

But I do not accept that this conclusion means that the courts are powerless to prevent the exercise by the executive of administrative discretions, even when conferred, as in the instant case, in terms which are on their face unlimited, in a way which infringes fundamental human rights. Most of the rights spelled out in terms in the Convention, including the right to freedom of expression, are less than absolute and must in some cases yield to the claims of competing public interests. Thus, article 10(2) of the Convention spells out and categorises the competing public interests by reference to which the right to freedom of expression may have to be curtailed. In exercising the power of judicial review we have neither the advantages nor the disadvantages of any comparable code to which we may refer or by which we are bound. But again, this surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations, we are not perfectly entitled to start from the premise that any restriction of the

right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it. The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment.

Applying these principles to the circumstances of the case, of which I gratefully adopt the full account given in the speech of my noble and learned friend, Lord Ackner, I find it impossible to say that the Secretary of State exceeded the limits of his discretion. In any civilised and law-abiding society the defeat of the terrorist is a public interest of the first importance. That some restriction on the freedom of the terrorist and his supporters to propogate his cause may well be justified in support of that public interest is a proposition which I apprehend the applicants hardly dispute. Their real case is that they, in the exercise of their editorial judgment, may and must be trusted to ensure that the broadcasting media are not used in such a way as will afford any encouragement or support to terrorism and that any interference with that editorial judgment is necessarily an unjustifiable restriction on the right to freedom of expression. Accepting, as I do, their complete good faith, I nevertheless cannot accept this proposition. The Secretary of State, for the reasons he made so clear in Parliament, decided that it was necessary to deny to the terrorist and his supporters the opportunity to speak directly to the public through the most influential of all the media of communication and that this justified some interference with editorial freedom. I do not see how this judgment can be categorised as unreasonable. What is perhaps surprising is that the restriction imposed is of such limited scope. There is no restriction at all on the matter which may be broadcast, only on the manner of its presentation. The viewer may see the terrorist's face and hear his words provided only that they are not spoken in his own voice. I well understand the broadcast journalist's complaint that to put him to the trouble of dubbing the voice of the speaker he has interviewed before the television camera is an irritant which the difference in effect between the speaker's voice and the actor's voice hardly justifies. I well understand the political complaint that the restriction may be counter-productive in the sense that the adverse criticism it provokes outweighs any benefit it achieves. But these complaints fall very far short of demonstrating that a reasonable Secretary of State could not reasonably conclude that the restriction was justified by the important public interest of combating terrorism. I should add that I do not see how reliance on the doctrine of "proportionality" can here advance the applicants' case. But I agree with what my noble and learned friend, Lord Roskill, says in his speech about the possible future development of the law in that respect.

I would dismiss the appeal.

LORD ROSKILL. My Lords, I agree that this appeal must be dismissed for the reasons given in the speech of my noble and learned friend,

Lord Bridge of Harwich, which I have had the advantage of reading in draft and with which I entirely agree. I add some observations of my own only on one matter, namely, the principle of "proportionality." Reliance was placed on behalf of the applicants upon a passage in the speech of my noble and learned friend, Lord Diplock, in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410, where after establishing his triple categorisation of the fields in which judicial review might operate, he added:

> "That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice."

In that passage my noble and learned friend was concerned to make plain, first, that his triple categorisation was not exhaustive and, secondly, that the time might come when further grounds might require to be added notably by reason of the "possible adoption" of that principle in this country. He clearly had in mind the likely increasing influence of Community law upon our domestic law which might in time lead to the further adoption of this principle as a separate category and not merely as a possible reinforcement of one or more of these three stated categories such as irrationality. My noble and learned friend emphasised that any such development would be likely to be on a case by case basis. I am clearly of the view that the present is a not a case in which the first step can be taken for the reason that to apply that principle in the present case would be for the court to substitute its own judgment of what was needed to achieve a particular objective for the judgment of the Secretary of State upon whom that duty has been laid by Parliament. But so to hold in the present case is not to exclude the possible future development of the law in this respect, a possibility which has already been canvassed in some academic writings.

Lord Templeman. My Lords, freedom of expression is a principle of every written and unwritten democratic constitution. That principle is not absolute; there are exceptions. The principle and the exceptions are the subject of article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) and the decisions of the European Court of Human Rights. The United Kingdom adheres to the Convention and Her Majesty's Government are satisfied that the laws of the United Kingdom are in conformity with their obligations under the Convention.

The Home Secretary, in the exercise of powers conferred on him by Parliament, has imposed restrictions on freedom of expression within the terms and for the reasons set forth in the evidence and in the speech of my noble and learned friend, Lord Ackner. The Home Secretary has forbidden the television and radio authorities knowingly to allow a member or supporter of a recognised terrorist organisation to make a

A live transmission. The Home Secretary has imposed this restriction because, supported by a majority of the members of the House of Commons, he believes that the live appearances of terrorist members and supporters cause outrage and fear and give a wholly false impression of the strength and legitimacy of terrorism, thus encouraging terrorism, which is a foul crime.

B The discretionary power of the Home Secretary to give directions to the broadcasting authorities imposing restrictions on freedom of expression is subject to judicial review, a remedy invented by the judges to restrain the excess or abuse of power. On an application for judicial review, the courts must not substitute their own views for the informed views of the Home Secretary. In terms of the Convention, as construed by the European Court, a margin of appreciation must be afforded to C the Home Secretary to decide whether and in what terms a restriction on freedom of expression is justified.

The English courts must, in conformity with the *Wednesbury* principles (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223) discussed by Lord Ackner, consider whether the Home Secretary has taken into account all relevant matters and has ignored irrelevant matters. These conditions are satisfied by the D evidence in this case, including evidence by the Home Secretary that he took the Convention into account. If these conditions are satisfied, then it is said that on *Wednesbury* principles the court can only interfere by way of judicial review if the decision of the Home Secretary is "irrational" or "perverse."

The subject matter and date of the *Wednesbury* principles cannot in E my opinion make it either necessary or appropriate for the courts to judge the validity of an interference with human rights by asking themselves whether the Home Secretary has acted irrationally or perversely. It seems to me that the courts cannot escape from asking themselves whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable. In terms F of the Convention, as construed by the European Court, the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent.

My Lords, applying these principles I do not consider that the court can conclude that the Home Secretary has abused or exceeded his powers. The broadcasting authorities and journalists are naturally G resentful of any limitation on their right to present a programme in such manner as they think fit. But the interference with freedom of expression is minimal and the reasons given by the Home Secretary are compelling.

I, too, would dismiss this appeal.

H LORD ACKNER. My Lords, in October 1988 the government reached the conclusion that it was no longer acceptable in the national interest that spokesmen for terrorist organisations, paramilitary organisations and those who support them should have direct access to television and radio. The Secretary of State for the Home Department, the respondent,

accordingly exercised his powers under clause 13 of the licence and agreement between the Secretary of State and the British Broadcasting Corporation ("the B.B.C.") and section 29 of the Broadcasting Act 1981. By directives, dated 19 October 1988, as further explained and defined in a letter dated 24 October 1988 from the Home Office he required the B.B.C. and the Independent Broadcasting Authority ("the I.B.A.") to refrain from broadcasting the direct statements (not the reported speech) by a person who represents or purports to represent a specified organisation or who supports or solicits or invites support for such an organisation.

The organisations concerned are those proscribed under the Prevention of Terrorism (Temporary Provisions) Act 1984 and the Northern Ireland (Emergency Provisions) Act 1978 together with Sinn Fein, Republican Sinn Fein and the Ulster Defence Association. These organisations are involved in terrorism, or in promoting or encouraging it, that is to say they are organisations which exist to further a political aim by the use of violence. It is an offence to belong to such proscribed organisations or to support any of them in particular ways. Although not proscribed, Sinn Fein, from which Republican Sinn Fein broke away, is known to be the political arm of the Provisional Movement; its spokesmen are apologists for the use of violence for political ends. The Ulster Defence Association is a paramilitary organisation, some of whose members engage in terrorism, often claiming terrorist acts in the name of the Ulster Freedom Fighters, itself proscribed under the Northern Ireland emergency provisions. These facts deposed to by Mr. Scoble, an assistant under-secretary of state in the Home Office and head of the broadcasting department, in his affidavit sworn on 15 March 1989, have not been challenged.

The applicants are neither the B.B.C. nor the I.B.A. They are (with one exception) broadcast journalists who are members of the National Union of Journalists ("the N.U.J."). The exception is Mr. Nash, who is employed by the N.U.J. and who relies on broadcasting for the provision of information about current affairs.

*The relevant legislative and contractual provisions*

(i) By sections 2 and 3 of the Act of 1981 the functions, duties and powers of the I.B.A. are defined. (ii) By section 4(1) of the Act of 1981:

> "It shall be the duty of the Authority to satisfy themselves that, so far as possible, the programmes broadcast by the Authority comply with the following requirements, that is to say—(*a*) that nothing is included in the programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling; (*b*) that a sufficient amount of time in the programmes is given to news and news features and that all news given in the programmes (in whatever form) is presented with due accuracy and impartiality; . . . (*f*) that due impartiality is preserved on the part of the persons providing the programmes as respects matters of political or industrial controversy or relating to current public policy. . . ."

(iii) By section 29(3) of the Act of 1981:

> "Subject to subsection (4), the Secretary of State may at any time by notice in writing require the Authority to refrain from broadcasting any matter or classes of matter specified in the notice; and it shall be the duty of the Authority to comply with the notice."

(iv) By clause 13(4) of the licence and agreement made between the B.B.C. and the Secretary of State on 2 April 1981:

> "The Secretary of State may from time to time require the Corporation to refrain at any specified time or at all times from sending any matter or matters of any class specified in such notice . . ."

*The directives*

The text common to both directives is as follows:

> "1. . . . to refrain from broadcasting any matter which consists of or includes—any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where—(a) the person speaking the words represents or purports to represent an organisation specified in paragraph 2 below, or (b) the words support or solicit or invite support for such an organisation, other than any matter specified in paragraph 3 below. 2. The organisations referred to in paragraph 1 above are—(a) any organisation which is for the time being a proscribed organisation for the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978; and (b) Sinn Fein, Republican Sinn Fein and the Ulster Defence Association. 3. The matter excluded from paragraph 1 above is any words spoken—(a) in the course of proceedings in Parliament, or (b) by or in support of a candidate at a parliamentary, European parliamentary or local election pending that election."

The essential parts of the letter of 24 October 1988, which further defined and explained the directives, read as follows:

> "It was asked whether the notice applied only to direct statements by representatives of the organisations or their supporters or whether it applied also to reports of the words they had spoken. We confirmed, as the Home Secretary has made clear in Parliament, that the correct interpretation (and that which was intended) is that it applies only to direct statements and not to reported speech, and that the person caught by the notice is the one whose words are reported and not the reporter or presenter who reports them. Thus the notice permits the showing of a film or still picture of the initiator speaking the words together with a voice-over account of them, whether in paraphrase or verbatim. We confirmed that programmes involving the reconstruction of actual events, where actors use the verbatim words which had been spoken in actuality, are similarly permitted. For much the same reason, we confirmed

that it was not intended that genuine works of fiction should be covered by the restrictions, on the basis that the appropriate interpretation of 'a person' in paragraph 1 of the notice is that it does not include an actor playing a character.

"The B.B.C. also asked whether a member of an organisation or one of its elected representatives could be considered as permanently representing that organisation so that all his words, whatever their character, were covered by the notice. We confirmed that the Home Office takes the view that this is too narrow an interpretation of the word 'represents' in paragraph 1(a) of the text. A member of an organisation cannot be held to represent that organisation in all his daily activities. Whether at any particular instance he is representing the organisation concerned will depend upon the nature of the words spoken and the particular context. Where he is speaking in a personal capacity or purely in his capacity as a member of an organisation which does not fall under the notice (for example, an elected council), it follows, from that interpretation, that paragraph 1(a) will not apply. Where it is clear, from the context and the words, that he is speaking as a representative of an organisation falling under the notice, his words may not be broadcast directly, but (as mentioned above) can be reported. (He may, of course, come within the scope of paragraph 1(b), if his words contain support for the organisation.) Although there may be borderline occasions when this distinction will require a careful exercise of judgment, we believe that the great majority of broadcast material will fall clearly within one case or the other."

It can thus be seen that the directives, as further defined and explained, do not restrict the reporting of statements made by terrorists or their supporters. What is restricted is the direct appearance on television of those who use or support violence, themselves making their statements ("actuality reporting"). Thus the activities of terrorist organisations and statements of their apologists may still be reported, as they are in the press; but such persons are prevented from making the statement themselves on the television and the radio. Publicity for their statements can be achieved, inter alia, by the dubbing of what they have said, using actors to impersonate their voices. These limited restrictions can be contrasted with those which have been in operation for many years in the Republic of Ireland, where not only is the direct appearance on television of those who use or support violence banned, but even the very statements which they make.

*The issue*

The appeal is concerned with a challenge by way of judicial review. It is contended by the applicants that the Secretary of State in issuing these directives has acted unlawfully. The attack has concentrated essentially on section 29(3) of the Act of 1981, and for the purpose of this appeal the point has not been taken as to whether different principles might be applied to the contractual powers of the Secretary of State under and by virtue of clause 13(4) of the licence and agreement.

A It is of course common ground that section 29(3) gives to the Secretary of State a wide discretion. The issue, expressed quite shortly, is whether in issuing these directives he has exceeded his discretionary powers, thus acting ultra vires and therefore unlawfully.

*The Secretary of State's reasons for his action*

B The Secretary of State's decision was the subject matter of a statement made on 19 October 1988 in both Houses of Parliament and was followed by debates in both Houses. The statement reads as follows:

> "For some time broadcast coverage of events in Northern Ireland has included the occasional appearance of representatives of paramilitary organisations and their political wings, who have used these opportunities as an attempt to justify their criminal activities. Such
C appearances have caused widespread offence to viewers and listeners throughout the United Kingdom, particularly just after a terrorist outrage. The terrorists themselves draw support and sustenance from access to radio and television—from addressing their views more directly to the population at large than is possible through the press. The Government have decided that the time has come to
D deny this easy platform to those who use it to propagate terrorism. Accordingly, I have today issued to the chairmen of the B.B.C. and the I.B.A. a notice, under the licence and agreement and under the Broadcasting Act 1981 respectively, requiring them to refrain from broadcasting direct statements by representatives of organisations proscribed in Northern Ireland and Great Britain and by representatives of Sinn Fein, Republican Sinn Fein and the Ulster
E Defence Association. The notices will also prohibit the broadcasting of statements by any person which support or invite support for these organisations. The restrictions will not apply to the broadcast of proceedings in Parliament, and in order not to impair the obligation on the broadcasters to provide an impartial coverage of elections the notices will have a more limited effect during election
F periods. Copies of the notices have today been deposited in the Library, and further copies are available from the Vote Office so that hon. members will be able to study their detailed effect.
>
> "These restrictions follow very closely the lines of similar provisions which have been operating in the Republic of Ireland for some years. Representatives of these organisations are prevented from appearing on Irish television, but because we have had no
G equivalent restrictions in the United Kingdom they can nevertheless be seen on B.B.C. and I.T.V. [Independent Television] services in Northern Ireland, where their appearances cause the gravest offence, and in Great Britain. The Government's decision today means that both in the United Kingdom and in the Irish Republic such appearances will be prevented. Broadcasters have a dangerous and unenviable task in reporting events in Northern Ireland. This step
H is no criticism of them. What concerns us is the use made of broadcasting facilities by supporters of terrorism. This is not a restriction on reporting. It is a restriction on direct appearances by those who use or support violence. I believe that this step will be

understood and welcomed by most people throughout the United Kingdom. It is a serious and important matter on which the House will wish to express its view. For that reason, we shall be putting in hand discussions through the usual channels so that a full debate on the matter can take place at an early date."

On 2 November there was a debate in the House of Commons on the motion that: "this House approves the Home Secretary's action in giving directions to the B.B.C. and I.B.A. to restrict the broadcasting of statements made by Northern Ireland terrorists organisations and their apologists." That motion was carried by 243 votes to 179. On 8 December a motion to take note of the Home Secretary's action was debated and agreed to without a division in the House of Lords. The Secretary of State's reasons for taking the action complained of are set out in the Hansard reports of those debates and were before your Lordships. The four matters which influenced the Secretary of State were highlighted by Mr. Scoble in his affidavit. These are: (1) offence had been caused to viewers and listeners by the appearance of the apologists for terrorism, particularly after a terrorist outrage; (2) such appearances had afforded terrorists undeserved publicity which was contrary to the public interest; (3) these appearances had tended to increase the standing of terrorist organisations and to create a false impression that support for terrorism is itself a legitimate political opinion; (4) broadcast statements were intended to have, and did in some cases have, the effect of intimidating some of those at whom they were directed.

*The challenge*

I now turn to the bases upon which it is contended that the Secretary of State exceeded his statutory powers.

*1. The directives frustrated the policy and the objects of the Act of 1981, in particular section 4(1)*

It is of course accepted by Mr. Laws on behalf of the Secretary of State that the discretion given to him by section 29(3) is not an absolute or unfettered discretion. It is a discretion which is to be exercised according to law and therefore must be used only to advance the purposes for which it was conferred. It has accordingly to be used to promote the policy and objects of the Act: see *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997. It is further accepted on behalf of the Secretary of State that the powers under section 29(3) can be properly categorised as "reserve" powers in the sense that they are to be used infrequently. In fact they have only been used once previously.

In the Divisional Court and Court of Appeal much was made of the words in section 4(1)(*f*), "due impartiality." The argument was not repeated before your Lordships. I can find nothing in paragraph 4(1)(*f*) to suggest that the policy and objects of section 4(1) are in any way frustrated by the Secretary of State's exercise of his reserve powers

where, in the proper exercise of his discretion, he considers it appropriate to do so.

*2. The directives were unlawful on "Wednesbury" grounds*

Save only in one respect, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms (Cmd. 8969), which is the subject matter of a later heading, it is not suggested that the minister failed to call his attention to matters which he was bound to consider, nor that he included in his considerations matters which were irrelevant. In neither of those senses can it be said that the minister acted unreasonably. The failure to mount such a challenge in this appeal is important. In a field which concerns a fundamental human right—namely that of free speech—close scrutiny must be given to the reasons provided as justification for interference with that right. Your Lordships' attention was drawn to *Reg. v. Secretary of State for Transport, Ex parte de Rothschild* [1989] 1 All E.R. 933, a case which concerned compulsory purchase and therefore involved, albeit somewhat indirectly, another fundamental human right—the peaceful enjoyment of one's possessions: see article 1 of the First Protocol to the Convention. In that case Slade L.J. said, at p. 939:

> "Given the obvious importance and value to landowners of their property rights, the abrogation of those rights in the exercise of his discretionary power to confirm a compulsory purchase order would, in the absence of what he perceived to be a sufficient justification on the merits, be a course which surely no reasonable Secretary of State would take."

Slade L.J. was in no sense increasing the severity of the *Wednesbury* test. He was applying that part of it which requires the decision-maker to call his attention to matters that he is obliged to consider. He was emphasising the Secretary of State's obligation to identify the factors which had motivated his decision so as to ensure that he had overlooked none which a reasonable Secretary of State should have considered.

There remains however the potential criticism under the *Wednesbury* grounds expressed by Lord Greene M.R. [1948] 1 K.B. 223, 230 that the conclusion was "so unreasonable that no reasonable authority could ever have come to it." This standard of unreasonableness, often referred to as "the irrationality test," has been criticised as being too high. But it has to be expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction. Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court in the exercise of its supervisory role will quash that decision. Such a decision is correctly,

though unattractively, described as a "perverse" decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision—that is, to invite an abuse of power by the judiciary.

So far as the facts of this case are concerned it is only necessary to read the speeches in the Houses of Parliament, and in particular those of Mr. David Alton, Lord Fitt and Lord Jakobovits, to reach the conclusion that, whether the Secretary of State was right or wrong to decide to issue the directives, there was clearly material which would justify a reasonable minister making the same decision. In the words of Lord Diplock in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014, 1064:

> "The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."

In his speech in the House of Commons on 2 November 1988 the Secretary of State in emphasising the significance of imposing a restriction, not on the reporting of the material uttered by terrorists and those supporting them, but on their direct appearance on television, said:

> "It is not simply that people are affronted—we can live with affront—by the direct access of men of violence and supporters of violence to television and radio. That direct access gives those who use it an air and appearance of authority which spreads further outwards the ripple of fear that terrorist acts create in the community. The terrorist act creates the fear and the direct broadcast spreads it. The men of violence and their supporters have used this access with skill. They do not hope to persuade—this is where we get into the cosy luxury of discussion which is unreal—but to frighten. So far from being outlaws hunted by the forces of law and order and pursued by the courts, they calmly appear on the screen and, thus, in the homes of their victims and the friends and neighbours of their victims."

McCowan L.J., ante, p. 730E, in his judgment, pointed out that the criticisms made by the applicants and their supporters were not wholly consistent. He quoted from the affidavit of Donald Malcolm Brind, a news producer for B.B.C. television news and current affairs programmes. In his affidavit he said:

> "part of the process of returning Northern Ireland to 'normal politics,' is to draw nationalist supporters back into the political process, which would be achieved by greater consideration and expression of their views rather than less."

He contrasted this, ante, p. 730F–G, with an affidavit relied on by the applicants from Jonathan Dimbleby, who has worked for both the B.B.C. and Independent Television. In his affidavit he says:

A "How much better it would be if the electorate were permitted to hear the weasel words, the half-baked logic, the mealy-mouthed falsehoods of the terrorists; how much better to see them subjected to thorough cross-examination in the full and merciless glare of the television lens . . ."

Your Lordships will, I am sure, need no persuading that all cross-
B examinations are not thorough. Indeed there are occasions where some may wonder whether an incompetent cross-examination is the product solely of lack of preparation. A deficient cross-examination can significantly advance the terrorist's cause.

I entirely agree with McCowan L.J. when he said that he found it quite impossible to hold that the Secretary of State's political judgment
C that the appearance of terrorists on programmes increases their standing and lends them political legitimacy is one that no reasonable Home Secretary could hold. As he observed: "It is, it should be noted, also the political judgment of the terrorists, or they would not be so anxious to be interviewed by the media or so against the Secretary of State's ban."

Mr. Lester has contended that in issuing these directives the Secretary
D of State has used a sledgehammer to crack a nut. Of course that is a picturesque way of describing the *Wednesbury* "irrational" test. The Secretary of State has in my judgment used no sledgehammer. Quite the contrary is the case.

I agree with Lord Donaldson M.R. who, when commenting on how limited the restrictions were, said in his judgment, ante, p. 723:

E "They have no application in the circumstances mentioned in paragraph 3 (proceedings in the United Kingdom Parliament and elections) and, by allowing reported speech either verbatim or in paraphrase, in effect put those affected in no worse a position than they would be if they had access to newspaper publicity with a circulation equal to the listening and viewing audiences of the programmes concerned. Furthermore, on the applicants' own
F evidence, if the directives had been in force during the previous 12 months, the effect would have been minimal in terms of air time. Thus, [I.T.N.] say that eight minutes twenty seconds (including repeats) out of 1200 hours, or 0·01 per cent., of air time would have been affected. Furthermore, it would not have been necessary to omit these items. They could have been recast into a form which
G complied with the directives."

Thus the extent of the interference with the right to freedom of speech is a very modest one. On the other hand the vehemence of the criticism of the Secretary of State's decision is perhaps a clear indication of the strength of the impact of the terrorist message when he is seen or heard expressing his views.

H

*3. The minister failed to have proper regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms and in particular article 10*

Article 10 reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Convention which is contained in an international treaty to which the United Kingdom is a party has not yet been incorporated into English domestic law. The applicants accept that it is a constitutional principle that if Parliament has legislated and the words of the statute are clear, the statute must be applied even if its application is in breach of international law. In *Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116, 143 Diplock L.J. stated:

> "If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations . . ."

Much reliance was placed upon the observations of Lord Diplock in *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751, 771 when he said:

> "it is a principle of construction of United Kingdom statutes . . . that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it."

I did not take the view that Lord Diplock was intending to detract from or modify what he had said in *Salomon's* case.

It is well settled that the Convention may be deployed for the purpose of the resolution of an ambiguity in English primary or subordinate legislation. *Reg. v. Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979 concerned a lady who arrived at London Airport from Pakistan with two small children saying that she was married to a man who was there and who met her. She was refused leave to enter and an application was made for an order of certiorari and also for mandamus on the ground that she ought to have been treated as the wife of the man who met her at the airport. During the course of argument a question arose about the impact of the Convention and in particular article 8 concerning the right to private

A and family life and the absence of interference by a public authority with that right.

In his judgment Lord Denning M.R. said, at p. 984:

> "The position as I understand it is that if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the Convention as an aid to clear up the ambiguity and
B uncertainty . . . But I would dispute altogether that the Convention is part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament."

In his judgment Geoffrey Lane L.J. said, at p. 988:

> "It is perfectly true that that Convention was ratified by this country. . . . Nevertheless, the Convention, not having been
C enacted by Parliament as a statute, it does not have the effect of law in this country; whatever persuasive force it may have in resolving ambiguities it certainly cannot have the effect of overriding the plain provisions of the Act of 1971 and the rules made thereunder."

D This decision was followed in *Fernandes v. Secretary of State for the Home Department* [1981] Imm.A.R. 1—another case where article 8 of the Convention was relied upon and where the Court of Appeal held that the Secretary of State in exercising his statutory powers was not obliged to take into account the provisions of the Convention, it not being part of the law of this country. The Convention is a treaty and may be resorted to in order to help resolve some uncertainty or
E ambiguity in municipal law. These decisions were most recently followed by the Court of Appeal in *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm.A.R. 161.

Mr. Lester contends that section 29(3) is ambiguous or uncertain. He submits that although it contains within its wording no fetter upon the extent of the discretion it gives to the Secretary of State, it is
F accepted that that discretion is not absolute. There is however no ambiguity in section 29(3). It is not open to two or more different constructions. The limit placed upon the discretion is simply that the power is to be used only for the purposes for which it is was granted by the legislation (the so-called *Padfield* [1968] A.C. 997 doctrine) and that it must be exercised reasonably in the *Wednesbury* sense. No question of the construction of the words of section 29(3) arises, as would be the
G case if it was alleged to be ambiguous, or its meaning uncertain.

There is yet a further answer to Mr. Lester's contention. He claims that the Secretary of State before issuing his directives should have considered not only the Convention (it is accepted that he in fact did so) but that he should have properly construed it and correctly taken it into consideration. It was therefore a relevant, indeed a vital, factor to
H which he was obliged to have proper regard pursuant to the *Wednesbury* doctrine, with the result that his failure to do so rendered his decision unlawful. The fallacy of this submission is however plain. If the Secretary of State was obliged to have proper regard to the Convention, i.e. to conform with article 10, this inevitably would result in

incorporating the Convention into English domestic law by the back door. It would oblige the courts to police the operation of the Convention and to ask themselves in each case, where there was a challenge, whether the restrictions were "necessary in a democratic society . . ." applying the principles enunciated in the decisions of the European Court of Human Rights. The treaty, not having been incorporated in English law, cannot be a source of rights and obligations and the question "Did the Secretary of State act in breach of article 10?" does not therefore arise.

As was recently stated by Lord Oliver of Aylmerton in *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* (the "International Tin Council case") [1990] 2 A.C. 418, 500:

> "Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant."

*4. The Secretary of State has acted ultra vires because he has acted in "in a disproportionate manner"*

This attack is not a repetition of the *Wednesbury* "irrational" test under another guise. Clearly a decision by a minister which suffers from a total lack of proportionality will qualify for the *Wednesbury* unreasonable epithet. It is, ex hypothesi, a decision which no reasonable minister could make. This is, however, a different and severer test.

Mr. Lester is asking your Lordships to adopt a different principle—the principle of "proportionality" which is recognised in the administrative law of several members of the European Economic Community. What is urged is a further development in English administrative law, which Lord Diplock viewed as a possibility in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410.

In his written submissions, Mr. Lester was at pains to record (ante, p. 737B) that "There is a clear distinction between an appeal on the merits and a review based on whether the principle of proportionality has been satisfied." He was prepared to accept that to stray into the realms of appellate jurisdiction involves the courts in a wrongful usurpation of power. Yet in order to invest the proportionality test with a higher status than the *Wednesbury* test, an inquiry into and a decision upon the merits cannot be avoided. Mr. Pannick's (Mr. Lester's junior) formulation "Could the minister reasonably conclude that his direction was necessary?" must involve balancing the reasons, pro and con, for his decision, albeit allowing him "a margin of appreciation" to use the European concept of the tolerance accorded to the decision-maker in whom a discretion has been vested. The European test of "whether the 'interference' complained of corresponds to a 'pressing social need'" (*The Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245, 277)

must ultimately result in the question "Is the particular decision acceptable?" and this must involve a review of the merits of the decision. Unless and until Parliament incorporates the Convention into domestic law, a course which it is well known has a strong body of support, there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country.

I would accordingly dismiss this appeal with costs.

LORD LOWRY. My Lords, I agree with your Lordships that this appeal should be dismissed. In particular I agree with the observations of my noble and learned friend, Lord Ackner, whose speech relieves me of the need to consider the matter in detail and, taken in conjunction with the other observations which have fallen from your Lordships, could well be thought to render unnecessary any contribution by me to the debate.

But the inspiration for the applicants' argument, if not perhaps the facts on which the argument is based, is closely linked with the principle of freedom of speech in a democratic society, so far as compatible with the safety of the state and the well-being of its citizens, which may provide a reason for me to say something.

The directives complained of have been the occasion for an eloquent vindication of freedom of expression and the freedom to hold opinions and to impart and receive information, which is supported by affidavit evidence, the applicants' printed case and counsel's submissions. The case (ante, p. 737F–G) avers that it is clear on the evidence that the directives "remove an important aspect of editorial control from the broadcasters to the Government" and "prevent the public from being shown [sic] material that may assist to inform them as to current affairs in Northern Ireland" and "oblige broadcasters to make difficult decisions as to whether the material to be broadcast falls within or without the directives." It is further asserted that

> "the inevitable consequence of the directives will be to hinder the communication of ideas and information about Northern Ireland to the public and to deter broadcasters from reporting Northern Ireland politics."

Administrative acts which had the effect contended for might well be justified, but they would certainly deserve the closest scrutiny. My noble and learned friend has, however, set out the facts, which show that television reporters and commentators, as well as reporting and commenting (like the press) on oral and written statements attributed to terrorists and supporters of terrorism, can, by interviews and other methods, make films of terrorists and supporters of terrorism which record the appearance and gestures of the persons depicted and the precise content, accent and emphasis of the words they use and can show the films on television. The only restriction is that, if the speaker was representing or purporting to represent an organisation specified in the directives, or the words used supported or solicited or invited support for such an organisation, the *voice* of the speaker must not be

heard; on the other hand the *words* of the speaker can be spoken by someone else, who may be a professional actor using the same local accent, intonation and emphasis as the original speaker used, while the viewers see on the screen that speaker, his facial expression and his gestures, if any. A true appreciation of exactly what the Home Secretary's directives involve makes nonsense of the statement, adduced in evidence before your Lordships, that interviews can no longer be shown on television and also of the wider claim that television reports of and discussions concerning negotiations with and the utterances and activities of members of the scheduled organisations and their supporters are now impossible. Indeed, the issue which seems to arise is whether the disadvantage of exposing the Government to the misrepresentations of its attitude of which your Lordships have seen examples may outweigh the advantage to be derived from the directives themselves.

Put thus (accurately, as applicants' counsel concede), the sole restriction is on transmitting the sound of the speaker's own voice. Therefore anything lost by either the broadcasters or the viewing public is, at best, only tenuously related to the freedoms in defence of which the present proceedings have been brought. My noble and learned friend, Lord Ackner, has drawn attention to the reasons for imposing this modest restriction which have been given by the Home Secretary and which, as McCowan L.J. has effectively pointed out, are not lacking in cogency. When, in addition, one has regard to the "political exception" and to the contrast between the present directives and the restrictions which have for 30 years existed in the Republic of Ireland, it is difficult to take seriously the applicants' description of the directives as the use of a sledgehammer to crack a nut.

Mr. Lester and his junior, Mr. Pannick, put the applicants' case with force and skill, presenting a variety of tests, as your Lordships have already noted, by which to judge the impugned directives. For my own part, I do not see how the modest invasion of liberties which has occurred in this case could fail to satisfy any of the criteria which have been suggested, including those criteria which, in point of law, I, in common with your Lordships, have found unacceptable.

I might be content to leave the matter thus, but what seems to me to give this case its importance is the variety and the potential effect of the legal weaponry which the applicants have deployed and the zeal with which the Secretary of State has met the assault, as if both parties were concerned to fight an impending battle in principle as well as the present one in practice.

Because they are of general importance, I will mention just two points, which are closely related, the test of unreasonableness in judicial review and the doctrine of proportionality.

The kind of unreasonableness for which a court can set aside an administrative act or decision is popularly called "*Wednesbury* unreasonableness" from the name of the famous case reported at [1948] 1 K.B. 223 in which Lord Greene M.R. spoke, at p. 229, of a decision "so absurd that no sensible person could ever dream that it lay within the powers of the authority." In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014,

A 1026 Lord Denning M.R. referred to decisions "so wrong that no reasonable person could sensibly take that view." In *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410 Lord Diplock, having used irrationality as a synonym of *Wednesbury* unreasonableness, said that "it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be B decided could have arrived at it," while in *Reg. v. Secretary of State for the Environment, Ex parte Nottinghamshire County Council* [1986] A.C. 240, 247 Lord Scarman, when invited to examine the detail and consequences of guidance given by the Secretary of State, said:

> "Such an examination by a court would be justified only if a prima facie case were to be shown for holding that the Secretary of State C had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses."

These colourful statements emphasise the legal principle that judicial review of administrative action is a supervisory and not an appellate jurisdiction. I recall that in *Rex v. Nat Bell Liquors Ltd.* [1922] 2 A.C. D 128, 156 Lord Sumner, admittedly speaking of an attempted challenge to the validity of court proceedings, said that the superior court's jurisdiction was one "of supervision, not of review."

I believe that the subject is nowhere better discussed than by Sir William Wade in chapter 12, "Abuse of Discretion," of his authoritative textbook, *Administrative Law*, 6th ed. (1988), pp. 388–462. The author, E with the aid of examples covering more than a century, clearly demonstrates that what we are accustomed to call *Wednesbury* unreasonableness is a branch of the abuse, or misuse, of power: the court's duty is not to interfere with a discretion which Parliament has entrusted to a statutory body or an individual but to maintain a check on excesses in the exercise of discretion. That is why it is not enough if a judge feels able to say, like a juror or like a dissenting member of the F Cabinet or fellow-councillor, "I think that is unreasonable; that is not what I would have done." It also explains the emphatic language which judges have used in order to drive home the message and the necessity, as judges have seen it, for the act to be so unreasonable that no reasonable minister etc. would have done it. In that strong, and necessary, emphasis lies the danger. The seductive voice of counsel will G suggest (I am not thinking specifically of the present case) that, for example, ministers, who are far from irrational and indeed are reasonable people, may occasionally be guilty of an abuse of power by going too far. And then the court is in danger of turning its back not only on the vigorous language but on the principles which it was intended to support. A less emotive but, subject to one qualification, reliable test is to ask, "*Could* a decision-maker acting reasonably have reached this H decision?" The qualification is that the supervising court must bear in mind that it is not sitting on appeal, but satisfying itself as to whether the decision-maker has acted within the bounds of his discretion. For that reason it is fallacious for those seeking to quash administrative acts

and decisions to call in aid decisions of a Court of Appeal reversing a judge's finding, it may be on a question of what is reasonable. To say what is reasonable was the judge's task in the first place and the duty of the Court of Appeal, after giving due weight to the judge's opinion, is to say whether they agree with him. In judicial review, on the other hand, the task of the High Court is as described above, and the task of the Court of Appeal and, when necessary, this House is to decide whether the High Court has correctly exercised its *supervisory* jurisdiction.

Of course, whichever kind of jurisdiction is being exercised on the subject of reasonableness, there is bound to be a subjective element in the decision. There is no objective standard in either case which would allow the result to be foretold with certainty. The first requirement, however, is to ask the right question.

The applicants have relied on the doctrine of proportionality. That is, in one sense of the word, a deeply rooted and well understood idea in English law. In a claim for damages for personal injuries suffered by a workman allegedly through his employer's negligent system of work the court has to weigh the risk of an accident, the likely severity of the consequences, the expense and difficulty of taking precautions and the resources of the employer with a view to deciding whether the employer failed to take reasonable care for the safety of the workman. In another field, as counsel once contended in *Reg. v. Secretary of State for Transport, Ex parte Pegasus Holdings (London) Ltd.* [1988] 1 W.L.R. 990, 1001, reliance on proportionality is simply a way of approaching the *Wednesbury* formula: was the administrative act or decision *so much* out of proportion to the needs of the situation as to be "unreasonable" in the *Wednesbury* sense?

Mr. Lester, however, frankly relied on proportionality, a well known concept of European law, as a doctrine calculated to advance his cause further than *Wednesbury* unreasonableness, but conceded that there was a clear distinction between an appeal on the merits and a review based on the principle of proportionality. Mr. Pannick equally frankly drew the same distinction and posed the test, "Could the minister reasonably conclude that his direction was necessary?" Here, of course, one comes back to the word "reasonably." I shall try to avoid repeating what has been said by my noble and learned friend, Lord Ackner, who has already referred to such phrases as "margin of appreciation" and "pressing social need."

In my opinion proportionality and the other phrases are simply intended to move the focus of discussion away from the hitherto accepted criteria for deciding whether the decision-maker has abused his power and into an area in which the court will feel more at liberty to interfere.

The first observation I would make is that there is *no* authority for saying that proportionality in the sense in which the appellants have used it is part of the English common law and a great deal of authority the other way. This, so far as I am concerned, is not a cause for regret for several reasons: 1. The decision-makers, very often elected, are those to whom Parliament has entrusted the discretion and to interfere with that discretion beyond the limits as hitherto defined would itself be

an abuse of the judges' supervisory jurisdiction. 2. The judges are not, generally speaking, equipped by training or experience, or furnished with the requisite knowledge and advice, to decide the answer to an administrative problem where the scales are evenly balanced, but they have a much better chance of reaching the right answer where the question is put in a *Wednesbury* form. The same applies if the judges' decision is appealed. 3. Stability and relative certainty would be jeopardised if the new doctrine held sway, because there is nearly always something to be said against any administrative decision and parties who felt aggrieved would be even more likely than at present to try their luck with a judicial review application both at first instance and on appeal. 4. The increase in applications for judicial review of administrative action (inevitable if the threshold of unreasonableness is lowered) will lead to the expenditure of time and money by litigants, not to speak of the prolongation of uncertainty for all concerned with the decisions in question, and the taking up of court time which could otherwise be devoted to other matters. The losers in this respect will be members of the public, for whom the courts provide a service.

*Halsbury's Laws of England*, 4th ed., vol. 1(1) reissue (1989), recognises proportionality in the context of administrative law as follows, at p. 144:

> "78. Proportionality. The courts will quash exercises of discretionary powers in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground of review in English law, but is regarded as one indication of manifest unreasonableness."

(The High Court's decision in the instant case is cited in the copious footnotes to this paragraph as the authority for the concluding statement.)

It finally occurs to me that there can be very little room for judges to operate an independent judicial review proportionality doctrine in the space which is left between the conventional judicial review doctrine and the admittedly forbidden appellate approach. To introduce an intermediate area of deliberation for the court seems scarcely a practical idea, quite apart from the other disadvantages by which, in my opinion, such a course would be attended.

*Appeal dismissed with costs.*

*Solicitors: Stephens Innocent; Treasury Solicitor.*

M. G.

# Judgment of the Court (Second Chamber), 15†May 2014. T.C.†Briels and Others v Minister van Infrastructuur en Milieu. Request for a preliminary ruling from the Raad van State (Netherlands). Environment — Directive 92/43/EEC — Article†6(3) and (4) — Conservation of natural habitats — Special areas of conservation — Assessment of the implications for a protected site of a plan or project — Authorisation for a plan or project on a protected site — Compensatory measures — Natura 2000 site Vlijmens Ven, Moerputten & Bossche Broek — Project on the route of the A2 ’s-Hertogenbosch-Eindhoven motorway. Case C-521/12.

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JUDGMENT OF THE COURT (Second Chamber)

15†May 2014†(*1)

'Environment — Directive 92/43/EEC — Article†6(3) and†(4) — Conservation of natural habitats — Special areas of conservation — Assessment of the implications for a protected site of a plan or project — Authorisation for a plan or project on a protected site — Compensatory measures — Natura 2000 site Vlijmens Ven, Moerputten & Bossche Broek — Project on the route of the A2 ’s-Hertogenbosch-Eindhoven motorway'

In Case C-521/12,

REQUEST for a preliminary ruling under Article†267 TFEU from the Raad van State (Netherlands), made by decision of 7†November 2012, received at the Court on 19†November 2012, in the proceedings

**T.C. Briels and Others,**

v

**Minister van Infrastructuur en Milieu,**

THE COURT (Second Chamber),

composed of R.†Silva de Lapuerta, President of the Chamber, J.L.†da†Cruz VilaÁa, G. Arestis (Rapporteur), J.-C.†Bonichot and A.†Arabadjiev, Judges,

Advocate General: E.†Sharpston,

Registrar: M.†Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11†December 2013,

after considering the observations submitted on behalf of:
— Stichting Reinier van Arkel and Stichting Overlast A2 Vught and Others, by L.†Bier, advocaat,
— the Netherlands Government, by J.†Langer and M.K.†Bulterman, acting as Agents,

— the United Kingdom Government, by S.†Brighouse, acting as Agent, assisted by E.†Dixon, Barrister,
— the European Commission, by E.†Manhaeve and L.†Banciella RodrÌguez-MiÒÛn and by S.†Petrova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27†February 2014,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article†6(3) and†(4) of Council Directive 92/43/EEC of 21†May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L†206, p.†7) ('the Habitats Directive').

2 The request has been made in proceedings between T.C.†Briels and Others and the Minister van Infrastructuur en Milieu (Minister for Infrastructure and the Environment, 'the Minister') concerning the project for widening the A2 's-Hertogenbosch-Eindhoven motorway (together, 'the A2 motorway project').

**Legal context**

*European Union law*

3 Article†1 of the Habitats Directive provides:

'For the purpose of this Directive:

…

(e)conservation status of a natural habitat means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article†2.The conservation status of a natural habitat will be taken as "favourable" when:

—its natural range and areas it covers within that range are stable or increasing, and—the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and…

(k)site of Community importance ["SCI"] means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex†I or of a species in Annex†II and may also contribute significantly to the coherence of Natura 2000 referred to in Article†3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.…

(l)special area of conservation ["SAC"] means [an SCI] designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated;…'

4 Article†3(1) of Directive 2004/113 provides:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex†I and habitats of the species listed in Annex†II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

…'

5 Article†6 of the Habitats Directive 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†I 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 thereon, either individually or in combination with other plans or pro-

jects, 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.

4.†††If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

*Netherlands law*

6 Article†19g of the Natuurbeschermingswet 1998 (Nature Conservation Law 1998), as applicable to the facts of the main proceedings ('the 1998 Law'), provides:

'1.†††If an appropriate assessment is prescribed under Article†19f(1),†the authorisation referred to in Article†19d(1) may be issued only if the provincial governments have ascertained, on the basis of the appropriate assessment, that the integrity of the site will not be affected.

2.†††By way of derogation from paragraph†1, if there are no alternative solutions to a project, the provincial governments may issue, for Natura 2000 sites which do not host any priority natural habitats or priority species, the authorisation referred to in Article†19d(1) for the purpose of carrying out the project in question only for imperative reasons of overriding public interest, including those of a social or economic nature.

3.†††By way of derogation from paragraph†1, if there are no alternative solutions to a project or other initiative, the provincial governments may issue, for Natura 2000 sites which host priority natural habitats or priority species, an authorisation as referred to in Article†19d(1) for the completion of the project in question, only:

(a)on the basis of considerations relating to human health, public safety or essential beneficial consequences for the environment, or(b)further to an opinion from the Commission to other imperative for other reasons of overriding public interest.4.†††The opinion referred to in paragraph†3(b) shall be sought by the Minister.'

7 Article†19h of the 1998 Law reads:

'1.†††If an authorisation referred to in Article†19d(1) is issued for imperative reasons of overriding public interest, for the purpose of carrying out projects in connection with which it has not been ascertained that they do not adversely affect the integrity of a Natura 2000 site, the provincial governments shall in any event make that authorisation subject to the obligation to take compensatory measures.

2.†††The provincial governments shall give the proponent of the project a suitable opportunity to put forward proposals for compensatory measures.

3.†††The proposals for compensatory measures referred to in paragraph†2 shall in any event set out the methods of implementation and time frame for the compensatory measures.

4.†††If compensatory measures are imposed for the purposes of the objectives referred to in Article†10a(2)(a) or†(b), the result sought by those measures must have been achieved when the significant effect referred to in Article†19f(1) occurs, unless it can be demonstrated that that time-limit is not necessary in order to guarantee the contribution of the site concerned to Natura 2000.

5.†††The Minister shall, in collaboration with the other Ministers, fix by ministerial order any additional conditions to be satisfied by the compensatory measures.'

8 Article†19j of the 1998 Law provides:

'1.†††When it decides to draw up a plan which, in the light of the conservation objective for a Natura 2000 site, save for the objectives referred to in Article†10a(3), is liable to have a deteriorative effect on the quality of natural habitats and habitats of species in that site or cause a significant disturbance to the species for which that site was designated, the administrative body shall, irrespective of which restrictions are imposed in the field by the legislation on which it bases itself, take into account:

(a)effects which the plan may have on the site, and(b)the management plan drawn up for that site

pursuant to Article†19a or†19b, in so far as it relates to the conservation objective save for the objectives referred to in Article†10a(3).2.†††For plans referred to in paragraph†1 which are project not directly connected with or necessary to the management of a Natura 2000 site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, the administrative body shall, before drawing up the plan, make an appropriate assessment of its implications for the site in view of the site's conservation objectives, save for the objectives referred to in Article†10a(3).
3.†††In the cases referred to in paragraph†2, the decision referred to in paragraph†1 shall be adopted only if the conditions laid down in Articles†19g and†19h are satisfied.
4.†††The appropriate assessment of those plans shall form an integral part of the environmental impact assessments prescribed for those plans.
…'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

9 The order for reference indicates that on 6†June 2011 the Minister adopted an order relating to the A2 motorway project concerning, inter alia, the widening of that motorway.

10 That project affects the Natura 2000 site Vlijmens Ven, Moerputten & Bossche Broek ('the Natura 2000 site'). That site was designated by the Netherlands authorities as an SAC for, in particular, the natural habitat type molinia meadows, which is a non-priority habitat type.

11 By further order of 25†January 2012, the Minister provided for a certain number of measures aimed at lessening the environmental impact of the A2 motorway project.

12 An initial 'Test nature A' was carried out in order to assess the negative environmental impact of the A2 motorway project on the Natura 2000 site in question. That assessment concluded that the possibility of significant adverse effects for the site's protected habitat types and species due to nitrogen deposits could not be ruled out and that it was necessary to conduct an appropriate assessment on that point. A second 'Test nature B' concluded that the A2 motorway project would have negative implications for the existing area comprising the habitat type molinia meadows. In Moerputten, 6.7 hectares of molinia meadows would be affected due to drying out and acidification of the earth. That assessment also stated that in Bossche Broek adverse effects from increased nitrogen deposits could not be ruled as a result of the widening of the motorway. The A2 motorway project would also lead to a temporary increase in nitrogen deposits in Vlijmens Ven, although it would not prevent an extension of the molinia meadows within that area. That assessment also stated that sustainable conservation and development of the molinia meadows be achieved if the hydrological system was completed.

13 In that regard the A2 motorway project provides for improvements to the hydrological situation in Vlijmens Ven, which will allow the molinia meadows to expand on the site. The Minister states that this will allow for the development of a larger area of molinia meadows of higher quality, thereby ensuring that the conservation objectives for this habitat type are maintained through the creation of new molinia meadows.

14 Briels and Others brought an action against the two ministerial orders before the referring court. They take the view that the Minister could not lawfully adopt the orders for the A2 motorway project, given the negative implications of the widening of the A2 motorway for the Natura 2000 site in question.

15 Briels and Others state that the development of new molinia meadows on the site, as provided for by the ministerial orders at issue in the main proceedings, could not be taken into account in the determination of whether the site's integrity was affected. The claimants in the main proceedings submit that such a measure cannot be categorised as a 'mitigating measure', a concept which is, moreover, absent from the Habitats Directive.

16 The Raad van State (Council of State) states that it follows from the Minister's standpoint that, where a project has negative implications for the area of a protected natural habitat type within a Natura 2000 site, it is necessary, in the assessment of whether the integrity of the site is affected, to take account of the creation of an area of equal or greater size to the existing area within the same site, in a place where that habitat type will not suffer the negative effects of the project in question. The Council of State takes the view, however, that the criteria for determining whether the integrity of the site concerned is affected are not to be found either in the Habitats Directive or the Court's case-law.

17 In those circumstances, the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:'1.Is the expression "will not adversely affect the integrity of the site" in Article†6(3) of [the Habitats Directive] to be interpreted in such a way that, where the project affects the area of a protected natural habitat type within [a Natura 2000 site], the

integrity of the site is not adversely affected if in the framework of the project an area of that natural habitat type of equal or greater size [to the existing area] is created within that site?2.[If not], is the creation of a new area of a natural habitat type then to be regarded in that case as a “compensatory measure” within the meaning of Article†6(4) of the [Habitats Directive]?’

**Consideration of the questions referred**

18 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article†6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of an SCI, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site and, if so, whether such measures may be categorised as ‘compensatory measures’ within the meaning of Article†6(4) thereof.

19 In paragraph†32 of its judgment in Case C-258/11 *Sweetman and Others*EU:C:2013:220, the Court held that the provisions of Article†6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Indeed, Article†6(2) and Article†6(3) are designed to ensure the same level of protection of natural habitats and habitats of species, whilst Article†6(4) merely derogates from the second sentence of Article†6(3).

20 The Court added that, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site’s conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project (*Sweetman and Others*EU:C:2013:220, paragraph†30).

21 The Court thus held that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article†6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive (*Sweetman and Others*EU:C:2013:220, paragraph†39).

22 In the main proceedings, it is common ground that the Natura 2000 site in question was designated by the Commission as an SCI and by the Kingdom of the Netherlands as an SAC, owing to the presence of inter alia the natural habitat type molinia meadows, the conservation objective of which consists in expansion of the area of that habitat and improvement in the quality thereof.

23 The case file submitted to the Court also indicates that the A2 motorway project will have significant adverse effects for the site’s protected habitat types and species and, in particular, for the existing area and for the quality of the protected natural habitat type molinia meadows, due to drying out and acidification of the earth caused by increases in nitrogen deposits.

24 Such a project is liable to compromise the lasting preservation of the constitutive characteristics of the Natura 2000 site in question and, consequently, as observed by the Advocate General in point†41 of her Opinion, adversely affect the integrity of the site within the meaning of Article†6(3) of the Habitats Directive.

25 Contrary to the position put forward by the Netherlands Government, in which it was supported by the United Kingdom Government, the protective measures provided for in the A2 motorway project do not cast doubt on the above assessment.

26 It is to be noted first of all that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article†6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (Case C-127/02 *Waddenvereniging et Vogelbeschermingsvereniging*EU:C:2004:482, paragraphs†57 and†58, and *Sweetman and Others*EU:C:2013:220, paragraph†41).

27 The assessment carried out under Article†6(3) of the Habitats Directive cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see,

to that effect, *Sweetman and Others*EU:C:2013:220, paragraph†44 and the case-law cited).

28 Consequently, the application of the precautionary principle in the context of the implementation of Article†6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for the Natura 2000 site concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.

29 However, protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in Article†6(3).

30 This is the case of the measures at issue in the main proceedings which, in a situation where the competent national authority has in fact found that the A2 motorway project is liable to have – potentially permanent – adverse effects on the protected habitat type on the Natura 2000 site concerned, provide for the future creation of an area of equal or greater size of that habitat type in another part of the site which will not be directly affected by the project.

31 It is clear that these measures are not aimed either at avoiding or reducing the significant adverse effects for that habitat type caused by the A2 motorway project; rather, they tend to compensate after the fact for those effects. They do not guarantee that the project will not adversely affect the integrity of the site within the meaning of Article†6(3) of the Habitats Directive.

32 It should further be noted that, as a rule, any positive effects of a future creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even where the new area will be bigger and of higher quality, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future, a point made in paragraph†87 of the order for reference. Consequently, they cannot be taken into account at the procedural stage provided for in Article†6(3) of the Habitats Directive.

33 Secondly, as rightly pointed out by the Commission in its written observations, the effectiveness of the protective measures provided for in Article†6 of the Habitats Directive is intended to avoid a situation where competent national authorities allow so-called 'mitigating' measures – which are in reality compensatory measures – in order to circumvent the specific procedures provided for in Article†6(3) and authorise projects which adversely affect the integrity of the site concerned.

34 It is only if, in spite of a negative assessment carried out in accordance with the first sentence of Article†6(3) of the Habitats Directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, that Article†6(4) of the Habitats Directive provides that the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (see Case C-304/05 *Commission* v *Italy*EU:C:2007:532, paragraph†81; Case C-182/10 *Solvay and Others*EU:C:2012:82, paragraph†72; and *Sweetman and Others*EU:C:2013:220, paragraph†34).

35 As an exception to the authorisation criterion laid down in the second sentence of Article†6(3) of the Habitats Directive, Article†6(4) can apply only after the implications of a plan or project have been analysed in accordance with Article†6(3) (Case C-239/04 *Commission* v *Portugal*EU:C:2006:665, paragraph†35, and *Sweetman and Others*EU:C:2013:220, paragraph†35).

36 Knowledge of those implications in the light of the conservation objectives relating to the site concerned is a necessary prerequisite for application of Article†6(4) since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (Case C-404/09 *Commission* v *Spain*EU:C:2011:768, paragraph†109).

37 In such a situation, the competent national authority can, where appropriate, grant authorisation under Article†6(4) of the Habitats Directive, provided that the conditions set out therein are satisfied (see, to that effect, *Sweetman and Others*EU:C:2013:220, paragraph†47).

38 It should be observed in that regard that, in the application of Article†6(4), the fact that the measures envisaged have been implemented on the Natura 2000 site concerned has no bearing on any 'compensatory' measures for the purposes of that provision. For the reasons set out by the Advocate Gen-

eral in point†46 of her Opinion, Article†6(4) of the Habitats Directive covers any measure liable to protect the overall coherence of Natura 2000, whether it is implemented within the affected site or in another part of the Natura 2000 network.

39 Consequently, it follows from the foregoing considerations that Article†6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site of Community importance, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site. Such measures can be categorised as 'compensatory measures' within the meaning of Article†6(4) only if the conditions laid down therein are satisfied.

**Costs**

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

**Article†6(3) of Council Directive 92/43/EEC of 21†May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site of Community importance, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site. Such measures can be categorised as 'compensatory measures' within the meaning of Article†6(4) only if the conditions laid down therein are satisfied.**

[Signatures]

*1

()Language of the case: Dutch.

| | |
|---|---|
| Authentic language: | Dutch |
| Author: | Court of Justice |
| Country or organisation from which the decision originates: | Netherlands |
| Type of procedure: | Reference for a preliminary ruling |
| Observers: | Netherlands |
| Observers: | European Commission |
| Observers: | United Kingdom |
| Advocate General: | Sharpston |
| Cites: | 62005CJ0304 - N 34 |
| Cites: | 62012CC0521 - N 24 38 |
| Cites: | 62002CJ0127 - N 26 |
| Cites: | 31992L0043 - N 1 5 17 - 21 24 - 35 39 |
| Cites: | 62009CJ0404 - N 36 |
| Cites: | 62010CJ0182 - N 34 |
| Cites: | 62011CJ0258 - N 19 - 21 26 27 34 35 37 |
| Cites: | 62004CJ0239 - N 35 |

**Subject matter:**

Environment

Judgments

**QBD, ADMINISTRATIVE COURT**

**Neutral Citation Number: [2014] EWHC 1523 (Admin)**

**Case No: (1) CO/6059/2013**
**(2) CO/6180/2013**
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**Royal Courts of Justice**
**Strand, London, WC2A 2LL**

**Date: Friday 16th May 2014**

**Before :**

**MR JUSTICE OUSELEY**

**- - - - - - - - - - - - - - - - - - -**

**Between :**

| | |
|---|---|
| **(1)†††† THE ROYAL SOCIETY FOR THE PROTECTION OF BIRDS**<br>**(2)†††† LYDD AIRPORT ACTION GROUP** | **Claimant in CO/6059/2013**<br>**Claimant in CO/6180/2013** |
| **- and -**<br>**THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT** | **First Defendant** |
| **SECRETARY OF STATE FOR TRANSPORT** | **Second Defend-ant** |
| **LONDON ASHFORD AIRPORT LIMITED** | **Fourth Defendant and First Interested Party** |
| **SHEPWAY DISTRICT COUNCIL** | **Third Defendant and Second Interested Party** |

**(Transcript of the Handed Down Judgment of**

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**Official Shorthand Writers to the Court)**

**(1)†††† Mr Timothy Mould QC and Mr Richard Moules (instructed by The RSPB Solicitor for the Claimant in CO/6059/2013**

**(2) Mr Matthew Horton QC (instructed by LSR Solicitors and Planning Consultants) on behalf of Lydd Airport Action Group for the Claimant in CO/6180/2013**

**Mr Jonathan Swift QC and Ms Lisa Busch (instructed by Treasury Solicitors) for the First Two Defendants**

**Mr Peter Village QC and Mr James Strachan QC (instructed by Pinsent Masons Solicitors) for London Ashford Airport Limited**

**Shepway District Council did not appear**

**Hearing dates: 21st, 22nd, 23rd & 24th January 2014**

**Judgment**

**As Approved by the Court**



MR JUSTICE OUSELEY :

1.†††† There are two separate applications under s288 of the Town and Country Planning Act 1990, each challenging the decision of 10 April 2013 by the Secretary of State for Communities and Local Government and the Secretary of State for Transport to grant permission for the extension of the north/south runway at London Ashford Airport at Lydd, Kent, with a limit by condition on annual aeroplane movements of 40000, and for a passenger terminal with a capacity limited by condition to handling 500,000 passengers per annum. In doing so, the Secretaries of State accepted the recommendations of the Inspector who had held a 42 day Public Inquiry in 2011 at which the two Claimants before this Court had appeared. Both challenge the grant of permission for the runway extension. Their grounds are essentially unconnected.

2.†††† As there is no real overlap between the two applications, I shall consider them separately after setting the scene.

Background

3.†††† Lydd Airport has been operational since the 1950s. Its north/south runway can be used for landings and take-offs in each direction, though not by all aircraft. The 1954 terminal building accommodated over 250,000 passengers per annum, ppa, in the 1960s, and has the capacity to handle 300,000. It is licensed by the CAA, and can operate 7 days a week for 24 hours a day, although at present the actual operation involves few flights at or around dawn or dusk, limiting the need for on-site bird control activity. Flight numbers have fluctuated over time. The airport still operates a scheduled passenger service to Le Touquet, though the numbers of passengers had dropped to a few hundred by 2009. It is used by business jets, general aviation, helicopters and a flying school. There are now some 22000 aircraft movements a year,

mostly general aviation; 99% were by aircraft lighter than 5,700kg. Fewer than 2 a day involve heavier aircraft, and many of those are empty positioning flights.

4.†††† The Inspector described the site as in a sensitive location. It is the only airport in the UK within 5km of a nuclear power station, and within 2.5km of a military danger area. The relationship to the nuclear power stations and other hazards and to the Special Areas of Conservation and Special Protection Areas is set out in paragraphs 2.3 and 2.4 of his report, IR:

"Dungeness Nuclear Power Stations A and B lie some 5km to the south of the Airport. Dungeness A was closed in December 2006 and is being decommissioned whilst Dungeness B is scheduled to begin decommissioning in 2018. A restricted flying area, extending to a height of 2,000 feet (ft), restricts all aerial activities for a 2 nautical mile (nm) radius around the power stations. Traffic arriving and departing from the Airport has an exemption reducing the restricted area to a 1.5nm radius. In addition, Lydd military firing range danger area is located approximately 2.3km to the west, extending to a height of 4,000ft, and the Hythe military firing range danger area lies some 10km to the north, extending to a height of 3,200ft.

The Dungeness SAC lies to the east of the existing runway and the paved area of the proposed runway extension would include 0.23 hectare, some 0.007%, of the overall SAC. The Dungeness to Pett Level SPA is located approximately 750m east and 500m south of the existing runway. An extension to the SPA is proposed which would result in the boundary of the SPA being closer to the Airport but the proposals would not use any land within the SPA or the pSPA. Natural England (NE) is consulting on a proposed Ramsar site but again the applications would not use any land within the pRamsar. The Dungeness SSSI lies to the east of the existing runway and the proposed runway extension would include 1.62 hectares around 0.018%, of the whole SSSI. The Dungeness National Nature Reserve (NNR), including an RSPB Reserve that falls within the SPA, pSPA (in part), SAC, pRamsar, SSSI and NNR, lies around 2m from the south-eastern boundary of the Airport. The RSPB Reserve is in the region of 320m from the existing runway at its nearest point".

5.†††† Planning permission had been granted in 1992, following an Inquiry in 1988, for a runway extension similar in direction and dimension to the one currently proposed, with a cap of 56000 on movements rather than the 40000 suggested in this application, and with generally slightly longer early morning operating hours than now proposed. The Inspector contrasted the position accepted in 1992 with that now proposed in paragraph 14.6.10:

"14.6.10 …Indeed, modern aircraft are quieter than those considered then. The exclusion zone around the power stations, with the exception of direct overflying at less than 2,000ft, was not introduced until 2001 and aircraft could take off and turn left over the Reserve, the pSPA and the pRamsar. Indeed, in 1992 6,000 movements by aircraft over 5,700kg could use FP D4 over the Reserve. This contrasts with the current proposals where only some 3,600 movements of larger aircraft are now contemplated and most would fly north over Lydd due to the Ranges being in use. Moreover, LAA is prepared to accept a condition preventing any jets taking off and flying south over the Reserve and designated sites even when the Range is closed if it is considered necessary".

6.†††† At the time of that Inquiry, the airport had operated at higher levels than now: 38900 aircraft movements in 1978, 60900 in 1979, and 19400 in 1987. Passenger numbers had fallen away over the years as well.

7.†††† The RSPB and Natural England, NE, had objected, pursuing what the Inspector described as an objection "similar to that made now"; IR 14.6.12. It was made on "scientific evidence not materially different to that relied on now"; IR 14.6.12. Bird scaring would have been then and would continue to be part of the operations at the airport; 14.6.13. The pRamsar site existed, the SPA was then a pSPA treated as if a designated SPA. The SSSI and RSPB Reserve existed in 1988.

8.†††† In 1997, the permission was renewed. Neither NE nor the RSPB objected, a stance not adopted because the application was for a renewal of the earlier permission; London Ashford Airport Limited, LAA, in return did not pursue its safeguarding objection to the proposed SPA. The SAC, SPA, pSPA and pRamsar designations were in place by then.

9.†††† The current proposal envisaged around 18 scheduled movements by larger aircraft, over 5700kg, a day, compared to one every three days experienced in 2009. Normal operating hours would be between 7am and 11pm.

10.†††† The 274 page report by the Inspector indicates the range of issues covered during the Inquiry in 2011 to consider the application which was called-in for determination by the Secretaries of State, before Shepway District Council could grant the permissions, as it was minded to do.

The RSPB challenge

11.†††† The Royal Society for the Protection of Birds, RSPB, a charity incorporated by Royal Charter, contends that the decision is unlawful because the evidence before the Inspector could not lawfully have satisfied him that no appropriate assessment was needed of the effect of the runway extension on various sites protected under the Habitats Directive; as the Inspector's conclusions were accepted by the Secretaries of State, their decision was flawed. Natural England, the statutory body with primary responsibility for giving advice to Government about these sites and species, and which gave evidence with the RSPB at the Inquiry in opposition to the proposals, is not party to the challenge.

12.†††† The RSPB raised two issues at the Inquiry: disturbance to birds from aviation activity, that is essentially disturbance caused by the noise from aircraft flying over the areas protected for their significance for birds, and disturbance to birds off the airport from bird control measures to be undertaken both on and off the airport. The RSPB was unsuccessful in its arguments on both points. However, it is to the latter point, disturbance from bird control measures, that the challenge is directed, although the Inspector's conclusions on the former cannot be wholly ignored. The concern is not with the marginal extension of the runway into the SAC.

13.†††† In judging whether or not to grant planning permission, the impact of the disturbance which bird control measures may have on the RSPB Reserve, the SSSI and the NNR, and on the birds that frequent them, is a material consideration. It is to be weighed in the light of the evidence, any relevant policies, and other material considerations as part of the overall planning judgment.

14.†††† These sites overlap to a considerable extent with the SPA, proposed extension to the SPA, (pSPA), SAC and proposed Ramsar, (pRamsar), sites as paragraph 2.4 IR states. However, in judging the effect on the SPA and SAC, a different approach is required, since they are European sites subject to the requirements of the European Council Directive on Wild Birds, 79/409/EEC and the Habitats Directive 92/43/EEC which amended it. These Directives have been transposed into domestic law by the Conservation of Habitats and Species Regulations 2010 SI No. 490, CHSR. As there is no dispute but that the Directives have been correctly transposed, I shall refer to the Regulations. The Regulations do not apply to pSPAs or to pRamsar sites. The Government's policy, however, is to treat such sites as if they were already designated and to apply to them the same legal framework as to a designated SAC or SPA.

15.†††† There is a further area of land of some considerable extent, but never defined on a map at the Inquiry, known to the Inquiry, at least, as Functionally Linked Land, FLL. The Inspector described it in this way at paragraph 14.6.4 IR, accepting the evidence of Natural England and the RSPB:

**"**The SPA and pSPA consist largely of waterbodies used for roosting and so land outside, but functionally linked to, the designated sites is also important. Arable and grassland fields adjacent to the Airport, to the north-west, west and south-west of it, and to the west and north-west of Lydd provide feeding areas for concentrations of designated species. Without this land outside the designated sites the range of species and assemblages for which the sites are designated might not be there".

16.†††† As the RSPB's case evolved before me, it was the effect on the FLL from measures taken within the airport site, and thus indirectly the effect on the protected sites, their bird population and its well being, which lay at the heart of the dispute about the effect of bird control measures. The RSPB was also concerned about off-site measures, which could also take place in the FLL.

The Conservation of Habitats and Species Regulations

17.†††† Regulation 3 defines "European sites". Regulation 61 is the most important as it sets out the process whereby the effect of projects on designated sites is to be assessed:

"61. Assessment of implications for European sites and European offshore marine 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 or a European offshore marine 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 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 the 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 or the European offshore marine site (as the case may be)".

18.†††† The question before the Inquiry was whether the plan or project was "likely to have a significant effect" on a European site so that an appropriate assessment was necessary. LAA did not contend that permission could be granted on the basis of "imperative reasons of overriding public interest", IROPI, its given

acronym, if the outcome of an appropriate assessment was that the plan or project would adversely affect the integrity of a European site.

19.†††† The Birds Directive 2009/147/EC Article 4 requires special conservation measures to be taken concerning habitats to ensure the survival and reproduction of species of birds; and outside those areas, States should strive to avoid deterioration of habitats.

20.†††† CJEU jurisprudence on the transposed Directives is relevant to the construction of the Regulations. A broad and purposive interpretation is called for. More specifically, in *Landelijke Vereniging tot Behoud van de Waddenzee and Another v Staatssecretaris van Landbouw* [2004] ECR I-7405 *"Waddenzee"*, it enunciated its precautionary interpretation of what made a plan or project "likely to have a significant effect" in this way in paragraph 44:

"…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 1-2265, 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".

21.†††† Its most recent decision is its Third Chamber decision in *Sweetman v An Bord Pleanala* Case C 258/11, 11 April 2013. A project would be likely to have a significant effect if it is "likely to undermine the site's conservation objectives"; paragraph 30. That reflects the language of Regulation 61(1). The procedures are designed to maintain designated habitats and species "at a favourable conservation status"; paragraph 36.

22.†††† A risk of lasting harm to the ecological characteristics of sites cannot be authorised; paragraph 43. An appropriate assessment, paragraph 44, "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site…It is for the national court to establish whether the assessment of the implications for the site meets these requirements". It is sufficient if the national court does that on conventional judicial review grounds, including rationality. The UK Courts have also commented on the nature of what must be shown for an appropriate assessment to be required. "Merely expressing doubt without providing reasonable objective evidence for doing so is not sufficient"; Sullivan J in *R(Hart DC) v SSCLG* [2008] EWHC 1204 (Admin),paragraph 81. There must be "credible evidence" of a "real, rather than a hypothetical, risk"; *R (Boggis) v Waveney DC* [2009] EWCA Civ 1061; Sullivan LJ, paragraph 37. Moore-Bick LJ at paragraph 17 of *R (Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157 commented obiter, but in the same vein, that what was probably required was more than a "bare possibility" though any "serious possibility" would suffice.

23.†††† Regulation 61(6) recognises that planning conditions can play a part in defining the plan or project, limiting its effects. They are relevant to the judgment of whether an appropriate assessment is required. The same applies to the provisions of a s106 agreement; *Feeney v Secretary of State for Transport* [2013] EWHC 1238(Admin) [2013] Env LR 34 illustrates this at paragraphs 44-47.

24.†††† There is no particular format or procedure required for the undertaking of an appropriate assessment.

25.†††† Authorisation can only be given by a competent authority, here the Secretary of State, if the authorities:

"Once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 *Commission v Spain*, paragraph 99, and Case C-182/10 *Solvay and Others*, paragraph 67)".

26.†††† A project could adversely affect the integrity of a site, if it were "liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site…in accordance with the [Habitats] directive;" "*Sweetman*, paragraph 48". The conservation objectives for the European sites here were to maintain in favourable condition certain habitats, and habitats for the populations of certain species of bird. A conservation status is "favourable" when the natural range and area covered by a habitat is stable or increasing and the specific functions and structure necessary for its long term maintenance exist and are likely to exist for the foreseeable future. "Maintain" meant "restore" if the condition was not favourable. The table of targets for bird species of European importance here uses phrases such as "No significant displacement" due to human disturbance in roosting and feeding areas.

27.†††† There is no authority on the significance of the non-statutory status of the FLL. However, the fact that the FLL was not within a protected site does not mean that the effect which a deterioration in its quality or function could have on a protected site is to be ignored. The indirect effect was still protected. Although the question of its legal status was mooted, I am satisfied, as was the case at the Inquiry, that while no particular legal status attaches to FLL, the fact that land is functionally linked to protected land means that the indirectly adverse effects on a protected site, produced by effects on FLL, are scrutinised in the same legal framework just as are the direct effects of acts carried out on the protected site itself. That is the only sensible and purposive approach where a species or effect is not confined by a line on a map or boundary fence. This is particularly important where the boundaries of designated sites are drawn tightly as may be the UK practice.

The Issue at the Inquiry

28.†††† There was no issue before the Inspector as to the approach required in relation to the effect on the protected sites. There was no real issue about it before me, although there were degrees of emphasis and nuance. There is no issue but that the Inspector applied or attempted to apply the right approach. The RSPB contend that his factual conclusions and the state of knowledge of effects of the project should have led him to conclude that an appropriate assessment was required. The Secretaries of State and LAA contend that he had sufficient evidence, and there was a great deal of evidence about the effect of the proposals on birds, to reach the conclusion that no appropriate assessment was required and that the points raised by the RSPB in the light of the evidence were no more than a "mere bare possibility". If that is a lawful conclusion, the challenge must fail.

29.†††† An appropriate assessment had been undertaken on behalf of Shepway DC, when it was the competent authority for deciding the planning applications, but that was not presented to the Inspector by LAA as sufficient for this purpose. Nor did LAA contend that the evidence which it had provided, extensive as it was, itself amounted to such an assessment. Its case was rather that the evidence which it had presented showed, to the required standard, that no appropriate assessment was required. That is the argument which the Inspector and Secretaries of State accepted.

30.†††† The issue related to the basis for and content of the Bird Control Management Plan, BCMP, to be produced by LAA for implementation in the event of planning permission being granted. It was in evidence

before the Inspector as a draft. The BCMP was based on the conclusions of a Bird Strike Risk Assessment produced by LAA to Shepway DC and available at the Inquiry.

31.†††† The draft BCMP included separate provision for on-airport measures and off-airport measures. The RSPB concern was not with the effect on birds on the airport but with the effect of on and off-airport measures on the land, principally FLL, and to a small extent designated sites, outside the airport boundaries.

32.†††† There is a very high number of birds in the area hazardous to aircraft. The BCMP's stated purpose was to reduce bird strike risk to acceptable levels, whilst "minimising disturbance to protected bird habitat near to the airport wherever possible". The seven elements of the draft BCMP, essentially on-site measures, included on-airport habitat management, continuous surveillance of the airfield and airspace above and immediately around it for hazardous concentrations of birds during operational hours, and active dispersal of birds from the airfield and its immediate environs by mobile patrols, broadcasting species-targeted distress calls or firing bird scaring cartridges to scare them away– this active dispersal was the controversial part, not as to the need for it but for the effect on-airport measures might have on birds off-airport.

33.†††† Paragraphs 12.4.1 and 12.4.2 of the draft BCMP explained this. LAA intended to create a 0.5km buffer zone around the airport perimeter, though the effects which would create the buffer would extend up to a distance of 1km from the perimeter.

"Bird detection and dispersal by mobile patrols is intended to prevent incursions of certain species into locations where they constitute a bird strike risk. The priority areas are the runway, its immediate environs and the approach and climb-out areas at either end of the runway.

In the context of current best practice, this will mean that day-to-day patrols and bird dispersal efforts will be prioritised within the airport boundary and the approach and climb-out areas (to ranges normally within 0.5 km of the perimeter fence), and, where possible, fields immediately adjacent to the airport perimeter fence. Action beyond the airport is normally only required when significant flocks of starlings or larger species are detected and there is a risk of incursions on to, or overflights of, the airport. Apart from starlings and occasional migrant or feeding flocks, small passerines are neither regarded as significantly hazardous nor controllable".

34.†††† Measures to deal with crossing waterfowl, principally swans and ducks, would be supported by visiting sites beyond the airport boundary to determine roosting and feeding sites and how they related to the use of the land. There might be some bird scaring at feeding sites away from the conservation sites, for example, on stubble fields north of the airport.

35.†††† Aerodrome safeguarding under statutory direction would aim to guard against new or increased hazards through increased numbers of waterfowl crossing over the airport, or the number of gulls settling on or in the immediate vicinity of the airport, or a new starling roost.

36.†††† Chapter 13 of the draft BCMP dealt with off-airfield bird control measures in this way at section 12.5.1:

"With the exception of the limited critical areas around the airport perimeter described above, no disturbance measures will routinely be carried out on sites beyond the airport boundary. However, there are possible exceptions if new large roosts of the following species – starling, rook, jackdaw or gulls (all spp.) become established and the behaviour of these birds brings them into regular conflict with aircraft movements at Lydd Airport. Similarly, if large numbers of hazardous birds are observed to be overflying the airport to concentrate at feeding sites nearby then disturbance or habitat management measures will be considered. These

measures will not involve lethal control, and will only take place after negotiation and agreement with the relevant landowner or tenant".

37.†††† The draft BCMP contained a note on the SPA, in chapter 14. Whilst all larger and flocking species should be deterred from the airfield, the BCMP was aimed at "minimising disturbance to these birds at their habitats". The summary said:

"15. Summary

The bird control programme at LAA Lydd Airport is designed to have a localised effect on certain key bird species - primarily gulls, grassland plovers, pigeons, corvids and starlings. This effect will be confined to the airport and a few hundred metres beyond the airport perimeter except in a few exceptional circumstances (as outlined above). We believe that the requirements of the airport to mitigate the birdstrike hazard can be handled with sensitivity to conservation concerns and will have no negative effect on bird populations in the wider area or species of conservation concern. In addition, the airport will provide enhanced habitat for a range of non-hazardous bird species (along with other fauna and flora) of conservation concern".

38.†††† Condition 2 on the runway extension permission required the development to be carried out in accordance with an approved BCMP. Clause 10 of the agreement between LAA and Shepway DC under s106 TCPA 1990 dated 26 September 2011, (but available and discussed during the Inquiry in its draft versions) dealt with the BCMP. It required LAA to submit the BCMP for approval to Shepway DC in consultation with Natural England and the RSPB before the runway extension was brought into operation. The BCMP had to contain details of the on-site measures essentially as already described above; paragraph 32. It had to submit details of any proposed off-site measures, with details as to the measures likely to be deployed, their duration, and their likely scope and location. Before any measures were put into effect, details of the actual as opposed to likely measures had to be provided to the Shepway DC and approved by it, again after consultation with Natural England and the RSPB. If a change in land use were proposed off-site, it had to be consistent with local agricultural practices or it had to have a conservation benefit to flora and fauna without increasing the risk of bird strike. The line between on and off-site is delineated on a plan which is part of the agreement. The line is not that of a 0.5km buffer, but is the application site red line plan plus certain other land as well, and reflects or is much closer to the airport operational land. A bird control measure undertaken in that land is an on-site measure even if it produces effects off-site.

39.†††† It was not at issue before the Inspector or before me but that the BCMP was part of the "plan or project" for the purposes of Regulation 61 CHSR, and so had to be taken into account in considering whether an "appropriate assessment" was required. It could be relevant as a means of reducing adverse effects or as a cause of adverse effects, or even both.

40.†††† There was an issue about the actual level of bird-scaring measures currently undertaken, and more so over what should be undertaken. The RSPB and Natural England contended that there was a low level of bird control, of no significance for the favourable condition of the designated sites but adequate for the level of aviation activity, whereas LAA contended that it ought to have been doing more and would do so. That was an issue for the Inspector.

The Inspector's Report

41.†††† Mr Mould referred to the expert evidence of RSPB as recorded by the Inspector at paragraph 8.3.38:

"8.3.38 Bird scaring can affect both target and non target species. It can reduce food intake as birds stop feeding and show alert behaviour or move away from feeding areas. Interruptions to feeding rates in hard

weather, when moulting, or when feeding young can lead to weight loss, abandonment of breeding attempts or breeding failure. Birds would also expend more energy through disruption. The creation of a buffer zone would sterilise an area used by SPA species for feeding and roosting".

42.†††† The Inspector summarised its case at paragraph 8.3.46 and 8.3.55:

"8.3.46 These proposals would necessitate bird control measures of unspecified intensity, frequency, nature and scope over an undefined area with no upper limit on what may be done. That the measures have to be in "substantial compliance" with the draft BCMP tells us nothing. This is why the SoS cannot properly assess impacts on the information available and on the legal structure proposed and therefore cannot lawfully grant permission. Once permission is granted, a major new factor enters the planning equation, the safety of 500,000 air passengers. That is one reason why the assessment has to be done in advance".

"8.3.55 It goes without saying that habitat management, buffer zones, bird scaring, and disruption of flight lines have the potential to adversely affect populations across the SPA/pSPA. The purpose of such measures would be to stop birds doing what they do now where they now do it. The extent of such adverse effect will depend on the detail which the SOS does not have".

43.†††† The Inspector's conclusions are set out in section 14.6 of his report, with a further summary in section 15. The first 16 paragraphs are applicable to both disturbance by aviation and by bird control measures. Having described the nature and significance of the designated sites, he passed comment critical of NE's evidence as statutory consultee on the Habitats Regulations. The objections it pursued were similar to those rejected at the Inquiry in 1988 leading to the 1992 permission, and those pursued to a nearby wind farm, which were also rejected. NE was dependant on the RSPB's evidence, had taken no steps to find out the current position at the airport, and its only known expert view was that there had been no objection to the 1997 renewal permissions since it was not considered to have any material adverse effect on ornithological interests. The Inspector's clear point is that the statutory consultee therefore had nothing of value to say about whether there was a risk requiring appropriate assessment.

44.†††† The Inspector then set out in summary the legal submissions, and although not directly referring to the CJEU jurisprudence with which all parties provided him, clearly directed himself by reference to it in the first sentence of paragraph 14.6.8 and then expressed his conclusions about it in the rest of that paragraph. It reads:

"The stringency of the test in the *Regulations* is acknowledged but it is not a test of absolute certainty. In this case RSPB does not say that any significant effects would be likely, which is the threshold under the *Regulations* before requiring an AA, or that there would be harm to the integrity of the SPA, only that all the ingredients are present to varying degrees and that there is no evidence to demonstrate that there would not be any effects. This is mere bare possibility".

He continued, saying that even if it were necessary to carry out an appropriate assessment, the test is:

"whether the proposals would have a significant adverse effect on the integrity of the site." "Integrity" meant "the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and/or the levels of populations of species for which it was classified"; IR14.6.9.

45.†††† The 1992 decision led to the following conclusion in paragraph 14.6.12 which is not affected either by changes in approach nor, as I read it, confined to noise disturbance from aeroplanes, which the Inspector dealt with in the next section of his Report:

"… The scientific evidence relied on then by NE/RSPB is not materially different to that relied on now and the main development, the recognition that an effect does not necessarily constitute an impact, only weakens their case. The range of birds breeding, feeding and wintering in the area was generally similar to those found today and it is difficult to see why species that were not identified as a concern then, when there was experience of frequent noisy movements, should now be thought to be at risk".

46.†††† He also pointed out that in 1997, and after consulting with the RSPB, Natural England did not object to the renewal of the 1992 permission as it was unaware of any further evidence regarding the impact of aviation on birds or any material change in circumstances. It was not affected by the fact that the application was for a renewal permission.

47.†††† He rejected the Natural England/RSPB contentions that there would be unacceptable disturbance from the noise of aircraft. He found that the proposals would not disturb or fragment the habitats such as to have an adverse impact on a species as a whole. There would be fewer movements and by quieter aircraft than the levels found acceptable in 1992. There was no further evidence of likely significant effects. At paragraph 14.6.24 the Inspector concluded:

"14.6.24 The conservation objectives require there to be no significant decrease in extent of habitat or displacement of birds by disturbance and the maintenance of areas of open water and food. No habitat would be lost and the areas of habitats within the contours that could possibly be affected would be small. They could be used by birds highly tolerant of noise such as those that breed within the 88dB contour. If birds were disturbed they would lose feeding time and have to expend energy flying but species disturbed by aviation could exploit the land for feeding at night when there would be no flights. Species do move elsewhere as indicated by the terns that relocated within the SPA from Dungeness to Rye Harbour. There is little evidence that there would be significant declines in the size, distribution and functioning of the populations of any species within the designated areas. Indeed, the Airport has functioned at a more intense level than now proposed and there is no evidence that it had such an effect at that time".

48.†††† Mr Mould put reliance on the next part of the paragraph in which the Inspector concluded that the proposals "would not disturb and fragment the habitats of the SPA, pSPA and pRamsar birds such as to adversely impact on a species as a whole. Nor would they have any adverse effect on the integrity of the site as a whole, or that part of it in the vicinity of the Airport, as there are other areas in the vicinity that could be used".

49.†††† The context of that paragraph is not bird control measures but disturbance by aviation activity, which is not the subject of challenge. However, the two areas of concern overlapped, I accept, at least at the point of the response of birds to disturbance while feeding on the FLL.

50.†††† The Inspector then turned to bird control, the specific area of controversy for this challenge. He noted that despite its location, LAA had a low incidence of recorded birdstrike, and that the CAA was satisfied that the Airport operated safely. The RSPB agreed that there could be some increase in business jet movements without change in the bird control regime; but the airport already operated scheduled flights and had an existing obligation to manage the risk of bird strike, reducing the risk to as low as reasonably possible, ALARP, albeit that the number of movements currently was lower than proposed. The difference between the parties was as to the intensity, scope and area of the measures required to manage the risk of birdstrike at the airport; IR 14.6.36.

51.†††† Natural England and the RSPB had identified two parts to the bird strike problem referred to in 14.6.38:

"… The first are flocks of lapwing, golden plover, corvids, pigeons, starlings and mute swans in the vicinity, and the second is longer distance overflights by Bewick's swans, mute swans, greylag geese, Canada geese and cormorants. They fan out from roosts to feed on arable fields and grassland with many crossing the airfield".

52.†††† There had been an issue over the quality of the data about birds and their movements. The Inspector rejected the suggestion that a particular form of survey should have been used, given the information that was available. No species had been missed. The numbers fluctuated significantly year on year for reasons other than the operation of the airport. The Bird Hazard Risk Assessment, BHRA, was not criticised in terms of pattern of birds around the airport. The fluctuating locations of the birds indicated to him that "further survey work would have little benefit in terms of possible off-site measures for an Airport operating some years into the future when birds may be in different locations"; 14.16.39. No one had identified any substantive errors in the BHRA. The data from different surveys by Natural England, the RSPB, and LAA all came to the same conclusions in terms of species present, overflights, potential flightlines and potential roosting and feeding areas; 14.6.40.

53.†††† While Natural England and the RSPB accepted that the data enabled an assessment to be made that there were no likely significant effects for the purposes of assessment under the Environmental Impact Assessment Regulations 1999, it was insufficient, they said, for the stricter purposes of the CHSR, (as explained, I add, in the CJEU jurisprudence). This was because it did not provide the "sufficient degree of certainty"; to leave an issue over until after permission had been granted for an assessment of its effects, would be impermissible "salami-slicing", and would change the basis upon which any future decision would be made. However, the Inspector pointed out that a Statement of Common Ground on the risk of birdstrike confirmed the appropriateness of the BHRA methodology. The bird management techniques proposed in the BCMP were accepted as appropriate.

54.†††† Natural England considered, though the RSPB urged a more flexible approach, that passenger jets required continuous bird control, including off-site measures, and there were already scheduled commercial flights from the Airport.

55.†††† The RSPB accepted that there was nothing in terms of on–airport management which should not already be taking place:

"14.6.44 RSPB accepts that in terms of Airport management there is nothing that would need to be done if planning permission were granted that it is not already recommended should happen now. An AA in June 2009, and a revised AA in February 2010, by consultants for SDC address the four main measures in the BCMP, habitat management, off-site land management agreements, safeguarding, and bird scaring. They note that there do not appear to be any reasonable grounds for concern about the first two. Grass management and some scrub clearance already take place but more is desirable and there is a need to net ponds and watercourses where reasonably practicable. There is no reason why these measures within the Airport site would have any likely significant effect on the designated sites as indicated by SDC's consultants".

56.†††† At paragraphs 14.6.45-14.6.47, the Inspector continued:

"14.6.45 In terms of off-site measures, NE and RSPB disagree with SDC's consultants about impact. Although options are identified in the BCMP, it states that no disturbance measures would routinely be carried out on sites beyond the airport boundary. There is a mechanism, involving SDC, NE and RSPB, for this to be reviewed but NE referred to the difficulties airports have in securing off-site agreements and, notwithstanding what witnesses might have said, it would be inappropriate to rely on such measures when there is no evidence that such an agreement could be secured.

14.6.46. Examples of reasons for off-site measures, such as stubble left in a field proving an attractant to geese, would best be dealt with by the farmer ploughing it in or placing some sort of bird scaring device in the field. These measures would require the consent of the landowner and cannot be assumed. Moreover, there is little point in speculating, if, when, where and to what extent such a situation might arise in the future as it would be likely to vary year on year.

14.6.47. NE acknowledges that the Airport would be unlikely to be able to take action in the SPA itself but refers to off-site measures at Derry, Heathrow and Wharton. Before any off-site bird control could be carried out the S106 Agreement would require details to be submitted for assessment. This would include the measures to be deployed, their duration, scope and location. Any change to land use would have to be consistent with local agricultural practices in terms of crop rotations, and timing of cultivation, and designed to have a conservation benefit, including to birds, without increasing the risk of bird strike. This would not be salami slicing but reacting to changing circumstances. These transitory measures, if any were ever approved, would not be likely to have any significant effect on the designated areas and, despite their concerns, none are alleged by RSPB. In any event, NE and RSPB would be able to make their views known to SDC. Unacceptable changes could not be approved unless LAA was able to demonstrate IROPI. The Airport does not rely on IROPI now, and there is no reason to believe that it would in the future. Indeed, the existence of Manston would make it difficult to do so".

57.†††† In paragraph 14.6.48 the Inspector set out his conclusions on emergency measures, also part of Mr Mould's challenge. The Inspector acknowledged that in the future, as now, genuine emergency measures would not be affected by the s106 agreement, and emergencies would not be the basis for taking any of the off-site measures in the BCMP either. But if taken they would be reviewed, in part with a view to seeing if pre-emptive measures could avoid the emergency measures in the future.

58.†††† The Inspector's approach to safeguarding the aerodrome, also challenged by Mr Mould, is at paragraph 14 .6.49. He said:

"Safeguarding is an essential part of the Airport Safety Management System. Its purpose is to allow LAA to object to development that has not yet taken place. SDC's consultants had concerns over safeguarding but note that they could have been overcome by a condition or Agreement. However, the test under the *Regulations* relates to the integrity of the SPA as it currently exists and comments on future development would not have any effect on the integrity of the site as it exists today, and so could not conflict with the *Regulations*. In any event, it is accepted that a compromise between air safety and conservation interests is sometimes achievable and that some positive conservation measures would have no impact on birdstrike risk".

59.†††† The Inspector then examined the effect of bird-scaring. At paragraph 14.6.50, he noted that it was agreed that LAA should already be seeking to disrupt flightlines across the airport. A buffer around the perimeter would push birds back, and killing birds in key species beyond the Airport boundary was already licensed by Natural England. If off-site measures or increasing bird control measures took place now, NE/RSPB thought that that would amount to a plan or project engaging the Habitats Regulations. The programme of improvements on which LAA had already embarked to bring the existing practices into line with what was required had brought "little evidence of any significant ramping–up of bird-control activities", though movements were still relatively low-key. The greater the number of movements, the lesser might be the requirement for deterrent measures.

60.†††† The Inspector pointed out that bird-scaring "could and should take place now when necessary". He continued, and I add that the buffer zone he refers to is an off-site buffer created by bird-control activities on-site including scaring:

"14.6.54 Bird scaring could, and should, take place now when necessary. The operation of a buffer zone for which the use of audio and pyrotechnics are the best option, is good practice and virtually continuous patrol-

ling of the airport should be carried out, rather than short bird scaring runs. Although the frequency of patrols might alter to a continuous level should the proposals be implemented, the methods would be the same and the range of any disturbance would be the same as now. Scaring trials were carried out in the summer of 2008 and winter of 2009, albeit that RSPB considers them inadequate due to the wide number of variables. These trials indicate scaring might have some effects up to 0.6-1km away but there is no indication that there would be any impacts. No off-site bird scaring takes place other than once or twice from one field immediately to the west but a gamebird shoot takes place on land surrounding the Airport. The range and intensity of activity is, therefore, known and can be assessed".

61.†††† The RSPB objection that there should be compensatory habitat met this response from the Inspector in paragraph 14.6.55:

"14.6.55 RSPB maintains that others would have to demonstrate damage, that there is little mitigation proposed, and that there should be replacement for sterilized areas and compensatory habitat for land on the SPA that would suffer adverse effects. However, no habitat on the SPA would be lost and although the use of some functionally linked land might change, there is nothing to suggest that it would be 'sterilized'. Even if birds were scared off a feeding area during the day they would be able to exploit it at night. This would be aided by the restriction on night time flying. The bird control management measures that would be necessary if permission were granted would be no different to what NE accepts the Airport is, or should, be doing already.

14.6.56. A precautionary approach should be taken such that the combined effects of bird control and aviation activity are assessed. The two things would happen at a similar time and measures aimed at one species could also affect other species using the same habitat. However, there is no evidence from other locations of any reinforcement of effects. The protection conferred by the designations is not limited to the area within the boundaries. Notwithstanding NE's view, there is little evidence that there would be likely to be a significant effect, such as a significant decline in the size, distribution, structure or function of the population that would require an AA. Even if an AA were required, the area of the SPA that would be affected would be small and there is no evidence that there would be an adverse effect on the integrity of the designated sites".

62.†††† The objectors' criticism of the BCMP was considered in 14.14.10:

"It is claimed that the nature, intensity and extent of any measures is not known but the BCMP sets out the measures that could be used. Studies to investigate the effect of distress calls and cartridge pyrotechnics were carried out in August 2008 and winter 2009. The BCMP states that bird control patrols would be continuous when movements were more than one an hour, but that no disturbance would routinely be carried out on sites beyond the Airport boundary. Exceptionally measures may be needed in fields immediately adjacent to the boundary but this would only follow agreement of the details by SDC in consultation with NE/RSPB. The effect of possible measures can, therefore, be assessed".

63.†††† Finally, in this chapter, the Inspector set out his overall conclusion relevant to ornithology generally in paragraph 15.1.6:

"In terms of ornithology, proposals should be considered in the light of the best scientific knowledge but the tests in the *Regulations* do not require absolute certainty about effects. In this case RSPB do not say that there would be likely significant effects or that there would be harm to the integrity of the SPA, only that all the ingredients are present to varying degrees and that there is no evidence to demonstrate that there would not be any effects. That is 'mere bare possibility'".

64.†††† As for bird-control, the data provided by NE, RSPB and LAA came to the same conclusion. Fluctuating annual numbers of birds made further survey work of limited value, and it was accepted that the environmental information sufficed for an assessment of environmental effects.

65.†††† The Inspector continued in 15.1.10-15.1.13:

“Nothing more would need to be done, if planning permission were granted, than it is recommended should happen now. More on-site habitat management is desirable but would have little effect on the designated sites and their populations. The BCMP indicates that no disturbance measures would be carried out beyond the airport boundary. Indeed, it would be inappropriate to rely on measures that would require the consent of a landowner when there is no evidence that such an agreement could be secured. If such a situation arose in the future, off-site measures could not be carried out without assessment and approval and NE and RSPB would be able to make their views known to SDC. The Airport does not rely on IROPI now, and the existence of Manston would make it difficult to do so in the future. Moreover, the Agreement would introduce a procedure for review of any emergency measures taken, including an assessment of any pre-emptive measures to reduce the likelihood of the need arising again.

15.1.11. The test under the *Regulations* relates to the integrity of the SPA as it currently exists and safeguarding comments on future development would not have any effect on the integrity of the site as it exists today, and so could not conflict with the *Regulations*.

15.1.12. In terms of bird scaring, this takes place now when necessary using techniques listed in the BCMP although the frequency would increase with the development and could be continuous. Trials indicate scaring might have some effects up to 0.6-1km away depending on conditions but there is no indication that there would be any significant adverse impacts. Indeed, game shooting already takes place close to the Airport. No habitat would be lost on the SPA/pSPA and although the use of some functionally linked land might change, there is nothing to suggest that it would be sterilized. Even if birds were scared off a feeding area during the day they would be able to exploit it at night due to the restriction on night time flying.

15.1.13. Considering the combined effects of bird control and aviation activity, measures aimed at one species could affect others using the same habitat. However, there is little evidence from other locations of any reinforcement of effects. There is little evidence that there would be any, never mind a significant, decline in the size, distribution, structure or function of the population such as to require an AA. Even if an AA were required, the area of the SPA that would be affected would be small and there is no evidence that there would be an adverse effect on the integrity of the designated sites as a whole.”

66.†††† The Secretaries of State accepted these conclusions at paragraph 23 of the Decision Letter:

“The Secretaries of State agree with the Inspector's reasoning and conclusions on ornithology at IR14.6.1-14.6.57 and IR15.1.9-15.1.13. They have carefully considered the formal advice of the NE and the case made by the RSPB to the Inquiry, but the Secretaries of State share the Inspector's conclusion (IR15.1.13) that there is little evidence that there would be any, never mind a significant, decline in size, distribution, structure or function of the population such as to require an appropriate assessment (AA). Overall, having regard to the requirements on them as the competent authority in respect of the Conservation (Natural Habitats) Regulations 2010, the Secretaries of State are satisfied that they can proceed to grant permission for the applications before them without first being required to carry out an AA”.

67.†††† In their overall conclusions at paragraph 42, the Secretaries of State said that they were “satisfied that there would be no likely significant effects on any designated conservation sites….”

Discussion and Conclusions

68.†††† I start with the observation that the Inspector was not faced with a dispute of law as to the right approach to the question of whether an appropriate assessment was required. There was no issue of principle. Nor did he describe the approach he adopted in a way which revealed an error of law. It is clear that he endeavoured to apply the correct precautionary test in paragraphs 14.6.7-8 and 14.6.56, although there is a different criticism of the last sentence of that paragraph, and in 15.1.6. The Decision Letter separately expressed the test and did so correctly.

69.†††† It follows that the real issue is whether he reached a conclusion which was not open to him in law, one which was irrational, on the considerable amount of evidence in this case on ornithological issues, particularly from LAA. Mr Swift QC for the Secretaries of State was right to highlight the difference between evidence and assertion, to which the Inspector was very much alive. As Mr Mould recognised, it is very difficult to show that the evaluation of disputed evidence about birds in a planning context, applying the test for whether an appropriate assessment is required, is irrational.

70.†††† The two principal issues concerned the Inspector's approach to the off-site effect of bird scaring measures taking place on-site, and then to the off-site effect of off-site measures. I take the former first: the only controversial on-site measure was bird-scaring and its impact largely but not wholly on the FLL; 14.6.44.

71.†††† Mr Mould summarised the RSPB case at the Inquiry as follows. LAA's data on birds was insufficient for ascertaining the bird strike control measures required. The scaring trials had not been adequate for an assessment in view of the variables left unassessed. The evidence that birds used the FLL around the airport and used the fringes of the pSPA and SPA around the airport was clear. Birds traversed flight lines at night and in the hour either side of dusk and dawn, with constant, unpredictable and at times large scale movements. There was an “astoundingly high” mass of bird activity close to the airport. Disturbance to feeding would not be solved by the return of birds to feed at night. An impact on the use of FLL would have an adverse impact on the integrity of the designated sites and proposed designated sites.

72.†††† Mr Mould submitted that the Inspector had erred in failing to treat the expert evidence of the RSPB, particularly in paragraph 8.3.38, as evidence. The Inspector had also misunderstood the RSPB case, since it had *not* accepted that significant effects would be unlikely. It was implicit in the Inspector's conclusions in paragraphs 14.6.55-56 that he accepted that there could be an adverse impact, as was also inherent in the notion of bird-scaring; and the site description in paragraph 2.4 showed that north western parts of the SPA and pSPA were within 1km from the airport, into which bird-scaring effects would spread.

73.†††† Mr Swift QC for the Secretaries of State and Mr Village QC for LAA submitted that there was a proper evidential basis, reading the Report as a whole, upon which the Inspector could conclude that there was no reasonable scientific doubt about the effect of the proposals on the designated sites, such as would require an appropriate assessment. The major ornithological issue had been disturbance by aviation activity and noise, which was not being pursued. Paragraph 8.3.38 showed that the RSPB's contentions were no more than general assertions, which the Inspector was entitled to reject in the light of LAA's witnesses' evidence.

74.†††† In my judgment, the Inspector considered and accepted LAA's case on the quality and extent of the ornithological survey data, as he was entitled to, rejecting the criticisms made by RSPB; IR 14.6.39-41. No one identified any substantive errors in the Bird Hazard Risk Assessment; 14.6.40. The bird control measures were not merely agreed to be appropriate, they were all, to some degree, being carried out already. I accept the submission of Mr Swift and Mr Village that the Inspector was entitled to conclude, on his reasonable appraisal of all the material, that there was no need for an appropriate assessment, correctly applying the *Wadenzee* test. I accept that the Inspector had a very considerable amount of evidence largely from LAA adduced to show that there was no reasonable scientific doubt about the effects of the proposals on designated sites, so that no appropriate assessment was required. Mr Village is also right to emphasise

that evaluation, which is for the Inspector, is undertaken by someone who has heard and read all the evidence, and there was a great deal of it including oral evidence, and not just those parts with which a court may be favoured.

75.†††† The Inspector was entitled to be critical in paragraph 14.6.13 of the evidence or lack of it from NE, which is of some importance given its role as the statutory advisor to the government on nature issues. The Inspector's comments on the evidence reflected the way in which the development of the RSPB case at the Inquiry had led to further evidence from LAA on a species by species basis to cover the effects on them. Mr Village is right that the Inspector accepted the evidence of LAA, including the first and rebuttal evidence of Mr Deacon, and LAA's submissions. In effect, LAA's evidence and submissions contended that neither NE nor RSPB had pointed to any evidence that the population levels of any species with which they were concerned would be affected, even if the effects which they said were a possibility in fact occurred. The Inspector was entitled to and did accept that position.

76.†††† The crucial issue on the off-site effects of on-site bird-scaring measures was the RSPB's contention, at paragraph 8.3.38, that birds would be affected by disturbance in feeding from the FLL, and that it would sterilise an area of SPA used for feeding and roosting. But this possibility depended on the strength of LAA's response which was that birds, scared-off from the FLL, and from the small amount of SPA which could be affected by bird control measures during airport operational hours, would return to feed and roost on the FLL or the affected part of the SPA at night. The issue was principally feeding. (There does not appear to have been an issue about whether other land would become FLL in its stead.)

77.†††† The Inspector dealt with this in paragraphs 14.6.8,14.6.24, 14.6.54-56, 15.1.6 and 15.1.12. He understood the cases made before him. The evaluation of the competing cases was one he was entitled to reach. Of course, while the aim of bird-scaring was to control birds in the buffer zone up to 0.5km from the airport, the effects of bird-scaring measures on-site might be felt in reducing degrees beyond that and up to 1km away. But without adverse effect on safety, birds might not routinely be scared off the FLL or SPA beyond 0.5km during operational hours. But the scientific literature showed that even if birds were scared off an area by day, they were able fully to exploit that area for feeding by night.

78.†††† Mr Village pointed out that paragraph 14.6.55 IR is cross-referenced to paragraph 16.38 in his closing submissions. I accept that the passage of his submissions in question, although in the section dealing with off-site effects, clearly in the relevant paragraph also deals with the off-site effect of on-site bird-scaring measures. There is no basis in the passage dealing with Dr Armstrong's evidence and scientific literature on behalf of LAA for treating the precise location of the scaring act as relevant to the submission about the effect on the willingness and ability of birds to return at night to feed when there was a significant disturbance free period.

79.†††† Whether paragraph 8.3.38 in the Inspector's summary of the RSPB was evidence or assertion or question, the Inspector was entitled to reject it, in the light of the evidence he had, as raising a reasonable scientific doubt about the effect of the bird-scaring measures on-site on the feeding of birds on the FLL and designated sites. There was no or at best no adequate contrary evidence from NE/RSPB to show that there might be any material effect on any species of concern.

80.†††† Mr Mould submitted that the Inspector had put the issue the wrong way round in paragraphs 14.6.8 and 14.6.55: it was not for the RSPB to produce positive evidence that significant effects were likely; it was for the developer to exclude it on the basis of objective material. The Inspector did not conclude that birds would not leave the SPA, or not do so because there was other FLL to which they would go. He did not say that they would feed somewhere else. But this, in my judgment, is to ignore the Inspector's evaluation of the evidence as to whether birds would return and feed during non-operational hours. It is a misreading of what the Inspector meant, for example in 15.1.6, to suggest that he thought that it was for the RSPB or NE to produce positive evidence of possible harm before an appropriate assessment was required. He meant, as

Mr Village submitted, that the RSPB and Natural England had produced no positive evidence of the likelihood of harm, but were instead raising questions about whether possible effects which it raised had been disproved. This was a common point made by the Inspector. In the context of feeding, they had produced no evidence to rebut the extensive scientific evidence from LAA about the return to feed outside operational hours, or to show that that could lead to a significant adverse effect.

81.†††† I do not accept Mr Mould's submission that the Inspector's conclusion on bird-scaring showed a gap in the Inspector's reasoning, or an internal inconsistency. It was said that once the Inspector had accepted that bird-scaring would produce disturbance, he could not conclude that significant effects could be ruled out from the increased frequency of bird-scaring measures. This ignores the Inspector's evaluation of the evidence. Nor had the Inspector ignored the RSPB predictions of the effect disturbance from feeding in habitual feeding areas could have on birds. Again this ignores the evidence which the Inspector was entitled to accept about the return of birds to feed outside operational hours, and the legitimacy of his evaluation of what RSPB produced as showing no more than a mere possibility.

82.†††† Mr Mould submitted that there was a further contradiction inherent in the evidence accepted by the Inspector and the conclusion he drew from it as to the need for an appropriate assessment. The BCMP was a primary source of objective information about the effects of the proposals on the designated sites. Its terms showed that significant effects could not be ruled out, since they acknowledged that birds would need to be disturbed from FLL. That is not so, in my judgment. The answer again comes back to the evidence he had from LAA about the lack of effect of bird-scaring on FLL and adjacent designated sites on the use of that land during non-operational hours. RSPB may not like the rejection of their points, but the Inspector was entitled to consider the scientific evidence produced by LAA on this aspect and to accept it as having the force which he concluded it did.

83.†††† Mr Mould submitted that the BCMP provided no clear understanding of the nature, intensity, frequency and location of bird control measures. It was not therefore possible to define the level of bird control which would be required to achieve the buffer zone, and LAA was not prepared to rule anything out, as RSPB had contended before the Inspector; paragraph 8.3.35IR. At paragraph 14.14.10, the Inspector rejected RSPB's case that the BCMP did not permit him to know the intensity, nature and extent of any bird scaring measures: patrols would be continuous when movements were more than one per hour; he knew that they would involve distress calls and pyrotechnics; they would not be routine outside the airport but exceptional. He was entitled to reject the views of the RSPB as to the inadequacy of the information; the fact that such a body regards the knowledge as inadequate does not mean that that has to be accepted as creating such uncertainty that an appropriate assessment is required. Although there was some debate at the Inquiry about the extent to which bird control measures should be increased anyway, the crucial one for this purpose was bird-scaring on-site. The Inspector accepted that that would increase, although the range of the effects would not increase over that experienced when bird-scaring was now employed using the same techniques as would be employed in the future. That was a view he was entitled to reach and to conclude that any greater effect would be no more than a mere possibility. The Inspector did not treat the on-site BCMP measures as if they were not part of the project to be considered at this stage, whether for impact or benefit. That was what his consideration of the bird control issue was about.

84.†††† The Inspector at paragraph 14.6.54 commented on the knowledge gained through the bird-scaring trials in Shepway DC's appropriate assessment. Mr Mould pointed out that that assessment had concluded that there would be no impact if a condition controlled the extent of use of cartridges and distress calls to acceptable levels, but, said Mr Mould, no such limits were proposed. However, the Inspector was not bound to accept that such a condition was necessary; after all the question of whether an appropriate assessment was required was before him, and the parties were not relying on Shepway DC's assessment as sufficient for the debate to be closed off. It is clear that the Inspector did not accept controls were necessary beyond what was in the BCMP in view of what he knew about the measures proposed, none of which were new to the site, and their effects. The Inspector was entitled to conclude, in my judgment, that sufficient was known

about the effect of bird-scaring on-airport, and through non-aviation activities for the purposes of his judgment on the need for an appropriate assessment; 14.6.54.

85.†††† Mr Mould next submitted that the Inspector had concluded that there would be a higher level of bird control than currently anyway, and so had appraised the degree of adverse effects from the proposal against a baseline which was higher than warranted on the evidence. There had been a very low level of bird control measures which had been thought adequate. There was no evidence of substantial bird-scaring at the airport's southern boundary. If those measures were in fact now necessary, there was no evidence that such a change had already occurred. If there were to be a ramping-up of such measures that would constitute a plan or project requiring appropriate assessment. They could not therefore be part of the baseline, and had to be treated as part of the project.

86.†††† This point is not, in my judgment, based on a proper reading of the Report. The Inspector accepted that existing practices needed to be brought in to line with what was required, but that there was little evidence of any significant ramping up of bird control measures; 14.6.52. He accepted that operations were still relatively low key. He also accepted that the measures would be the same as were presently used and the range of effects would be the same; 14.6.54. However, the important conclusion on this point is in 14.6.54, and 15.1.10-12, namely that, with the expansion, there would be an increase in the frequency with which on-site bird scaring measures would be deployed, and could become continuous. He considered the buffer zone, the effect on the possible area affected beyond the buffer zone; he also considered the effects of bird-scaring should it occur off-site. He concluded, reading the Report as a whole, that there was no reasonable scientific doubt about the absence of adverse effects if the measures became continuous, because there would be no adverse effects; and not because he concluded that there would be adverse effects but that they could or would happen anyway.

87.†††† The comment in the last sentence of paragraph 14.6.53, to the effect that the greater the frequency of aircraft movements, the lower the frequency with which birdstrike deterrence measures might be needed, is a comment on a possible limit to the degree of change required to bird control measures with greater numbers of aircraft movements because the measures would not necessarily be proportionately increased. But again, the real conclusion is in 14.6.56, which deals with reinforcement of disturbance effects as between aircraft movements and bird control measures. He does not discount the effect of the increase in numbers of aircraft on bird control measures, and so find there to be no possible adverse effect from the bird control measures; rather he applies the required precautionary approach. And though feeding in the buffer zone would be disturbed as necessary to accommodate the aircraft, and could be disturbed beyond that, the Inspector accepted that LAA had shown that there was no basis for reasonable scientific doubt about the birds' return to feed undisturbed during non-operational hours. That was not an irrational conclusion or evaluation on the material he had from all parties.

88.†††† I accept Mr Mould's argument that an appropriate assessment might have provided further information: modelling different bird control measures, further trials of the effect on birds which feed in the FLL in the buffer zone by routine bird-scaring, further study of the possible effect of that on the conservation value of the SPA, further scientific study of the prospect of night feeding and its value to them. The relationship between the FLL and the SPA could have been examined further. But I do not accept this as supporting a case that the Inspector was bound to conclude that a reasonable scientific doubt existed, nor do I accept that any or all of those studies would have been a necessary part of a proper appropriate assessment. I do not accept Mr Mould's assertion that there would have been a better defined regime of control over birds. On an issue of this sort, the amount of study and research which experts can suggest might yield possibly useful information and the need for yet further research seems to me to be probably limitless. The Inspector was not merely the person best placed to judge the sufficiency of what he had; I am not persuaded that the possibility of further research shows that his judgment on the sufficiency of what he had is irrational. Rather, Mr Mould's submissions on this score reinforced to my mind the very considerable extent of evidence which he had, a very long way indeed from a developer saying that it was for objectors to show that there was a reasonable scientific doubt. The Inspector's approach meant that the significant matters were investigated, in-

cluding the impact of disturbance from feeding areas, where the RSPB's doubts about the possibility of return at night to feed were rejected on the basis of evidence. The off-site measures were dealt with differently.

89.†††† Mr Mould contended that the approach to safeguarding in paragraph 14.6.49 and 15.1.11, focusing on the current state of the sites, was unlawful. The RSPB was concerned that the project might lead to successful objections by LAA to as yet unspecified future improvements to protected sites. The proposed development might in the future prevent improvements which were necessary to maintain the achievement of the conservation objectives. Natural England had given evidence that landowners might be discouraged from measures which improved their land for various species; agricultural practices might change to accommodate the needs of the airport; the restoration of mineral workings for nature conservation purposes might be affected. This should have been seen as relevant to whether an appropriate assessment was necessary.

90.†††† I do not accept that there is practical substance in that submission in this case. The Inspector was right first to consider the integrity of the protected sites as they currently existed already in a favourable status. He did not ignore some specific proposal for future implementation necessary for the maintenance or improvement of the favourable conservation status of a designated site. Consistency with maintaining or restoring favourable conservation status did not require future changes, unspecified and speculative, to be imagined and then considered. Paragraph 50 of Advocate-General Sharpston's Opinion in *Sweetman*, above, does not require that either. There is always a risk that at some point in the future a proposal for maintenance or improvement, as yet unformed, will emerge; but that cannot be a basis for requiring an appropriate assessment. An appropriate assessment would then always be required, but without anything to focus on. This would amount to a mere possibility of effect, which is the general way in which the Inspector saw the level of evidence led by the RSPB in its case for an appropriate assessment.

91.†††† Mr Mould made much the same point about emergency measures: the Inspector did not know what, where, when and how often they would occur. But I see nothing unlawful in his approach to such measures: the limits of knowledge do not legitimise speculation about possible scenarios as the basis for requiring a speculative appropriate assessment of that which of its nature is wholly unpredictable as to what, when, where and with what consequences, or turn the raising of questions into something beyond a mere possibility of effect. Neither 14.6.48 nor 15.1.10 requires the conclusion that there was a significant effect which could not be ruled out.

92.†††† I turn to off-site measures. Mr Mould contended first that the Inspector unlawfully approached off-site measures as if they were not part of the LAA's proposed operations. He referred to the last sentence of paragraph 14.6.45. This meant that off-site measures would in the future not be considered against whether the project complied with the CHSR, but against the effect on the airport as permitted to be enlarged and passenger safety. The Inspector and Secretaries of State therefore failed to ask themselves whether they had sufficient objective information to rule out the risk of significant harm from off-site measures. The BCMP was an integral part of the proposals. Paragraph 12.5.1 of the draft BCMP, above, dealing with off-site measures, and paragraph 7.7 dealing with waterfowl over-flying the airport and its immediate airspace showed the problems. The latter would not be dispersed in flight, but records would be kept, and off site roosts and feeding areas visited, to see if a pattern or trend emerged which could lead to better forecasting, or mitigation off-site. Bird scaring might be used off-site away from conservation sites. The Inspector's acceptance of the draft BCMP showed acceptance that there could be adverse effects, and so an appropriate assessment was required.

93.†††† Mr Mould also submitted that the nature of the off-site works was seen by the Inspector as too uncertain to enable an assessment of effects to be made; for this he relied on paragraph 14.6.47. Uncertainty of that nature was a matter for caution since there was again a risk that it would change the baseline against which such measures were later assessed. It might be difficult to undertake the task, given the uncertainties, but a reasonable worst case scenario was required, and it was not lawful to use the difficulty of the task as a reason for not undertaking it all. The s106 agreement, in Schedule 1 section 10 paragraph 10.1.7, requires details of any proposed off-site bird strike control measures *before* the runway extension becomes opera-

tional. Part of the LAA case was that these measures could be the subject of an appropriate assessment at that stage as a project in their own right. But, submitted Mr Mould, if details were to be produced then, why not now? Or there could be a condition prohibiting off-site measures.

94.†††† I accept Mr Swift's and Mr Village's submission that there was no error of law in relation to the off-site measures in paragraphs 14.6.45-47. LAA's case at the Inquiry was that these measures were not required to manage bird strike risk; LAA had pointed out that it could not permit the safe operation of the airport to depend on the agreement of landowners off-site, who could refuse all co-operation. Off-site measures were not required or authorised by the BCMP. Paragraph 14.6.45 cross-refers to paragraph 5.6.50 in Mr Village's submissions where those points are made. Mr Mould's contention that if off-site measures could be ruled out in that way, they could be ruled out by condition, which LAA had refused, does not contradict that. LAA might find off-site measures achievable and useful; a change in agricultural regime off-site could avoid bird-scaring on-site; they might have a conservation and airport-related benefit and there is no reason why they should be ruled out regardless. But they were not necessary. As Mr Village pointed out such measures would and could not be routine, as the BCMP said, because the operation of the airport could not depend routinely on such measures, as carrying them out was not within the power of the LAA. So the Inspector approached the decision on the basis that it would not be appropriate for LAA to rely on such measures. That is a lawful first step.

95.†††† Second, although the Inspector, as he was entitled to, accepted LAA's contention that it would not have been possible to identify when, where and the degree to which a situation might arise in which the consent of off-site landowners would be sought, for measures to be taken to deal with unknown sporadic problems, the Inspector knew the type of measures which on an unpredictable basis might be sought off-site; paragraphs 14.6.46-47, and referring back to paragraph 5.6.51.

96.†††† Paragraph 10.1.7 in section 10 of Schedule 1 to the s106 agreement dealing with the BCMP does require details to be provided of any proposed off-site bird strike control measures, including details as to likely measures, their likely duration, scope and location, before the runway extension becomes operational. They could have been produced before the Inquiry, so far as I can see, though it is inevitable that the “detail” would have been quite general in the light of the unpredictability of what might be sought and what might be permitted by landowners. However, paragraph 10.3 of the BCMP requires that, before any off-site measures approved as part of the BCMP are carried out, details are to be submitted to Shepway DC of the actual measures to be deployed, their duration, scope and location; any change in land use proposed has to be consistent with local agricultural practices or designed to have a conservation benefit without increasing the risks of bird strike. The DC has to consult with NE and the RSPB before agreeing to the details.

97.†††† This has significance in two respects. First it reinforces the fact that what would have been provided at the first stage under the BCMP before the runway extension became operational, if provided to the Inquiry, would have been at a fairly general level, in view of the second stage. Second, before such measures are carried out, it was accepted by the Inspector that they would amount to a plan or project; 14.6.47, since he accepted that they could not be carried out if adverse in effect in the absence of IROPI. This would require consideration of an appropriate assessment, and then an actual assessment to be carried out, if the legal test for one were satisfied.

98.†††† By this later stage, whatever might have been produced at the Inquiry, equivalent to the first stage under the BCMP, there would be sufficient detail to enable the need for such an assessment, and any assessment itself, to be considered on an informed rather than speculative basis. Save for one point, I can see no legal objection to such an approach. The Inspector's approach in 14.6.46-47, how to handle changes in unpredictable circumstances, is clearly that that is preferable to considering or to carrying out a speculative assessment of what may never be suggested, when the issue can be dealt with later on a more certain basis.

99.†††† That one point is the concern that the baseline would change, and so the appropriate assessment, or consideration of the need for one, would be undertaken on a different basis from that on which it would have been undertaken at what the RSPB says was the appropriate time, at or before the Inquiry, and using whatever information LAA would have had to provide under the s106 agreement before the runway extension became operational, or on some hypothetical reasonable worst case scenario derived on some other basis. If the Inspector's approach meant that the later consideration of an appropriate assessment in respect of off-site measures would be undertaken on a prejudicially changed baseline, that could involve an error of law in his conclusion that no appropriate assessment was required, including of off-site measures; see *R (Buckinghamshire County Council and Others v Secretary of State for Transport* [2013] EWHC 481(Admin) at paragraphs 282-4. The RSPB's concern is that the runway extension, permitted and operational, would become a factor in judging the significance of the off-site effects remaining to be assessed.

100.†††† However, I do not see that the Inspector erred in effect in holding that the assessment of off-site measures under the BCMP would not be carried out on a changed baseline in that way, when he rejected the notion that this would be “salami-slicing”; 14.6.47 and 15.1.10. First, LAA made it perfectly clear that it did not require any off-site measures in order to operate, let alone to operate safely. I cannot see that the baseline could be different from that which would exist if there had been a condition forbidding off-site measures, a condition acceptable to the RSPB but equally capable of alteration or removal.

101.†††† Second, the off-site measures, before being carried out, have to go through an approval process. It was not in issue but that the off-site measures proposed under the BCMP at the second stage would constitute a “plan or project”. LAA, and others, would have to consider whether an appropriate assessment was required. If it concluded that one was required, and the upshot was that a significant adverse effect was likely, the Inspector was entitled to conclude that IROPI now and in the future would not be relied on, reinforced by the existence of Manston airfield.

102.†††† Mr Village pointed out that, in relation to off-site measures, the fact that LAA was a statutory undertaker for the purposes of the Town and Country Planning Act 1990, by virtue of the Airports Act 1989, meant that it was a “competent authority” for the purposes of the CHSR, under paragraphs 3 and 7, and directly under a duty to comply with them before permitting any plan or project to proceed. This statutory position was not challenged.

103.†††† The existence of an emergency would not lead to the off-site measures being introduced since there would not be time for that, and it is not their purpose to deal with emergencies. If the review of emergency measures showed that an off-site measure were desired, it would still have to go through the BCMP approval process.

104.†††† In those circumstances, if the Inspector had had or ought to have had the first stage details of off-site measures or some other hypothetical description of reasonable worst case possibilities, I cannot see that he would have reached any different decision on how to approach their assessment. Moreover, the s106 agreement laid down a limit on the changes of agricultural practice off-site, and his knowledge of the non-routine and controllable nature of the measures entitled him to come to the view that there was no evidence on which “these transitory measures” would be likely to have any significant effect; 14.6.47. The Inspector had a proper evidential basis for coming to the conclusions he did about the future impact of off-site measures, that nothing showed the need now for an appropriate assessment, and what at present would be possible but wholly speculative measures and impacts would be subject to the same procedural requirements on an unchanged baseline.

105.†††† The Inspector may have treated the off-site measures in the BCMP as part of the project, but as ones which could not sensibly be assessed and which, on the extensive knowledge he had about the sort of measures and effects, could not now be said to require appropriate assessment, knowing that they would be subject to an appropriate assessment if required. He may have treated the off-site measures as not part of

the project because, if they came about they would be assessed as a project in their own right on an unchanged baseline. Either way, the approach is lawful in this case, and if in error could give rise to no difference in outcome.

106.†††† The final group of points concerned the Inspector's approach to the “integrity” of the sites, although this was not an issue which arose directly at the stage of considering whether an appropriate assessment was necessary. Mr Mould was critical of the last sentence of IR 14.6.56, in which the Inspector concluded that an appropriate assessment would not lead to a finding of an adverse effect, since the area of SPA affected would be small and there would be no adverse effect on the integrity of the site. Mr Mould was also critical of the reference in paragraph 15.1.13 to the need to consider the effect of a project on the “integrity of the designated sites as a whole”. It was wrong to ask whether the proportion of the site affected by the development was so great that the whole was affected; the right approach was to focus on the essential unity of the site, to avoid “death by a thousand cuts”. Disturbance of a small proportion of the species or habitat could affect the integrity of a designated site, the objective for which it was designated or the species for which it was classified. The question was the effect on the species in the SPA, and not the effect on the species over its natural range; *RSPB v Secretary of State for Scotland* [2000] SLT 1272, First Division. The Directive was not concerned with protecting individual specimens of the species as such; whether activities amounted to disturbance of a species would depend on when the activities occurred, the rarity of specimens of the species, its conservation status and prospects in the location in question; *R(Morge) v Hampshire County Council* [2011] UKSC 2, [2011] 1 WLR 268.

107.†††† I do not disagree with the way in which Mr Mould sets out the approach to “integrity”, although I emphasise that the statutory focus of “adverse effects” is on the integrity of the site, not on an adverse effect in some lesser sense. But I do disagree with his contention that the Inspector erred in the way alleged, either in paragraph 14.6.56 in the reference to a small area only of the SPA being affected, or elsewhere. That contention is quite contrary to the overall tenor of the Inspector's conclusions, which is that there was no evidence of any adverse effect on the integrity of the site. He is right not to treat any effect as an effect on integrity; but he does not commit the error of thinking that it is merely because the affected area is small, that there can be no effect on integrity. In reality, whether an adverse effect on a small proportion of a site would amount to an adverse effect on its integrity depends on the particular circumstances. The Inspector made no judgment that an adverse effect required a significant proportion of the site to be affected adversely. I also accept Mr Swift's submission that paragraph 14.6.24, 14.6.56, as with paragraph 15.1.13, is dealing with the way in which NE put its case at paragraphs 7.5.75-77, to the effect that there would be a significant decline in the size, distribution, structure or function of the population and so a significant effect within the designated site.

108.†††† Mr Mould took issue with the use of the adjective “significant” by the Inspector to qualify “adverse effect on the integrity of the site” in paragraph 14.6.9. That criticism cannot be made of the Decision Letter itself, which is the decision under challenge. But the criticism seems to me to be devoid of substance anyway. True it is that Regulation 61(1)(a) requires the competent authority to focus on the likelihood of “significant effects” in deciding whether an appropriate assessment is called for, and by Regulation 61(5) if the plan or project would “adversely affect” the integrity of the European site consent must be refused in the absence of IROPI. Paragraph 14.6.9 deals with the latter and the interpolation of “significant” to qualify the effect required could suggest that a higher test was applied than warranted. However, first, the issue which was for the Inspector's consideration was whether an appropriate assessment was required, and what he said about the way in which consent would have been approached after an appropriate assessment is not necessary for his conclusions. Second, it is difficult to see that the CJEU jurisprudence on the test to be applied under Regulation 61(1)(a) entails a different approach in practice between the degree of possible effect which could necessitate an appropriate assessment and the degree of ascertained effect which could necessitate a refusal of consent. The former would be required and conducted with the next stage in the decision-making process in mind. For that same reason, the fact that in places the Inspector considers how the evidence would fare in showing that, at the second stage, there was no adverse effect does not show an error of law. The full extent of the evidence which the Inspector had on the issue of disturbance to birds must be borne in

mind. The Inspector's approach to the meaning of the integrity of a site in paragraphs 14.6.9 was correct; the definition was taken from an ODPM, Circular 06/2005, which had not been said to be incorrect.

109.†††† I accept that the Inspector has added the words at the end of 15.1.13 “as a whole”, when considering the effect of a project on the integrity of a site or sites. Those words do not appear in the Regulations, and certainly not in relation to a group of sites. I see no significance in the plural of “sites”, given the reference earlier in the sentence to a singular SPA. I am not sure either what significance can attach to “integrity as a whole”, which would not attach to “integrity”, of its nature; certainly I can see nothing by way of error of law. I see no error in the conclusion of the Inspector on the question of whether an appropriate assessment was required, which is the first point: there was no likelihood of a significant effect, applying the correct test as set out in *Waddenzee*. It would follow that, if correct, as I conclude that to be, there could be no adverse effect on the integrity of a designated site.

110.†††† The reasons challenge added nothing to the substantive points. The RSPB did not pursue as a separate point the ground related to regulation 9 CHSR as it added nothing to its submission on the other grounds, as Mr Mould explained, and rightly in my judgment.

111.†††† Accordingly, I do not accept Mr Mould's submissions and the RSPB's claim fails.

Reference to the CJEU

112.†††† Mr Mould submitted that, were he unsuccessful, a reference to the CJEU should be considered of questions relating to the point at which bird control measures were defined in relation to what an appropriate assessment should cover; whether “integrity” meant “integrity as a whole”, and whether the assessment of effects was confined to the assessment of the effects on sites as they currently were or should include the effect on possible future proposals for the sites. I accept Mr Swift's response submissions. The first two raise no issue of law or EU law; I see no real issue of interpretation about “integrity”, and it is on the periphery here. The question of future proposals does not arise on the facts here. Besides, a higher court should make such a reference, once the matter has been fully considered domestically and an issue of interpretation necessary for the resolution of the issues arises.

The Lydd Airport Action Group challenge

113.†††† The Lydd Airport Action Group, LAAG, an unincorporated association, contends that the risk of air crash on the nearby nuclear power station sites of Dungeness A and B was not lawfully assessed. The Inspector had reached an unlawful conclusion in a variety of ways, but essentially he had placed too much reliance on the stance taken by the Office for Nuclear Regulation, ONR; in effect he had delegated his role to the ONR; he should have realised that its position was flawed; he failed to appreciate the significance of the risk levels he found. The Secretaries of State accepted the Inspector's conclusions; and so their decision was unlawful. After the Inspector's report had been sent to the Secretaries of State, LAAG made further written representations, which the Secretaries of State resolved in effect by continuing the delegation of the exercise of their judgment to the ONR. Rationally, they should have at least deferred the decision until those representations had been considered as ONR accepted they needed to be. A contention that the Secretaries of State had simply accepted an *ipse dixit* from the ONR was abandoned, rightly, as the position became clearer to LAAG.

114.†††† The airport at Lydd was operational well before Dungeness A was built in 1965, at a time when the airport was very busy. Its decommissioning began in 2006. Dungeness B was built in 1983, before the 1988 Inquiry into the expansion approved in 1992, and renewed in 1997. No flying exclusion zone in relation to the power stations was imposed until after 1992; until then a flight path had passed through that zone. Neither the Health and Safety Executive, nor the Nuclear Installations Inspectorate which is part of it, and the

precursor to the ONR, had objected to the current proposal when consulted about it by Shepway DC before it was called-in. The Secretaries of State did not call the application in for their own decision because of any nuclear-related issues. The issue was raised by LAAG at the pre-Inquiry meeting and the Inspector decided to hear evidence from it on the topic, to which LAA provided rebuttals.

The Inspector's Report and the Decision Letter

115.†††† The Inspector described the current operations in this way in paragraph 14.3.1, to which Mr Horton QC for LAAG attached some weight:

“The Airport is the only one in the UK that has a nuclear power station within 5km, a military danger area within 2.5km on the final approach track, a runway width less than 45m, only one runway direction available at times for landing the B737/A319 sized aircraft proposed for commercial operations, and a 5∞ offset ILS localiser and a 3.5∞ ILS glideslope."

116.†††† The Inspector recognised of course the potentially catastrophic consequences of a plane crashing into the nuclear power station but accepted that a rational assessment of the chances of that happening was required and of the extent to which the grant of permission would increase that risk.

117.†††† He dealt with the effect of the 1992 permission in paragraph 14.7.2:

“The SoS considered, and rejected, arguments about the impact of airport expansion on nuclear safety in 1992 and did not identify it as a matter requiring consideration at this Inquiry. LAAG's view is that the manoeuvres posing a threat are due to the proximity of the sites and could not be mitigated as the restricted flying zone would not provide any physical restriction on an aircraft heading towards the power station. However, the effects of these proposals were assessed by expert consultants in the planning process and accepted by SDC after consulting HAS/NII, now ONR. Whilst LAAG considers it unclear why ONR finds the proposals acceptable, the 1992 permission was granted when there was no exclusion zone around the power station, unlike now, and there was a FP for jets in closer proximity to the power station than now proposed. Moreover, the current application proposes a lower cap on the number of flights than that which was imposed in 1992, and aircraft safety has improved in the intervening period.”

118.†††† The risk of significant damage came not from General Aviation, which made up much of the existing movements, but from larger aircraft such as B737s. The LAA witness evidence stated at paragraph 14.7.3 – 4:

“… ONR is well aware of the type of nuclear power stations at Dungeness, the potential risks of an accident, and the resultant consequences. It would, therefore, know that a high level of risk would remain after the power stations were closed and be aware of the events in Fukushima.

14.7.4. Notwithstanding LAA's view that there would only be a residual risk by the time the proposals reach capacity, ONR would know of the possible extension of operation at Dungeness B, the changing pattern of risk and hazard during the lengthy decommissioning period, and the uncertainty over the timing of fuel removal from Dungeness. Whilst it might have altered its view on which of the power stations, A or B, would present the greatest risk, ONR has maintained its original stance of not objecting.”

119.†††† The Inspector noted that LAAG challenged the refusal of ONR to object to the Application, its concern that a worst case scenario should be considered, and its view that, if the consequences were too extreme, then it might be necessary to reduce the probability of an accident to zero, which he described as “impractical to achieve in practice”. LAAG's concern was that the ONR misunderstood a variety of risks, the

scale of increase in risk of a large radiological release because of the proposal, the increase in numbers and weight of aircraft, target size, and skid risks, all despite LAAG's repeated but unsuccessful attempts to persuade ONR of them.

120.†††† The Inspector said at paragraph 14.7.7:

“The Government recently considered the risk which flights to and from Lydd pose to nuclear safety in its review of the options for future nuclear power stations.”

He then pointed out that while Dungeness C had been ruled out for the time being, that was not because of any nuclear safety issues associated with the airport. EDF would have presented evidence against the Airport if it had thought the prospect of such a development could be harmed by this permission. He continued in paragraph 14.7.7:

“… Although British Energy has objected on the grounds that it is duty bound to resist any increase in risk, however small, it acknowledges that the increase in risk would be very small and would not compromise current or future activities.”

121.†††† The Inspector described LAAG's witnesses as considering that a risk based approach involved too great a risk, and this approach would apply to all aircraft overflying any nuclear power station. None of the criticisms made by LAAG witnesses, in a number of cases in which they had been involved for anti-nuclear groups, had been accepted. He described the core of LAAG's case as “an attack on the methodology used by the ONR to assess risk”, but it was not for the planning system in this Inquiry to pursue an alternative assessment methodology.

122.†††† The Inspector then dealt carefully with LAAG's case at paragraphs 14.7.9 – 14.7.17:

“If the established safety procedures are applied the issue reverts to the application of risk assessments. These have been carried out by consultants for ONR using standard methodologies. The Byrne methodology is the standard basis for assessing risk and it was accepted that it had been applied correctly.

14.7.10. LAAG asserts that the risk would be unacceptable by virtue of being above the level of 1 in 10 million pa ($10^{-7}$ pa) due to known deficiencies in the modelling. However, this is not a limit of tolerability but a screening level below which the potential for aircraft crash need not be considered further. LAA's assessment has been peer reviewed, unlike LAAG's report, which in any event considers 2mppa for which there is no application.

14.7.11. For aircraft crash ONR's SAPs define the design basis as an event with a frequency of 1 in 100,000pa but the Byrne methodology allows a relaxation to 1 in 10,000pa for events that could not lead to off-site doses over a threshold of 100 milliSieverts. Based on experience, the consultants consider that only crashes on the nuclear island could lead to doses above that threshold. In a 2009 report the consultants estimated the crash frequency as $8.3 \times 10^{-6}$ for the whole site and $5.6 \times 10^{-7}$ for the nuclear island, both well below the design basis criteria. LAAG does not dispute the mathematics but does not accept the assumptions.

14.7.12. Criticism is made of a cut off 3.275km beyond the runway for landings on runway 21 in the Byrne model but this indicates that such large overshoots or overruns are so unlikely that the airport related crash frequency at such locations is indistinguishable from the background level. Similarly, for take offs on runway 03 the equation is not valid for values less than -0.6km indicating that crashes further away in the opposite

direction to take off would also be indistinguishable from background levels. The same would apply to 'go-arounds'.

14.7.13. LAAG claims that there are systematic biases in the Byrne model such that the ratio of airfield to background crash rates are under estimated. It suggests that there are better methods than the nuclear industry standard Byrne methodology, which takes no account of the particular circumstances at Lydd. LAAG has carried out its own assessment based on added assumptions including a different runway split and an increased risk of bird strike. Based on a throughput of 500,000ppa LAAG's own calculation, which it is claimed is robust and valid, indicates a frequency of $6.964 \times 10^{-6}$ which is still well within the tolerability criteria.

14.7.14. LAAG maintains that the integrated risk of a chain of events, such as a failed go-around, a pilot diverting left, bird strike and engine failure, that could lead to an accident have been rationalised away. Whilst it might not be possible to make a numerical assessment of site specific factors, the probability of any of these events in isolation is very low and the probability of a combination of events would be even more remote, although there would always be a chance that a combination of events could occur.

14.7.15. Turning to overall risk, there would be some increase. There might be less movements by aircraft over 5,700kg in the fall back position than claimed, and an increase in airport activity might trigger AA or a revised safety case. However, ONR has maintained its position of no objection and there is little evidence that would suggest its view should be overturned.

14.7.16. LAAG's concerns have been set out in correspondence. ONR is aware of the points raised but remains satisfied that it is appropriate to use the Byrne methodology. LAAG does not put forward any alternative methodology that could be used to assess the risk. Even if the Byrne methodology were modified in the way that LAAG suggests to take account of the points of particular concern, the results are still well below the tolerance threshold.

14.7.17. In any event, the risks to which LAAG refers are not specific to Lydd. They arise wherever aircraft overfly nuclear power stations. Consequently the logical extension of LAAG's argument is that nuclear power stations should be ruled out until they can be proofed against aircraft."

123.†††† The Inspector considered and dismissed each of LAAG's four crash scenarios in paragraphs 14.7.18 – 14.7.22. He summarised his conclusions at paragraph 15.1.14:

"The SoS considered, and rejected, arguments about the impact of the expansion of the Airport on nuclear safety in 1992. The Government's recent review of the options for nuclear power stations did not rule out Dungeness C on the grounds of safety associated with the Airport. LAAG challenges the Regulator's decision not to oppose the applications, and the methodology used to assess risk. ONR has not altered its position despite the events at Fukushima and repeated attempts by LAAG to persuade it otherwise. British Energy has objected, as it is duty bound to resist any increase in risk however small, but it acknowledges that the increase in risk would be extremely small and would not compromise current or future activities at the site. LAAG's own calculation of risk for a throughput of 500,000ppa, including site specific assumptions, is still within the tolerability criteria. Crash scenarios suggested by LAAG are based on situations where the sequence of events becomes increasingly improbable. In any event, large aircraft would not be allowed to turn towards the power station, as up to 6,000 could have done in the 1992 decision, and there would be a lower cap on aircraft movements."

124.†††† After the conclusion of the Inquiry, LAAG and others made extensive further written representations. No complaint could be made about the way in which they were handled; it enabled all to consider and

respond to them as they wished. The Secretaries of State considered them at paragraphs 24 – 25 of the Decision Letters:

"Nuclear Safety

24. The Secretaries of State have carefully considered the Inspector's analysis on nuclear safety at IR14.7.1-14.7.22 and IR15.1.14, and the post inquiry representations received on the matter, including those of LAAG and those of Ms Trudy Auty. These representations raised matters that include the appropriateness of the Byrne model, the intention of the ONR to convene a Technical Advisory Panel (TAP) to provide independent advice on developments in methodologies in this area, the size of the target area used in assessments, bird strike, and the status of Dungeness C. The Secretaries of State are satisfied that the ONR, in addition to the Rule 6 parties to the inquiry, has been given all necessary opportunity to consider and comment on the matters raised and the evidence submitted in this respect. Taking into account the ONR's responsibilities as the UK's independent regulator of the nuclear sector, they attach significant weight to its ongoing regulatory position of not objecting to the planning applications, notwithstanding its convening of a TAP. Regarding the status of Dungeness C, the Secretaries of State have had regard to the ONR's view in its representation of 24 October 2012 that the site is currently not on the list of identified sites for future new nuclear build and they consider that the status of Dungeness C merits little weight.

25. Overall the Secretaries of State see no reason to disagree with the Inspector's assessment that there would be some increase in overall risk, but that the ONR has maintained its position of no objection and there is little evidence that would suggest its view should be overturned (IR14.7.15). In reaching this view, the Secretaries of State have taken into account the Inspector's comment that although British Energy has objected to the proposals on the grounds that it is duty bound to resist any increase in risk, however small, it acknowledges that the increase in risk would be very small and would not compromise current or future activities."

125.†††† Mr Watson, Head of Planning Casework at the Department for Communities and Local Government, provided a witness statement about the post-Inquiry representations. After the close of the Inquiry, Ms Auty, who gave evidence for LAAG at the Inquiry, contacted officials and a Minister at the Department for Energy and Climate Change. It is that Department, rather than the decision-making Departments in this case, which has responsibility for nuclear energy policy, and it is the Department for Work and Pensions which sponsors the HSE of which the ONR was then an internal agency. She sought to discuss minimum separation distances with them.

126.†††† The decision-making Departments received the Inspector's report on 9 March 2012. Ms Barton for LAAG sent to the Defendant Departments on 2 April 2012 a report from a Dr Trotta of Imperial College entitled "Review of the Byrne model for aircraft crash probability in relation with the planned expansion of London Ashford Airport at Lydd". He concluded that estimates of crash probability using the Byrne model could not be considered robust and accurate, and the model was insufficient as a basis for sound and informed decision making about the increased level of risk of a major radiological release after expansion at Lydd. He criticised the estimation of background crash probability, certain features of the Byrne model, the high level of uncertainty in its application to Lydd, and the way in which factors relevant to increased risk from certain aircraft types and movements were not allowed for. This was circulated to the parties and to the ONR, and the responses were themselves circulated. Ms Auty then sent in further material which was also circulated as were the responses. ONR was sent this further material as well. Yet further material was sent in by Ms Auty on the day before the decision was due to be issued. ONR did see that later material and, as with the earlier material, it did not cause ONR to change its mind, as it had told the Defendants.

The Grounds and Challenges and the relevant ONR documents

127.†††† I can summarise the grounds relied on by Mr Horton in this way, since they are variants of the same complaints. The Secretaries of State unlawfully delegated their judgment in relation to the issue of nuclear power station safety to the ONR, adopting uncritically the ONR's assessments which led it not to object originally and to maintain that stance subsequently. I am not clear how much of that specific variant is left after Mr Horton's acceptance that the Secretaries of State did not in fact simply take the absence of objection from ONR as of itself sufficient and leave it at that. He accepted that the Inspector had evidence, including material from ONR to LAAG, which explained the reasons for its conclusions and stance, and that the Secretaries of State sought and received advice from ONR on the Trotta report and other post Inquiry representations from LAAG.

128.†††† The unlawful delegation point is closely related to the further contention that the Secretaries of State erred in law in relying on ONR's advice since the advice it gave was irrational and flawed in ways which were or should have been apparent to the Secretaries of State. In accepting its view, they adopted its public law flaws, making their own decision unlawful. Further, since ONR's reasons were inadequate, so too were those of the Secretaries of State and the Inspector. Likewise the Inspector's reasons were inadequate, which infected the reasoning of the Secretaries of State who adopted them. Finally the Secretaries of State should have deferred making a decision on the application, or perhaps refused it, until the uncertainties relating to the Byrne model had been resolved. These grounds require some examination of the technical material in evidence.

129.†††† These grounds require consideration of ONR's thinking as explained in documents presented by LAAG and LAA to the Inquiry and Secretaries of State. Of course, this Inquiry and application were not the first occasion upon which safety at Dungeness had been considered by the HSE and either the NII or the ONR. British Energy, which was the licensed operator of Dungeness B, also dealt with those bodies over safety at Dungeness B.

130.†††† On 28 November 2008, the HSE Nuclear Directorate, of which the NII was the larger part, wrote to Shepway DC to say that it had been reviewing the impact of the proposals for Lydd airport on the risk profiles of the two power stations at Dungeness. Dungeness A was preparing to defuel. Independent consultants reviewed the risk of accidental aircraft impact; levels of risk had been judged against the ND's Safety Assessment Principles, SAPs. “The Inspectorate is satisfied that the risk to the Nuclear Installations at Dungeness in their current plant states is sufficiently remote that we have no grounds for objection to the proposed development on the grounds of Nuclear Safety”.

131.†††† The consultants' report, from ESRT, was entitled “Lydd Airport Planning Application: Review of Dungeness B Aircraft Impact Hazard Analysis”, and dated July 2007. I set out the Executive Summary:

“A planning application has been submitted for a runway extension at Lydd Airport that would allow the operation of larger aircraft than currently use the facility, in particular Boeing 737 jet aircraft. The Dungeness B Power Station safety case addressed the external hazard represented by aircraft impact. An assessment of this hazard, taking account of operations at Lydd, as previously envisaged, concluded that the associated risk was acceptable. To take account of the proposed development and change in the nature of operations, the aircraft crash hazard has been re-assessed and it has been concluded that the risk would remain acceptable if the development currently foreseen were to proceed. The Nuclear Installations Inspectorate has requested that ESR Technology undertake a review of this re-assessment of the aircraft crash hazard.

The key findings of the review are as follows:

1.†††† The primary limitation of the AEA Technology methodology arises from the limited amount of accident data, representative of UK operations, associated with what is a rare hazard event, that forms the basis of the empirical model. Given these limitations, we consider the methodology to be generally reasonable.

2.†††† Reference to a wider data set from non-UK operations, supports our view that risk estimates derived using the methodology are generally likely to be pessimistic.

3.†††† With one minor exception, the risk estimate that we derive for the Dungeness B site by application of the standard AEA Technology methodology are consistent with those presented by Amec NNC on behalf of British Energy and we confirm that the methodology has been correctly implemented.

4.†††† The risk estimate is comprised of two elements, the background risk from aircraft en-route, not associated with Lydd Airport, and the risk associated with take-off and landing operations at Lydd Airport. The background risk makes the dominant contribution to the total risk of radiological release. The risk associated with Lydd operations in 2014 is estimated to [increase and comprise 12.3% of the total].

5.†††† The risk model employed for determining the crash location relative to the runway threshold and extended centreline is applicable where aircraft employ runway-aligned approach and departure paths. Due to the exclusion zone around the Dungeness nuclear site and the Lydd ranges, a standard runway-aligned approach to Runway 03 is not possible and the standard risk model is therefore not applicable to these operations.

6.†††† Runway 03 landing involved flight initially along the Runway 21 approach path followed by flight over the runway, then a 180 degree turn onto a runway-aligned path. This procedure may lead to a greater likelihood of crash at the Dungeness site than would have been the case if the aircraft was on a runway aligned path throughout.

7.†††† Whereas we can identify qualitative arguments, based on the considerable distance from the Runway 03 approach path and the Dungeness B site, to support the view that the Runway 03 approach procedure is unlikely to lead to a high probability of a crash at the site, developing a quantitative estimates for the probability of a crash at the site associated with Runway 03 approach operations presents significant difficulties. Estimates made using the standard AEA Technology methodology are not reliable.

8.†††† The possibility of a skidding impact at a location some distance from critical targets at the site, followed by a travel along the ground, possibly for several hundred metres, has been identified as having the potential to increase the probability of an impact leading to radiological release. In practice, the extent to which this represents a significant fact will be dependent upon the shielding of sensitive elements of the site by non-critical facilities. Preliminary review of this issue with British Energy indicates that there will be considerable mitigation by shielding. Whereas it will be appropriate for this issue to be formally considered in the aircraft crash hazard element of the plant safety case, in practice it is not expected that this would lead to a significant increase in the estimate risk, when assessed against the 1 in 10 per annum criterion."

132.†††† ESRT reviewed that assessment in November 2007. A number of changes then led HSE's Nuclear Safety Directorate to obtain a further assessment of the risks, which ESRT completed in a report in February 2009. ESRT had completed in 2008 a review of aircraft crash rates for the UK up to 2006 and revised them; crash rates were an important part of the methodology in calculating aircraft crash risk at specific nuclear sites. In the 2009 report, ESRT concluded:

"Overall it was found that the revised risk shows only around a 10% change as a result of the revised aircraft crash rates. This is well within the inherent accuracy of the Aircraft Crash Risk methodology and hence it can be asserted that the revised aircraft crash rates do not have a significant impact on the Aircraft Crash Risk at the Dungeness Nuclear Power site.

The Review of Aircraft Crash Rates report also considered other aspects of the established methodology, specifically the crash location model. The AEA crash location model was developed in 1991 and the review

considered potential changes to the model coefficients by including the additional 1991-2008 UK crash location data. The review found that there was good agreement between the two datasets and certainly within the overall accuracy of the model. It was therefore concluded that revision to the model to provide a better fit to the increased data would be of relatively limited benefit and that the model in its current form would be acceptable for the intended application. Therefore the results of the existing Dungeness Aircraft Risk Assessment remain unchanged with respect to the crash location model."

133.†††† The ESRT 2009 Report also dealt with risks arising from constrained airfield approaches such as exist in part at Lydd. I set this out more fully since much of LAAG's case revolved around these constraints. The report concluded:

"… Risk Assessment for Dungeness is robust to the situation at Lydd Airport. Although the research outlined the limitations of the existing crash location model when applied to constrained approaches, it was able to demonstrate that the risks are acceptable. The research also provided guidance on the future treatment of the issue recommending the use of the standard AEA model supplemented by other crash location models, specifically the NLR and DNVT crash location models."

134.†††† At paragraph 3.2.1, it considered the limitation of existing crash models in dealing with constrained approaches. Standard modelling assumed a runway aligned flight path from 10kms out from the runway threshold. A curved path was not so critical during take-off and was quite common for a variety of reasons. The crash risk was very much concentrated towards the runway threshold by which time the approach would have become runway aligned; the runway aligned flight path assumption therefore provided reasonable risk estimates across areas subject to more significant risk. There were instances where that assumption might break down for sites further from the runway threshold and in certain circumstances that applied at Lydd. The report said in section 4 that although it would not be unreasonable to expect that the risk posed to sites, including the Dungeness Nuclear Site, in the vicinity of the currently adopted approach may be greater than if a conventional unconstrained straight–in approach were available, the key question in relation to that site was whether the risk would be significant**:**

**"…** Careful consideration of this issue, taking account of uncertainties associated with a range of factors, indicates that, within the limits of what might reasonably be expected to be the increased probability of crash on approach due to its specific nature, the risks to the Dungeness Nuclear site posed by approach operations would remain very small indeed."

135.†††† The Report also considered other aspects in which operations at Lydd were unconventional, but not exceptional: lack of ILS for the runway 03 approach, the use of the offset localiser and the 3.5 degree glide slope. These did not give rise to significant or unacceptable risks.

136.†††† On 1 April 2009, ONR affirmed its position to Ms Auty, in response to emails and a letter from her. A "rigorous and systematic review of the nuclear safety considerations" had been completed. Its Annex explained why:

"Risk Modelling

The risk model used has been identified previously as that laid out in the AEA research report 150/1997. The methodology for the assessment is clearly laid out therein, and will not be repeated here, other than to confirm:

• Allowance for the distribution of take off and landings between 03 and 21 runways in accordance with the prevailing wind has been made.

• The most recent and relevant crash data statistics relevant to the type of operations at Lydd has been used.

The limitations of the risk model in terms of crash location accuracy, deviation from a linear approach path and applicability of the base crash statistics has all been examined in some degree of detail. In addition, the specific nature of the flight operations at Lydd has also been reviewed against practice at other UK and European airports. The use of generalised risk data in specific applications is common in risk assessment and care has been taken to select data which is sufficiently relevant to the situation at Lydd to ensure that the risk model is representative of the actual situation.

Within your letters, there are a number of references to "Error bars". It is unclear exactly what you are referring to, however I will make the assumption that you mean the positional accuracy of the planes arriving and leaving the airport may be lower than at most commercial airports due to the operational arrangements at Lydd. Acceptance of the flight paths and take off and landing procedures is the responsibility of the CAA. In order to operate the airport therefore minimum standards will need to be met. If however you are referring to how uncertainties in the risk model are handled and developed, this is done in a number of ways, firstly through statistical manipulation within the risk model and secondly through sensitivity studies on the base data. The repeated assertion in your letters that integration of the error bars has not been undertaken and indeed cannot be undertaken is incorrect in the context of our risk modelling. We have not used a multivariate model with either direct integration or monte carlo simulation to calculate the risk; a situation where "error bar" integration would be a relevant issue to be examined in detail.

A considerable amount of effort has been expended in the development and refinement of the risk models over a significant period of time. The models have been subjected to extensive peer review. Their potential limitations are well understood and have been taken into account in the assessment of the risks to the Dungeness Nuclear Site from operations at Lydd. It should be further recognised that the aircraft crash risk modelling and the interpretation of the modelling results draws on much wider experience in risk assessment that goes back further than the 1980s. Use is made of sound general practices in risk assessment, such as sensitivity analysis and the use of pessimistic or cautious estimates in the face of uncertainty.

Local Operations

It should be re-iterated that the restrictions and conditions imposed on operations at Lydd are fully understood and reflected in the risk assessment undertaken. Whilst there are aspects of the operations at Lydd airport that differ from the most common practice at other commercial airports in the UK, these aspects should not be considered to be in any way exceptional and they should not be considered to lead to an exceptionally high level of risk. From the perspective of risk to the Dungeness Nuclear Site the key question to be addressed when determining the acceptability of the proposed expansion at Lydd is whether any increased risk associated with the expansion would be significant. Careful consideration of this issue, taking account of uncertainties associated with a range of factors, indicates that, within the limits of what might reasonably be expected to be the increased probability of crash on approach due to its specific nature, the risks to the Dungeness Nuclear site posed by approach operations would remain very small indeed.

Background Risk

One issue where there appears to be confusion relates to what is referred to as background risk. This is the risk that is present anywhere in the UK of a plane crashing from activities unrelated to take off and landing and is associated with the total loss of control of a plane and its subsequent descent to ground. This risk cannot be removed from consideration unless all flying activities cease and from a public perception must be considered as acceptable. It is therefore a useful baseline against which to judge the effects of other directed activities such as airport related movements to gain an appreciation of the net change from what are clearly accepted levels of risk. Your statements that these risks cannot be compared as they are "not comparable" is incorrect. We are concerned with aircraft impact, regardless of its origin.”

137.†††† The Annex also pointed out the role of the concept of reducing risk to a level “As Low As Reasonably Practical”, ALARP. The “Tolerability of Risk”, TOR, philosophy had translated in certain cases into numerical targets: the “Basic Safety Objective”, BSO, and the “Basic Safety Level”, BSL. The former represented the level below which regulatory resources would generally not be used to seek further improvements. In this case “The levels of risk calculated are little changed between current operations and those proposed, and in addition fall below the BSO levels. Further detailed consideration is therefore seen as unnecessary”. Both Mr Swift QC for the Secretaries of State and Mr Village QC for LAA emphasised the importance to ONR and to the decision-makers of the risk being below the BSO, and the absence of significant change in risk from the expansion.

138.†††† The HSE “Safety Assessment Principles for Nuclear Facilities” of 2006 explained some of these concepts more fully. Their purpose was to guide regulatory decisions in the nuclear commissioning process, as part of giving effect to the legal requirement on nuclear site licensees to reduce risks so far as reasonably practicable. For a severe accident such as could occur in the event of a larger aircraft crashing on to a nuclear power station, the design base analysis should ensure that such an accident was highly unlikely, but analysis was still required to ensure that the risk was ALARP. The BSL was the risk level which a new facility should meet, at least, though the application of ALARP may lower risks further. The BSO was a benchmark reflecting “modern nuclear safety standards and expectations”. It also represented the level of risk below which further consideration of the case would not be a reasonable use of NII resources, and further improvements need not be sought from the dutyholder. The latter however did not have the option of stopping at this level. ALARP may mean that he was justified in stopping before risk levels were as low as the BSO, but if it were still reasonably practical to provide a higher safety standard, the duty holder should do so, even below the BSO.

139.†††† The relevant levels for the sort of accident being considered in this case, radioactive release from a major accident risking 100 or more fatalities from exposure to radiation were a BSL of 1:100,000 pa (1 in 100000 years) and a BSO of 1:10,000,000. In a letter of October 2008, this level was described as a “high level screen to remove from detailed consideration those hazards which are clearly extremely remote, rather than limit of acceptability. However, for the hazard posed by aircraft crash, it is not clear that this criterion can be met, and hence a more detailed evaluation of the likelihood and consequences of aircraft crash is required.” It then explained how the British Energy safety case, with an assumed 2mppa throughput, had been assessed originally and reviewed at the time of the earlier airport expansion proposal. I emphasise that this claim is not about the dutyholder's task but about the role of the NII/ONR.

140.†††† The NII sent to the Department of Energy and Climate Change in May 2009 a paper entitled “Lydd Airport Briefing Note”, produced in December 2008, which reiterated the rigorous review carried out of the proposed changes to Lydd Airport, concluding that the overall risk for the two power stations still fulfilled the ALARP requirement. British Energy had undertaken a risk assessment in relation to Dungeness B, which made it:

“not inclined to support the development, on the basis that it increases the overall risk, albeit by a very small amount. BE's objection is therefore based on the principle of avoiding any increase in risk, however small, where that is reasonably practicable. Clearly, BE's effort involved in posting an objection to the external development is minimal and, if successful, would prevent a small predicted increase in risk *(whether it is real or not could not be substantiated at these levels).* This is consistent with BE's legal duty to ensure that the risk due to its own operations is reduced as far as reasonably practicable.” Magnox had not objected as the licence holder for Dungeness A: the overlap between the presence of fuel and the increased risk due to airport operations “is likely to be negligible””.

141.†††† The Note described the process whereby NII had come to its view:

" . Review by NII specialists of the basis and assumptions of the case and applicability of the risk assessment methodology adopted by British Energy. This methodology is based on recognised best practice and uses the appropriate target area for an aircraft crash together with the relevant historical data whilst addressing any uncertainties.

. Independent risk studies by an external consultant with considerable experience in the field of analysing and/or assessing aircraft impact studies. These studies have demonstrated the robustness of the methodology used.

. Consultant with relevant statutory bodies, including Department for Transport, Civil Aviation Authority, (in respect of flight paths), Office for Civil Nuclear Security (OCNS) and the local authority Emergency Planning Office.

These studies have shown that the risk level imposed by the proposed airport operations is a small increase on that extant from current operations and postulated background crash rate (without the present of an airport). The calculated risk of a significant radiological release (per annum) are as follows."

142.†††† The background risks were the same with the current and future proposed operations at 1: 18,000,000 because the background risk is not the risk from current operations but the random risk from over flying aircraft, which are not landing at or taking off from Lydd. The risk from future proposed airport operations was marginally higher than at present: 1:66,000,000 at present compared to 1:62,000,000. The combined background and operational risks at Lydd were 1:14,500,000 at present, compared to 1: 14,300,000 in the future. (At that time the NII work assumed a 2mppa throughput for the future). The larger aircraft, though increasing in number and in risk potential if crashing on the site, would be more reliable than helicopters and light aircraft, which would reduce in number. Hence the overall risk was "more or less unchanged and still dominated by the background risk".

143.†††† Mr Horton contrasted these figures with those of both LAA and LAAG presented to the Inquiry both using the Byrne methodology, but with adjustments in LAAG's case. These are the figures at paragraph 14.7.11 in LAA's case, which presented in the same format are 1:120,000 for the whole site and 1: 1,800,000 for the nuclear island, which it said was the only location where a crash would lead to the radiological release qualifying as a Target 9 incident. LAAG's figure is at 14.7.13 and again altered in format, but based on a 500,000 mppa throughput, produced 1:144,000 to compare with 1:120,000. As Mr Horton said, these two are quite close.

144.†††† ESRT also produced in October 2010 a Technical Note entitled "Potential risk factors associated with site-specific aspects of Lydd operations". It dealt with "non-standard" aspects of operations at Lydd. These were within the spectrum of what might be considered normal operations, but might create specific operational risks. This Note makes the same points as the 2009 Report. Quantitative risk assessment was not "viable" because of a want of reliable statistics, and generic statistics would have to be adjusted for, e.g. off-set approaches different from Lydd. So these operations were assessed on "broader qualitative considerations". Whether the steeper 3.5 degree glide slope in the later stages of approach led to an aborted landing or to a crash landing at the airfield, there would be no risk at Lydd to the nuclear site. An aircraft on the offset approach on runway 03 would have passed the point of closest approach to the nuclear site before the increased complexity of approach would have any significant effect on operational safety so the safety implications were expected to be negligible. It explained why there was negligible risk to the nuclear site from the use of runways 03 and 21 when one of the ranges was active.

145.†††† All of the documents I have referred to above were before the Inspector at the Inquiry. I have already mentioned the Trotta Report and other material submitted by LAAG to the Secretaries of State after the Inquiry, material which was provided to ONR. In an email of 9 May 2012, responding only a month or so after receipt of material submitted in April 2012, and sent to the parties, ONR said that it had not assessed

the material and “our current regulatory position with regard to the planning application remains the same”. There had been a number of pieces of technical work in this area, including that from LAAG, which suggested emerging information which might warrant ONR's consideration. ONR therefore intended to convene a Technical Advisory Panel, TAP, to provide objective, scientific and technical based advice on aircraft crash hazards in relation to nuclear safety assurance and improvement. The deliberations would be made public. It reminded the Departments that it had the power to demand reasonable practicable improvements or to curtail or stop licensed operations as need be.

146.†††† ONR responded about further post Inquiry representations to the Departments in an email dated 24 October 2012, also sent to the parties. It identified the “key areas of concern in the emails requiring a response” as including the use of the Byrne methodology. By this time ONR had clearly read and reached some view about what it should do in respect of the material. The email said:

“ONR has provided evidence to the planning enquiry for Lydd airport expansion and judges the Byrne methodology as fit for the purpose of supporting its decision. It should be noted that the Chief Inspector has convened a Technical Advisory Panel to provide independent advice on the developments in methodology in this area, which is holding its first meeting in November.”

The submissions and conclusions

147.†††† Before turning to the submissions, it is in my judgment worth pointing out that the Inspector had significant evidence from LAA and LAAG. He accepted the Byrne methodology, as he was entitled to do. He accepted the BSL as an appropriate standard for the assessment of risk. Both sides said that the risks were below the BSL. He considered the application of the Byrne methodology to the specific characteristics of Lydd. He was entitled to reject the contention from LAAG that the BSO represented the level above which permission should be refused. He considered the work done by ONR and its consultants. He was entitled to give the weight he did to the views, explained as they were, of that expert body. On the face of it, that is a perfectly sensible conclusion which the Secretaries of State were entitled to accept as they did.

148.†††† I turn to the submissions. Mr Horton was right to abandon the suggestion that the Inspector and Secretaries of State had acted on a mere say so from ONR. The material emanating from the ONR, which the Inspector had, relating to the way in which it reached its conclusions, and there is much more which underlies the summaries and conclusions to which I have referred, explains the original safety assessment for Dungeness B's commissioning at a time when the Airport was already operational, the review at the time of the earlier expansion proposal, the knowledge which it had acquired of the operation of the airport, the work which it had undertaken itself, and through external consultants, expert in the assessment of aircraft crash risk, and explained adequately the basis for its decision not to object.

149.†††† I can see no basis either for holding that Inspector delegated the decision on the risk to nuclear safety to ONR. The Inspector considered the basis for the stance adopted by ONR. He was entitled to give it the very considerable weight he did. There was nothing unlawful about his giving to those views the weight he did. The weight he gave them was entirely a matter for his reasonable judgment. The NII/ONR was an expert body, with a particular function in this area. The conclusions of NII/ONR were reasoned, supported by external consultants, expert and considered over time. Unless there was something irrational about the ONR's views which called for their rejection or further investigation before rational reliance could be placed on them, that is the end of the matter so far as the Inspector's report and acceptance of it by the Secretaries of State is concerned. A fair reading of the report shows that the views of ONR were an important part of the Inspector's reasoning, but he had other evidence as well, notably the expert evidence from LAA and LAAG. The latter was of value to him to the extent that, in applying the Byrne methodology, critical of it though some of its witnesses were, the numerical outcome was very similar to that obtained by LAA, and both were below the BSL. But none of that is equivalent to delegating the decision to the ONR.

150.†††† The Secretaries of State were entitled to accept the Inspector's conclusions. That alone would make the argument that they delegated the decision to ONR unsustainable. The post Inquiry representations did not support the contention that there was a delegation of the decision at that stage but not earlier. ONR maintained its position, having read LAAG's material, although it thought that some further consideration of aspects via a TAP would be useful. There is a separate challenge to their decision not to defer the decision pending the outcome of the TAP's deliberations, whenever that might have been. But that is not the same as the delegation issue. I see nothing to support the contention either in the way in which the representations were handled, or in the acceptance that the ONR saw nothing in them to warrant a change in its position. ONR was not answerable to or sponsored by the decision-making Departments, and they were entitled to give to this conclusion the weight they did.

151.†††† The next ground concerns the extent to which the acceptance of the ONR view involved the acceptance of an irrational view, as the Secretaries of State ought to have realised. Mr Horton made a number of points under this head, none of which I accept.

152.†††† First he argued that there is a contradiction between two strands of evidence which the Inspector did not resolve or deal with, or perhaps even recognise. The ONR calculations of risk produced an outcome which was below the BSO, and hence no further work was required. I accept that the ONR calculations showed the risk to be below that level. The Inspector also accepted that the LAA and LAAG figures, applying the Byrne model, showed a risk level between the BSO and BSL.

153.†††† Mr Horton contended that such varying results showed the poor quality of the model, or of ONR's use of it albeit that LAA and LAAG were quite close together. This should have been explored, or the decision should have awaited the post Inquiry TAP report. Mr Swift suggested that there was a good reason for the differences: ONR had greater knowledge of the inputs relevant to the nuclear site than did LAA and LAAG and, for security reasons, not all of that information would have been available to the parties. It is reasonable in my judgment to infer that ONR/ESRT have a greater awareness of what is the size of the relevant area where the impact of an aircraft would lead to the radiological release the risk of which was being assessed, and not everything relevant to the safe design and protection of a specific nuclear site would be public. There is some support for that in redactions in the documents. That is a plausible basis for the differences in outcomes from the various model runs.

154.†††† But there is a stronger point, although it shows that Mr Swift is right as well. It relates to the effect of a smaller target size on the level of risk calculated. LAAG raised at the Inquiry the smaller target size which ONR/ESRT had used, compared to other contributors, and which LAAG said had a huge impact on predicted crash rates; IR 9.5.27. The LAA/LAAG figures were only “quite close” taking those which related to the whole site. The LAA consultants had also examined the nuclear island alone, though not necessarily on the same basis as ONR looked at it. But on that smaller target size, the risk level calculated by LAA was 1:1,800,000, still above the BSO, but much further below the BSL.

155.†††† I am not persuaded that the differences in outcome between the applications of the model to this issue have been shown by Mr Horton to make acceptance of the model or its conclusions irrational, or to require further reasoning.

156.†††† Mr Horton's next point was that the Inspector, faced with two model outcomes which were between the BSO and BSL risk levels, ought not to have recommended approval without going through the ALARP process, or requiring ONR or the parties to do so. This was what the SAP envisaged where the levels were between the BSO and BSL.

157.†††† I am not persuaded that there is an error of law in what the Inspector concluded over this. First, he had two groups of model output; and that of the ONR, which was the expert and independent responsible body, showed that the result was below the BSO, so no ALARP test was required from the ONR on any

footing. Second, the Inspector clearly also measured safety against the conclusion that the levels were above BSO but below BSL. Risks at or above the BSL are at the level at which the HSE SAP holds that licensing a nuclear site should be refused, as Mr Horton accepts. Having regard to what the BSL represents in relation to the design basis for the power stations, the Inspector was entitled to adopt that level as the level at which he would recommend refusal of permission for the airport expansion, since the power stations would not have been permitted at such risk levels.

158.†††† Mr Horton submits that ALARP should have been applied, but the Inspector wrongly ignored it. I disagree. ALARP is not a principle or policy for application in deciding planning applications for external proposals which may have an effect on nuclear safety; the SAP does not so suggest. ALARP, as the SAP makes clear, is the approach to be adopted by the HSE in licensing nuclear sites, and, then, whatever the risk level below BSL, the duty applies to the dutyholder. ALARP governs the relationship between the ONR and the licence holder. The Planning Inspectorate is neither the regulator nor the dutyholder. ALARP was reflected in British Energy's objection, understood and rejected at paragraph 14.7.7. Mr Horton's case would impermissibly elevate ALARP to a planning policy, and on his application of it, would require refusal of permission for an external development even where the risk level was below that at which, on any view, the nuclear site would have been refused a licence. It was not LAAG's case that the nuclear site should be redesigned or re-located; it was that the airport expansion should not proceed, as the result of giving effect to ALARP. It was difficult to see what else the application of ALARP could be on its case; and it was not for the Inspector to recommend changes to the design or operation of the power stations, nor was he obliged to perform some calculation as to the possible number of deaths in the event of a Target 9 crash.

159.†††† Mr Horton's point also rather ignores what the Inspector said in paragraph 14.7.17. In effect the background risk would have meant on LAAG's case that aircraft should not overfly nuclear power stations. I reject the suggestion that that mischaracterised LAAG's case or showed bias. The Inspector also dealt with the important question of the increase in risk which expansion would bring in rejecting LAAG's case in paragraph 14.7.15. He accepted that there would be some increase in risk, but relied on ONR, whose figures showed how small an increase with expansion there would be over the existing airport level plus background, the dominant contributor to risk.

160.†††† I am not persuaded that Mr Horton is remotely right to suggest that the difference between the ONR results and the LAA/LAAG results of applying the Byrne model shows that there was a very large increase in risk. That was not how the LAA/LAAG figures were arrived at; they did not take the ONR model output for background and existing risk as the starting point and apply new fleet mix and movement inputs to that modelled outcome. They did not model changes in risk from background and existing to future. The change in risk on the Byrne model was only in the ONR figures, and they provided the only modelled measure of change, and it was also therefore internally consistent. There is no evidence of internal consistency between the ONR inputs and those of LAA/LAAG. Mr Horton was wrong to suggest that the ONR work had failed to take account of the change in the aircraft mix at Lydd with expansion, leading to a significant increase in flights by aircraft over 5700kg. The ONR fleet mix assumptions do not show that at all.

161.†††† The Inspector was not obliged to ask whether ONR would have objected if it had come up with the results which LAA and LAAG did from their application of the Byrne model: that is no more than a permissible question for an advocate in cross-examination. The Secretaries of State were not obliged either to seek an answer to that question in order to reach a lawful decision.

162.†††† The Inspector was entitled to rely on the Byrne model, and treat the LAAG challenge to it as not for him to resolve. ONR itself pointed to the limitations of that model for application at Lydd, and described how those limitations should be assessed. He was entitled to rely on its work. There was no error of law in his acceptance of the safety evidence on either sets of figures, and certainly nothing irrational in giving weight to the considered, reasoned, explained and continuing absence of objection from ONR, in view of the material he had from it and the way the cases were presented to him. None of the points reformulated as a want of legally sufficient reasoning of one form or another can succeed, for the reasons which I have given in dealing

with the challenge substantively. The conclusions are amply explained, and deal with the principal issues in controversy on this topic.

163.†††† The Secretaries of States' decision therefore cannot be flawed by reliance on the reasoning and conclusions of the Inspector. The particular point directed at them but inapplicable to the Inspector is the conclusion they adopted as a result of the Trotta report and the ONR response to it, particularly in setting up a TAP to consider key issues which included the use of the Byrne methodology. Mr Horton submitted that their continued reliance on ONR was irrational since ONR had refused to reconsider its position after receipt of the Trotta Report. The Secretaries of State should have required ONR to consider the report and refused permission, or at least deferred a decision on permission, until ONR had done so, after the TAP reported; their failure so to react was irrational.

164.†††† I am unable to accept that argument. Clearly ONR had considered the Trotta Report, and decided to maintain its position of not objecting. The Secretaries of State knew that it maintained that position although it had set up a TAP to examine the use of the Byrne model. The limitations of the Byrne model both generally and in its specific application to Lydd had been considered, explained and allowed for by ONR in its work produced to the Inquiry. The ONR had not approached its risk assessment on some simplistic basis that the Byrne model should be applied uncritically and unthinkingly. The Inspector had been able to judge the extent to which allowances had been made for those factors in a way which he found sufficient. It is not as though the Trotta Report was the first time that the problems of using Byrne were raised and dealt with. The ONR was still entitled to conclude that it was not persuaded to change its position in the light of the Trotta Report, and the Secretaries of State were still entitled to attach weight to that stance. There is no inconsistency such as to make the decision irrational between ONR saying that it had considered the Trotta Report on the problems of Byrne which were not exclusive to Lydd and had not changed its mind on Lydd, and saying that a TAP should consider the use of the Byrne model, expressed in a very general way. It is obvious that there might, or might not, be scope for some improvements in the model, or reservations as to its use in certain circumstances, but that a willingness to consider that would not mean that decision-making in a specifically considered case had to be halted in the light of how the ONR understood the model, its limitations and had made qualitative assessments to deal with them.

Conclusion

165.†††† None of the grounds succeed. This claim is also dismissed.

Judgments

# Smyth v Secretary of State for Communities and Local Government

*Town and country planning – Development – Development consent – Claimant appealing against grant of planning permission for residential development – Development site located close to Special Protection Area and Special Area of Conservation – Whether inspection complying with requirements of European Union environmental law – Council Directive (EEC) 92/43, art 63*

*European Union – Environment – Conservation of natural habitats and of wild fauna and flora – Claimant appealing against grant of planning permission for residential development – Development site located close to Special Protection Area and Special Area of Conservation – Whether inspection complying with requirements of European Union environmental law – Council Directive (EEC) 92/43, art 63*

[2015] EWCA Civ 174, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

**CA, CIVIL DIVISION**

**RICHARDS, KITCHIN, SALES LJJ**

**17, 18 FEBRUARY, 5 MARCH 2015**

**5 MARCH 2015**

G Jones QC and D Graham for the Appellant/Claimant

J Maurici QC for the Respondent

R Price Lewis QC for the Interested Parties

Leigh Day Solicitors; Treasury Solicitor; Ashfords LLP

**SALES LJ:**

*INTRODUCTION*

**[1]** This is an appeal by the Appellant, Mrs Smyth, against the decision of Patterson J – [2013] EWHC 3844 (Admin) – in which the Judge dismissed an application by Mrs Smyth under s 288 of the Town and Country Planning Act 1990 ("the 1990 Act") against a decision dated 20 June 2012 of the Inspector (John Wilde CEng MICE.), on behalf of the Secretary of State, to grant planning permission for a development of 65 residential dwellings on land at Sentry's Farm, Exminster, Devon EX6 8DY ("the development site"). The Inspector granted planning permission in respect of the development site on an appeal by the developer ("Bellway") against a decision of the local planning authority, Teignbridge District Council ("the Council"), to refuse planning permission.

**[2]** Mrs Smyth is Chair of "Get Involved Exminster" ("GIE"), an association of local residents which was a party to the planning inquiry before the Inspector and objected to the proposed development.

**[3]** The development site is located close to the Exe Estuary Special Protection Area for birds ("the SPA"), which is also designated as a Site of Special Scientific Interest. The SPA incorporates the Dawlish Warren Special Area of Conservation ("the SAC"). The entire SPA is an area protected under EU law, in particular (so far as is relevant on this appeal) for the purposes of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive"). The development site is only about 350m from the closest part of the SPA, an area known as the Exminster Marshes which is managed as a nature reserve by the RSPB.

**[4]** The principal ground of appeal in this court has focused on the question whether the decision of the Inspector to grant planning permission complied with the requirements set out in art 6(3) of the Habitats Directive, as incorporated into domestic law in reg 61 of the Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations"). It was common ground that the Regulations simply reflect the relevant provisions of the Habitats Directive, so the argument before us proceeded by way of direct reference to the terms of the Habitats Directive, and it is not necessary to refer further to the Regulations in any detail.

**[5]** Although the Council refused planning permission for the development, that was for reasons unrelated to the application of the Habitats Directive. Pursuant to the Habitats Directive, the Council carried out a screening assessment by its officer, Mary Rush, and an "Appropriate Assessment", also by Ms Rush. The net effect of these assessments was that, having regard to certain mitigation measures, the Council's view was that the development proposal would have no significant adverse impact on the SPA and the SAC. The national agency with responsibility for nature conservation, Natural England, endorsed Ms Rush's assessment.

**[6]** At the planning inquiry, the Inspector heard from an expert ecologist (Mr Goodwin) called by Bellway, whose evidence was to the same effect. No other expert ecology witness gave evidence. Having reviewed the material available to him, the Inspector was persuaded by the assessments of Ms Rush, Natural England and Mr Goodwin, and concluded that there was no risk of significant harm to the SPA or the SAC associated with the implementation of the development.

**[7]** The Appellant challenged this assessment on her application to Patterson J, as Ground 2 of her application to the Judge ("the Habitats Directive Ground"). In a careful and thorough review, the Judge rejected that challenge: see paras 144 – 176 of the judgment. The Appellant appeals on that issue to this court.

**[8]** In the course of her complaint under the Habitats Directive Ground, the Appellant makes a number of subsidiary complaints about findings made by the Inspector and upheld by the Judge. I will address below what appear to be the main subsidiary complaints, albeit for the most part they were touched on only very lightly by Mr Jones QC in his oral submissions for the Appellant. However, the observation of Mr Maurici QC for the Secretary of State that a "scattergun" approach had been adopted by the Appellant is a fair one. Where an Appellant adopts a "scattergun" approach and presents a range of sub-complaints under the umbrella of a main Ground of appeal, but without proper focus in submissions, as here, it is not necessary or appropriate for this court "to examine every pellet in detail" (*R (Richardson) v North Yorkshire County Council* [2003] EWCA Civ 1860, [2004] 2 All ER 31, [2004] 1 WLR 1920, at 80 per Simon Brown LJ).

**[9]** As further grounds of appeal in this court, the Appellant says that the Inspector misapplied national policy contained in para 119 of the National Planning Policy Framework ("NPPF") (Ground 4 of the Appellant's application to the Judge: "the Policy Ground") and failed to give adequate reasons for his decision (Ground 5 of the Appellant's application to the Judge: "the Reasons Ground"). These grounds are, in the main, parasitic upon the Appellant's principal ground of appeal based on the Habitats Directive. The Judge rejected these grounds at paras 198 – 217 and 218 – 221 of her judgment, respectively.

**[10]** The Appellant also advances distinct grounds of appeal (covered by Ground 3 of her application to the Judge: "the CIL Grounds"), that the Inspector failed to apply reg 122 of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations") and/or failed to have proper regard to the effect of reg 123 of the CIL Regulations, in accepting that the developer could make a contribution to required ecological mitigation measures in respect of the SPA and the SAC by way of a payment under a contribution agreement made under s 106 of the 1990 Act. The Judge rejected these grounds at paras 178 – 197 of her judgment.

*THE LEGISLATIVE FRAMEWORK*

**[11]** The developer, Bellway, applied for planning permission to the Council, as the designated local planning authority under the 1990 Act. This meant that the Council, in taking its decision, was the competent authority for the purposes of the Habitats Directive and the Habitats Regulations to check whether the proposed development properly complied with the requirements of those instruments.

**[12]** As mentioned above, the Council was satisfied that the proposed development would be compatible with the requirements of the Habitats Directive, but refused planning permission for other reasons. Bellway appealed to the Secretary of State, who delegated the determination of the appeal to the Inspector. This meant that the Inspector, in taking his decision, became in turn the competent authority for the purposes of the Habitats Directive and the Habitats Regulations to check for compliance with those instruments. As he explained in his Report, the Inspector understood this very well.

**[13]** Article 6(2) and (3) of the Habitats Directive provides as follows:

> "(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."

**[14]** It is relevant to note at this point that art 6(3) provides for two stages of assessment: (i) under the first sentence, a screening assessment whether a plan or project is "likely" to have a significant effect on a protected site (for discussion of the precise meaning of the word "likely", see below); and, if such an effect cannot be ruled out at the screening stage, (ii) an "appropriate assessment", under the second sentence.

**[15]** In this case, the Council, in its screening assessment, thought that the proposed development would be likely, in combination with other projects or plans, to have a significant effect on the SPA, and therefore proceeded to make an "appropriate assessment". In its "appropriate assessment", the Council came to the conclusion that the proposed development would not adversely affect the integrity of the SPA. The reason for the difference was that at the screening assessment stage the Council did not bring into account certain mitigation measures which were proposed in respect of the development, whereas for its "appropriate assessment" it did.

**[16]** By contrast, the ecology expert at the inquiry, Mr Goodwin, pointed out in his proof of evidence that there is authority that it is legitimate to bring mitigation measures into account in making the screening assessment required by the first limb of art 6(3): see *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin); [2008] 2 P & CR 16. This appeared to have been overlooked by the Council. Mr Goodwin's view, therefore, was that having regard to the mitigation measures which the Council required and regarded as acceptable at the "appropriate assessment" stage under the second limb of art 6(3), the proposed development would in fact pass the test for compliance with the Habitats Directive at the first, screening stage of assessment under art 6(3): see, in particular, paras 5.27 to 5.31 of Mr Goodwin's proof of evidence.

**[17]** The Inspector in his Report followed the analysis set out by Mr Goodwin. The Inspector found, under the first limb of art 6(3), that "the proposed development, even when combined with other development, would not be likely to give rise to any significant effects on either the SPA or the SAC" (para 38 of his Report). On this approach, no separate "appropriate assessment" needed to be carried out (para 39 of the Report).

**[18]** Article 6(4) of the Habitats Directive provides that in certain cases where there are "imperative reasons of public interest", it may be possible for a competent authority to authorise a development plan or project despite the adverse effects it may have on a protected site, in particular if adequate compensatory measures are adopted to off-set those effects in other ways. In the present case, as a result of their respective somewhat differing analyses under art 6(3), neither the Council nor the Inspector considered that reference needed to be made to art 6(4). Their respective decisions that the proposed development would be compatible with the Habitats Directive were based on art 6(3).

**[19]** Regulation 122 of the CIL Regulations applies in relation to planning obligations entered into under s 106 of the 1990 Act. It provides in relevant part as follows:

> "122 – Limitation on use of planning obligations:
>
> (1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
>
> (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is –
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and kind to the development."

**[20]** Regulation 123 of the CIL Regulations, though not yet applicable, will impose further limitations on the use of planning obligations under s 106 of the 1990 Act. As it stood at the time of the Inspector's decision and the judgment below (it has since been amended), it provided in relevant part as follows:

> "123 . . .
>
> (3) A planning obligation ('obligation A') may not constitute a reason for granting planning permission to the extent that –

(a) obligation A provides for the funding or provision of an infrastructure project or type of infrastructure; and

(b) five or more separate planning obligations that –

(i) relate to planning permissions granted for development within the area of the charging authority; and

(ii) which provide for the funding or provision of that project, or type of infrastructure, have been entered into before the date that obligation A was entered into."

**[21]** Regulation 123 was due to come into effect in April 2014, but that timetable has been extended now until later in 2015. In summary, when reg 123 comes into effect, it will prevent the use of planning obligations under s 106 falling within the scope of operation of reg 123 to fund infrastructure projects on a collective basis. Instead, it will be necessary for a local planning authority to set a community infrastructure levy under the CIL Regulations to levy money to provide collective funding for such projects.

*FACTUAL BACKGROUND*

**[22]** The judgment below provides a detailed review of the facts. For the purposes of this appeal, it is sufficient to set out the following.

**[23]** The proposed development, comprising 65 dwellings, will be an extension of an existing village. It will include a new grassed area of public open space dedicated for public use of about 1.2 ha ("the POS"). The purpose of this is to absorb recreational use, such as by people walking dogs, to alleviate any impacts from the new development upon the SPA and the SAC. In an ecological report submitted by Bellway in support of its application for planning permission, it was suggested that as a result of the POS there would be little impact from the development on the SPA and the SAC.

**[24]** When the development proposal was put forward, the Council identified that there might be possible hydrological effects (water run off) and recreational effects (more pressure from people pursuing recreational activities) upon the SPA and the SAC associated with the development. On this appeal, it is not suggested that there was any inadequate assessment in relation to the hydrological effects, and it is not necessary to consider this aspect further.

**[25]** The Council drew the proposed development to the attention of Natural England. By a letter dated 17 March 2011 from Natural England to the Council, Natural England commented on Bellway's ecological report, to say that though some of the possible impacts on the SPA and the SAC would be removed by the on-site POS, not all the impacts associated with the development would be. Natural England objected to the application "until the impacts under the [Habitats Regulations] have been mitigated and compensated against".

**[26]** The Council, together with two other local planning authorities in the vicinity (Exeter City Council and East Devon District Council), commissioned a report from ecological consultants "Footprint Ecology" in relation to strategic planning and impacts from recreation in respect of the SPA and the SAC. Footprint Ecology reviewed bird surveys and carried out other work to produce a detailed report dated 19 September 2011 (Liley, D & Hoskin, R (2011) *Exe Estuary SPA and Dawlish Warren SAC Interim Overarching Report Relating to Strategic Planning and Impacts from Recreation* – "the Interim Report"). The Interim Report was interim in the sense that it was drawn up in the context of the developing strategic planning framework for the local ar-

ea as each of the local planning authorities proceeded with the process of drawing up and adopting their Core Strategies and other local development plan documents in accordance with national planning legislation which would, together, constitute their Local Development Frameworks ("LDFs").

**[27]** The LDFs which were being developed contemplated major housing development in the future, apart from and additional to that in the proposed development. The Council's LDF was being drawn up to provide for about 15,000 new houses in the Council's area; Exeter CC's LDF was aiming to provide for a further 12,000 new houses in its area; and East Devon DC's LDF was aiming to provide about a further 16,000 houses in its area. On any view, these plans contemplated that there would in due course be developments to house substantial additional population in the areas proximate to the SPA and the SAC which could put pressure on those protected sites. The developing LDFs recognised that an overall strategic package of mitigation measures would be required across the three local planning authority areas to avoid damage to the protected sites.

**[28]** In particular, the developing LDFs contemplated that three substantial green parklands dedicated to public use should be acquired as suitable alternative natural green spaces ("SANGs"), with a view to attracting recreational use associated with this substantial combined residential development away from the SPA and the SAC, so as to prevent harm being caused to those sites as a result of that development. The proposed parkland SANG closest to the development site at Sentry's Farm is the Ridge Top Park of 60 – 70 Ha in the south west of Exeter contemplated in the Council's developing Core Strategy, in Policy SWE1.

**[29]** The three major SANGs represent a proposed strategic approach across the three local planning authority areas to meet the overall combined effects of increased recreational pressures associated with the population which will eventually come to live in the substantial new housing to be built in those areas as the LDFs come to be adopted and then implemented. The substantial residential developments contemplated by the draft LDFs lie in the future. Similarly, the creation of the three parkland SANGs lies in the future. Relevant land for them will have to be acquired, including as necessary by use of compulsory purchase orders. Funding will have to be found to acquire the land for the SANGs. At present, there is uncertainty about how and when both the substantial residential developments contemplated by the draft LDFs and the setting up of the SANGs will take place.

**[30]** In its Interim Report, Footprint Ecology drew on work it had undertaken for another report it had been commissioned to provide, the Exe Disturbance Study report, eventually issued in final form dated 21 December 2011 (Liley D, Cruickshanks, K, Waldron, J & Fearnley, H. (2011) *Exe Estuary Disturbance Study* – "the Disturbance Study"). This was another very detailed report regarding disturbance to birds in the SPA and the SAC from water-based and land-based recreation, with extensive reference to various forms of evidence bearing on those matters. Footprint Ecology also drew on other published works by ecologists dealing with similar issues of human recreational disturbance of protected species' habitats. There is a considerable body of practical experience and expertise that has built up among professional ecologists in relation to these matters.

**[31]** The Interim Report provided advice to the three local planning authorities to assist with their application of the Habitats Regulations (and the Habitats Directive) to forthcoming development projects and the emerging LDF documents. Footprint Ecology specifically drew the attention of the Council and the other local planning authorities to the stringent tests to be met under the Habitats Regulations and the need for a precautionary approach (see, eg, p 14 of the Interim Report). Section 6 of the Interim Report dealt with "Exploration of mitigation options and their application elsewhere". The measures discussed included "The creation of alternative sites to divert visitors from sensitive sites . . ." (paras 6.11ff) and "On-site access management", including wardening of sensitive locations, use of a patrol boat, mitigation relating to dog walking and so forth (paras 6.17ff). It was noted: "There is already wardening in place at [the SAC], however as visitor numbers increase existing wardens are likely to become more stretched and additional staffing at busy times . . . would be effective at reducing disturbance" (para 6.17).

**[32]** In s 8 of the Interim Report, entitled “Incorporating recommendations into development management”, Footprint Ecology said this:

> “8.1 In accordance with the Habitats Regulations, each development project with a likelihood of significant effects upon a European site should be the subject of a more detailed appropriate assessment of the implications of the project for European sites, in light of their conservation objectives. The three authorities are responsible for undertaking appropriate assessments of any development proposals to inform whether permission can be given, and what measures may need to be added to the proposal in order to ensure that European sites are not adversely affected.
>
> 8.2 At this point in time, a strategic approach to mitigation is not yet established, which leaves the only option of assessing each proposal on a case by case basis. For larger developments, alternative greenspace will be more easily provided, and should certainly be pursued. For smaller developments, and the on site management element of larger developments, the absence of a mitigation strategy at this stage makes it more difficult to require contributions at the right level to adequately provide appropriate mitigation, although the precautionary approach must always be applied in the absence of further information.
>
> 8.3 An interim approach could therefore be to identify particular projects, in partnership with Natural England, that are costed and capable of implementation, and equate to a per house contribution that meets the anticipated level of housing growth within a given period, until a longer term strategy can be put in place. These projects could be a range of alternative greenspace, enhancement of greenspace, on-site access management projects or the funding of wardening staff to start to plan and put in place some of the longer term on site work that staff on the ground would implement.
>
> 8.4 It has been recognised by Natural England and Habitats Regulations practitioners that once the need for a large scale approach and comprehensive mitigation strategy has been identified, an initial approach can be implemented having full regard of the precautionary principle in the absence of a more refined approach, until a longer term and more comprehensive approach can be developed. This was the approach taken in the Dorset Heathlands, where an 'Interim Planning Framework' was put in place by a consortium of local authorities, with funding allocated to a set of specific projects, until a more comprehensive approach was embedded into the relevant LDFs.
>
> 8.5 Given that it is anticipated that an interim approach would need to be in place for a shorter timescale than that for Dorset Heathlands, a simple and relatively straightforward project or set of projects should be identified. This approach still recognises the need for a case by case assessment, and there may be some development proposals for which adverse effects cannot be ruled out, due to the proximity or nature of the development, and the interim approach does not provide the necessary certainty. With this interim approach suggested, it is now necessary to obtain further input from Natural England as to whether this represents an appropriate and achievable interim solution.
>
> An initial and interim approach could include the identification of projects, in partnership with Natural England, that are costed and capable of implementation, and equate to a per house contribution that meets the anticipated level of housing growth within a given period, until a longer term strategy can be put in place. These projects could be a range of alternative greenspace, enhancement of greenspace, on-site access management projects of the funding of wardening staff to start a plan and put in place some of the longer term site work that staff on the ground would implement. It is advised that the latter may represent the most effective way

> of implementing and interim approach, and may be of greatest benefit to the longer term strategy.
>
> With this interim approach suggested, it is now necessary to obtain further input from Natural England as to whether this represents an appropriate and achievable interim solution."

**[33]** Thus, Footprint Ecology looked forward to the development of a joint interim strategy by the three local planning authorities, in partnership with Natural England, to address the strategic in-combination pressures from the residential developments contemplated across their areas. Under such an interim strategy, the costs of implementing the strategic mitigation measures would be shared equitably across residential developments as they came forward, in proportion to the contribution each development would make to the overall increase in population in those areas and the related recreational pressures on the SPA and the SAC. At the same time, Footprint Ecology reminded the three local planning authorities of their duties under the Habitats Regulations (and Habitats Directive) to screen and assess each proposed development as it was brought forward.

**[34]** It seems that work had already been done to develop such an interim strategy before the Interim Report was finalised. Eventually, a Joint Interim Approach to securing recreation mitigation ("the JIA") was adopted by the three local planning authorities on 1 November 2011. It had been endorsed by Natural England. The JIA provided for a developer to agree to pay a "standard Habitat Mitigation Contribution", assessed by the number of houses in the development, in addition to making any standard public open space provision in relation to the development. The standard contribution was to be used to fund a range of mitigation measures, including hiring additional site wardens and purchasing the three strategic SANGs in due course.

**[35]** Before the finalisation of the Interim Report and the formal adoption of the JIA, Ms Rush, the relevant officer for the Council, made her screening assessment and "appropriate assessment" of the proposed development at Sentry's Farm for the purposes of art 6(3) of the Habitats Directive, both in documents dated 14 June 2011 ("the Council's screening assessment" and "the Council's appropriate assessment", respectively).

**[36]** In the Council's screening assessment, Ms Rush noted potential hazards to the SPA and SAC associated with increased numbers of residents, but did not conclude that the development site would have a likely significant effect on the protected sites if taken by itself. However, she went on to consider "in combination" effects which the development site might have on the protected sites in combination with other proposed residential developments. She referred to existing planning consents already given by the Council for 300 houses at Milbury Farm, Exminster, 275 houses at Secmaton Lane, Dawlish, 174 houses at Secmaton Rise, Dawlish, 60 houses at Shutterton Lane, Dawlish Warren and 45 static units and 40 touring pitches at Lady's Mile Holiday Park, Dawlish ("the existing consents"), and to the large housing numbers to be provided for in the developing LDFs (see para 27 above: 15,000 for the Council plus a total of 28,000 in Exeter and East Devon). Ms Rush commented "This means that the impacts from the Sentry's Farm proposal are part of an in-combination effect of around 15,000 houses in Teignbridge and a further 28,000 in Exeter and East Devon. This many houses equates to around 2.3 x 43,000 = 98,900 people. The recreational impacts on the SPA and SAC of so many additional people will be large and will constitute a Likely Significant Effect".

**[37]** Ms Rush observed that the POS would incorporate a children's play area and an informal green space, but that a financial contribution to strategic mitigation measures would be required in addition to this. The conclusion in the Council's screening assessment was that the development proposal would have "A Likely Significant Effect – in combination with other plans or projects, through . . . insufficiently mitigated recreational impacts of damage and disturbance to [the SPA and the SAC]". More detail was also required in relation to the POS.

**[38]** In the Council's appropriate assessment, Ms Rush noted that the POS would provide some value in diverting recreational use away from the SPA and the SAC, particularly through the provision of an "on-the-doorstep dog walking location that is likely to 'intercept' a high proportion of day-to-day dog walking trips", but again concluded that the POS fell "well short of the full mitigation for impacts required by the legislation". The Council required to be satisfied about the detailed plans for the POS to ensure that the POS was of good quality, so that it could be expected to have an attractive effect as intended. This would be covered by a planning condition. In addition, a financial contribution was required in respect of the development in relation to providing strategic mitigation measures on a shared-costs basis. A contribution figure of £26,252.36 (to be corrected for inflation since 2008 – "the Conservation Contribution") was calculated as the required sum, based on early work the Council had done on a strategic approach to mitigation on a shared-costs basis in relation to the grant of planning permission at the Secmanton Lane site in 2008 and the likely population which would occupy the 65 houses to be built on the development site. This contribution was to be secured under a planning agreement made under s 106 of the 1990 Act. Ms Rush noted "This contribution is to be spent to offset impacts with the [SPA and SAC] themselves, by a variety of visitor management measures; on monitoring of impact; and as a contribution towards a major recreational site to attract people away from the SPA/SAC."

**[39]** In the conclusion of the Council's appropriate assessment, Ms Rush stated "As a result of this Appropriate Assessment [the Council] concludes that this proposal will have no significant effect on [the SPA and the SAC] *subject to* the mitigation measures set out [in the assessment]".

**[40]** Ms Rush supplied the Council's screening assessment and appropriate assessment to Natural England. By an email dated 29 June 2011, Natural England confirmed that it agreed with the conclusions of the appropriate assessment. It supported the proposal to require a condition in relation to the quality of the POS, since "The design of the POS will be particularly important if it is to 'soak up' as much recreation pressure as possible from the SPA".

**[41]** In the event, on 21 July 2011 the Council refused Bellway's application for planning permission for reasons unrelated to the Habitats Directive. Bellway appealed to the Secretary of State, who appointed the Inspector. The appeal was held by way of a public inquiry, which opened on 31 January 2012.

**[42]** During the inquiry, GIE's representative cross-examined Bellway's planning consultant on ecology issues, with the result that the Inspector adjourned the inquiry to allow Bellway an opportunity to instruct an expert ecologist to deal with the detailed ecological matters raised by GIE.

**[43]** Bellway then instructed Mr Goodwin as an expert. Mr Goodwin prepared a lengthy and detailed proof of evidence, to be adduced at the inquiry. In his proof of evidence, Mr Goodwin set out his view that the proposed development was not likely to have a significant effect on the SPA and the SAC within the meaning of the first limb of art 6(3) of the Habitats Directive, either alone or in combination with other plans or projects (see, eg, the summary of his evidence at para 3.4 of his proof; also paras 5.33 and 8.5).

**[44]** Mr Goodwin referred to the relevant legislation, including in particular the Habitats Regulations and the Habitats Directive, and to the guidance given by the ECJ in its leading judgment in the *Waddenzee* case (Case C-127/02, *Landelijke Vereniging to Behoud van de Waddenzee v Staatsecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405, [2005] All ER (EC) 353) (paras 5.2 to 5.11 of his proof). He also referred to the judgment of Sullivan J (as he then was) in the *Hart* case, above, to explain that in his (Mr Goodwin's) view it was permissible to take account of mitigation or avoidance measures which form an integral part of the plan or project when applying the test in the first limb of art 6(3) of the Habitats Directive (paras 5.12 to 5.14 of his proof; also, paras 5.27 to 5.33). In s 8 of his proof, entitled "Predicted Effects and Strategy for Avoidance, Mitigation and Enhancement", Mr Goodwin set out the detail of his reasoning on the potential likely effects upon the SPA and the SAC.

**[45]** In my view, Mr Goodwin's proof of evidence is careful and considered, and shows a good understanding of the factors relevant to protection of the SPA and the SAC.

**[46]** Mr Jones submitted that Mr Goodwin's evidence amounted merely to assertion, unsupported by any objective evidence. I do not agree. Three points should be made. First, I consider that on a fair reading of Mr Goodwin's proof of evidence it can be seen that he has drawn on specific information relevant to the SPA and the SAC, as well as the development site and proposed mitigation measures, in a manner which supports in an entirely conventional and acceptable way his expressions of opinion as an ecological expert. By way of example, at paras 10.4 and 10.5 of his proof, he pointed out that, contrary to the suggestion made by GIE's representative at the inquiry, it was not appropriate to use the analogy of mitigation measures developed for heathland sites (a 400m exclusion zone), where ground nesting birds might be subject to predation by cats, since for the SPA "the designating bird features are wintering or passage species and access to large parts of the site is not possible in any event" (because it is marshland or cut off by water). He referred to the Interim Report and the Disturbance Study, as appropriate. Mr Goodwin demonstrated a good understanding of the particular ecological and mitigation features relevant to the SPA and the SAC. Contrary to Mr Jones's contention, Mr Goodwin's evidence was very far from being unsupported, free-standing assertion.

**[47]** Secondly, in my view it is acceptable and to be expected that an expert will draw on his own background knowledge, experience and expertise in the field to inform the opinions which constitute his evidence to a relevant decision-maker (here, the Inspector). That is, indeed, in large part the point of looking to expert witnesses to provide assistance on technical matters. In this case, Mr Goodwin's own practical experience, the practical experience of ecologists generally and the knowledge shared between them all informed the expertise which he was able to bring to bear in giving his views regarding the effects of the development and the practical impact and viability of the mitigation options which he reviewed in his proof of evidence.

**[48]** Thirdly, expert evidence of the kind given by Mr Goodwin was objective evidence on which the competent authority, the Inspector, was entitled to rely in making his assessment for the purposes of art 6(3) of the Directive. Where, as in this case, an assessment is called for of impacts on bird species and of how large numbers of people might be expected to react to incentives to direct their recreational habits away from a protected site or of how on-site control measures could be expected to limit their impact, the views of an expert ecologist drawing on his practical experience and knowledge of the effectiveness of ecological initiatives elsewhere may constitute highly material and relevant objective evidence. The Inspector clearly thought he would be assisted by such evidence, which is why he adjourned the inquiry to provide an opportunity for Bellway to provide it. It cannot be said that this indicates any error of approach on the part of the Inspector. On the contrary, in my view it indicates the care with which the Inspector approached the question of application of the Habitats Directive in this case.

**[49]** In s 8 of his proof of evidence, Mr Goodwin referred to the Council's screening assessment and its appropriate assessment, discussed the JIA then in place and endorsed the conservation contribution for the development site of £26,252.36 (paras 8.77 to 8.97 of his proof). At para 8.97 he noted that Natural England had confirmed that the contribution measures were appropriate in scale to avoid any significant adverse effects on the SPA and the SAC. He also discussed the targeted use of the contributions, as contemplated by the Interim Report, the JIA and the Council's "Submissions on s 106 Contributions" produced for the inquiry, in relation to site-specific mitigation projects identified by the Council (as measures additional to the three strategic SANGs), including provision of a warden and patrol boat, a bylaw review, additional signage and monitoring measures (paras 8.98 to 8.104 of his proof).

**[50]** Then, in an important part of his proof of evidence, Mr Goodwin reviewed the status and robustness of the joint approach to strategic mitigation on which the Council sought to rely: paras 8.105ff. He discussed the evidence base for the joint approach, in particular by reference to Footprint Ecology's Interim Report (paras 8.110 to 8.114). He agreed with Footprint Ecology's view that it would be "appropriate to rely upon an interim strategy [ie what had by this time been developed as the JIA], where Natural England are consulted on the specific details of an individual plan/project, such as is the case with the Appeal Site" (para 8.114; see also

para 8.5 of the Interim Report, set out above). Mr Goodwin discussed the effectiveness of use of interim strategies elsewhere, of which he had knowledge (paras 8.115 to 8.118). He again emphasised, at para 8.118, the importance of Natural England's advice being sought “on a case by case basis, notwithstanding the adoption of a [joint interim] strategy”. The involvement of Natural England, case by case, would ensure that a properly precautionary approach to the safeguarding of protected sites would be applied. Then Mr Goodwin turned to discuss the position of Natural England regarding interim mitigation strategies, which was that it was willing to endorse such strategies (paras 8.119 to 8.122).

**[51]** In the following paragraphs of his proof (paras, 8.123 to 8.135), Mr Goodwin discussed the impact of the development site on the SPA and the SAC on a stand-alone basis and also in combination with other projects. His view was that, considered alone, the development proposal would “at worst give rise to a *de minimis* effect”, so that no “appropriate assessment” would be required on that basis under the second limb of art 6(3): paras 8.123, 8.126 and 8.132. Even in combination with other residential developments which were planned, Mr Goodwin was doubtful that the effects of the development site upon the SPA and the SAC would rise above the *de minimis* level (paras 8.126 to 8.128 and 8.132). However, even assuming that they might do, the in-combination effects from the development site would be subject to the adoption of the mitigation or avoidance measures reviewed by him, and on that footing his view was that they would not be likely to give rise to significant effects on the protected sites, within the meaning of art 6(3) of the Habitats Directive (paras 8.132 to 8.135; see also paras 3.4 and 5.31).

**[52]** Mr Goodwin was cross-examined on his proof of evidence when the inquiry resumed on 2 March 2012. He was the only expert ecologist to give oral evidence. It is clear that the Inspector considered that he could place weight on Mr Goodwin's evidence. The Inspector was lawfully entitled to take that approach.

**[53]** In his Report, the Inspector accepted Mr Goodwin's evidence and approach, to the effect that on the material available by the time of the inquiry the compatibility of the proposed development at Sentry's Farm could be determined under the first limb of art 6(3) of the Habitat's Directive, on a screening assessment, without the need to proceed further to conduct an “appropriate assessment” under the second limb of that provision. The Inspector dealt with the relevant ecology issues at paras 25ff of his Report, as follows (footnotes omitted):

> “25 The appeal site lies in reasonably close proximity to the Exe Estuary Special Protection Area (SPA) and RAMSAR site and somewhat further away from the Dawlish Warren Special Area of Conservation (SAC). The Council have previously undertaken an initial screening assessment in line with the requirements of the Conservation of Habitats and Species Regulations 2010 (HSR) into whether the proposed development would be likely to result in a significant effect on this site. They concluded from this initial assessment that an Appropriate Assessment (AA) was necessary and consequently undertook such an assessment. The result of the AA was that the Council concluded that the proposed development would have no significant effect on the SPA/RAMSAR site or the SAC.
>
> 26 In an email dated 29 June 2011 Natural England confirmed that they agreed with the conclusions of this AA. In a Secretary of State decision regarding Land at Dilley Lane, Hartley Witney, it is made clear that the *Secretary of State continues to give great weight to the views of NE as the appropriate nature conservation body in relation to the application of the Conservation (Natural Habitats &c) Regulations 1994* and consequently I give considerable weight to their conclusion relating to the Council's AA. Notwithstanding this however, it falls to me as the 'Competent Authority' to determine whether the proposed development complies with the HSR.
>
> 27 The Conservation Objectives for the Exe Estuary SPA are to *maintain the following habitats and geological features in favourable condition with particular reference to any dependent component special interest features for which the land is designated*. The habitats listed are littoral sediment, supra-littoral sediment, fen, marsh and swamp and neutral grassland and the

geological features are coastal cliffs and foreshore. For Dawlish Warren SAC the Conservation Objectives are similar with the habitat types being supra-littoral sediment and littoral sediment, and the geological feature being active process geomorphological.

28 The screening assessment undertaken by the Council identified disturbance of bird populations, physical damage to the habitats and invertebrate communities by recreational users and pollution from discharges of surface water and drains as the potential hazards to the Exe Estuary SPA and Dawlish Warren SAC. They noted that recreational use was already causing significant disturbance to birds and also physical damage to habitats and invertebrate communities. I note however that in the Exe Estuary SSSI condition assessment undertaken by NE there is no mention of recreational use causing disturbance and damage or having an adverse effect on qualifying bird species. The Council also identified that any impacts from the proposed development would be part of a future in-combination effect of about 15000 houses in Teignbridge and a further 28000 in Exeter and East Devon. From this information the Council concluded that there would be a Likely Significant Effect.

29 Consequently an Appropriate Assessment (AA) was undertaken which identified that the proposed public open space on the site would be of too small an area to fully mitigate the impact of the proposed development. In the absence of a robust mitigation package specific to the Exe Estuary and Dawlish Warren, the Council have accepted advice from NE that a Joint Interim Approach to securing recreation mitigation (JIA) would be suitable. Such an approach has been used for the Thames Basin Heaths and Dorset Heathlands Special Protection Areas and was utilised by the Council for a residential development proposal at Secmaton Lane, Dawlish. This approach to securing recreational mitigation is operated jointly with Exeter City Council and East Devon District Council and was adopted in November 2011. The outcome of this approach is that a contribution would be required from residential development, based on the likely number of residents, to be spent on a variety of visitor management measures, on monitoring of the impact of visitors, and towards the provision of a major recreational site to attract people away from the SPA/SAC.

30 During the Inquiry my attention was drawn to an interim report (IR) produced by Footprint Ecology. This report related to strategic planning and impacts from recreation on the Exe Estuary SPA and the Dawlish Warren SAC. The IR indicated that there is a clear relationship between the distance people live from the estuary and how often people visit, and GIE pointed out that the IR suggests that *there may be a need for restrictions to be placed on development in close proximity to the most sensitive parts of the European sites*. Conversely, the IR also states that *proposed options for growth in very close proximity need to be carefully checked to ensure that adequate and appropriate measures can be implemented to prevent an increase in recreational pressure causing further harm to European sites*. To my mind that is the very purpose of considering the proposed development against the requirements of the HSR. I also note that the sensitive habitats (intertidal, shore and open water) within the SPA and the SAC are at least 2.5km to 3km from the appeal site.

31 The IR also concludes that in terms of visitors to the Exe, alternative sites and green infrastructure are not likely to be effective alone. However, it goes on to say that such measures may be effective if combined with on-site management measures that may serve to deter visitors, and gives an example of such a measure as dog control orders in certain areas.

32 This is very much the approach taken by the JIA, and as well as the provision of a strategic suitable alternative natural green space (SANGS), I was made aware of a list of schemes that would form part of this approach, including enforcement of exclusion zones, provision of a patrol boat, dog control orders and enhanced signage. Overall, notwithstanding that the Exe Es-

tuary SPA and the Dawlish Warren SAC are estuarine habitats as opposed to heathlands, I consider the JIA and its outcomes to be an acceptable way of achieving the required mitigation.

33 In arriving at this conclusion I am aware that the JIA is an interim measure that tends towards a 'one size fits all approach'. I consider, however, particularly in view of the housing shortage in the district, that it would be inappropriate for planning permission for residential development to be consistently refused until such time as a final mitigation package is produced.

34 The AA undertaken by the Council further noted that the extent to which the on-site public open space would attract every day recreational use away from the SPA and SAC would be dependent on its quality and continuing management, and recommended a variety of landscape features and the division of the area into several small visually contained areas. The AA also noted that full details of the sustainable drainage scheme (SUD) would be needed before the commencement of development. If I ultimately conclude in favour of the Appellants, then I consider that it is perfectly acceptable from a legal and planning perspective for the details of the SUD and the landscape features to be approved through a suitable planning condition. This would enable the Council to ensure that no harmful discharges would occur to the SPA and SAC and to have control over the design of the public open space.

35 Evidence produced by the Appellants makes the point that the SPA and SAC are not designated on account of breeding birds, but on account of their passage and over-wintering bird populations. The Appellants also point to the fact that the Exminster Marshes Nature Reserve is accessible from the appeal site. This reserve has been designed to alleviate pressure from visitors on the SPA site. There are also large expanses of accessible forest about 8km from the appeal site, which may well be preferable for dog walkers. The Appellants also point to the fact that much of the SPA is not well suited to public access, comprising mud flats and saltmarsh.

36 Rule 6 parties considered that as the appeal site is within 400m of a European site then mitigation is not possible. However, from the evidence that is available to me it would seem that this approach stems from the delivery plan and guidance associated with the Thames Basin Heaths, and is not strictly applicable to the case before me. The types of habitats involved here differ from a heath, as do the types of species involved and the accessibility, and consequently I am not persuaded that a 400m rule applies.

37 It is acknowledged by both main parties that the on-site public open space (POS) will be smaller than that required to fully mitigate the impact on the SPA and SAC, and will to an extent be compromised by the provision of the SUD. However, this POS is over and above the primary mitigation measure, the contributions under the JIA, and this is not therefore an issue that can be afforded significant weight.

38 Overall, taking into consideration the conservation objectives of the SPA and the SAC, and the proposed mitigation measures and other factors that I have outlined above, I conclude that the proposed development, even when combined with other development, would not be likely to give rise to any significant effects on either the SPA or the SAC. There would therefore be no conflict with the requirements of paragraph 118 of the Framework. This makes clear, amongst other things, that if significant harm resulting from a development cannot be avoided, adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused.

39 My attention has been drawn to paragraph 119 of the Framework, which makes clear that the presumption in favour of sustainable development does not apply where development re-

> quiring appropriate assessment under the Birds or Habitats Directive is being considered, planned or determined. Whilst an Appropriate Assessment was undertaken by the Council at application stage, in light of my findings above, I have found no necessity for repeating this process. Consequently, the presumption in favour of sustainable development applies to this determination."

**[54]** The Inspector granted planning permission for the development, subject to a number of conditions. These included that the developer should enter into an agreement under s 106 of the 1990 Act to pay the Conservation Contribution and a condition that no development should take place until details of the design, layout, equipment and future maintenance of the POS had been approved by the Council (condition 6). This was directed to ensuring that the POS on the development site would be of sufficient quality, and so likely to "soak up" recreational pressure away from the SPA (as Natural England had put it, in its email of 29 June 2011).

*DISCUSSION*

*The Habitats Directive Ground*

**[55]** Although it might be said that the Appellant appears to have an uphill struggle in relation to this Ground, since the Council in its appropriate assessment, Footprint Ecology in its Interim Report, Natural England and the only expert ecologist witness at the inquiry, Mr Goodwin, as well as the Inspector, all considered that the development proposal would not be likely to or would not have any significant adverse effect on the SPA and the SAC, once mitigation measures were taken into account, Mr Jones rightly reminded us that the test under both limbs of art 6(3) is a stringent one in law. If all those bodies and persons have not applied the correct legal approach, then this Ground of challenge and appeal would be made out.

*(i) A Strict Precautionary Approach*

**[56]** The *Waddenzee* judgment is the leading judgment of the ECJ on the interpretation of the Habitats Directive. The case concerned authorisations given for mechanical cockle fishing in respect of a protected site in the Netherlands. In view of their significance for the present case, I set out certain important passages in both the Advocate General's Opinion and the judgment of the court in full.

**[57]** AG Kokott set out her view that the circumstances in which a screening opinion under the first limb of art 6(3) may be found to exclude the need for an appropriate assessment are very limited, as follows (footnotes are omitted in the quotations below):

> "69 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 '*kˆnnte*' (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.
>
> 70 Since the normal authorisation procedure is intended to prevent protection areas being affected by plans or projects, the requirements relating to the probability of an adverse effect cannot be too strict. If the possibility of an appropriate assessment were ruled out in respect of plans and projects which had only a 10% likelihood of having a significant adverse effect, statistically speaking one in ten measures precisely under this limit would have significant effects.

However, all such measures could be authorised without further restrictions. Consequently, such a specific probability standard would give rise to fears that Natura 2000 would slowly deteriorate. Furthermore, the appropriate assessment is also precisely intended to help establish the likelihood of adverse effects. If the likelihood of certain adverse effects is unclear, this militates more in favour than against an appropriate assessment.

71 In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measures could be carried out with sufficient precision in the absence of the factual basis of a specific assessment.

72 On the other hand, it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment. Adverse effects, which are not obvious in view of the site's conservation objectives, may be disregarded. However, this can be assessed and decided on only on a case-by-case basis.

73 In that regard the criterion must be whether or not reasonable doubt exists as to the absence of significant adverse effects. In assessing doubt, account will have to be taken, on the one hand, of the likelihood of harm and, on the other, also of the extent and nature of such harm. Therefore, in principle greater weight is to be attached to doubts as to the absence of irreversible effects or effects on particularly rare habitats or species than to doubts as to the absence of reversible or temporary effects or the absence of effects on relatively common species or habitats.

74 Therefore, an appropriate assessment is always necessary where reasonable doubt exists as to the absence of significant adverse effects."

**[58]** Later, at paras 85 and 86 of her Opinion, AG Kokott said this:

"85 Thus, in principle any adverse effect on the conservation objectives must be regarded as a significant adverse effect on the integrity of the site concerned. Only effects which have no impact on the conservation objectives are relevant for the purposes of Art 6(3) of the habitats directive.

86 The answer to this part of the third question must therefore be that any effect on the conservation objectives has a significant effect on the site concerned."

**[59]** At paras 95 to 111 of her Opinion, AG Kokott again emphasised the strictness of the tests in art 6(3) to safeguard a protected site, as follows:

"i) *Appropriate assessment*

95 It should first be noted that the habitats directive does not lay down any methods for carrying out an appropriate assessment. In this respect it may be helpful to refer to the relevant documents of the Commission, even though they are not legally binding. The court can in no way draw up, in abstract terms, a particular method for carrying out an appropriate assessment. However, it is possible to derive certain framework conditions from the directive.

96 Most languages versions, and also the 10th recital in the preamble to the German version, expressly require an *appropriate* assessment. As the Commission in particular correctly states, it is also clear from the wording of Art 6(3) of the habitats directive that an appropriate assessment must precede agreement to a plan or project and that it must take account of cumulative effects which arise from combination with other plans or projects.

97 This assessment must, of necessity, compare all the adverse effects arising from the plan or project with the site's conservation objectives. To that end, both the adverse effects and the conservation objectives must be identified. The conservation objectives can be deduced from the numbers within the site. However, it will often be difficult to encompass all adverse effects in an exhaustive manner. In many areas there is considerable scientific uncertainty as to cause and effect. If no certainty can be established even having exhausted all scientific means and sources, it will consequently be necessary also to work with probabilities and estimates. They must be identified and reasoned.

98 Following an appropriate assessment, a reasoned judgment must be made as to whether or not the integrity of the site concerned will be adversely affected. In that respect it is necessary to list the areas in which the occurrence or absence of adverse effects cannot be established with certainty and also the conclusions drawn therefrom.

ii) *Taking account of the precautionary principle and permissible doubts as regards the authorisation of plans and projects*

99 As regards the decision on authorisation, the second sentence of the German version of the second sentence of Art 6(3) of the habitats directive provides that such decision is to be taken only when, in the light of the conclusions of the assessment of the implications for the site, the competent authorities have ascertained that it will not adversely affect the integrity of the site concerned. As the Commission correctly emphasises, the other language versions go further than a mere 'ascertainment' in that they require that the competent authorities establish certainty in this respect. Therefore, it must be concluded that the ascertainment required for agreement in the German version can be made only when, in the light of the conclusions of the assessment of the implications for the site, the competent authorities are certain that it will not adversely affect the integrity of the site concerned. Therefore, as regards the decision the decisive factor is not whether such adverse effect can be proven but – conversely – that the authorising authorities ascertain that there are no such effects.

100 This rule gives concrete expression to the precautionary principle laid down in Art 174(2) EC in relation to a protection area covered by Natura 2000. The precautionary principle is not defined in Community law. It is examined in case law primarily in so far as protective measures may be taken, where there is uncertainty as to the existence or extent of risks, without having to wait until the reality and seriousness of those risks become fully apparent. Therefore, the decisive factor is the element of scientific uncertainty as to the risks involved. However, in each particular case the action associated with the protective measures must be proportionate to the assumed risk. In that regard the Commission stated in its communication on the precautionary principle that judging what is an 'acceptable' level of risk for society is an eminently political responsibility. Such responsibility can be met only where the scientific uncertainty is minimised before a decision is taken by using the best available scientific means.

101 Accordingly, the rulings of the court did not concern a 'failure to observe' the precautionary principle in abstract terms, but the application of provisions which give expression to the precautionary principle in relation to certain areas. On the one hand, these provisions normally provide for a comprehensive scientific assessment and, on the other, specify the acceptable

level of risk which remains after this assessment in each case or the margin of discretion of the relevant authorities.

102 Article 6(3) of the habitats directive constitutes such a rule. In order to avoid adverse effects on the integrity of Natura 2000 sites as a result of plans and projects, provision is first made for the use of the best available scientific means. This is done by means of a preliminary assessment of whether there are likely to be significant effects and then, where necessary, an appropriate assessment is carried out. The level of risk to the site which is still acceptable after this examination is set out in the second sentence of Art 6(3). According to that provision, the authorising authority can grant authorisation only when it is certain that the integrity of the site concerned will not be adversely affected. Consequently, remaining risks may not undermine this certainty.

103 However, it could be contrary to the principle of proportionality, which is cited by PO Kokkelvisserij, to require certainty as to the absence of adverse effects on the integrity of the site concerned before an authority may agree to a plan or project.

104 It is settled case law that the principle of proportionality is one of the general principles of Community law. A measure is proportionate only where it is both appropriate and necessary and not disproportionate to the objective pursued. This principle is to be taken into account in interpreting Community law.

105 The authorisation threshold laid down in the second sentence of Art 6(3) of the habitats directive is capable of preventing adverse effects on sites. No less stringent means of attaining this objective with comparable certainty is evident. There could be doubts only as regards the relationship between the authorisation threshold and the protection of the site which can be achieved thereby.

106 However, disproportionate results are to be avoided in connection with the derogating authorisation provided for in Art 6(4) of the habitats directive. Under this provision, plans or projects may be authorised, by way of derogation, in spite of a negative assessment of the implications for the site where there are imperative reasons of overriding public interest, there are no alternative solutions and all compensatory measures necessary to ensure that the overall coherence of Natura 2000 have been taken. Thus, in Art 6(3) and (4) of the habitats directive the Community legislature itself set out the relationship between nature conservation and other interests. Consequently, no failure to observe the principle of proportionality can be established.

107 However, the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of Art 6(3) of the habitats directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty.

108 Such a conclusion of the assessment is tenable only where the deciding authorities at least are satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned. As in the case of a preliminary assessment – provided for in the first sentence of Art 6(3) of the habitats directive – to establish whether a significant adverse effect on the site concerned is possible, account must also be taken here of the likelihood of harm occurring and the extent and nature of the anticipated harm. Measures to minimise and avoid harm can also be of relevance. Precisely where scientific uncertainty exists, it is possible

to gain further knowledge of the adverse effects by means of associated scientific observation and to manage implementation of the plan or project accordingly.

109 In any event, the decisive considerations must be set out in the authorisation. They may be reviewed at least in so far as the authorising authorities' margin of discretion is exceeded. This would appear to be the case in particular where the findings of an appropriate assessment on possible adverse effects are contested without cogent factual arguments.

110 It is uncertain whether the Netherlands rule on the need for obvious doubt complies with the level of acceptable risk thus defined. It classifies as acceptable a risk of adverse effects which can still give rise to doubts which are reasonable but not obvious. However, such reasonable doubts would preclude the certainty that the integrity of the site concerned will not be adversely affected which is necessary under Community law. The Raad van State's comments on the available scientific knowledge confirms this assessment. It refers to an expert report which concludes that there are gaps in knowledge and that the majority of the available research findings which are cited do not point unequivocally to serious adverse (irreversible) effects on the ecosystem. However, this finding merely means that serious adverse effects cannot be ascertained with certainty, not that they certainly do not exist.

111 In summary, the answer to the fourth question – in so far as it relates to Art 6(3) of the habitats directive – must be that an appropriate assessment must:

– precede agreement to a plan or project;

– take account of cumulative effects; and

– document all adverse effects on conservation objectives.

The competent authorities may agree to a plan or project only where, having considered all the relevant information, in particular the appropriate assessment, they are certain that the integrity of the site concerned will not be adversely affected. This presupposes that the competent authorities are satisfied that there is no reasonable doubt as to the absence of such adverse effects."

**[60]** The Court of Justice adopted the Advocate General's approach, in substance, in the following passages of its judgment:

"39 According to the first sentence of Art 6(3) of the Habitats Directive, 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, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

40 The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.

41 Therefore, the triggering of the environmental protection mechanism provided for in Art 6(3) of the Habitats Directive does not presume – as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled 'Managing Natura 2000 Sites: The

provisions of Article 6 of the 'Habitats' Directive (92/43/EEC)' – that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.

42 As regards Art 2(1) of Directive 85/337, the text of which, essentially similar to Art 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.

43 It follows that the first sentence of Art 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 Art 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. 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 Art 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 Art 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.

. . .

46 As is clear from the first sentence of Art 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives.

47 So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.

48 Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site. As the Commission in essence maintains, in assessing the potential effects of a plan or project, their significance must be established in the light, *inter alia*, of the characteristics and specific environmental conditions of the site concerned by that plan or project.

. . .

52 As regards the concept of 'appropriate assessment' within the meaning of Art 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.

53 None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.

54 Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Arts 3 and 4 of the Habitats Directive, in particular Art 4(4), be established on the basis, *inter alia*, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed.

55 As regards the conditions under which an activity such as mechanical cockle fishing may be authorised, given Art 6(3) of the Habitats Directive and the answer to the first question, it lies with the competent national authorities, in the light of the conclusions of the assessment of the implications of a plan or project for the site concerned, to approve the plan or project only after having made sure that it will not adversely affect the integrity of that 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 Art 6(3) of the Habitats Directive integrates the precautionary principle 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 Art 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.

> 60 Otherwise, mechanical cockle fishing could, where appropriate, be authorised under Art 6(4) of the Habitats Directive, provided that the conditions set out therein are satisfied.
>
> 61 In view of the foregoing, the answer to the fourth question must be that, under Art 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account 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 an 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."

**[61]** The strict precautionary approach in the *Waddenzee* case was followed and again emphasised in Case C-258/11, *Sweetman v As Bord Pleanala* [2013] 3 CMLR 404, [2014] PTSR 1092. AG Sharpston explained the "very low" threshold under the first limb of art 6(3): paras 45 – 49 of her Opinion. "In case of doubt" whether there may be significant effects on a protected site, an appropriate assessment is required (para 47). The CJEU (Third Chamber) in its judgment did not indicate any doubt as to the correctness of this approach. Like the Advocate General, it emphasised that art 6 should be construed as a coherent whole (para 32 of the judgment); that the competent national authorities should only authorise a plan or project pursuant to art 6(3) where – "once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field" – they are "certain" that the plan or project will not have lasting adverse effects on the protected site, ie "where no reasonable scientific doubt remains as to the absence of such effects" (para 40 of the judgment); and that the assessment under art 6(3) "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned" (para 44 of the judgment). See also, among a number of other authorities to similar effect, Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias* [2013] Env LR 21, paras 109 – 117.

**[62]** The importance of applying a precautionary approach under art 6(3), to ensure that appropriate protection for a protected site will be in place *before* any significant harmful effects occur in relation to the site, was again emphasised in Case C-418/04, *Commission v Ireland* [2007] ECR I-10947, at para 208. There, the ECJ emphasised that an ability on the part of a relevant public authority to take steps to obtain injunctive relief after any deterioration had occurred in respect of the protected site would not constitute adequate protection for the purposes of the Habitats Directive, since the protection under the Directive "requires that individuals be prevented in advance from engaging in potentially harmful activities".

**[63]** Below, I assess the present case in the light of this guidance, after consideration of certain other issues which arose on Mr Jones's submissions.

*(ii) Mitigation Measures And Compensation Measures*

**[64]** Issues have arisen in the authorities (a) whether any measures designed to mitigate or eliminate possible adverse effects on a protected site from a plan or project may be taken into account within art 6(3) of the Habitats Directive, as distinct from being relevant under art 6(4), and, if so, (b) whether such measures may be taken into account in applying the test in the first limb of art 6(3), or may only be brought into account as part of an "appropriate assessment" under the second limb of art 6(3).

**[65]** As to (a), in my judgment it is clear that preventive safeguarding measures which have the effect of eliminating completely or mitigating to some degree possible harmful effects of a plan or project on a protected site (in the sense that they prevent such effects from arising at all or to some degree) may be taken into account under art 6(3), and a competent authority is not confined to bringing them into account under art 6(4). If preventive safeguarding measures have the effect of preventing harmful effects from arising, or reduce them to a level where they are not significant, then the conservation objectives of art 6(3) of the Habitats Directive will have been fulfilled to the requisite standard stipulated by the Directive, as interpreted by the Court of Justice, and there would be no further discernible or proportionate justification for preventing the plan or project from proceeding or for imposing the stricter requirements involved in satisfying art 6(4) before authorising it. As the CJEU has said (see para 23 of the judgment in *Sweetman*), "article 6 . . . must be construed as a coherent whole in light of the conservation objectives pursued by the Directive": this approach points firmly in favour of this interpretation of art 6(3).

**[66]** There is sometimes reference in cases and guidance to a distinction between mitigation measures and compensation measures: see eg the European Commission's Guidance Document on art 6(4) of the Habitats Directive (2007/2012), referred to in the Opinion of AG Sharpston in Case C-521/12, *Briels v Minister van Infrastructuur en Milieu* [2014] PTSR 1120, at paras 8 – 10. One needs to be careful here, because although the concept of "compensatory measures" is used in art 6(4), no definition is given; and, further, the concept of mitigation is not used in the Habitats Directive itself, and the idea of mitigation is not always a precise one. However, I think that the basic distinction which is relevant for purposes of the application of the Habitats Directive is clear enough. If a preventive safeguarding measure of the kind I have described is under consideration, which eliminates or reduces the harmful effects which a plan or project would have upon the protected site in question so that those harmful effects either never arise or never arise to a significant degree, then it is directly relevant to the question which arises at the art 6(3) stage and may properly be taken into account at that stage. This view is supported by para 108 of AG Kokott's Opinion in the *Waddenzee* case, where, in relation to what may be brought into account as part of an "appropriate assessment" under the second limb of art 6(3), she says in terms: "Measures to minimise and avoid harm can also be of relevance." The part of the judgment of the court which corresponds with this part of her Opinion indicates no dissent from her approach. Rather, the wide language used by the court to indicate what should be brought into account for the purposes of an "appropriate assessment" under art 6(3) supports it: an appropriate assessment requires "*all aspects* of the plan or project which *can*, either individually or in combination with other plans or projects, *affect [the objectives of the Directive]*" to be taken in to account (emphasis supplied), and preventive safeguarding measures which would prevent harm from occurring meet this description.

**[67]** The approach of AG Kokott, to treat preventive safeguarding measures as relevant at the art 6(3) stage, is also supported by other authority: see Case C-239/04, *Commission of the European Communities v Portuguese Republic* [2006] ECR I-10183, para 35 of the Opinion of AG Kokott; paras 31 – 33 and 36 – 38 in the Opinion of AG Sharpston in *Briels*; and para 28 of the judgment in *Briels*, where the ECJ said this:

> ". . . the application of the precautionary principle in the context of the implementation of article 6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for [the protected site] concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site."

**[68]** On the other hand, where measures are proposed which would not prevent harm from occurring, but which would (once harm to a protected site has occurred) provide some form of off-setting compensation so that the harm to the site is compensated by new environmental enhancing measures elsewhere, then it cannot be said that those off-setting measures prevent harm from occurring so as to meet the preventive and precautionary objectives of art 6(3). In the case of off-setting measures, the competent authority is asked to allow harm to a protected site to occur, on the basis that this harm will be counter-balanced and offset by other measures to enhance the environment elsewhere or in other ways. In order to allow the harm to a pro-

tected site which art 6(3) is supposed to ensure does not occur, a competent authority will have to be satisfied that such harm can be justified under art 6(4), taking account of the off-setting compensation measures at the stage of analysis under art 6(4). Such measures would not be capable of bearing on the application of the tests under art 6(3), and so could not be relevant at the art 6(3) stage.

**[69]** The *Briels* case was concerned with measures to create new meadow areas for a protected species to compensate for harm to protected meadow areas within a protected site, associated with the construction of a new road. It is thus an example of a case concerned with off-setting compensation measures of the kind I have described, rather than preventive safeguarding measures. AG Sharpston reasoned that since compensatory measures are required by art 6(4) "where (i) there has been a negative assessment under art 6(3), (ii) there are no alternative solutions and (iii) the plan or project must go ahead for imperative reasons of overriding public interest", it would be illogical to say that they could be brought into account at the prior, art 6(3) stage: see para 28 of her Opinion, and the further discussion at paras 29 – 33. The ECJ came to the same conclusion: see paras 29 – 32 of the judgment. The measures at issue in that case were "not aimed either at avoiding or reducing the significant adverse effects" for the protected site, and so could not be brought into account at the art 6(3) stage: para 31 of the judgment.

**[70]** As regards issue (b) in para 64 above, there is domestic authority that it is legitimate for a competent authority at the screening opinion stage under the first limb of art 6(3) to have regard to proposed preventive safeguarding measures which are to be incorporated as a condition or requirement for authorisation of a plan or project, as well as at the "appropriate assessment" stage under the second limb of art 6(3): *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin); [2008] 2 P & CR 16, a judgment of Sullivan J, as he then was. This was the authority to which Mr Goodwin's proof of evidence called the Inspector's attention.

**[71]** Like the present case, *Hart* concerned potential harmful effects on an SPA (created to protect bird species) associated with increased recreational pressure on the protected site from a project for new residential development, in relation to which mitigation measures including the creation of SANGs were proposed. Sullivan J specifically considered issue (b) in detail at paras 54 – 76, by reference to the *Waddenzee* judgment and domestic authority. He referred to a passage at para 71 in AG Kokott's Opinion in the *Waddenzee* case which the Claimants in the *Hart* case relied upon (as did Mr Jones in the present case) as precluding reference to "the possibility or avoiding or minimising adverse effects" at the first stage under art 6(3), and explained that it had not been reflected in the ECJ's judgment, not least because the issue of preventive mitigation measures had not been in issue in that case; Sullivan J also explained that para 71 was phrased as it was because of the particular form of the question which had been posed by the national court: see 57 – 59. This paragraph in the Opinion, on proper analysis, did not constitute authority contrary to Sullivan J's view that preventive mitigation measures could be taken into account under the first limb of art 6(3). As he said (para 61) "if the competent authority is satisfied at the screening stage that the proponents of a project have fully recognised, assessed and reported the effects [on a protected site], and have incorporated appropriate mitigation measures into the project, there is no reason why they should ignore such measures when deciding whether an appropriate assessment is necessary".

**[72]** Sullivan J observed at para 72 that if, on the basis of all information put forward at the screening stage under the first limb of art 6(3), including preventive mitigation measures, the competent authority was satisfied that the package put forward would avoid any net increase in recreational visits to the SPA in question:

> "it would have been 'ludicrous' for her to disaggregate the difference elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered without the SANGs, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment."

**[73]** Sullivan J's conclusion at para 76 was as follows:

> ". . . I am satisfied that there is no legal requirement that a screening assessment under Regulation 48(1) must be carried out in the absence of any mitigation measures that form part of a plan or project. On the contrary, the competent authority is required to consider whether the project, as a whole, including such measures, if they are part of the project, is likely to have a significant effect on the SPA. If the competent authority does not agree with the proponent's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information (see *Waddenzee* above)."

**[74]** Mr Jones submitted that this part of the reasoning in *Hart* was wrong, or that the position under EU law was uncertain and that a reference to the CJEU should be ordered to obtain its view. I do not accept either submission. In my judgment, the reasoning of Sullivan J is compelling and is clearly correct, to the *acte clair* standard.

**[75]** The CJEU has emphasised that art 6 is to be read as a coherent whole in the light of the conservation objectives pursued by the Habitats Directive (see *Sweetman*, judgment, para 32; *Briels*, judgment, para 19). The first, screening opinion limb of art 6(3) is intended to operate as a preliminary check whether there is a possibility of significant adverse effects on a protected site, in which case an "appropriate assessment" is required under the second limb of art 6(3) to consider in detail whether and what adverse effects might arise. Both limbs are directed to the same conservation objectives under the Directive, which explains why the threshold under the first limb has been interpreted as being so low (see para 49 of AG Sharpston's Opinion in *Sweetman*). Since it is clear from the relevant case-law that preventive safeguarding measures are relevant matters to be taken into account under an "appropriate assessment" under the second limb (see the discussion above), there is in my view a compelling logic to say that they are relevant and may properly be taken into account in an appropriate case under the first limb of art 6(3) as well. In accordance with this logic, on a straightforward reading of para 108 in AG Kokott's Opinion in the *Waddenzee* case, set out above, she treats preventive safeguarding measures as relevant to both limbs of art 6(3).

**[76]** If the competent authority can be sure from the information available at the preliminary screening stage (including information about preventive safeguarding measures) that there will be no significant harmful effects on the relevant protected site, there would be no point in proceeding to carry out an "appropriate assessment" to check the same thing. It would be disproportionate and unduly burdensome in such a case to require the national competent authority and the proposer of a project to undergo the delay, effort and expense of going through an entirely unnecessary additional stage (and see in that regard paras 72-73 of AG Kokott's Opinion in *Waddenzee*, where she explains that "it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment").

**[77]** In my judgment, these are all powerful indicators that the proper interpretation of art 6(3) is as set out by Sullivan J Accordingly, I do not accept Mr Jones's submission that the Inspector erred in law in the present case in following the approach in *Hart*. The Inspector was lawfully entitled to take into account the proposed preventive safeguarding measures in respect of the SPA and SAC under the first limb of art 6(3), for the purposes of giving a screening opinion to the effect that no "appropriate assessment" would be required under the second limb of art 6(3), in the course of his consideration whether to grant planning permission.

*(iii) Standard Of Review*

**[78]** A further issue arising from Mr Jones's submissions concerns the standard of review by a national court supervising the compliance by a relevant competent authority with the legal requirements in art 6(3) of the Habitats Directive. Although the legal test under each limb of art 6(3) is a demanding one, requiring a

strict precautionary approach to be followed, it also clearly requires evaluative judgments to be made, having regard to many varied factors and considerations. As AG Kokott explained in para 107 of her Opinion in *Waddenzee*, the conclusion to be reached under an "appropriate assessment" under the second limb of art 6(3) cannot realistically require the attainment of absolute certainty that there will be no adverse effects; the assessment required "is, of necessity, subjective in nature". The same is equally true of the assessment at the screening stage under the first limb of art 6(3). Under the scheme of the Habitats Directive, the assessment under each limb is primarily one for the relevant competent authority to carry out.

**[79]** Mr Jones submitted that Patterson J erred in treating the assessment by the Inspector of compliance of the proposed development with the requirements of art 6(3) as being a matter for judicial review according to the *Wednesbury* rationality (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680) standard. He said that in applying EU law under the Habitats Directive the national court is required to apply a more intensive standard of review which means, in effect, that they should make their own assessment afresh, as a primary decision-maker.

**[80]** I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment (EIA) Directive and Regulations, this court has held that the relevant standard of review is the *Wednesbury* standard, which is substantially the same as the relevant standard of review of "manifest error of assessment" applied by the CJEU in equivalent contexts: see *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA CIv 114, [2013] JPL 1027, 32 – 43, in which particular reference is made to Case C-508/03, *Commission of the European Communities v United Kingdom* [2006] QB 764, at paras 88 – 92, [2006] ECR I-3949, [2006] 3 WLR 492 of the judgment, as well as to the *Waddenzee* case. Although the requirements of art 6(3) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts. Like this court in the *Evans* case (see para 43), I consider that the position is clear and I can see no proper basis for making a reference to the CJEU on this issue.

**[81]** In his submissions, Mr Jones sought to rely on a different *Evans* case: *R (Evans) v Attorney General* [2014] EWCA Civ 254, [2014] QB 855, [2014] 3 All ER 682. That case concerned a different directive (Parliament and Council Directive 2003/4/EC regarding access to environmental information), which is drafted in materially different terms from the Habitats Directive (since the Environmental Information Directive requires "access to a review procedure before a court of law" whereby the court of law can review and make final decisions of its own: see art 6, set out at para 12 of the judgment) and requiring a materially different scheme of decision-making processes to be followed (see paras 42 – 47, 52 and 54 – 68). By reason of the different context and terms of the directive in issue in that case, I consider that Mr Jones's attempt to pray in aid *R (Evans) v Attorney General* as the relevant analogy for present purposes fails.

*(iv) Reliance On Expert Evidence*

**[82]** Mr Jones correctly emphasised passages in the authorities regarding art 6(3) of the Habitats Directive which refer to the need for a national competent authority to make its assessments (whether at the screening opinion stage or the "appropriate assessment" stage) on the basis of "objective information" regarding the level of risk of harm to a protected site which may be associated with a plan or project and "in the light of the best scientific knowledge in the field": see eg paras 44 and 45 of the judgment in the *Waddenzee* case and paras 54 and 61 of that judgment, respectively; and para 40 of the judgment in *Sweetman*. He submitted that the material available to the Inspector, and in particular the expert evidence of Mr Goodwin, did not meet these standards. Mr Jones submitted that Mr Goodwin's evidence amounted to no more than bald assertion.

**[83]** I agree with Mr Jones's submission, to the extent that he argued that it would not comply with the relevant standards of evidence indicated by the ECJ/CJEU for a national competent authority simply to rely for its screening opinion or "appropriate assessment" under art 6(3) on a mere assertion by an expert, unsupported by consideration of any background facts and without reasoning to explain the assertion made. If such a case arose, evidence of that character could fairly be described as merely subjective, and as material which failed to qualify as something which could be regarded as "the best scientific knowledge in the field". However, such a case will be rare. Expert witnesses know that it is incumbent on them to refer to relevant underlying evidence and to explain their opinions, and typically do so.

**[84]** I do not accept Mr Jones's further contention that the present case falls within the objectionable category, where the only evidence available is mere assertion by an expert. On the contrary, a considerable amount of careful survey and scientific work had been done regarding the underlying factual position (in particular, for the Footprint Ecology Interim Report and Disturbance Study), and Natural England (the expert national agency) and Mr Goodwin (an expert ecologist) were entitled to draw on that in forming their views. Mr Goodwin's evidence set out careful reasoning by him, with reference back as appropriate to underlying facts, to explain his opinion and expressions of view. It was expert evidence in conventional form and of good quality. Mr Goodwin was entitled to draw on his own experience and expertise as well, in forming his opinion: see paras 46 – 48 above.

**[85]** Moreover, the authorities confirm that in a context such as this a relevant competent authority is entitled to place considerable weight on the opinion of Natural England, as the expert national agency with responsibility for oversight of nature conservation, and ought to do so (absent good reason why not): *Hart*, supra, 49; *R (Akester) v DEFRA* [2010] Env LR 33, 112; *R (Morge) v Hampshire County Council* [2011] UKSC 2, [2011] 1 All ER 744, [2011] 1 WLR 268, 45 (Baroness Hale); *R (Prideaux) v Buckinghamshire County Council* [2013] EWHC 1054 (Admin), [2013] PTSR D39, [2013] Env LR 32, 116. The Judge could not be faulted in giving weight to this consideration in the present case, at para 165 of her judgment.

**[86]** In my judgment, therefore, the Appellant's complaint that the Inspector did not have information before him which he could rationally and lawfully regard as "objective information" and "the best scientific knowledge in the field" for the purposes of proceeding under art 6(3) should be rejected.

*(v) Application Of The Strict Precautionary Approach In This Case*

**[87]** I turn, then, to consider the application of the law to the facts of this case. In my view, the most impressive of the various grounds of appeal pressed on behalf of the Appellant concerns the question whether the Inspector satisfied the requirements of art 6(3) in making the decision he did that – having regard to the proposed mitigation measures – the proposed development, even when combined with other plans or projects, would not be likely to give rise to any significant effects on either the SPA or the SAC. This was a decision under the first limb of art 6(3), that no further "appropriate assessment" was required: see paras 38-39 of the Inspector's Report, set out above.

**[88]** Mr Jones submitted that the Inspector failed properly to comply with the strict precautionary approach to avoid harm to protected sites required under art 6(3), as interpreted in the *Waddennzee* case and other authorities referred to above, in that he could not be certain to the requisite standard in advance of the development taking place that there would be no possibility of adverse effects upon the SPA or the SAC. Mr Jones relied in this regard on paras 81 – 92 in the Opinion of AG Kokott in Case C-209/04 *Commission v Austria* [2006] ECR I-02755. Mr Maurici correctly pointed out that this passage in AG Kokott's Opinion was concerned with the implementation of compensation measures under art 6(4), not with mitigation or what I have called preventive safeguarding measures under art 6(3), and also that the ECJ did not have to review the passage in its judgment, by reason of the way it ultimately disposed of the case. Nonetheless, I consider that this passage in AG Kokott's Opinion is broadly illustrative, once again, of the strict precautionary approach which a competent authority is required to adopt under art 6 generally, including art 6(3).

**[89]** Mr Jones argued that the mitigation measures on which the Inspector relied were too vague and uncertain. They were proposed to be implemented in the future, but there could be no guarantee whether and when they would be put in place. In particular, the funding to purchase the land for the three strategic SANGs might only be forthcoming under the JIA arrangements after a lot of further residential development had occurred, when sufficient further contributions under the JIA had been forthcoming. Also, there might not be sufficient funding, if land prices went up. Even after allowing for all these uncertainties, the land would probably have to be acquired pursuant to compulsory purchase orders, and there could be no guarantee that such orders would be made. Generally, both in relation to the strategic SANGs and the other mitigation measures to be funded under the JIA arrangements (referred to in para 32 of the Inspector's Report), Mr Jones said that there was no sufficient objective evidence that they would be effective to avoid significant harm to the SPA and the SAC.

**[90]** I consider that there is force in these submissions, but ultimately, in my view, they cannot be accepted in relation to the specific circumstances which the Inspector was required to address.

**[91]** Two preliminary points should be made. First, it appeared from the Council's screening opinion and "appropriate assessment", endorsed by Natural England, that it was only by reason of the potential in-combination effects of the proposed development at the site together with other very substantial residential developments contemplated under the three developing LDFs of the local planning authorities in the vicinity of the SPA that the proposed development was (subject to mitigation measures) likely to have a significant effect on the SPA. In other words, the development at the Sentry's Farm site on its own was not assessed to create any risk of significant harm to the SPA or the SAC. Mr Goodwin's evidence at the inquiry was explicitly to the same effect, ie that any adverse effects associated with the development itself were *de minimis*.

**[92]** These were legitimate and sustainable assessments, and the Inspector was entitled to proceed on the basis of them. The proposed development itself was small and involved only a very limited increase of population (associated with building 65 dwellings) in an area which was already reasonably well populated. Moreover, the POS on the development site would be capable of absorbing a significant amount of recreational pressures associated with the development, and it was proposed that there should be a planning condition to ensure that it was of good quality (see para 34 of the Inspector's Report). The relevant assessments available to the Inspector (by the Council, Natural England and Mr Goodwin) were in agreement on the question of absence of significant impact from the development taken on its own, and the Inspector accepted their assessments, as he was entitled to do.

**[93]** The Appellant argued before the Judge that the Inspector should have found that there would be significant impact from the development taken by itself, but the Judge rejected that submission at para 170 of her judgment. In my view, she was right to do so.

**[94]** The critical question for the Inspector, therefore, was whether there was sufficient assurance from the JIA, and the approach to mitigation and the taking of what I have called preventive safeguarding measures which it contemplated, to allow him to be sure, to the requisite standard under the first limb of art 6(3), that there would be no significant in-combination adverse effects on the SPA and the SAC if he granted planning permission for the development.

**[95]** This leads to the second preliminary point. In this case the relevant competent authority (the Inspector) was conducting an inquiry for the purposes of art 6(3) which to a significant degree was informed by work done for a different body (the Council) at the stage when the Council was the relevant competent authority to consider matters, as the local planning authority considering at the earlier stage whether it should grant planning permission. Also, by the time of his inquiry, the Inspector had more evidence available to him, particularly in the form of the evidence from Mr Goodwin. Accordingly, when the Inspector considered the relevant question at the screening opinion stage under the first limb of art 6(3), he had a good deal more infor-

mation, and more focused information, than will often be the case for a competent authority at the screening stage under art 6(3).

**[96]** This meant that the Inspector was particularly well placed to consider the position at the screening assessment stage under the first limb of art 6(3). In truth, there was very little difference between his position and that of the Council itself, which had carried out an “appropriate assessment”, other than that the Inspector had available to him in addition the Footprint Ecology reports and the very full and detailed evidence of Mr Goodwin. The Inspector was as well-informed about the risks to the SPA and the SAC as most competent authorities in relation to decisions of this nature would be after conducting an “appropriate assessment”. As observed above, by reference to the *Hart* case, the Inspector was entitled to take account of proposed preventive safeguarding measures in relation to the SPA and the SAC in conducting his screening assessment under the first limb of art 6(3). If the very full information available to the Inspector properly enabled him to make the screening assessment which he did, he was not obliged to go on nonetheless and require a further “appropriate assessment” to be carried out under the second limb of art 6(3).

**[97]** The Inspector was specifically briefed by Mr Goodwin in his evidence that the relevant test to be applied was the strict precautionary one, as explained in the *Waddenzee* case (see also Footprint Ecology's Interim Report). The Inspector adequately summarised the effect of that case in para 38 of his Report. He clearly directed himself correctly regarding the test to be applied.

**[98]** In my judgment, the Inspector was entitled to make the assessment he did in para 38 of his Report, that “the proposed development, even when combined with other development, would not be likely to give rise to any significant effects on either the SPA or the SAC”. The development on its own would not give rise to any significant effects, and the in-combination effects were future effects when allocations of specific sites for the very substantial residential development under the three LDFs which were being developed were eventually brought forward, planning permission was obtained for them and then the new housing was built. Mr Goodwin had emphasised in his evidence (see para 50 above) that there was an important safeguard associated with the JIA arrangements, in that as each new proposed site was brought forward and planning permission sought in future, the relevant local planning authority, in consultation with Natural England, would have to make a further assessment under art 6(3) before permission was granted for the development of that site (ie a further screening assessment and, as necessary, an “appropriate assessment”, pursuant to the first and second limbs of art 6(3), respectively; and see para 8.5 of the Interim Report). Accordingly, the potential in-combination effects identified by the Council and by Mr Goodwin could not occur without further screening and appropriate assessments by a relevant competent authority, advised by Natural England.

**[99]** In my view, this feature of the JIA arrangements meant that the Inspector was entitled to be satisfied, as he was, that those arrangements provided adequate protection for the SPA and the SAC on the appropriate strict precautionary approach identified in *Waddenzee*. There was no possibility of irreversible harmful effects on the SPA and the SAC arising from implementation of the development on the site at once, and there was sufficient scope to ensure that appropriate preventive safeguarding measures would be implemented before any other major residential developments gave rise to possible in-combination effects. The Inspector was entitled to be satisfied on the information he had about the viability and suitability of the JIA arrangements (from, in particular, Footprint Ecology in the Interim Report, Natural England and Mr Goodwin) that they provided assurance that future adequate preventive safeguarding measures would be put in place in proper time before any contemplated in-combination adverse effects might arise. That assessment was underpinned by the fact that before any further relevant development could take place which might give rise to in-combination effects, the relevant competent authority and Natural England would first have checked that adequate preventive safeguarding measures were indeed in place at that time to meet in full any in-combination effects (including those associated with the development at the Sentry's Farm site).

**[100]** The implications of this can be spelled out as follows. If (for example) planning permission were sought in future for a substantial new residential development in the vicinity of the SPA and the Sentry's Farm site, the relevant competent authority would be obliged to subject it to screening and, as necessary, an

“appropriate assessment” under art 6(3); and if the in-combination adverse effects of that new site plus the Sentry's Farm site were not clearly going to be avoided by the preventive safeguarding measures which would be in place before the new housing was built and occupied, permission would have to be refused at that stage for the new development. If, say, those in-combination effects could only be satisfactorily avoided by the creation of a strategic SANG, there might have to be a delay before any permission was granted for the new development until the competent authority could be satisfied that sufficient funding and other arrangements would be forthcoming to ensure that the SANG would be in place before the dwellings in the new development were built and occupied. But the possibility that there might have to be pause in future development in this way does not indicate that planning permission could not properly be granted by the Inspector for the Sentry's Farm site.

**[101]** To put it another way: the Inspector was entitled to find that the uncertainties regarding possible future in-combination effects relevant to the Sentry's Farm site were adequately catered for by the JIA arrangements and the safeguards associated with them, in that those arrangements meant there was sufficient assurance that future preventive safeguarding measures would have to be in place, to the satisfaction of relevant competent authorities and Natural England, before any future in-combination effects could actually arise. This evaluative judgment did not involve any compromise of the strict precautionary approach under art 6(3) explained in *Waddenzee* and the other authorities referred to above.

**[102]** In that regard, it should be observed that in *Waddenzee* itself AG Kokott noted the problems which can arise under the Habitats Directive “where the possible effects cannot be assessed with sufficient accuracy at the time of the initial authorisation but instead depend on variable circumstances” (para 35 of her Opinion). In such cases, in the context of an activity like cockle fishing such as was under review there, her view was that “Temporary authorisations which have to be reviewed on a regular basis are particularly appropriate”, since that allows up to date informed assessments to be made which take account of developing circumstances at the appropriate times (ibid. and para 36). This is a sensible pragmatic approach which gives appropriate effect to the strict precautionary approach to be adopted under art 6(3), and there is nothing in the judgment of the ECJ which casts doubt on her view. I consider that this supports the conclusion that the way of addressing future uncertain effects adopted in this case (by way of the JIA and the requirement for future assessments under art 6(3) when future residential projects are brought forward), where plainly a temporary authorisation would not have been appropriate, is lawful and in compliance with art 6(3).

*(vi) Miscellaneous Additional Points Under The Habitats Directive Ground*

**[103]** In addition to, or in support of, this main contention for the Appellant, Mr Jones made a number of other criticisms of the Inspector's decision and reasoning and of the judgment below, where the Judge declined to accept that these criticisms were valid. In my view, there was no merit in any of these further points, and the Judge was right to reject them. It suffices here to deal with the main points which Mr Jones made, in so far as not already covered in the discussion above.

**[104]** Mr Jones referred to para 35 of the Inspector's Report, and sought to suggest that it showed that the Inspector made a fundamental error of fact, in thinking that the Exminster Marshes Nature Reserve is an area which is not part of the SPA. The Judge rejected this contention at paras 174-175 of the judgment. She was right to do so. On a fair reading of what the Inspector said, in the context of the wealth of information he had about the SPA and the fact that it included Exminster Marshes, he cannot be taken to be saying that Exminster Marshes was not part of the SPA. In fact, in para 36 of his Report, he noted that the appeal site was within 400m of the SPA, and this meant the Exminster Marshes part of the SPA. His reference in para 35 of the Report to Exminster Marshes Nature Reserve being designed to alleviate pressure from visitors on the SPA was factually accurate (he had evidence before him in the form of a booklet issued by the RSPB which made that abundantly clear), and did not imply that he thought that it was not part of the SPA. The Nature Reserve was part of the SPA which had been laid out and was managed as an area to alleviate pressure on the SPA generally, and in particular in relation to other, more sensitive parts of the SPA.

**[105]** Mr Jones referred to the last sentence of para 30 of the Inspector's Report in order to suggest that the Inspector was in error in his understanding of the factual position regarding the SPA, since (Mr Jones claimed) the Inspector appeared to think that the sensitive areas were some distance away from the development site, whereas the whole of the SPA was a sensitive area. However, in my view, in context, it is clear that the Inspector appreciated that the whole of the SPA was a sensitive area in one sense (it was only by virtue of it being sensitive that it was designated as a protected site), and what he was referring to in para 30 of his Report was the fact (supported by the evidence from Footprint Ecology and Mr Goodwin, on which he was rationally entitled to rely), that the most sensitive areas of the SPA in terms of the need to protect bird species were at some distance from the development site. This was a proper relevant consideration which the Inspector was entitled to take into account.

**[106]** Mr Jones was also critical of the Inspector's reasoning in para 36 of his Report to discount the need for a 400m development exclusion zone, such as had been employed in relation to the Thames Basin Heaths. However, again, the Inspector had a proper basis for thinking that the situations of the two protected sites were so materially different, in terms of habitat (a heath as distinct from an estuary and wetlands) and the species types requiring protection (ground nesting birds as distinct from birds in passage, as explained in paras 10.4 and 10.5 of Mr Goodwin's proof of evidence), that the analogy urged by the Appellant was not an apt one.

**[107]** Of somewhat greater force, in my opinion, was Mr Jones's criticism of para 33 of the Inspector's Report, which Mr Jones said indicated that the Inspector had allowed himself to be influenced by an extraneous factor ("the housing shortage in the district") which could only properly be taken into account, if at all, under art 6(4) of the Habitats Directive, with the result that he had unlawfully departed from the strict precautionary approach required under art 6(3). However, in my view, on a fair reading of the Report, para 33 does not bear the weight which Mr Jones sought to place on it.

**[108]** I have already noted that the Inspector correctly directed himself as to the proper test under art 6(3): see, in particular, para 38 of his Report. I do not think that what he says at para 33 can be taken to imply a misdirection to himself contrary to the central thrust of his reasoning. An Inspector's Report is not to be construed like a statute, but is to be read in a sensible way having regard to its overall coherence and reasoning. The better interpretation of para 33 is that the Inspector was simply noting that the general safeguarding measures to be provided under the JIA were interim measures, rather than the final strategic measures which would ultimately be provided under the local authority LDFs when they came to be adopted and implemented, and in that context was noting that the interim nature of the measures (ie that they were something short of the final implementation of the full package of strategic preventive safeguarding measures which it was hoped would ultimately be put in place) was not a reason why he should decline to grant planning permission. That is something which is entirely consistent with the Inspector also recognising, as he did, that he had to be fully satisfied under the strict precautionary approach under art 6(3) that there would be no significant risk of harm to the SPA if he granted permission for this particular development.

**[109]** Mr Jones's further suggestion that para 29 of the Inspector's Report – where the Inspector noted that reliance was being placed on the JIA, "In the absence of a robust mitigation package specific to [the SPA and SAC] . . ." – indicated that he thought the JIA arrangements were not "robust", and hence further indicated that he had failed correctly to follow the strict precautionary approach required by art 6(3) when he granted planning permission, is answered in the same way, in my view. The Inspector's noting the fact that the full package of strategic preventive measures would ultimately provide the best (ie "robust") strategic solution to the need to protect the SPA and SAC in relation to the strategic, in-combination pressures they would eventually face from the substantial additional residential development in the vicinity contemplated in the developing LDFs, does not imply that he failed to apply the correct strict precautionary approach in respect of the particular planning application before him.

**[110]** Similarly, it is clear, in my view, on reading para 37 of the Inspector's Report in context, that the full mitigation of the impact on the SPA and the SAC to which he refers there is that in relation to the

in-combination effects from the development site plus other, future sites which might be developed. Bellway, of course, in particular by Mr Goodwin's evidence, had made it plain that its position was that there was no likelihood or risk of significant impact on the SPA and the SAC arising from the Sentry's Farm development taken by itself; so when the Inspector says at the start of para 37 that there was acknowledgement “by both main parties” that the POS would not “fully mitigate the impact on the SPA and the SAC”, it was the in-combination adverse effects which was the focus of his comment.

**[111]** In his oral submissions in reply, Mr Jones advanced a new argument. He suggested that there were in-combination effects on the SPA and the SAC arising from the existing consents (see para 36 above) taken in conjunction with the development site, and that there should have been an “appropriate assessment” of those effects.

**[112]** In my view, this new argument was raised far too late in the hearing. It would not be fair to the Secretary of State or the owners of the development site, who participated in the proceedings as Interested Parties, to allow it to be taken. Mr Jones did not set this distinct argument out in his skeleton argument nor did he open the appeal by referring to this argument. For the Secretary of State and Bellway to be able to deal with it adequately would have called for significant further argument and court time, and quite possibly further evidence, to explain the position. The Council's screening opinion and appropriate assessment did not identify possible in-combination effects amounting to a “likely significant impact” for the purposes of art 6(3) by reason of the existing consents, but referred instead to the in-combination effects associated with the developing LDFs of the three local planning authorities. We were not taken to information about the locations of the sites for the existing consents, or about the terms on which the consents had been granted, and were not in any position to assess this new argument. Nor were we taken to any material to suggest that this had been raised as an argument before the Inspector. Moreover, from other reading in the case, it appears that a conservation contribution had been raised in association with the development at Secmaton Lane in Dawlish, and it may well be the case in fact that adequate preventive safeguarding measures had been put in place in relation to that development and the other existing consents which meant that they would not, by themselves (and ignoring the much bigger projected residential developments under the developing LDFs), have any significant likely impact on the SPA and SAC in combination with the Sentry's Farm Development.

**[113]** For all the reasons set out above, I would dismiss the Appellant's appeal on the Habitats Directive Ground. There is no aspect of the legal issues raised on the appeal which merits the making of a reference to the CJEU.

*The Policy Ground*

**[114]** The Policy Ground of appeal is parasitic on the Habitats Directive Ground of appeal, and likewise falls to be dismissed.

**[115]** Paragraph 119 of the NPPF states “The presumption in favour of sustainable development (para 14 [of the NPPF]) does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined”.

**[116]** For reasons set out above, the Inspector was entitled to find that the proposed development did not require “appropriate assessment” under the Habitats Directive. Therefore, he was entitled to have regard as he did (para 39 of his Report) to the presumption in favour of sustainable development.

*The CIL Grounds*

**[117]** In my judgment, the appeal based on both aspects of the CIL Grounds should also be dismissed. The Appellant's case on this can be dealt with quite shortly, because I agree with the Judge and the reasons she gave in her judgment (paras 178 – 197).

**[118]** As to the aspect based on reg 122 of the CIL Regulations, I consider that the Inspector was fully entitled to find that the condition that Bellway agree to provide the Conservation Contribution pursuant to s 106 of the 1990 Act met the requirements of the regulation. He directed himself correctly as to the relevant test under reg 122 (para 42 of his Report) and was entitled to make his assessment (at paras 42 to 44 of his Report), as a matter of rational planning judgment, that the Conservation Contribution required from the developer (i) was necessary to make the development acceptable in planning terms (ie to ensure that the developer makes a fair contribution to the strategic measures required to mitigate the general in-combination impacts to be expected), (ii) was directly related to the development (ie because the development was expected to make a contribution to the general in-combination impacts which were expected in relation to the SPA and the SAC), and (iii) was reasonably related in scale and kind to the development (ie it is properly calibrated by reference to the likely contribution to the in-combination impacts which might be expected, having regard to the likely number of people who would come to live in the new houses on the development site and based on considered estimates of costs with which the Council and Natural England were happy). I do not think it is necessary to say more.

**[119]** Turning to the aspect of this Ground based on reg 123 of the CIL Regulations, again I consider that the Judge was right for the reasons she gave. Regulation 123 was not yet applicable at the time of the Inspector's decision, but it was contemplated that it would become applicable at some time in the not far distant future. The Inspector was not obliged to give consideration to the impact it might have when it did, however, for the reasons given by the Judge at para 196 of the judgment. Quite simply, there was no reason to think that reg 123 would make any material difference to the operation of the JIA, which is what the Inspector was concerned to assess. Although when reg 123 came to be applied it would prevent contributions for the JIA being made by way of s 106 agreements, the relevant local planning authorities would be able to impose a levy in exercise of their powers under the CIL Regulations which would have the same practical effect. Indeed, Footprint Ecology observed in its Interim Report that use of a levy under the CIL Regulations, once the levy-raising power under that those Regulations became available, would be a preferable method of raising the funding for the JIA arrangement which it considered should be put in place.

*The Reasons Ground*

**[120]** The Reasons Ground of appeal is largely parasitic on the other grounds of appeal already considered above, and likewise falls to be dismissed for similar reasons. Again, I agree with the reasons given by the Judge, at paras 218 – 221 of her judgment. I do not consider that there was any failure on the part of the Inspector to explain his reasons in dealing with the principal points in issue between the parties on the planning appeal to him. He complied with the familiar standards laid down in *South Buckinghamshire District Council v Porter (No 2)* [2004] UKHL 33, [2004] 4 All ER 775, [2004] 1 WLR 1953, at 36.

**[121]** As regards the specific points made by Mr Jones in his skeleton argument under this head:

- (i) on a fair reading of the Inspector's Report, he did not disclose any failure to appreciate that the Exminster Marshes are an integral and sensitive part of the SPA;

- (ii) it could not be said that he had misunderstood the meaning of the word “likely” as used in the Habitats Directive (both because everyone participating in the inquiry knew he had been correctly briefed about the particular meaning given that term in the *Waddenzee* case and by reference to para 38 of the Report);

† (iii) the Inspector sufficiently explained (especially for anyone who had participated in the inquiry) the different context of the SPA from the Thames Basin Heaths, and why a 400m exclusion zone was not required;

† (iv) the Inspector sufficiently explained (especially for anyone who had participated in the inquiry and hence was aware of the way in which the JIA was intended to operate, including review site by site by Natural England in relation to future residential developments) why he was satisfied that there would not be significant harm to the SPA and SAC; and

† (v) the Inspector sufficiently explained (again, especially for anyone who had participated in the inquiry) why the Conservation Contribution was fairly and reasonably related to the scale of the proposed development.

*CONCLUSION*

**[122]** For the reasons set out above, I would dismiss this appeal. There is no good basis for making a reference to the CJEU.

**KITCHIN LJ:**

**[123]** I agree

**RICHARDS LJ:**

**[124]** I also agree.

*Appeal dismissed.*

Judgments

62015CJ0387

**Court of Justice of the European Union**

**Neutral Citation Number: C-387/15, C-388/15**

**21 July 2016**

**ECLI:EU:C:2016:583**

**JUDGMENT OF THE COURT (Seventh Chamber)**

**21 July 2016 (*)**

**In Joined Cases C-387/15 and C-388/15,**

**REQUESTS for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Belgium), made by decisions of 13 July 2015, received at the Court on 17 July 2015, in the proceedings**

**Hilde Orleans,**

**Rudi Van Buel,**

**Marina Apers (C-387/15),**

**and**

**Denis Malcorps,**

**Myriam Rijssens,**

**Guido Van De Walle (C-388/15)**

**v**

**Vlaams Gewest,**

**intervening party:**

**Gemeentelijk Havenbedrijf Antwerpen,**

**THE COURT (Seventh Chamber),**

**composed of C. Toader (Rapporteur), President of the Chamber, A. Prechal and E. Jarašiūnas, Judges,**

**Advocate General: E. Sharpston,**

**Registrar: A. Calot Escobar,**

**having regard to the written procedure,**

**after considering the observations submitted on behalf of:**

**– Ms Orleans, Mr Van Buel, Ms Apers, Mr Malcorps, Ms Rijssens and Mr Van De Walle, by I. Rogiers, advocaat,**

**– the Gemeentelijk Havenbedrijf Antwerpen, by S. Vernaillen and J. Geens, advocaten,**

**– the Belgian Government, by L. Van den Broeck and S. Vanrie, acting as Agents, and by V. Tollenaere, advocaat,**

**– the European Commission, by E. Manhaeve and C. Hermes, acting as Agents,**

**having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,**

**gives the following**

**Judgment**

1 These requests for a preliminary ruling concern the interpretation of Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive').

2 The requests have been made in two sets of proceedings between Ms Hilde Orleans, Mr Rudi Van Buel and Ms Marina Apers in the first case, and Mr Denis Malcorps, Ms Myriam Rijssens and Mr Guido Van De Walle in the second case, and the Vlaams Gewest (Flemish Region, Belgium), concerning challenges to the validity of decisions establishing the Regional Development Implementation Plan for the 'Demarcation of the maritime port area of Antwerp — Port development on the left bank' ('the RDIP').

Legal context

EU law

3 The first and third recitals in the preamble to the Habitats Directive state:

'... the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community, as stated in Article [191 TFEU];

…

… the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; ... the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities'.

4 Article 1 of the Habitats Directive provides:

'For the purpose of this Directive:

…

(e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservation status of a natural habitat will be taken as “favourable” when:

– its natural range and areas it covers within that range are stable or increasing,

and

– the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future,

…

(k) *site of Community importance* means a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

…

(l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated;

…'

5 Under Article 2 of that directive:

'1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

6 Article 3(1) of the Habitats Directive is worded as follows:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats

of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

…'

7 Article 6 of the Habitats Directive states:

'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 I 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 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.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

Belgian law

8 Paragraph 30 of Article 2 of the decreet betreffende het natuurbehoud en het natuurlijk milieu (Decree on nature conservation and the natural environment) of 21 October 1997 (*Belgisch Staatsblad*, 10 January 1998, p. 599), defines 'significant effect on the integrity of a special area of conservation' in the following terms:

'an effect which has measurable and demonstrable implications for the integrity of a special area of conservation, to the extent that there are measurable and demonstrable implications for the conservation status of the species or the habitat(s) for which the special area of conservation concerned has been designated or for the conservation status of the species listed in Annex III to this Decree in so far as that effect may occur in the special area of conservation concerned'.

9 Paragraph 38 of Article 2 of that decree describes the 'integrity of a special area of conservation' as follows:

'the totality of biotic and abiotic factors, together with their landscape and ecological features and processes, which are necessary for the conservation of:

(a) the natural habitats and the habitats of the species for which the special area of conservation concerned has been designated and

(b) the species listed in Annex III'.

10 Article 36b of the decree provides:

'1. In special areas of conservation, regardless of the intended use of the site concerned, the administrative authority shall, within the limits of its powers, take the necessary conservation measures, which must continue to correspond to the ecological requirements of the habitat types listed in Annex I to this Decree and of the species listed in Annexes II, III and IV to this Decree as well as the migratory birds species not mentioned in Annex IV to this Decree but regularly found in the territory of the Flemish Region. The Flemish Government may lay down the detailed rules concerning the necessary conservation measures and the ecological requirements, and the procedure for setting the conservation objectives.

…

3. An activity requiring a permit or a plan or programme, which, either individually or in combination with one or more existing or proposed activities, plans or programmes, might significantly affect the integrity of a special area of conservation, shall be subject to an appropriate assessment as regards the significant effects on the special area of conservation.

…

The initiator shall be responsible for preparing the appropriate assessment.

…

4. The authority responsible for deciding on a permit application, plan or programme may grant the permit or approve the plan or programme only if the plan or programme or the activity to be performed does not significantly affect the integrity of the special area of conservation concerned. The competent authority shall continue to ensure, through the imposition of conditions, that the integrity of a special area of conservation is not significantly affected.

5. Notwithstanding the provisions of paragraph 4, an activity requiring a permit or a plan or programme which, either individually or in combination with one or more existing or proposed activities, plans or programmes, might significantly affect the integrity of a special area of conservation, may be authorised or approved only:

(a) after it has been shown that no less damaging alternative solution exists for the integrity of the special area of conservation and

(b) for imperative reasons of overriding public interest, including those of a social or economic nature. Where the special area of conservation concerned or a part thereof hosts a priority natural habitat type or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

Furthermore, the derogation referred to in the previous paragraph may be authorised only after the following conditions have been satisfied:

1∞ the necessary compensatory measures have been taken and the necessary active conservation measures have been taken or are under way for the purpose of ensuring the overall coherence of the special area(s) of conservation;

2∞ the compensatory measures are of such a nature that, in principle, a habitat of the same value or the natural environment thereof, of at least an equivalent area, is actively developed.

The Flemish Government may lay down the detailed rules for preparing the appropriate assessment of the implications of the activity for the habitats, the habitats of a species and the species in respect of which a special area of conservation is designated, for examining less damaging alternatives and on compensatory measures.

The Flemish Government shall assess whether there are any imperative reasons of overriding public interest, including those of a social or economic nature.

All decisions adopted under the derogation procedure in the present paragraph shall state the grounds on which they are based.'

The disputes in the main proceedings and the question referred for a preliminary ruling

11 The disputes in the main proceedings concern the RDIP, which provides for the development of a large part of the port of Antwerp (Belgium) on the left bank of the Scheldt.

12 That project affects the Natura 2000 site known as 'Scheldt and Durme estuary from the Dutch border to Ghent' ('the Natura 2000 site in question'), designated as being a special area of conservation, in particular, for the habitat type 'estuary'.

13 By decision of 27 April 2012, the Flemish Government provisionally adopted the draft RDIP, which was definitively established by decision of 30 April 2013. The decision of 30 April 2013 formed the subject matter of an action for suspension and for annulment before the Raad van State (Council of State, Belgium). By judgment of 3 December 2013, that court ordered the partial suspension of the implementation of that decision, in particular, in so far as it concerned the commune of Beveren (Belgium).

14 Following that partial suspension, the Flemish Government adopted, on 24 October 2014, a corrective decision, which amended the content of the decision of 30 April 2013 by withdrawing and replacing the suspended provisions of that decision. The decision of 24 October 2014 was published in the *Belgisch Staatsblad* on 28 November 2014.

15 According to the orders for reference, the RDIP forming the subject matter of the decisions of 27 April 2012 and 24 October 2014 is liable to affect significantly the Natura 2000 site in question, in so far as

the works envisaged will entail the destruction of land falling within the scope of certain habitat types present on that site.

16 In particular, the Doel section of the commune of Beveren, in which the applicants in the main proceedings live, and the surrounding polders, are to give way to the 'Saefthinge zone', which includes the Saefthinge dock and a tidal dock.

17 Actions for suspension and for annulment were brought before the Raad van State (Council of State), which rejected the former in the orders for reference, and which is at present called on to examine the validity of the decisions of 30 April 2013 and 24 October 2014.

18 The referring court notes that, in its opinion on the draft decision of 24 October 2014, the legislation department of the Raad van State (Council of State) expressed doubts about the compatibility of the RDIP with the national measures transposing Article 6 of the Habitats Directive, as interpreted by the Court, in particular, in its judgment of 15 May 2014 in *Briels and Others* (C-521/12, EU:C:2014:330).

19 However, the Flemish Government took the view that those doubts were unfounded. In the circumstances that gave rise to the judgment of 15 May 2014 in *Briels and Others* (C-521/12, EU:C:2014:330), the new area of natural habitat had to be developed only after the existing area was affected. It is for that reason that it was not certain, at the time the decision concerning the project was decided upon, that that project would not adversely affect the integrity of the special area of conservation.

20 In the present cases, according to the Flemish Government, the present RDIP establishes, first, that the development of affected areas will become possible only after the sustainable establishment of habitats and habitats of species in ecological core areas. Second, a decision of that government will have to declare, following an opinion from the Agency for Nature and Forests, that habitats in the nature reserves have in fact been sustainably created, and the application for a planning permit relating to implementing the intended use of the area concerned will also have to include that decision.

21 Consequently, according to the Flemish Government, at the time it becomes possible adversely to affect an existing area, the ecological core areas will already contribute to the integrity of the Natura 2000 site in question. The use of ecological core areas in the RDIP is therefore not a compensatory measure, but rather a conservation measure, within the meaning of Article 6(1) of the Habitats Directive.

22 The applicants in the main proceedings state, in support of their action for annulment, that a plan or project may be approved only in so far as the appropriate assessment shows that that plan or project does not adversely affect the integrity of the site at issue. In that regard, they state that the examination was carried out not by reference to the existing ecological situation, but by reference to that which would result from the initial measures. They submit that according to the judgment of 15 May 2014 in *Briels and Others* (C-521/12, EU:C:2014:330) in particular, the creation of an 'ecologically resistant' core area must be regarded, at least in part, as a compensatory measure that may not be taken into consideration in the appropriate assessment.

23 In the alternative, in the event that the creation of an 'ecologically resistant' core area is not a compensatory measure but an autonomous ecological development, the applicants submit, again on the basis of the grounds of the judgment of 15 May 2014 in *Briels and Others* (C-521/12, EU:C:2014:330), that that area ought likewise not be taken into consideration.

24 Furthermore, according to the applicants, the technique used — consisting in creating, following the approval of the RDIP, new nature reserves that have to correspond to the characteristics of the Natura 2000 site in question — contravenes the Court's case-law relating to Article 6(3) of the Habitats Directive, which

integrates the precautionary principle. The competent national authorities ought therefore to refuse to approve the proposed plan or project where they are not yet certain that it will not adversely affect the integrity of the site at issue.

25 In response to the arguments of the applicants in the main proceedings, the Flemish Region contends that they are wrong in proceeding on the assumption that the RDIP adversely affects the integrity of that site. It is only significant effects that are referred to in Article 6(3) of the Habitats Directive.

26 The Flemish Region contends, moreover, that the status of the areas concerned is unfavourable, so that its conservation is not an option and restoration is necessary. In the present case, an ecologically resistant core area would be created prior to carrying out the port development. Therefore, the situation at issue in the main proceedings is not comparable to that which gave rise to the judgment of 15 May 2014 in *Briels and Others* (C-521/12, EU:C:2014:330), since, in the case that gave rise to that judgment, the adverse effect on the existing area of a protected habitat was occurring without an area of the same type having been created beforehand.

27 The Gemeentelijk Havenbedrijf Antwerpen (Antwerp Port Authority, Belgium), intervener in the main proceedings, also emphasises the fact that the RDIP does not apply any mitigating or compensatory techniques, but lays down conservation measures. It states that the RDIP provides for the creation of nature reserves that must imperatively be put in place before any possible adverse effect on the existing habitat. As indicated, it submits that it is certain that the new areas of habitats will be fully developed prior to any adverse effect that might occur outside those areas. The staggering [of works] incorporated in the RDIP requirements and the times [set aside for] monitoring and adaptation will make it possible to ascertain at any time the true impact of that plan and to ensure that the interim period will not lead to any ecological regression.

28 Taking the view that the outcome of the two cases before it depends on the interpretation of the provisions of the Habitats Directive, the Raad van State (Council of State) decided to stay the proceedings and to refer the following question, which is formulated in identical terms in both cases, to the Court of Justice for a preliminary ruling:

'The [RDIP] contains planning rules under which, in mandatory terms, the development of areas (more specifically, for seaport- and water-related businesses, for a logistics park, for waterway infrastructure and for traffic and transport infrastructure) that have ecological features (areas hosting a natural habitat type or the habitat of a species for which the special area of conservation concerned was designated) that contribute to the conservation objectives of the special areas of conservation concerned, is possible only after the creation of sustainable habitats in ecological core areas (designated within the Natura 2000 area) and following a decision by the Flemish Government preceded by an opinion from the Flemish administrative body responsible for nature conservation — which decision must form part of the application for a planning permit relating to the development of the aforementioned facilities — that the sustainable creation of the ecological core areas has been successful.

Can those planning rules with their envisaged positive developments of ecological core areas be taken into account in the determination, under Article 6(3) of the Habitats Directive, of potentially significant effects and/or in the making of the appropriate assessment, or can those planning rules be regarded only as 'compensatory measures', within the meaning of Article 6(4) of the Habitats Directive, in so far as the conditions laid down in that provision have been satisfied?'

29 By decision of the President of the Court of 18 September 2015, Cases C-387/15 and C-388/15 were joined for the purposes of the written and oral procedure and the judgment.

The question referred for a preliminary ruling

30 By its question, the referring court asks, in essence, whether the provisions of Article 6 of the Habitats Directive must be interpreted as meaning that measures, contained in a plan or project not directly connected with or necessary to the management of a site of Community importance, providing, prior to the occurrence of adverse effects on a natural habitat type present thereon, for the future creation of an area of that type, but the completion of which will take place subsequently to the assessment of the significance of any adverse effects on the integrity of that site, may be taken into consideration in that assessment, under Article 6(3) of that directive, or whether those measures must be categorised as 'compensatory measures', within the meaning of Article 6(4) of that directive.

31 As a preliminary point, it must be recalled that Article 6 of the Habitats Directive imposes upon the Member States a series of specific obligations and procedures designed, as is clear from Article 2(2) of that directive, to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation (see, to that effect, judgment of 11 April 2013 in *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 36 and the case-law cited).

32 The provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by that directive. Thus, Article 6(2) and (3) are designed to ensure the same level of protection of natural habitats and habitats of species, whilst Article 6(4) constitutes merely a provision derogating from the second sentence of Article 6(3) (see, to that effect, judgment of 14 January 2016 in *Grˌne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraph 52 and the case-law cited).

33 Accordingly, Article 6 of the Habitats Directive divides the measures into three categories, namely conservation measures, preventive measures and compensatory measures, provided for in Article 6(1), (2) and (4), respectively.

34 In the cases in the main proceedings, the Antwerp Port Authority and the Belgian Government submit that the planning rules contained in the RDIP constitute conservation measures within the meaning of Article 6(1) of the Habitats Directive. The Belgian Government takes the view that such measures might possibly fall within Article 6(2) of that directive.

35 In this regard, it should be noted that under Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is considered to be 'favourable' when, inter alia, its natural range and the areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.

36 In that context, the Court has already held that the Habitats Directive has the aim that the Member States take appropriate protective measures to preserve the ecological characteristics of sites which host natural habitat types (judgment of 11 April 2013 in *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 38 and the case-law cited).

37 In this instance, the referring court has found that the RDIP will result in the disappearance of a body of 20 hectares of tidal mudflats and tidal marshes of the Natura 2000 site in question.

38 It should therefore be observed that, first, the findings of fact made by that court show that the measures at issue in the main proceedings envisage, inter alia, the disappearance of a part of that site. It follows that such measures cannot constitute measures ensuring the conservation of that site.

39 Second, as regards preventive measures, the Court has already held that the provisions of Article 6(2) of the Habitats Directive make it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establish a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive's objectives (judgment of 14 January 2010 in *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 49 and the case-law cited).

40 Accordingly, a preventive measure complies with Article 6(2) of the Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives (judgment of 14 January 2016 in *Grˌne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraph 41 and the case-law cited).

41 It follows that Article 6(1) and (2) of the Habitats Directive is not applicable in circumstances such as those in the main proceedings.

42 Accordingly, the points of law needed in order to provide an answer to the question referred should be confined to Article 6(3) and (4) of that directive.

43 Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (judgment of 11 April 2013 in *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 28 and the case-law cited).

44 That provision thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site (judgment of 11 April 2013 in *Sweetman and Others*, C-258/11, EU:C:2013:220, paragraph 29 and the case-law cited).

45 In particular, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project (judgment of 15 May 2014 in *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 20 and the case-law cited).

46 The second stage, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4) of that directive.

47 The Court has thus held that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of sites of Community importance, in accordance with the directive (judgment of 15 May 2014 in *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 21 and the case-law cited).

48 As regards, more specifically, the answer to be given to the question referred, it must, in the first place, be recalled that, in paragraph 29 of the judgment of 15 May 2014 in *Briels and Others* (C-521/12,

EU:C:2014:330), the Court held that protective measures provided for in a project which are aimed at compensating for the negative effects of the project on a Natura 2000 site cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3).

49 Admittedly, in the cases in the main proceedings, the circumstances are not identical to those in the case that gave rise to the judgment of 15 May 2014 in *Briels and Others* (C-521/12, EU:C:2014:330), since the measures envisaged in the former cases must be completed before the adverse effects, whereas in the latter case, the measures were to be completed subsequently to such effects.

50 However, the Court's case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (judgment of 14 January 2016 in *Gr¸ne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraph 50 and the case-law cited).

51 In this connection, the appropriate assessment of the implications of the plan or project for the site concerned that must be carried out pursuant to Article 6(3) implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified in the light of the best scientific knowledge in the field (judgment of 14 January 2016 in *Gr¸ne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraph 49 and the case-law cited).

52 Moreover, it must be noted that, as a rule, any positive effects of a future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future (see, to that effect, judgment of 15 May 2014 in *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 32).

53 In the second place, Article 6(3) of the Habitats Directive also integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that set out in that provision could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (see, to that effect, judgment of 14 January 2016 in *Gr¸ne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraph 48 and the case-law cited).

54 The application of that principle in the context of the implementation of Article 6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for the site concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects on the site, in order to ensure that it does not adversely affect the integrity of the site (judgment of 15 May 2014 in *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 28).

55 In the present cases, first, the adverse effects on the Natura 2000 site in question are certain, since the referring court was able to quantify them. Second, the benefits resulting from the creation of the nature reserves have already been taken into account in the assessment and in demonstrating the absence of significant adverse effects on the site even though the result of the creation of those reserves is uncertain, since it is not complete.

56 Consequently, the circumstances of the cases in the main proceedings and those that gave rise to the judgment of 15 May 2014 in *Briels and Others* (C-521/12, EU:C:2014:330) are similar in so far as they involve, at the time of assessing the implications of the plan or project for the site concerned, the identical

premise that future benefits will mitigate the significant adverse effects on that site, even though the development measures in question have not been completed.

57 In the third place, it should be pointed out, as noted in paragraph 33 above, that the wording of Article 6 of the Habitats Directive contains no reference to any concept of 'mitigating measure'.

58 In this connection, as the Court has already observed, the effectiveness of the protective measures provided for in Article 6 of Directive 92/43 is intended to avoid a situation where competent national authorities allow so-called 'mitigating' measures — which are in reality compensatory measures — in order to circumvent the specific procedures provided for in Article 6(3) and authorise projects which adversely affect the integrity of the site concerned (judgment of 15 May 2014 in *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 33).

59 It follows that the negative implications of a plan or project not directly connected with or necessary to the management of a special area of conservation and affecting its integrity do not fall within the scope of Article 6(3) of the Habitats Directive.

60 As regards Article 6(4) of the Habitats Directive, it must be recalled that, as an exception to the criterion for authorisation laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) must be interpreted strictly (judgment of 14 January 2016 in *Gr¸ne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraph 73 and the case-law cited) and can be applied only after the implications of a plan or project have been analysed in accordance with Article 6(3) (see, to that effect, judgment of 15 May 2014 in *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 35 and the case-law cited).

61 In order to determine the nature of any compensatory measures, the damage to the site concerned must be precisely identified. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for the application of Article 6(4) of the Habitats Directive, since, in the absence of those elements, no condition for the application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration (see, to that effect, judgment of 14 January 2016 in *Gr¸ne Liga Sachsen and Others*, C-399/14, EU:C:2016:10, paragraph 57 and the case-law cited)

62 Under Article 6(4) of the Habitats Directive, if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of that directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

63 Therefore, in such a situation, the competent national authorities may grant an authorisation under Article 6(4) of the Habitats Directive only in so far as the conditions set out therein are satisfied (see, to that effect, judgment of 15 May 2014 in *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 37 and the case-law cited).

64 In the light of the foregoing considerations, the answer to the question referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that measures, contained in a plan or project not directly connected with or necessary to the management of a site of Community importance, providing, prior to the occurrence of adverse effects on a natural habitat type present thereon, for the future creation of an area of that type, but the completion of which will take place subsequently to the assessment of the significance of any adverse effects on the integrity of that site, may not be taken into consideration in that assessment. Such

measures can be categorised as 'compensatory measures', within the meaning of Article 6(4), only if the conditions laid down therein are satisfied.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that measures, contained in a plan or project not directly connected with or necessary to the management of a site of Community importance, providing, prior to the occurrence of adverse effects on a natural habitat type present thereon, for the future creation of an area of that type, but the completion of which will take place subsequently to the assessment of the significance of any adverse effects on the integrity of that site, may not be taken into consideration in that assessment. Such measures can be categorised as 'compensatory measures', within the meaning of Article 6(4), only if the conditions laid down therein are satisfied.

[Signatures]

** Language of the case: Dutch.

Judgments

62017CJ0164

**Court of Justice of the European Union**

**Neutral Citation Number: C-164/17**

**25 July 2018**

**ECLI:EU:C:2018:593**

**JUDGMENT OF THE COURT (Second Chamber)**

**25 July 2018 (*)**

**In Case C-164/17,**

**REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 20 March 2017, received at the Court on 3 April 2017, in the proceedings**

**Edel Grace,**

**Peter Sweetman**

**v**

**An Bord Plean·la,**

**intervening parties:**

**ESB Wind Developments Ltd,**

**Coillte,**

**The Department of Arts Heritage and the Gaeltacht,**

**THE COURT (Second Chamber),**

**composed of M. Ilešič, President of the Chamber, A. Rosas, C. Toader (Rapporteur), A. Prechal and E. Jarašiūnas, Judges,**

**Advocate General: E. Tanchev,**

**Registrar: R. Schiano, Administrator,**

**having regard to the written procedure and further to the hearing on 1 February 2018,**

**after considering the observations submitted on behalf of:**

**– Ms Grace and Mr Sweetman, by O. Collins, Barrister, and J. Devlin, Senior Counsel, instructed by O. Clarke and A. O'Connell, Solicitors,**

**– the An Bord Plean·la, by F. Valentine, Barrister, and N. Butler, Senior Counsel, instructed by A. Doyle and B. Slattery, Solicitors,**

**– ESB Wind Developments Ltd and Coillte, by R. Mulcahy, D. McDonald, Senior Counsel, and A. Carroll, Barrister-at-Law, instructed by D. Spence, Solicitor,**

**– the Netherlands Government, by M. Bulterman and C.S. Schillemans, acting as Agents,**

**– the European Commission, by E. Manhaeve and C. Hermes, acting as Agents,**

**after hearing the Opinion of the Advocate General at the sitting on 19 April 2018,**

**gives the following**

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive').

2 The request has been made in proceedings between Ms Edel Grace and Mr Peter Sweetman, the applicants, and the An Bord Plean·la (National Planning Appeals Board, Ireland) ('the An Bord') concerning the latter's decision granting ESB Wind Developments Ltd and Coillte permission for a wind farm project in a special protection area which is classified as it hosts the natural habitat of a protected species.

Legal context

European Union law

The Birds Directive

3 Article 1(1) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7) ('the Birds Directive') states that the directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the FEU Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.

4 Article 4 of that directive provides as follows:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies.

…

4. In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

5 The species mentioned in Annex I to the directive include the hen harrier (*Circus cyaneus*).

The Habitats Directive

6 The 10th recital of the Habitats Directive states as follows:

'Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future.'

7 Article 2 of that directive provides as follows:

'1. The aim of this Directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the [FEU] Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

8 Article 6 of the Habitats Directive states as follows:

'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 I 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 should 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.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

9 Pursuant to Article 7 of the Habitats Directive, obligations arising under Article 6(2) to (4) of the directive are applicable to special protection areas ('SPAs') within the meaning of the Birds Directive.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 The dispute in the main proceedings concerns a plan to build a wind farm, which will be developed and operated jointly by Coillte, a public forestry undertaking, and ESB Wind Developments, and located in the SPA that stretches from Slieve Felim to Silvermines Mountains (in the counties of Limerick and Tipperary, Ireland, respectively) ('the contested development').

11 That territory has been classified as an SPA for the purposes of the fourth subparagraph of Article 4(1) of the Birds Directive because it hosts the natural habitat of a species of bird identified in Annex I to that directive, namely the hen harrier. That territory, which covers 20 935 hectares, includes, in particular, areas of unplanted blanket bog and heath and 12 078 hectares of woodland. Due to its characteristics, the whole of this area is potentially suitable as a habitat for that species.

12 According to the referring court, it is envisaged that the contested development will occupy 832 hectares of the SPA, essentially covered by first and second rotation plantations of conifers and unplanted bog and heath. The erection of 16 wind turbines and related infrastructure will require the clearance of trees at each wind turbine location. It is estimated that 41.7 hectares of trees will be felled. The development will result in the permanent loss of 9 hectares of habitat, corresponding to the built-on areas, and the temporary loss of 1.7 hectares of habitat, which will be used for the construction of temporary settlement ponds. Moreover, as it is assumed that foraging hen harriers will not come within 250 metres of a wind turbine, the referring court notes that this may result in the complete loss of 162.7 hectares of foraging habitat.

13 The contested development includes a Species and Habitat Management Plan ('the management plan'). That plan, to be implemented over a period of five years, includes measures to address the potential effects of the wind farm on the hen harrier's foraging habitat. First, the management plan envisages that three currently planted areas, covering an area of 41.2 hectares, 14.2 of which would be within 250 metres of a turbine, will be restored to blanket bog. Second, during the lifetime of the contested development, under the plan 137.3 hectares of second rotation forest will be subjected to 'sensitive' management, which foresees the felling and replacing of the current closed canopy forest so as to ensure that there will be 137.3 hectares of perpetually open canopy forest providing suitable foraging habitat for the hen harrier and an ecological corridor between two areas of open bog. The felling will be done on a phased basis, starting a year prior to

construction. Third, construction works will generally be confined to times outside the main hen harrier breeding season.

14 By decision of 22 July 2014, the An Bord decided to grant permission for the contested development on the ground that it would not adversely affect the integrity of the SPA.

15 Ms Grace and Mr Sweetman brought proceedings before the High Court (Ireland) contesting the An Bord's decision. By decisions of 1 October and 4 December 2015, that court rejected their application and upheld the An Bord's decision.

16 By decision of 26 February 2016, Ms Grace and Mr Sweetman were granted leave to appeal against that decision before the Supreme Court (Ireland). By judgment of 24 February 2017, that court gave final rulings on two of the three grounds of appeal. However, the final outcome of the appeal depends on the interpretation of Article 6(3) and (4) of the Habitats Directive.

17 According to Ms Grace and Mr Sweetman, the An Bord should have come to the conclusion that the contested development and its related management plan entailed compensatory measures and, accordingly, it should have taken account of the criteria laid down in Article 6(4) of Habitats Directive when carrying out its assessment.

18 The An Bord and the interveners in the main proceedings argue that, for the purpose of determining whether the development is likely to adversely affect the integrity of the SPA within the meaning of Article 6(3) of the Habitats Directive, it is necessary to take account of the fact that no part of the wooded sector of the area will remain permanently in a condition allowing it to provide suitable habitat.

19 In that connection, the Supreme Court indicates that hen harriers are primarily birds living in open countryside which require extensive areas of suitable land over which to forage. Nesting requirements are, however, small-scale and can be met in a smaller geographical area and a variety of habitat types. Moreover, the decline in the number of the protected species is attributable more to the potential deterioration of the foraging habitat than to that of the nesting habitat. The referring court states that, while unplanted bog and heath were once generally recognised as prime hen harrier habitat, it has been observed that, as commercial forestry has become more widespread, young conifer plantations on bog provide the hen harrier with foraging opportunities. On the other hand, it is apparent from those considerations that a forest which is not thinned or harvested, but is simply left to mature, resulting in a closed canopy, will not provide suitable foraging habitat.

20 It is apparent from the documents submitted to the Court that commercial forestry has an average cycle of 40 years, which includes two rotation stages. The parts of the area in which the plantations have matured at the end of the first stage and which therefore have a closed canopy are clear-felled. This is followed by a replanting stage, as a result of which part of the area will once again be open-canopy, providing suitable territory for hen harrier foraging. It follows that the foraging habitat of this species in the SPA is in constant flux and depends on which of those stages — which are linked to forest management — has been reached. Thus, a failure to actively manage the forest plantation would in itself lead to loss of hen harrier foraging habitat, as a result of the gradual disappearance of parts of the open canopy area. According to the available studies, the population of this protected species can be expected to fall and rise in accordance with the availability of open canopy forest. In the present case, the amount of open canopy forest will gradually decrease from 14% of the total afforested lands over the period 2014 to 2018 to a low of 8% during the period 2024 to 2028.

21 According to the referring court, it is required to determine whether the An Bord was incorrect to take the view that the contested development and the management plan entail mitigating elements which allow it to carry out its assessment solely on the basis of Article 6(3) of the Habitats Directive.

22 In that regard, the referring court is uncertain whether that provision is to be interpreted as meaning that the measures proposed in the management plan relating to the contested development which seek to ensure that the total area providing suitable habitat will not be reduced and could even be enhanced may, in the circumstances of the present case, be classified as mitigating measures, or whether they must be regarded as compensatory measures within the meaning of Article 6(4) of the Habitats Directive.

23 In those circumstances, the Supreme Court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Where

(a) a protected site has as its essential purpose the provision of habitat for a specified species,

(b) the nature of the habitat which is beneficial for that species means that the part of the site which is beneficial will necessarily alter over time, and

(c) as part of a proposed development a management plan for the site as a whole (including changes to the management of parts of the site not directly affected by the development itself) is to be put in place which is designed to ensure that, at any given time, the amount of the site suitable as habitat as aforesaid is not reduced and indeed may be enhanced; but

(d) some of the site will, for the lifetime of the development project, be excluded from having the potential to provide appropriate habitat,

can such measures as are described in (c) properly be regarded as mitigatory?'

Consideration of the question referred

24 It should be noted, first, that, although the question referred by the Supreme Court does not contain any reference to provisions of EU law, that question, which must be read in the light of the details given in the order for reference, concerns the interpretation of Article 6(3) and (4) of the Habitats Directive.

25 Next, as regards the terms in which the question referred is couched, it should be added that Article 6 of the Habitats Directive does not contain any reference to 'mitigating measures' (judgments of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 57, and of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 25).

26 In this connection, the Court has previously observed that the effectiveness of the protective measures provided for in Article 6 of the Habitats Directive is intended to avoid a situation where competent national authorities allow so-called 'mitigating' measures' — which are in reality compensatory measures — in order to circumvent the specific procedures laid down in Article 6(3) of the directive and authorise projects which adversely affect the integrity of the site concerned (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 58 and the case-law cited).

27 Lastly, with regard to areas classified as SPAs, obligations arising under Article 6(3) of the Habitats Directive replace, in accordance with Article 7 thereof, any obligations arising under the first sentence of Article 4(4) of the Birds Directive, as from the date of classification under the Birds Directive, where that date is later than the date of implementation of the Habitats Directive (judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 109 and the case-law cited).

28 If follows that the referring court's question is to be understood as asking, in essence, whether Article 6 of the Habitats Directive must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned, or whether that fact falls to be considered, if need be, under Article 6(4) of the directive.

29 Article 6 of the Habitats Directive imposes a set of specific obligations and procedures on Member States designed, as is apparent from Article 2(2) of the directive, to maintain or restore, as the case may be, at favourable conservation status, natural habitats and species of wild fauna and flora of European Union interest, with a view to attaining the directive's more general objective, which is to ensure a high level of environmental protection as regards the sites protected pursuant to the directive (see, to that effect, judgments of 8 November 2016, *Lesoochran·rske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 43, and of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 106).

30 In that regard, the provisions of Article 6 of the Habitats Directive constitute a coherent whole in the light of the conservation objectives laid down by the directive. Indeed, Article 6(2) and (3) is designed to ensure the same level of protection for natural habitats and habitats of species, whilst Article 6(4) merely derogates from the second sentence of Article 6(3) (judgment of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 24 and the case-law cited).

31 The 10th recital of the Habitats Directive states that an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future. That recital finds expression in Article 6(3) of the directive, which provides, inter alia, that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its implications for that site (judgment of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 28 and the case-law cited).

32 Article 6(3) of the Habitats Directive refers to two stages. The first, envisaged in the provision's first sentence, requires Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site. The second stage, which is envisaged in the second sentence of Article 6(3) and occurs following the appropriate assessment, allows such a plan or project to be authorised only if it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4) of the directive (judgment of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 29 and the case-law cited).

33 It is in the light of those considerations that the question referred must be answered.

34 In the first place, it should be noted that, in order for the integrity of a site not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive, the site needs to be preserved at favourable conservation status; this entails the lasting preservation of the site's constitutive char-

acteristics that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of sites of Community importance, in accordance with the directive (see, to that effect, judgments of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 47 and the case-law cited, and of 17 April 2018, *Commission* v *Poland(Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 116).

35 In accordance with Article 4(1) of the Birds Directive, the designation of a territory as an SPA for the conservation of a species entails the lasting preservation of the constitutive characteristics of the habitat in that area, the survival of the species in question and its reproduction being the objective justifying the designation of that area.

36 In the main proceedings, it is common ground, as indicated by the referring court and as observed by the Advocate General in points 13 and 74 of his Opinion, that the conservation objective of the SPA is to maintain or restore favourable conservation conditions for the hen harrier. In particular, it is by providing the protected species with a habitat including a foraging area that the SPA enables that objective to be attained.

37 As regards, in the second place, the effects of the contested development on the SPA, the referring court states that the aim of the management plan is to put in place safeguards to ensure that, as regards the foraging habitat of the hen harrier, at any given time the area is not reduced and indeed may be enhanced, even though, during the lifetime of the contested development, some of the site will not have the potential to provide the hen harrier with appropriate habitat.

38 Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the area concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of the area (see, to that effect, judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 108 and the case-law cited).

39 The assessment carried out under that provision may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned (see, to that effect, judgment of 12 April 2018, *People Over Wind and Sweetman*, C-323/17, EU:C:2018:244, paragraph 38 and the case-law cited).

40 The fact that the appropriate assessment of the implications of a plan or project for the area concerned must be carried out under that provision means that all the aspects of the plan or project which can, either by themselves or in combination with other plans or projects, affect the conservation objectives of that area must be identified in the light of the best scientific knowledge available in the field (see, to that effect, judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 113 and the case-law cited).

41 It is at the date of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the area in question (see, to that effect, judgment of 17 April 2018, *Commission* v *Poland (Białowieża Forest)*, C-441/17, EU:C:2018:255, paragraph 120 and the case-law cited).

42 In the present case, it is apparent from the order for reference, first, that the Supreme Court alludes to the permanent and direct loss of nine hectares of land hosting a suitable habitat for the hen harrier. Second, the felling of woodland for the construction of wind turbines and related infrastructure will have the effect of removing 41.7 hectares of that habitat. Third, the part of the area that will not be available during the lifetime of the project could be as much as 162.7 hectares. Fourth, it should also be borne in mind that, during

the development stage of the project, the area of open canopy forest, which is one of the constitutive characteristics of the foraging habitat of the protected species, will fall steadily.

43 The Court has previously ruled, in that regard, that where a plan or project not directly connected with or necessary to the management of an area may undermine the area's conservation objectives, it must be considered likely to have a significant effect on that area. The assessment of that risk must be made in the light, inter alia, of the characteristics and specific environmental conditions of the area concerned by such a plan or project (see, to that effect, judgments of 15 May 2014*, Briels and Others*, C-521/12, EU:C:2014:330, paragraph 20 and the case-law cited, and of 21 July 2016, *Orleans and Others*, C-387/15 et C-388/15, EU:C:2016:583, paragraph 45).

44 In the third place, the types of measures included in the contested development that form part of the management plan and are intended to address the effects of the development consist in, first, restoring areas of blanket bog and wet heath covering an area of 41.2 hectares (14.2 hectares of which will be within 250 metres of a wind turbine) and, second, providing areas of optimum habitat for hen harriers and other animals within the territory during the lifetime of the project, inter alia by felling and replacing the current closed canopy forest in that territory covering an area of 137.3 hectares in order to ensure that, ultimately, there is an open canopy area.

45 The referring court draws attention to a fact which, in its view, could be decisive for the purpose of the answer to be given to its question, in so far as it distinguishes the circumstances of the present case from those of the cases which gave rise to the judgments of 15 May 2014*, Briels and Others* (C-521/12, EU:C:2014:330) and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583).

46 Accordingly, the SPA will be managed 'dynamically' in order to preserve the hen harrier's natural habitat, in the sense that the areas suitable for that habitat will vary geographically and over time, according to how the SPA is managed.

47 In that regard, as the Advocate General observed in point 58 of his Opinion, it follows from Article 6(3) and (4) of the Habitats Directive and the Court's related case-law that there is a distinction to be drawn between protective measures forming part of a project and intended avoid or reduce any direct adverse effects that may be caused by the project in order to ensure that the project does not adversely affect the integrity of the area, which are covered by Article 6(3), and measures which, in accordance with Article 6(4), are aimed at compensating for the negative effects of the project on a protected area and cannot be taken into account in the assessment of the implications of the project (see, to that effect, judgments of 15 May 2014*, Briels and Others*, C-521/12, EU:C:2014:330, paragraphs 28 and 29; of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 48; and of 26 April 2017, *Commission* v *Germany*, C-142/16, EU:C:2017:301, paragraphs 34 and 71).

48 In the present case, it is apparent from the findings of the referring court that some parts of the SPA would no longer be able, if the project went ahead, to provide a suitable habitat but that a management plan would seek to ensure that a part of the SPA that could provide suitable habitat is not reduced and indeed may be enhanced.

49 Accordingly, as the Advocate General observed in paragraph 71 et seq. of his Opinion, while the circumstances of the main proceedings are different from those of the cases which gave rise to the judgments of 15 May 2014*, Briels and Others* (C-521/12, EU:C:2014:330), and of 21 July 2016, *Orleans and Others* (C-387/15 and C-388/15, EU:C:2016:583), those cases are similar in that they are based, at the time the assessment of the implications of the plan or project for the area concerned, on the same premiss that there will be future benefits which will address the effects of the wind farm on that area, even though those benefits are, moreover, uncertain. The lessons to be drawn from those judgments may therefore be transposed to a set of circumstances such as those of the main proceedings.

50 In that regard, the Court has previously ruled that the measures provided for in a project which are aimed at compensating for the negative effects of the project cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3) of the Habitats Directive (judgments of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 29, and of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 48).

51 It is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration when the appropriate assessment is carried out (see, to that effect, judgment of 26 April 2017, *Commission* v *Germany*, C-142/16, EU:C:2017:301, paragraph 38).

52 As a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type in a protected area, are highly difficult to forecast with any degree of certainty or will be visible only in the future (see, to that effect, judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 52 and 56 and the case-law cited).

53 It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires 'dynamic' management that is the cause of uncertainty. In fact, such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development.

54 The foregoing considerations are confirmed by the fact that Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected areas as a result of the plans or projects being considered (see, to that effect, judgment of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 26 and the case-law cited).

55 Lastly, it should be noted that, in accordance with Article 6(4) of the Habitats Directive, in the event that, in spite of the fact that the assessment conducted in accordance with the first sentence of Article 6(3) of that directive is negative, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and where there are no alternative solutions, the Member State concerned is to take all compensatory measures necessary to ensure that 'the overall coherence of Natura 2000' is protected.

56 Therefore, in such a situation, the competent national authorities may grant an authorisation under Article 6(4) of the Habitats Directive only in so far as the conditions set out therein are satisfied (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 63 and the case-law cited).

57 It follows that the answer to the question referred is that Article 6 of the Habitats Directive must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of

the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive.

Ilešič Rosas Toader
Prechal Jarašiūnas

Delivered in open court in Luxembourg on 25 July 2018.

A. Calot Escobar M. Ilešič

Registrar President of the Second Chamber

* Language of the case: English.