PLANNING CASE LAW UPDATE

LGG’S 13th Annual Planning Law Conference

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1. As in previous years, this personal selection of recent developments in the decisions of the courts takes account not only of developments in the national courts but also in the European Court of Justice in Luxembourg ("ECJ") and the European Court of Human Rights in Strasbourg ("ECtHR"). I have used the following abbreviations in this paper:

TCPA - Town & Country Planning Act 1990
PCPA - Planning & Compulsory Purchase Act 2004
EIA, SEA - Environmental impact assessment, strategic environmental assessment
Habitats Regulations - The Conservation (Natural Habitats, etc.) Regulations 1994, S.I. 1994 No. 2716
HC - The High Court
CA - The Court of Appeal
HL - The House of Lords

Applications/ the grant of and need for permission & prior approval

2. In R (John Childs) v First Secretary of State and Test Valley BC [2005] EWHC 2368, the difficult issue of intensification arose again. The Deputy Judge, James Goudie QC, held that a simple increase in the number of caravans on site might amount to a material change of use requiring planning permission. In the instant case, the site had an existing use for four caravans and an application for a certificate of lawful use pursuant to s.192 TCPA 1990 asked for confirmation that the use of the site as a residential caravan site for 8, 15, 30 and 50 caravans would be lawful. This application was refused. The Deputy Judge held that

“25. In a case such as the present, not falling within any use class but being a recognised use, namely a residential caravan site, in my judgment the planning authority is entitled, albeit not bound, to include in the description of the use the intensity of the use. I regard the 2003 certificate, the lawfulness of which was not challenged at the time, as having been lawful in certifying the site for four caravans. In considering whether there was a material change in that use, I do not consider that it can be said that a change in the number, however great, is incapable of amounting to a material change of use, whatever the position might have been if the 2003 certificate had been silent as to number…

33. Once one has a definition of the existing use, and that definition validly contains a reference to intensity of use, then an intensification of that use does not necessarily amount to a material change of use but a change of use is not excluded and the change may be material. I do not regard the position as being comparable to a situation where a use falls within a class in a use classes order. Then there may be no change of use in a relevant sense if the use remain within the same class. This seems to me to be the effect of the Brooks and Burton case.”
3. A change in number, however great, was therefore capable of amounting to a material change of use although the position appeared to remain (as it does generally) that a mere increase in numbers above the number certified did not necessarily constitute a material change. The certification would not therefore detract from the proposition that mere intensification does not generally amount to a material change: see e.g. *Kensington & Chelsea RBC v Secretary of State* [1981] JPL 50 and *Lilo Blum v Secretary of State* [1987] JPL 278. For a material change to occur, the use must be intensified to the point where its land use consequences are materially different and will be regarded as a change of use. See e.g. *R (Tapp) v. Thanet DC* [2001] 3 P.L.R. 52 at para. 21, together with the caution expressed by Carnwath L.J. as to consideration of pre-1991 cases in *Fidler v. First Secretary of State* [2004] EWCA Civ 1295 at paras. 14 and 28-30.

**Consent**

4. In *Butler v Derby CC* [2006] JPL 830, the question for Sullivan J was whether an advertisement displaying a political message displayed without consent contrary to regs 5 and 27 of the Town and Country Planning Act (Control of Advertisements) Regulations 1992 and s. 224 TCPA 1990 fell within the definition of ‘freedom of expression’ under Art. 10 ECHR. The appellant’s argument was that the banner contained a political message and that the judge had erred in holding that the commencement of prosecution proceedings did not engage his right to freedom of expression. Sullivan J held that the appellant’s Art.10 rights were engaged by the decision to prosecute, but that he could and should have made an application for consent under the 1992 Regulations. The requirement for advertising consent was not therefore a disproportionate interference with the appellant’s right of freedom of expression.

5. In *R (Orange PCS Ltd) v. Islington LBC* [2005] EWHC 963, Crane J considered whether prior approval under the Town and Country Planning (General Permitted Development) Order 1995 was the equivalent of the express grant of planning permission and could not therefore be subsequently undermined by amending its terms or designating the land in question as a conservation area. He held that prior approval bestowed accrued rights on the applicant which could not be removed by designating the land as a conservation area and bringing it within the definition of article 1(5) land.

6. The CA upheld Crane J. at [2006] JPL 1309. Laws L.J. (with whom the other members of the CA agreed) held:

“19. It seems to me that in a non-prior approval case once the work has been done the advent of conservation area status cannot condemn the development as unlawful. The planning permission has been implemented; work has been done and expense incurred on the faith of it.

20. It is true … that in such a case the developer - perhaps a home owner - will have incurred expense before starting the work and that expense would not be compensatable if then the conservation area is designated before the works are commenced. The matter is, no doubt, inevitably rough and ready, but a point has to be fixed somewhere for the crystallisation of the benefits given by the planning permission; and it seems to me that the start of the works provides at least a desirable degree of certainty.

21. So much for a non-prior approval case. What about a case where prior approval has to be sought, as here? The judge thought this instance was not at all straightforward. I am bound to say that I have some sympathy with that. It seems to me … that in a prior approval case the analogue to the commencement of work in a non-prior approval case is the application for prior approval and receipt of and reliance on the planning authority's response. In making the application the developer must have committed resources to assembling the required materials.

22. In a case where, in response, the planning authority grants prior approval, unlike this case where the response was that approval was not required, it would surely be unjust if the developers’ inevitable reliance on the grant could be defeated by the adventitious fact of a conservation area designation. Cases like the present where no approval is required cannot be in a different category.
23. I would not fix the date at which the planning permission crystallises or its benefits accrue in a non-prior approval case at the moment of commencement of the work but at the time when the favourable response of the local planning authority is received.
24. … there is a strong parallel between the prior approval process and the process of the grant of planning permission by a local planning authority in the ordinary way. In that latter case, as far as I can see, it is beyond contest that the planning permission once granted cannot be undermined by a later change in the status of the land save, I suppose, where there is expressly retrospective legislation or something of the kind.…”

7. With regard to the need for planning permission, it should be noted that The Town and Country Planning (Application of Subordinate Legislation to the Crown) Order 2006 SI 2006/1282 came into force on June 7 2006. Part 7 of the Planning and Compulsory Purchase Act 2004 applies significant parts of the TCPA 1990, the Planning ( Listed Buildings and Conservation Areas) Act 1990 and the Planning (Hazardous Substances) Act 1990 to the Crown. This Order applies existing planning subordinate legislation to the Crown with certain modifications. For example, a new class is included in the Use Classes Order, “secure residential institutions”, to cover prisons and other secure detention facilities.

Reserved matters

8. Castlebay Ltd v Asquith Properties Ltd [2006] 2 P&CR 374 concerned the question whether an application for reserved matters approval was a planning application within the meaning of an option agreement. The appellant company (A Co) challenged a decision that an option to purchase granted to A Co by the respondent landowner (L) had determined. The option had been exercisable by notice within a defined period during which there had been opportunity to extend if certain circumstances arose, including where a "decision [was] awaited in respect of a planning application". A Co was granted outline planning permission subject to conditions and applied for approval of the reserved matters a few days before the term date, informing L of the application and of its intention to exercise the option after the application was approved. L refused to accept exercise of the option on the ground that it had not been exercised within the time allowed and that the reserved matters application was not a planning application within the meaning of the agreement. L sought a declaration that ACo was not entitled to exercise the option and for the entry in the charges register to be cancelled. The judge held that the option determined on the due date as A Co was not awaiting any decision in respect of a planning application. A Co submitted that it should be granted an extension of the option period given that on the expiry date "a decision [was] awaited in respect of a planning application" as its application for approval of reserved matters was outstanding. A Co argued that such an application was one for planning permission since it was one for permission without which the development could not proceed. A Co contended that the judge had been wrong to interpret the term "planning application", which was not a term of art, so as to exclude such an application. L submitted that the terms at issue were to be interpreted in the context of the agreement and not simply in accordance with planning law usage, even if the judge's exposition of the latter was correct.

9. The CA held (per Chadwick LJ), that (1) the agreement had clearly been put together with the planning legislation in mind. There was a common distinction between an application for planning permission and an application for approval of reserved matters throughout planning legislation. There was no statutory definition of "planning application" but the term must be taken to refer to an application under the TCPA 1990 s.58(1) and not to one for reserved matters under s.92(2)(a) of the Act: see R. v Bradford upon Avon Urban DC Ex p. Bolton [1964] 1 W.L.R. 1136. The Town and Country Planning (General Development Procedure) Order 1995 art.1 defined "outline planning permission" and "reserved matters" as distinct. (2) If the parties had intended the terms of the agreement to have a wider meaning than merely what the legislation afforded they would have made it clear, but they had not, so the court would adopt the approach of the trial judge and uphold the original expiry date. (3) There was no reason to be found in the surrounding circumstances to enlarge the meaning of the terms, unlike in the case of Hargreaves Transport Ltd v Lynch [1969] 1 W.L.R. 215. If there were such a context the court would give effect to it. There was
a balance to be struck between the interest of the two parties, and it was impossible to take the view that giving the phrase its normal planning meaning was other than a sensible commercial arrangement.

10. The sharp edged distinction between the grant of permission and reserved matters approvals in domestic law, however, is less clear when considering the requirements for EIA of development consents under the EIA Directive. In two important cases, Cases C290-03 Barker and C-508/03 Commission v UK [2006] 3 WLR 492 the ECJ held that EIA could be required at the reserved matters stage even though the decision in principle had already been made on the issue of the outline permission. These cases will be considered under EIA, below.

Challenges

11. It is a fundamental principle “that matters of planning judgment are within the exclusive province of the local planning authority or the secretary of state”: Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, per Lord Hoffmann. It appears to be a regular occurrence that the courts should issue, at intervals, warnings about the limited nature of the review jurisdiction in planning and other administrative law areas.

12. In Persimmon Homes (Thames Valley) Ltd v. Stevenage BC [2005] EWCA Civ 1365, the CA emphasised the limited supervisory role of the court under s. 287 TCPA 1990 when dealing with a challenge to the LPA’s view of the requirement that a local plan should be in “general conformity” with a structure plan pursuant to s. 36(5) TCPA 1990. The Hertfordshire Structure Plan 1991-2011 had identified a number of strategic housing allocations for Stevenage, including a requirement for 1000 houses west of the A1(M). Certain land for this level of provision was identified by the Local Plan, but following an Inspector’s recommendation the Local Plan provided that the land was to be “safeguarded from development pending reconsideration and acceptance of its strategic justification”.

13. In the HC, the claimants succeeded only in part in quashing the Local Plan and the CA dismissed their appeal (Lloyd LJ strongly dissenting). Laws LJ (with the agreement of Wall LJ) held that a flexible approach should be taken to the phrase “general conformity” so as to allow considerable room for manoeuvre within the local plan to enable the LPA to meet the various contingencies that might arise. The courts’ role under s. 287 in relation to this type of issue was held to be one of Wednesbury review rather than one of statutory construction.

14. However, First Secretary of State v Hammersmith Properties [2006] JPL 843 illustrates how easy it can be for judges to stray into impermissible questions of the planning merits. Hammersmith Properties had applied for planning permission for the change of use of half of a large two-storey building from employment use to use as a health and fitness club. The Inspector dismissed the appeal, having identified the two main issues as being whether the proposal was an appropriate use of employment land and whether there was a need for the proposed development. The judge found it difficult to see how on the material before the Inspector he could reasonably have decided that permission should not be granted and he quashed the Inspector’s decision. The CA (Pill LJ) overturned the judge’s decision, holding that the Inspector had properly found the facts and applied his planning judgment. The judge had allowed his personal view of the planning merits to cloud his judgment and overstep his function of examining the lawfulness and reasonableness of the Inspector’s decision.

15. In the subsequent case of Ensign Group Limited v First Secretary of State [2006] EWHC 255 (Admin) Sullivan J, when quashing part of a Regional Spatial Strategy leading to a housing policy gap, commented that it was unfortunate that the TCPA 1990 did not enable the court to grant declaratory relief rather than the blunt instrument of deciding whether to...
An even blunter instrument may be all that is available in CPO cases, see the discussion of *Pascoe v. FSS & Urban Regeneration Agency* [2006] EWHC 2356 (Admin), below.

In *R(on the application of Jeeves and Baker) v Gravesham BC* [2006] EWHC 1249, Collins J considered a claim for judicial review of the council’s decision to refuse to entertain a planning application on the basis that it was within two years of the date upon which the Secretary of State had determined a similar application. A predecessor of the claimants had obtained a temporary planning permission for the stationing of two caravans and a toilet hut for a gypsy family on a site that he owned. At the expiry of that permission he had made an application to station a mobile home and a touring caravan on the land for a gypsy couple. His appeal against the refusal of that application was dismissed on December 22, 2004. On February, 1, 2005 the council issued an enforcement notice requiring removal of the caravans – the notice taking effect on September 6, 2005. In April 2005, the site was purchased by the claimants’ immediate predecessor and he made a full planning application for the stationing of one mobile home for a named gypsy family. The council refused to accept this application on the basis that it was within two years of the refusal of a similar application by the Secretary of State. The application was amended on September 6, 2005 and it was resubmitted in the name of the claimant.

Collins J held that the local authority had erred in deciding not to determine the application. In the circumstances of the case it could not be said that the local authority had, on the evidence that was before it, acted unlawfully in thinking that there had been no significant change, as was required by s.70A of the Act, since the previous planning determination. However, whilst circular 14/91 could not override the Act, its purpose was to ensure its correct implementation and so the circular was a material consideration for the local authority to take into account. In the circumstances of the case it was clear that the local authority had failed properly to take the guidance into account and, accordingly, had breached the claimant’s legitimate expectation that it would do so.

**Compulsory purchase**

In *Pascoe v. FSS & Urban Regeneration Agency* [2006] EWHC 2356 (Admin), the claimant (P) applied for judicial review of the validity of a compulsory purchase order made by English Partnerships acting as the URA pursuant to the power in s. 162 of the Leasehold Reform, Housing and Urban Development Act 1993. The order is one in a series of compulsory purchase orders for Liverpool’s housing market renewal initiative planned for some of its deprived inner city areas, the others of which are being pursued under s. 226 of the TCPA by the City Council. Following a public inquiry, the inspector, appointed by the Secretary of State, held that the order land was “predominantly” under-used or ineffectively used and so fulfilled the statutory requirements of s.159(2)(b) of the Act. The inspector recommended that the order be confirmed without qualification, as he considered that a compelling case in the public interest had been demonstrated and that that justified the interference with the human rights of those with an interest in the affected land. The Secretary of State agreed with the inspector’s conclusions and confirmed the order.

The Claimant was the owner and occupier of a residential property named in the order and an objector at the CPO inquiry. C contended that (1) the Secretary of State had misdirected himself in law by holding that the requirements in s. 159(2)(b) were satisfied; (2) the order had constituted an unjustified interference with her right to respect for private life and the right to peaceful enjoyment of her possessions under Art. 8 and Article 1 of Protocol No. 1; and (3) she had been deprived of her right to a fair hearing under Art.6(1) because of the unavailability of public funding for legal representation – there was a lack of equality of arms.

Forbes J allowed P’s claim, holding that:

(1) the purpose for which the statutory compulsory purchase power had been granted in the Act was to secure area-wide regeneration. The concept of land being "under-used" or "ineffectively used" in s.159(2)(b) expressly contemplated that some of the land to
be acquired was being used, since otherwise it would be land that was unused under s.159(2)(a). In practical terms, the regeneration of a complete area would often require IP to take over the entire area in order to implement a coherent and effective plan of redevelopment for regeneration. Parliament could not plausibly have intended to restrict IP's powers to a piecemeal or patchwork acquisition of individual plots of land in a regeneration area. In order to meet the requirements of s.159(2)(b), it was necessary to establish that the land, when considered as a whole, was under-used or ineffectively used. A finding that the land was predominantly under- or ineffectively used plainly involved the application of a less stringent standard than that required by s.159(2)(b). In the instant case, both the inspector and the secretary of state had fallen into error by engaging in an impermissible dilution of the statutory requirement that had to be satisfied before IP was empowered to acquire the land in question compulsorily in order to secure its regeneration. The error made by the secretary of state in confirming the order in respect of land that had been found to be predominantly under- or ineffectively used could not properly be remedied by recourse to s.160(4) of the 1993 Act. Accordingly, that ground of challenge succeeded;

(2) The order had constituted an interference with P's rights under Art. 8 and Article 1 of Protocol No. 1 since it deprived her of her home. However, the interference was not in accordance with the law, and was therefore not justified and constituted a breach of s.6 of the 1998 Act; and

(3) P had been given a reasonable opportunity to present her case, which was the essence of the requirement of equality of arms. In the circumstances, there had been no violation of Art. 6. See, further, below.

Aftermath (1) - relief

22. Forbes J. has yet to decide whether or not to exercise his discretion not to quash.

23. On the effect of a quashing order, if made, it seems clear from s. 24(2) of the Acquisition of Land Act 1981 that in CPO cases it is the order not the confirmation which is quashed which takes the matter back to the point prior to the publication of the draft CPO by the relevant authority. The term "compulsory purchase order" in s. 24(2) means the compulsory purchase order as made by the promoting authority and submitted to and confirmed by the minister (see s. 2(2)) and not merely the final confirmation of the order by the Secretary of State. Accordingly, the Court has only the starkest of choices of either quashing the order back to the very start or declining to exercise its discretion.

24. It cannot be sensible in all cases for the clock to be put back so far, nor always in the public interest, and there is much to be said for the courts powers on quashing in various statutory contexts to be reviewed to provide more flexible and less drastic remedies, for use when the circumstances justify it.

Aftermath (2) - injunction

25. Since the judgment was granted, Liverpool City Council has taken steps to demolish some of the vacant properties in its ownership in pursuant of its HMRI policies, having first followed the appropriate procedure under Part 31 of the GDPO. Miss Pascoe, however, obtained an injunction to restrain such demolition claiming it would either influence Forbes J's exercise of discretion or was somehow otherwise unlawful in the absence of the CPO (even though the properties in question were already in Council ownership). The issue has yet to be resolved.

26. However, similar issues as to injunctions have recently been considered by the HC.

27. In R (England) v LB Tower Hamlets & Others [2006] EWHC 1801 Admin, the claimant sought judicial review of a planning permission and an injunction to prevent demolition (para.2). Collins J. considered the effect of s. 55 TCPA, and concluded that no planning permission was required for demolition. He went on to hold that there could be no legal basis for granting an injunction to prevent demolition:
“7. Demolition is covered by section 55 of the Town and Country Planning Act 1990, as amended by section 13 of the Planning and Compensation Act 1991. Section 55(1A)(a) provides that building operations include the demolition of buildings, but section 55(2)(g) enables the Secretary of State to make directions describing buildings whose demolition is not to be regarded as development. The relevant directions are in the Town and Country Planning (Demolition - Description of Buildings) Direction 1995. The effect of this, so far as this case is concerned, is that the warehouse can be demolished, since its demolition is not to be taken to involve development. Thus no planning permission is required for it to be demolished.

8. This means, as Mr McCracken was constrained to accept, or rather if not accept at least was unable to put forward any argument to the contrary, that there could be no legal basis for granting an injunction to prevent demolition. If the interested party (that is to say Team Ltd, who are the developers) choose to demolish they cannot be stopped from so doing, whether or not the planning permission is quashed. There are no conditions relating to its demolition which are material and which would prevent such demolition, as I say whether or not the planning permission is continued in being.”

28. Further, in *R (Ellson) v. LB of Greenwich and Lane Castle* [2006] EWHC 2379 Admin the Claimant challenged a planning permission which, as a result of that challenge, the decision to grant planning permission was to be reconsidered (para.1). The Claimant sought an interim injunction to restrain the D’s from demolishing the wharf which had been subject to the application for planning permission. The principles to be applied were set out at para. 10 and the judge rejected the claim for an injunction holding on the balance of convenience:

(1) C was legally aided and was unable to give an undertaking in damages – the losses which would be incurred by the D2 as a result of an injunction wrongly granted were way outside the means of the C (para.11)

(2) The fact that a C was unable to give a meaningful undertaking as to damages is a factor to be taken into account (para.13)

(3) The lack of compensability for D2 of the detriment which it would suffer means that the arguability of the claim must be the more carefully considered (para.17)

29. An argument was advanced that demolition would be unlawful as it was a preparatory step, and an integral part of a development which is not at all certain to proceed and which needed environmental assessment (paragraph 19). The judge held at para 27 that:

(1) it was not arguable that the demolition was unlawful; and

(2) if it were arguable the overwhelming balance of the case indicated that the injunction should not be continued.

30. Permission to appeal was refused by Moses L.J. on 11.10.06.

Bias

31. In *R(on the application of Condron) v National Assembly for Wales and Miller Argent (South Wales) Ltd* [2005] EWHC 3007, Lindsay J had to consider the grant of planning permission for open-cast mining and related removal and reclamation operations on a large site in South Wales. Prior to the planning committee meeting, the chairman was alleged to have had a brief conversation with one of the objectors and said that he was “going to go with the Inspector's Report”. The chairman did not deny making this statement. Lindsay J held that there had been unlawful predetermination ([75]):

“Having heard the argument I conclude that there was an unacceptable possible pre-determination in the Planning Decision Committee that authorised the grant of planning permission that finally emerged on 11 April 2005. A fair-minded observer, hearing the words which Jennie Jones attributes to Carwyn Jones AM, on learning that the Minister was to be chair of the PDC dealing with the application the next day, and even recognising that
the PDC could be expected to follow the Inspector's Report unless there were planning reasons not to, would, in my view, conclude that there was a real possibility that that member of the PDC was biased. He would think the member would be approaching the question of permission with a closed mind and hence also without impartial consideration of all relevant planning issues. His hearing that the Minister had not read the Inspector's Report would not serve to deny the possibility of bias that he would have concluded existed. That Miller Argent's application had excited a good deal of controversy and was far from being such that the balance of its merits and demerits could only possibly point one way made the absence of bias more than usually important."

32. In *R (on the application of Sager House (Chelsea) Ltd v First Secretary of State* [2006] EWHC 1251 the applicant developer (S) applied to quash a planning inspector's decision dismissing its appeal against the second respondent local authority's failure to render a decision on its planning application within the prescribed period. The inspector dismissed the appeal on the basis that the proposed development, which involved the redevelopment of an abandoned power station, would cause significant harm to views from adjoining conservation areas and impair the privacy and "sense of enclosure" of neighbouring residential properties. S raised seven grounds, including Wednesbury unreasonableness, bias and unfairness, and almost 100 sub grounds challenging the inspector's decision. The secretary of state broadly contended that the application was an attempt to re litigate the merits of the case and that the issues were primarily issues of planning judgment with which the court should not interfere.

33. The application was refused. In relation to the bias issue, the court noted that the allegation of bias was a serious allegation which should have been particularised in the claim form. It was also extraordinary. No fair minded and informed observer would conclude that there was any real possibility of bias, and it was unfortunate that the ground had been raised:

"118. The sixth ground of the application alleges that the Inspector's decision was infected by bias so as to be unlawful. That is a serious allegation but there are no particulars of the allegation at all contained in the claim form. That is wholly unacceptable. A serious allegation of that kind should have been properly particularised in the claim form. At the hearing, the claimant sought to rely on section 11 of Mr Cooper's written statement. That is a section of his witness statement which, as I have mentioned previously, contained some 20 pages constituting a detailed critique of Mr Coey and his evidence. It is quite wrong to leave the parties and the judge to have to pick through a witness statement in that way to seek to deduce how the case of bias is put. The claimant's skeleton argument does, however, specify the acts of the Inspector which are alleged to show bias. They are the Inspector's failure to raise with the claimant during the inquiry matters troubling him, the CABE saga, the facts relating to ground 2 (xii), the failure to criticise the privacy of the proposed apartments and the reliance on Mr Coey's assessment of privacy.

119. Those are all matters which are the subject of independent grounds of challenge. I find it extraordinary to allege that those matters either singularly, or cumulatively, show bias on the part of the Inspector. I have had regard to Mr Coey's witness statement and I have read the decision letter as a whole. I have also had regard to the test of *Porter v Magill* (2002) 2 AC 357, namely whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Inspector was biased. The answer to that question is 'no'. Although I appreciate that the claimant and their expert witnesses feel very aggrieved by the Inspector's decision, it is unfortunate that this ground of appeal was raised at all."

34. In *R (on the application of Port Regis School Ltd.) v North Dorset District Council* [2006] EWHC 742 (Admin) the claimant school applied for judicial review of a decision of the local planning authority that it was minded to accept a recommendation to approve an application for planning permission. The application was for planning permission to use agricultural land as a showground and to erect a pavilion. It was proposed that one of the rooms in the pavilion would be set aside for use by a masonic lodge. The ground of challenge to the decision was that two members of the local planning authority who attended and voted at the meeting giving rise to the decision were freemasons, so that the
35. The claimant argued that it was relevant that the freemasons constituted a secret society and a fraternal society, whose members agreed to abide by the principle of "mutual assistance". Both councillors had, in accordance with the local authority's code of conduct, declared that they were freemasons and signed declarations to abide by the terms of the code of conduct. However, at the meeting, neither of them declared an interest as freemasons because they did not consider that their freemasonry gave rise to any prejudicial interest.

36. The issue was whether a freemason, by reason of his membership of that society, was to be regarded as restrained from participating in local government decision making whenever another freemason or branch of freemasonry had an interest in the outcome of the decision. Newman J held that they were not so restrained. While the secrecy said to surround freemasonry undoubtedly gave rise to suspicion and heightened the role which the concept of fraternity could play, it was of little substance in the instant case. Both councillors had declared their freemasonry and the interest of the masonic lodge which proposed to use the pavilion had been declared. Even though disclosure of membership of the freemasons was required in local government it was unrealistic to believe that the firmly held suspicion that being a member required partiality to be shown to other freemasons had been dispelled. It was likely that a large section of fair minded people would agree with the claimant's position and would believe that there was always a real possibility that a freemason would assist another freemason or freemasonry, whatever might be called for by the merits of a decision which had to be taken in connection with local government. However, a fair minded observer informed of the facts in connection with freemasonry which had been placed before the court and having regard to the circumstances of the instant case would not conclude that there was a real possibility of apparent bias affecting the local authority's decision. Freemasons were obliged only to show charity or mercy to those in need, not to give unquestioning support. They were required to obey the law of the state. The information and guidance given to freemasons included advice on the need for declarations of interest to be made. The two council members in the instant case were governed in their conduct by the various obligations and standards of conduct dictated by freemasonry as well as by the declarations signed by them in accordance with the local authority's code of conduct. The true meaning to be attributed to the "oath of mutual assistance" was that freemasonry did not require a freemason to be partial to any other freemason or the interests of freemasonry. Freemasonry underpinned the requirements of impartiality and fairness set by the law.

Enforcement

37. In R(on the application of Mid Suffolk DC) v First Secretary of State [2006] JPL 859, the LPA had served 2 enforcement notices: one alleging an unlawful change of use from agricultural and woodland to a café use. The second notice alleged the unlawful laying of hardstanding. The Inspector found that the café was a building rather than a change of use and that it had been there for four years and was lawful because of the passage of time. Sullivan J rejected this approach. The use of the (immune) café building was not permitted by any of the planning permissions relating to the site and it had not been in existence for ten years. It was not correct to say that there could be an implicit planning permission for the café use. Even if the planning permission had been granted for the use of the open land on all parts of the site for café use purposes, the question would arise whether such a permission would also permit the use of a building on the land if that building was erected without planning permission and subsequently became immune from enforcement action. The case was therefore remitted for the Inspector to address this question.

38. Sullivan J's decision highlights the mistaken assumption held by many that, in the case of the erection of an unauthorised building, an appeal on the basis that the building has become immune from enforcement action is all that is required to render the use of the building lawful. However, as Sullivan J makes clear, the erection of the building and its use are two separate matters.

39. R(on the application of O'Brien) v Basildon DC [2006] EWHC 1346 has significant
implications for the ability of a planning authority to take speedy enforcement action and the possibility of unlawful site occupiers to exploit the system to delay a decision. The claimant gypsies applied for judicial review of the defendant local authority’s decision to use its powers under s.178 TCPA 1990 to enter upon their Green Belt land and remove their caravans to secure compliance with enforcement notices. The enforcement notices had required that the use of the land as a caravan site should stop, and the caravans, ancillary vehicles, hard standings and rubbish should be removed from the site. The time for compliance had expired. The gypsies had then made applications for planning permission to station the caravans and a mobile home on the site. Permission had been refused and the appeal hearing was pending. Meanwhile, the local authority decided to use its powers under s. 178. The gypsies contended that the action of the local authority, in choosing to secure compliance with the enforcement notices by the direct action route of s. 178 rather than seeking an injunction under s. 187B of the 1990 Act, was a disproportionate interference with their rights under Art.8 and the decision to secure compliance with the enforcement notices was itself disproportionate and unlawful in ordinary public law terms.

40. Ouseley J allowed the application. He held that the single question was whether the local authority’s decision to take action under s. 178 of the 1990 Act to enforce compliance with the enforcement notices was lawful: comparisons with s. 187B were beside the point. A local authority’s decision to take steps under s. 178 to effect a residential eviction was not necessarily unlawful and disproportionate since judicial review coupled with the procedures for substantive planning decision making, provided all the procedural protection necessary for interference by direct action with Art. 8 rights to be proportionate. However, because the use of s. 178 was a draconian step, and a further planning appeal was pending, it was not enough that the authority thoroughly reconsidered the planning merits of the site, the case for enforcement and the implications for the health and well-being of the site occupiers:

“177. It is clear that if an injunction under section 187B is sought, the prospects of success in the planning application or on appeal are a factor which the court will consider, even where, as in Porter’s individual case, occupation of the site was not just in breach of planning control but was a criminal offence in breach of an effective enforcement notice.

178. The prospects of success are closely related to the degree of harm done to the public interest. It follows that although the defence to an injunction sought in such circumstances would be made in court rather than by way of a judicial review challenge to the decision to seek an injunction, prospects of success are relevant for a local planning authority to consider before embarking on such a step.

179. Importantly one effect of the grant of an injunction is to make its enforcement by committal to prison a real possibility. There is no power to sentence someone to prison for an offence under section 179, so there has to be a stronger case for seeking an injunction than merely the enforcement of the criminal law whether by reference to the harm done, the urgency, the flagrancy of the breach, or the proven ineffectiveness of the criminal sanction.

180. It is easy to see why in those circumstances a court would wish to see whether the enforcement of actual removal through committal, was necessary, if there were good or better prospects of success in a planning application or an appeal. So the step to be taken may affect what considerations are material and have to be considered.

181. My view about the danger of splitting the one decision into a decision to enforce and a decision as to which steps are to be taken, is reinforced by the concern I have about the way in which the argument can proceed from a legitimate decision that the planning law is to be enforced, to the simple proposition that all that matters at the next stage is what steps will be most effective in enforcing planning control, an argument which rather risks ignoring the differing impacts which differing steps can have.

182. It is in this context that I specifically refer back to the approval by Lord Bingham in paragraph 20 of his speech in Porter of what Simon Brown LJ said in paragraph 41 of his judgment in the Court of Appeal, which I see as making precisely the point that it is not necessarily sufficient, and certainly not in a residential eviction case, to say that
all that matters is the determination of which is the swiftest and most effective remedy available.

183. The power given by section 178, when used as I conclude the Act permits, for residential eviction is a drastic power. Even when notice is given, as here, of the decision and of the actual taking of the action (steps likely to be necessary for this mode of action to be proportionate), section 178 remains a drastic step in these circumstances.

184. It is in my view necessary for a local planning authority in deciding whether to use section 178 to consider and weigh various factors: the degree of harm done to the interests protected by planning control; the need for a swift or urgent remedy; the need to uphold and enforce planning control embodied in an effective enforcement notice and the criminal law; the personal circumstances and impact on the individuals of removal.

185. Part of that will involve the question of whether they have somewhere else to go or whether inevitably they will have to camp on the roadside, or in some other unauthorised Green Belt location of indeterminate harm. But it is also relevant, and the more plainly so where the conclusion is that the occupants have nowhere lawful or suitable to go, to consider the prospects of success which they might have on a planning application or on appeal, and the time scale over which that might be resolved.

186. I see a real difference in that respect between the relevance of that issue where the question is whether they should be evicted rather than whether they should be prosecuted and fined. Where an enforcement notice had recently been upheld on appeal, in which the personal circumstances had not been essentially different from those relied on by the current gypsy occupiers, (and many of the problems of health management and educational stability are common and the details do not involve significant variables), a local planning authority could properly conclude that it, or the Secretary of State on appeal, would probably maintain that position in the absence of a significant change of circumstances. Removal could well be proportionate. Conversely, an appeal decision might be imminent with obvious good prospects of success in the light of other decisions nearby; the removal of a group of gypsies for them shortly after to be reinstated after a successful appeal would be plainly disproportionate. In neither case however could complaint properly be made about a prosecution. I consider that for a decision to use section 178 to be lawful, consideration of the occupiers' prospects of success in a planning application or appeal and the timing of the resolution of that issue is necessary. If that is not done, a material consideration will have been ignored and action may well be disproportionate, depending on the prospects, the timing of the decision, the degree of harm, and so on.

187. The consideration of the prospects of success will usually entail consideration of that part of Government policy which bears on the appraisal of need and recent relevant decisions of Inspectors. It does not require (and it may not be possible to provide in any event) any very detailed assessment. It may be difficult, often, to go beyond distilling the hopeless from the reasonably arguable or the case with strong prospects.

188. A local planning authority may find it difficult before deciding an application to form more than a rough-and-ready preliminary view, or, if awaiting an appeal decision from a refusal, to do more than recognise what its prospects are on a like basis. But Central Government policy and previous decisions, along with the Development Plan, can afford the basis for a reasonably objective appraisal.

189. The timetable is also important, for it may be months before a planning application is made or before an appeal is even lodged against the refusal. An inquiry date may be several months’ away, with the decision some time yet beyond that. Some consideration of that is important, to be seen in the light of the period of occupation already enjoyed, with whatever stability that has brought.”

41. Since, in that case, that material consideration of the prospects of success of the gypsies' appeal had not been considered by the local authority and its decision to take such drastic action was, accordingly, not proportionate:
“193. The position, however, at April 2006 is this, in my judgment. The case of those who have appeals is plainly not hopeless. Government policy has arguably moved in their favour. I regard any objective appraisal as inevitably leading to the conclusion that the claimants have reasonable prospects of success, even if they cannot have been improved by occupation of their sites, over time, in breach of the criminal law.

194. I do not consider that a decision to use section 178 could now reasonably or proportionately be taken in advance of the appeal decision, in view of the imminence of the inquiry and the fact that it is an Inspector’s and not a Secretary of State’s decision, and is accordingly likely to be quicker. The position may be different (indeed, very different) if the appeal fails and there is merely an attempted application to the court to pursue an appeal on a point of law.”

42. Silber J provided a comprehensive review of the principles on which injunctions may be granted in South Cambridgeshire DC v Flynn [2006] EWHC 1320. The claimant planning authority, by proceedings issued on July 19, 2005, sought an injunction requiring the Defendants to remove caravans from certain non-green belt land which they owned. A total of three enforcement notices has been served in respect of different parts of the land, they had all been the subject of appeals and they had taken effect. In respect of the third enforcement notice there had been an eight day inquiry and on March 11, 2005 the Secretary of State had accepted the Inspector’s report and had upheld the notice, refusing to extend time for compliance. The defendants resisted the injunction on two grounds: (i) under Art. 8 it would not be proportionate to grant an injunction; and (ii) that because of Circular 01/2006 there were now such prospects of obtaining at least temporary consent that it would not be appropriate to grant and injunction. The defendants were Irish gypsies and it was accepted that there was inadequate accommodation for them in the claimant’s area.

43. Silber J granted the injunction, holding: (i) that it was proportionate to grant an injunction in favour of the local authority and there was no breach of the defendant's Art. 8 rights. Following South Buckinghamshire DC v Porter (No.1) [2003] 2 A.C. 558, Silber J held that in deciding whether to grant relief, the court had to take account of the planning merits of the case, the personal circumstances of the defendant, and the way in which the local authority had approached the matter, followed. The inspector had made a detailed and carefully reasoned decision that the case against planning permission was "very strong". He had taken account of and fully investigated the defendant's personal circumstances and the unmet need for gypsy sites in the area. The court had to respect the balance that the local authority struck between public and private interests, and the defendant's circumstances did not override the powerful conclusion that their use of the land had to cease. That there was an unmet need for gypsy sites was not sufficient in the circumstances to outweigh the proposed development's non-compliance with local development plans. There could be no criticism of the way in which the local authority had dealt with the defendant's applications under the homelessness legislation, and there was no condition precedent to the grant of an injunction that the local authority had to discharge all of its duties, including those under the Housing Acts. Whilst the local authority's decision making process was relevant, the position was that if the decision to seek an injunction was founded on a full understanding of the personal circumstances of the defendants and a proper consideration of the questions of necessity and proportionality, the very fact that such a decision had been made weighed heavily in favour of granting an injunction. The defendant's failure to comply with the enforcement notices and their continued presence on the land placed them in flagrant breach of planning control and there had been no material changes since the inspector's decision that could demonstrate a real possibility that their application for planning permission could succeed.

44. In relation to point (ii), Silber J held that whilst Circular 1/2006 meant that local authorities should be less reluctant to grant temporary planning permission than they previously would have been, the starting point had to be the exact terms set out in the case of Berry, and a real prospect of success was necessary before an adjournment of the injunction application could be justified. The prospects of the Defendant obtaining temporary planning permission were very low. Moreover, there was nothing in the circular that altered the inspector's view about the severe harm to the landscape and amenity caused by the proposed development.
and he had, on that basis, concluded that temporary planning permission was not appropriate.

45. A similar point was raised in *South Bedfordshire DC v Price* [2006] EWCA Civ 493. In that case, an enforcement notice had been served in July 2002 and the authority sought to obtain an injunction under s.187B in November 2004. The defendants did not comply and in July 2005 the authority sought a committal. Bean J made a committal order which was appealed. The aspect of the appeal which is interest to the present talk relates to the question whether the order should be discharged in the light of the new government guidance in Circular 01/2006 in respect of gypsies.

46. Lloyd LJ held that the order should not be discharged:

“35. The Defendants' evidence before the judge included a letter from their planning consultant, Mr Philip Brown, in which he expressed confidence that the new application would be successful at least to the extent of a temporary permission. The letter says nothing about the highway issue.

36. The new circular clearly does improve the Defendants' case on the planning appeal. Previously, unmet need was a factor to which weight had to be given. Now the planning authorities are directed 'to give substantial weight to the unmet need in considering whether a temporary planning permission is justified.

37. The success of the application, at least to the extent of a temporary permission, is therefore more likely than it would otherwise have been. But it does not seem to me that it is possible to assume that it is more likely to succeed, even to that extent, than to fail.

38. If the appeal does succeed, at least to that extent, then the injunction and the suspended committal order would be discharged, because (subject to any points of detail on the terms of the grant) it would become lawful for the land to be used as the Defendant wish to use it. If it fails, then the injunction would remain in force and, if the committal order had been suspended pending the outcome of the planning appeal, it would again come into effect. In a sense, therefore, the question for the court on this appeal is whether the Defendants should be allowed to go back on to the land pending the outcome of the planning appeal.

39. I recognise the difficulties that the Defendants are likely to be suffering, through having no settled place where they can keep their caravans and live for the time being. Mr Masters made the particular point that the Defendant would find it much easier to participate in the planning appeal, and to present their case properly, if they were for the time being living at the site, both because it would be a settled place making it easier for them to focus on the relevant issues and because they could be more easily contacted by their advisers for the purpose of taking instructions.

40. Nevertheless it seems to me that the point made by the judge at para 17 was right:

'Whichever way it is put, to suspend the injunction now after the Defendants have ignored the enforcement notice for four years and the injunction for ten months would be an extraordinary step.'

41. Mr Masters pointed out that during 18 months of the four year period the Defendants' continued use of the site was legitimate because of the Secretary of State's extension of the time for compliance. Nevertheless the point made by the judge is fair, and accurately expressed. In my judgment, it would only be right to suspend the committal order pending the result of the planning appeal if there were evidence before the court showing a substantial likelihood that the planning appeal would succeed, at least to the extent of a temporary permission. The Defendants' chances of success on the planning appeal have improved, by virtue of the new circular, from having been, as assessed by the judge, 'remote', but it is impossible for this court to conclude that those chances are particularly strong.

42. In those circumstances, it seems to me that the judge was right in the way he dealt with the case as it stood before him, and that the change in circumstances since then
does not justify allowing the appeal so as to permit the Defendants to return to the property pending the outcome of the planning appeal. I would therefore dismiss the appeal against the committal order and refuse permission to appeal against the judge's refusal to suspend the injunction.

43. No submissions were addressed to us about the term of the committal order which relates to the obligation to restore the land to its former state. By virtue of my order made on 24 November, the committal order was suspended, so far as that obligation was concerned, until 16 January 2006. At that time the appeal was expected to come on for hearing by that date. Unless something has been done in this respect of which we were not told, the Defendants are already at risk of committal because of this part of the order. We will consider any submissions from Counsel (in default of agreement) as to whether, and if so for how long, the order should be further suspended in this respect.

44. It might be said that to suspend the committal order in respect of this obligation would be illogical if the order is not to be suspended in other respects. It seems to me that there is a material difference between the obligations to cease residential use of the land and to remove all caravans, mobile homes and so on from the land, on the one hand, and the obligation to restore the land by removing rubbish, rubble, hardcore and so on, and then to re-seed the cleared areas to grass, on the other. The most important thing at present from the point of view of the Council and the public interest is that the land should not be used in breach of planning control. That is achieved by the committal order as it stands. The obligation to restore the land is also important, but the public interest in the enforcement of planning control would not be greatly injured if the stage at which that obligation came to be backed up with the sanction of an imminently effective committal order were to be postponed until the result of the planning appeal is known. At that stage, if the appeal is successful, and subject to any issues arising from the terms of that success, it is likely that the injunction will have to be discharged. If the appeal fails, then the position in relation to the land will be settled, at least for the time being, and it would be appropriate for the obligation to restore the land then to be reinforced by the prospect that, if it is not complied with within a specified period after the result of the planning appeal is known, then the suspension of the committal order in this respect should come to an end.”

Standing

47. The use of the judicial review procedure by commercial rivals has been deprecated by the courts. In R(on the application of Noble Organisation Limited) v Thanet DC [2005] EWCA Civ 782, Auld LJ held that:

“I would dismiss the appeal. In doing so I add a note of dissatisfaction at the way the availability of the remedy of judicial review can be exploited –some might say abused –as a commercial weapon by rival potential developers to frustrate and delay their competitors’ approved developments, rather than for any demonstrated concern about potential environmental or other planning harm. By the time of the hearing of this appeal, as is often the case, the approved scheme in issue is clearly of a piece with surrounding and much larger approved proposals already taking shape around it. It could not conceivably be regarded as a significant addition to the overall environmental impact of such development. This may be the cause of great economic harm to individual developers and, more importantly, it is likely to frustrate the public interest in much needed regeneration in areas such as the Isle of Thanet. However seemingly complicated the issues are, or how sophisticated and technical the statement of facts and grounds supporting the initial claim for judicial review, they should be subject to rigorous examination by the single judge at the permission stage of a claim for judicial review.”

48. A more nuanced approach was recently taken in R(on the application of Rockware Glass Ltd) v Chester City Council [2006] Env. L.R. 30, where Judge Gilbart QC held that one glass manufacturer had standing to challenge the grant of a permit to a rival manufacturer. At [170] he stated that:
“Mr Taylor argued, rightly in my view, that the mere fact that a Claimant is a commercial competitor does not provide the necessary standing to challenge a decision taken within the PPC system. Put that way, no-one could disagree. I also agree that one must also guard against the type of challenge which Auld LJ was dealing [in Noble]. But then I depart from Mr Taylor’s able submissions. For it does not follow from either [Feakins or Noble] that a commercial competitor cannot have sufficient standing simply because he is seeking to protect his commercial position. Whether he does so or not depends on the subject matter. As with all such matters there is inevitably a spectrum of cases falling on either side of the line. To take an example from the planning field, suppose AB plc gets permission for a superstore a mile outside the town centre on a playing field, in breach of statutory Development Plan and national policies, and those policies have been overlooked or misinterpreted by the local planning authority. CD plc which has a superstore built on another playing field a mile from the same town centre would have little basis for a challenge, whereas EF plc, which has bought a town centre site allocated for retailing in the statutory Development Plan, would almost certainly do so. They both have the same commercial interest, but their cases are quite different.”

Environmental assessment

49. A regular feature of case law updates has been the annual crop of EIA cases. 2005/6 has proved no exception to this almost inexhaustible area of litigation. During argument in the HL on 6 November Lord Bingham described this area of law as “shark infested waters.”

Cases C290-03 Barker and C-508/03 Commission v UK

50. The ECJ summarised the issue raised by the reference in this way at para. 42 of its judgment in Barker:

“Is EIA required to be carried out if, following the grant of outline planning permission, it appears at the time of approval of the reserved matters that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location?

51. In Barker the ECJ held:

“46. … it is therefore the task of the national court to verify whether the outline planning permission and decision approving reserved matters which are at issue in the main proceedings constitute, as a whole, a ‘development consent’ for the purposes of Directive 85/337 (see, in this connection, the judgment delivered today in Case C-508/03 Commission v United Kingdom [2006] ECR I-0000, paragraphs 101 and 102).

47 Second, as the Court explained in Wells, at paragraph 52, where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

48 If the national court therefore concludes that the procedure laid down by the rules at issue in the main proceedings is a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, it follows that the competent authority is, in some circumstances, obliged to carry out an environmental impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved (see, in this regard, Commission v United Kingdom, paragraphs 103 to 106). This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.
49. In the light of all of the foregoing, the answer to the second and third questions must be that Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.

52. In Commission v UK infraction proceedings in relation to the determination of the White City and Crystal Palace developments had been brought by the Commission alleging breaches of the EIA Directive by the UK. It raised similar issues to Barker and was heard at the same time. The ECJ said:

“101 In the present case, it is common ground that, under national law, a developer cannot commence works in implementation of his project until he has obtained reserved matters approval. Until such approval has been granted, the development in question is still not (entirely) authorised.

102 Therefore, the two decisions provided for by the rules at issue in the present case, namely outline planning permission and the decision approving reserved matters, must be considered to constitute, as a whole, a (multi-stage) ‘development consent’ within the meaning of Article 1(2) of Directive 85/337, as amended.

103 In those circumstances, it is clear from Article 2(1) of Directive 85/337, as amended, that projects likely to have significant effects on the environment, as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to their effects before (multi-stage) development consent is given (see, to that effect, Case C-201/02 Wells [2004] ECR I-723, paragraph 42).”

53. Challenges by the Commission to the decisions not to have EIA on the facts in both the White City and Crystal Palace cases were held to be admissible, but failed since the Commission had failed to provide evidence of appropriate failure in the light of detailed evidence from the UK. The ECJ rejected the complaint by the Commission on the facts that there had been “a manifest error of assessment” in determining that EIA was not required (see paras. 82–92).

54. The HL heard further argument on 6 November although the Claimant abandoned her claim for a quashing order (which would have revived the expired outline permission) and sought merely declaratory relief which was not opposed in principle by the Secretary of State, although Bromley LBC still maintained that the reserved matters determination in that case was not a development consent.

55. Pending the views of the HL, and amendments to the EIA Regulations, the position appears to be as follows, fortified by interim guidance issued by DCLG

1. The multi-stage UK planning process is not inconsistent or incompatible with the EIA Directive. The ECJ proceeded on the basis of considering how EIA should be integrated within the procedure for the grant of, as the ECJ put it, the “principal decision” and of the subsequent “implementing decision”. It is possible consistently with the EIA Directive to have a two-stage planning consent procedure “one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision”. However, the EIA Directive requires that it must be possible for there to be EIA at the implementing (reserved matters) stage in the particular circumstances identified by the ECJ;

2. The ECJ emphasised, consistently with the requirements of the EIA Directive and its

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3 See http://www.communities.gov.uk/index.asp?id=1501525. The consultation draft of the new EIA Circular states that it is subject to the outcome of the Barker case in the HL.
previous case-law, that the effects which a project may have on the environment should be identified at the earliest possible stage\(^4\). In other words, they should ordinarily be identified and assessed in the procedure relating to the principal decision, the grant of outline planning permission. It is only if those effects are not identifiable until the time of the procedure relating to the approval of reserved matters that EIA needs to be considered at that later stage.

(3) It appears likely that the general approach to EIA at the outline permission stage remains that formulated by Sullivan J. in *R. v. Rochdale B.C. ex p. Tew* [2000] Env. L.R. 1 and *R. v. Rochdale B.C. ex p. Milne* [2001] Env. L.R. 22 and followed in subsequent cases. The ECJ’s decisions are consistent with such an approach and the requirement to carry out EIA at the earliest possible stage.

(4) If the approach in *Tew* and *Milne* is followed, based as it is on the key requirement to assess at the earliest stage, then it is unlikely that there should be many cases where there is a need for EIA at the reserved matters stage. Outline permissions which have not properly assessed the likely significant effects of a project will still be in breach of the EIA Regulations and EIA Directive and liable to be quashed.

(5) However, the ECJ’s decisions make it clear that “in some circumstances” EIA may be required at the subsequent reserved matters stage, although the in principle decision has already been made.

(6) The ECJ held that EIA at the reserved matters stage may be required where likely significant effects are identified at the reserved matters stage which -

(a) were not identifiable at the outline planning permission stage (this may include those effects which were not identified as well); or

(b) were identified but which now require “a fresh assessment”. It seems likely that this will apply only where there has been some material change of circumstances since the grant of outline planning permission.

56. The following situations can be considered when determining whether EIA may be required before reserved matters are approved:

(1) **where an EIA was undertaken at the outline permission stage** -

In this case, it seems that if the approach set out in *Tew* and *Milne* has been followed the likelihood of the need for further EIA at the reserved matters stage is highly unlikely to say the least (as any significant environmental effects will have been identified at the outline planning permission stage);

(2) **where the need for EIA was considered, but determined not to be required at the outline permission stage** -

Again, provided the screening process at the outline planning permission stage was undertaken properly and in accordance with the guidance (now contained in Circular 02/99) it seems likely that it will only be in rare cases that EIA should be required at the reserved matters stage when it was not required at the outline permission stage. Any potentially significant environmental effects should have been identified at the outline stage and, on this basis, they would have been considered and ruled out;

(3) **where there was a failure to consider the need for EIA at the outline permission stage**

It is in these circumstances that the ECJ’s decisions are likely to have most impact and where EIA at the approval of reserved matters stage is most likely to be required.

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\(^4\) Accordingly, the ECJ’s decisions do not affect the Secretary of State’s guidance in Circular 02/99 that EIA needs to be carried out at the earliest stage possible i.e. before outline planning permission is granted.
57. The HL may or may not go so far as providing further direction on the issues set out in the DCLG interim guidance but is likely to cast light on at least some of them.

58. The question then arises as to what should be the content of a reserved matters stage EIA. The ECJ stated the requirement for an assessment in Barker, para 48, as follows:

“This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.”

59. In planning law, the grant of outline permission gives to the developer a right to develop in accordance with the conditions attached to the permission, and subject to consideration of reserved matters, which cannot be used by a planning authority to frustrate that right. The authority is bound to act in accordance with the principle of development already established by the grant of outline planning permission: see Latham L.J.’s judgment in the CA at para. 27.

60. The ECJ was plainly aware of these principles, as is made clear by both the reference to reserved matters as an “implementing decision” and the reference to the UK’s submissions in Commission v UK at para 99. It did not purport to alter the existing domestic law principles as to the relationship between the outline and reserved matters approval but to ensure that EIA was properly carried out within the structure of the national law. Moreover, the requirement that a reserved matters assessment should be “comprehensive” is limited in terms to the aspects of the project which have not yet been assessed or which require reassessment.

61. The logic of the ECJ’s judgment followed its earlier ruling in the context of the determination of new conditions on old mining permissions in R(Delena Wells) v Secretary of State Case C-201/02 [2004] 1 C.M.L.R. 31. The logic of its approach may be applicable elsewhere e.g. not only to reserved matters but to the discharge of negative Grampian-style conditions which have to be satisfied before a development can proceed. It also raises the prospect of re-opening failures with regard to EIA at the outline stage where the period for quashing the outline has expired.

**EIA, enforcement action and LDCs**

62. In Commission v United Kingdom Case-98/04, the ECJ declared inadmissible a complaint by the Commission that the s.191 TCPA mechanism for granting Lawful Development Certificates. The ECJ stated:

“19 During both the pre-litigation stage of the present procedure and the litigation itself, the Commission concentrated its criticisms on the issue of LDCs in so far as it allows by-passing of the procedures governing application for consent and environmental impact assessment required by Directive 85/337 for projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location.

20 The Commission has not put forward any complaints concerning the actual existence of time-limits for the taking of enforcement action against development which does not comply with the applicable rules, although the introduction of LDCs is by its very nature inseparable from the provisions laying down such rules of limitation. Pursuant to section 191 of the TCPA, an LDC is issued, in particular, when no enforcement action may then be taken against the uses or operations concerned, whether because they did not involve development or require planning permission or because the time for enforcement action has expired.

21 Consequently, the present action for failure to fulfil obligations, since it puts before the Court only one aspect of a legal mechanism composed of two inseparable parts, does not satisfy the requirements of coherence and precision referred to above.

22 That conclusion is all the more necessary because the arguments put forward by the United Kingdom Government to contest the failure to fulfil obligations are based, in essence, on the system of time-limits which the Commission failed to include in the
subject-matter of the dispute and which, accordingly, could not form the basis of detailed discussion between the parties.

23 It follows from the foregoing that the action must be dismissed as inadmissible.”

63. However, although he had erred on the admissibility issue, the Advocate General Ruiz-Jarabo Colome had flagged up a difficulty with the enforcement regime and suggested that UK legislation which granted local authorities a discretion to take enforcement action in respect of uses of land contrary to the town planning legislation allows projects included in Annexes I and II to EIA Directive to be carried out without prior consent and, where appropriate, without assessment of their effects on the environment. Although it was argued that LDCs were not a development consent within the Directive (since they merely recognise and declare an existing lawful use), he stated (emphasis added):

"30. It is of little importance whether the ground of the breach relates to the date on which the local authorities, in the exercise of their discretion, took no action or to the point in time when the LDC was issued, precluding any breach; it is of still less relevance whether the certificate in question is in the nature of a decision or is merely declaratory. The crucial point is that, for reasons of convenience, it was decided not to intervene and a situation in breach of arose, whereas, wide as the discretion of the administration is, it may not give rise to a result contrary to the central objective of the Community legislation set out in Article 2(1) thereof."

64. Importantly he considered:

"33. If those responsible for monitoring the lawfulness of town planning do not react on learning that a facility is operating without an assessment of its effects on the environment having been carried out, or, where its scale is evident, do not require its assessment, they are tacitly consenting to it and, thereby, contravening the directive. The fact that, by reason of the passage of time and in the light of the principle of legal certainty, it was not appropriate to take enforcement action, does not make conduct which was previously on the margins of the law 'lawful'; it merely precludes any reassessment of the past in order to safeguard the stability of legal relations, which is one of the pillars of our coexistence in society. That conclusion does not preclude those harmed by the unlawful conduct from obtaining compensation on other grounds such as the responsibility of the State in breach to safeguard property rights, which the position of the United Kingdom Government would undermine."

65. The ECJ, however, did not consider this important issue since it rejected the Commission's complaint as inadmissible. The problem for the Commission was that it had concentrated on the issue of LDCs. It did not put forward any complaints concerning the actual existence of time-limits for the taking of enforcement action. The Court considered that the issue of the issue of LDCs was inseparable from the provisions laying down the limitation periods for enforcement. This conclusion was inescapable given that the government's defence had been based in essence on the existence of time-limits. This had not, therefore, been capable of forming the subject of discussions between the parties.

66. However, this leaves open the possibility that EIA may be required if a planning authority determines not to take enforcement action since that decision may amount to a development consent if it leads to a lawful use. There are difficulties with that approach, not least that the issue may be considered some time before the statutory time limits for enforcement expire and often the issue arises due to lack of knowledge on the LPA’s part rather than due to a conscious decision. The Advocate General’s opinion provides cause for concern that there may be another gap in the transposition of the EIA Directive.

**EIA and PPC**

67. In **R(Edwards & Pallikaropoulos) v Environment Agency** [2006] EWCA Civ 877, the appellants appealed against the decision ((2005) EWHC 657) not to quash a conditional permit granted by the Environment Agency to the interested party (R), pursuant to the Pollution Prevention and Control (England and Wales) Regulations 2000 Part I, Reg 10, for
the continued operation of its cement plant in Rugby, including, as a new proposal, the
burning of waste tyres as a partial substitute for conventional fuel in the kiln at the plant.

68. The judge had found that the Agency, by withholding certain internal reports from the
consultation process, had not been in breach of any EU obligation but had been in breach of
its common law duty of fairness to provide fully informed consultation before making its
decision. However, he withheld relief in respect of that breach in the exercise of his
discretion. The appellants submitted that (1) the permit was unlawful for want of an
environmental impact assessment pursuant to the EIA Directive; (2) R's application did not
comply with the 2000 Regulations because of the shortfall of information on the predicted
emissions of low level dust and an assessment of their significant effects on the
environment; (3) the judge had erred in refusing relief once he had decided that there had
been a breach of the common law duty of fairness.

69. The CA dismissed the appeal, holding that

(1) R's proposal to burn shredded tyres as partial substitute fuel for its process of
manufacturing cement at the plant did not require the Agency to consider an EIA. Even if the introduction of tyre burning in the instant case could, as a change in the
manner of operating an installation, constitute a "project" within Art. 1.2 of the
Directive, it was plainly not a project within Annex II requiring "development consent"
or an amendment to a project within para. 13 (there were no significant adverse
effects) and therefore environmental assessment was not required. The essential
purpose and process of the plant were, on the evidence before the Judge, the
manufacture of cement, not the disposal by incineration of waste tyres, which was
simply ancillary to that purpose and process. There was no need to refer that issue to
the European Court of Justice.

(2) The judge, for the reasons he gave, had been right to hold that the Agency was
entitled to regard the application as conforming to the requirements of the 2000
Regulations. Whether the information supplied was adequate was pre-eminently a
matter for the Agency as the competent authority. The fact that, following the
consultation process, the Agency obtained further information from R did not of itself
signify that the information provided before the matter went to consultation was so
inadequate that the application did not comply with the Regulations.

(3) The internal reports were potentially material to the Agency's decision and to the
members of the public who were seeking to influence it, and failure by the Agency to
disclose them at the time was a breach of its common law duty of fairness. However,
the judge had been entitled to refuse relief. Given his finding on the evidence of no
environmental harm from the plant and the continuous and dynamic nature of the
regulatory system enabling assessments to be made on what was known rather than
predicted, it would be pointless to quash the permit simply to enable the public to be
consulted on out-of-date data.

70. In somewhat extraordinary circumstances which are not mentioned in the judgment, on the
last day of the hearing Mr Edwards sacked his legal representatives in open court and they
then successfully sought the addition of a new appellant, Lilian Pallikaropoulos, which was
ironic given the issues as to standing which had been raised before Keith J. and which he
had rejected at [2004] 3 All E.R. 21.

71. Mrs Pallikaropoulos has recently sought leave to appeal to the HL. Objections have been
lodged but the HL has yet to determine whether leave should be granted.

72. Two infractions (Commission v. UK Case 199/04) raising the issue of the relationship
between EIA and PPC were heard by the ECJ on 23 February shortly after the CA heard the
Edwards appeal. As infraction proceedings are confidential to the parties, at least until the
Court given judgment, the terms can be seen from Commission Press Notice IP/03/1070:

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\[5\] See now Commission v. Italy, below, judgment 23.11.06.
“The first decision relates to a complaint concerning the failure to do an EIA with regard to changing the fuel used to fire cement kilns in Lancashire. This change involved the burning of hazardous as well as non-hazardous waste. The Commission considers that, before being approved, this change should first have been environmentally assessed, in accordance with the EIA Directive. The failure to carry out an assessment in this type of case is partly due to the United Kingdom’s restricted way of applying the EIA Directive to land-use planning decisions, an approach which the Commission considers much too narrow. The Commission is particularly concerned that it excludes much of the decision making process on potential environmental pollution with regard to such projects. The Court referral will address this excessively narrow interpretation of the Directive.”

Judgment is awaited.

73. In its very recent (23.11.06) judgment in Commission v. Italy Case C-486/04, the ECJ held that Italian legislation exempting certain types of waste disposal from EIA was in breach of the EIA Directive (emphasis added) and considered the meaning of “disposal of waste” for the purposes of EIA (emphasis added):

“36. The Member States must implement Directive 85/337 in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to an assessment with regard to their effects (see, to that effect, Case C-287/98 Linster [2000] ECR I-6917, paragraph 52).

37. In addition, it follows from the Court’s case-law that the scope of Directive 85/337 is wide and its purpose very broad (see Case C-72/95 Kraaijeveld and Others [1996] ECR I-5403, paragraphs 31 and 39, and Case C-227/01 Commission v Spain [2004] ECR I-8253, paragraph 46).

The complaint relating to the failure to subject the Massafra installation for electricity production through the incineration of CMW and biomass to the environmental impact assessment procedure

38. As the Italian legislation stands, the Massafra installation for the incineration of CMW and biomass is considered to be an installation for the recovery of non-hazardous waste, with a capacity exceeding 100 tonnes per day, subject to the simplified procedures under the provisions of Legislative Decree No 22/1997, intended to transpose Article 11 of Directive 75/442. The Commission maintains that, in the light of the classification made by Directive 85/337, it is an installation for the disposal of non-hazardous waste by incineration or by chemical treatment, with a capacity exceeding 100 tonnes a day, within the meaning of point 10 of Annex I to Directive 85/337.

39. In order to establish whether that complaint is justified, the Court must first determine the legal scope of the concept of ‘disposal of waste’ for the purpose of Directive 85/337 in the light of the same expression used in Directive 75/442.

40. It is common ground that Directive 85/337 does not define the concept of waste disposal, Annexes I and II to that directive merely referring to some waste disposal installations. Furthermore, it is also common ground that Directive 75/442 does not include any general definition of the concepts of waste disposal and recovery, but merely refers to Annexes II A and II B to the directive, in which various operations falling within the scope of those concepts are listed (see Case C-6/00 ASA [2002] ECR I-1961, paragraph 58).

41. The essential characteristic of a waste recovery operation, such as is apparent from Article 3(1)(b) of Directive 75/442 and from the fourth recital to that directive, is that its principal objective is that the waste can serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources (see, inter alia, ASA paragraph 69; Case C-458/00 Commission v Luxembourg [2003] ECR I-1553; and Case C-103/02 Commission v Italy [2004] ECR I-9127, paragraph 62).
42. That characteristic is extraneous to the consequences which the waste recovery operations as such can have on the environment. As the Advocate General pointed out in paragraphs 54 to 56 of his Opinion, those operations, like those for waste disposal, are capable of having significant effects on the environment. Moreover, Directive 75/442, in Article 4, obliges Member States to take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment.

43. Lastly, it must be noted that where the Community legislature considered it necessary in Directive 85/337 to establish a link with Directive 75/442, it did so expressly. That applies, in particular, where, in points 9 and 10 of Annex I to that directive, it refers to chemical treatment as defined in Annex II A to Directive 75/442, under heading D 9. However, no reference of that nature is made concerning waste disposal itself.

44. Therefore, it must be held that the concept of waste disposal for the purpose of Directive 85/337 is an independent concept which must be given a meaning which fully satisfies the objective pursued by that measure, recalled at paragraph 36 above. Accordingly, that concept, which is not equivalent to that of waste disposal for the purpose of Directive 75/442, must be construed in the wider sense as covering all operations leading either to waste disposal, in the strict sense of the term, or to waste recovery.

45. As a result, the establishment in Massafra, which generates electricity from the incineration of biomass and CMW and has a capacity exceeding 100 tonnes per day, comes into the category of disposal installations for the incineration or chemical treatment of non-hazardous waste in point 10 of Annex I to Directive 85/337. As such, before being authorised, it should have undergone the environmental impact assessment procedure, since the projects which fall within Annex I must undergo a systematic assessment under Articles 2(1) and 4(1) of that directive (see, to that effect, Case C-431/92 Commission v Germany [1995] ECR I-2189, paragraph 35).

46. In the light of the foregoing, it must be held that, by exempting from the environmental impact assessment procedure the Massafra installation for the incineration of CMW and of biomass, with a capacity exceeding 100 tonnes per day, covered by point 10 of Annex I to Directive 85/337, the Italian Republic has failed to fulfil its obligations under Articles 2(1) and 4(1) of that directive.

51. As stated in paragraph 47 above, the effect of the criticised national legislation is that projects for the recovery of hazardous or non-hazardous waste to which the simplified procedures apply avoid any assessment procedure as to their environmental effects. Installations for waste recovery covered by point 11(b) of Annex II to Directive 85/337 may be among those projects.

52. According to the Commission, the criterion set by the Italian authorities in order to thus exclude the installations for waste recovery referred to in Annex II from the environmental impact assessment procedure, namely that they must be subject to the simplified procedures laid down by Legislative Decree No 22/1997, is unsuitable in so far as it can exclude from that assessment projects which have significant effects on the environment.

53. In this connection, the Court has already held that Member States may establish the criteria and/or thresholds necessary to determine which of the projects covered by Annex II to Directive 85/337, in its original version, are to be subject to an assessment. However, the discretion thus granted to the Member States is limited by the obligation, set out in Article 2(1) of that directive, to subject projects likely to have significant effects on the environment, particularly by virtue of their nature, size or location, to an assessment with regard to their effects (see, to that effect, Kraaijeveld and Others, paragraph 50, and Case C-332/04 Commission v Spain [2006], not published in the
Accordingly, when establishing those thresholds and/or criteria, Member States must take account not only of the size of projects, but also of their nature and location (see, to that effect, Case C-392/96 Commission v Ireland [1999] ECR I-5901, paragraph 65, and Commission v Spain, paragraph 76).

54. In addition, in accordance with Article 4(3) of Directive 85/337, the Member States are under an obligation to take into account, when establishing those criteria or thresholds, the relevant selection criteria defined in Annex III to that directive (see, to that effect, Commission v Spain, paragraph 79).

55. Annex III to Directive 85/337 distinguishes, among the selection criteria referred to in Article 4(3), (i) the characteristics of projects, which must be considered having regard, in particular, to the size of the project, the cumulation with other projects, the use of natural resources, the production of waste, pollution and nuisances and the risk of accidents, (ii) the location of projects, which means that the environmental sensitivity of geographical areas likely to be affected by projects must be considered having regard, in particular, to the existing land use and the absorption capacity of the natural environment, and (iii) the potential significant effects of projects having regard in particular to the geographical area and size of the population.

56. As regards having recourse to the simplified procedures laid down by the provisions of Legislative Decree No 22/1997, adopted in order to transpose Article 11 of Directive 75/442, it must be pointed out that the exemption, for the establishments or undertakings concerned, from the obligation to obtain a permit to carry out waste recovery, a permit which is in principle required at the stage when the waste treatment procedure is implemented under Article 10 of that directive, can only apply under the conditions specified in Articles 4 and 11(1) of the directive.

57. It follows from those latter provisions that, first, the competent authorities must have adopted general rules for each type of activity, laying down the types and quantities of waste and the conditions under which the activity in question may be exempted from the permit requirement. Second, the types or quantities of waste and methods of recovery must be such that human health is not endangered and there is no use of processes or methods which could harm the environment, and in particular there is no risk to water, air, soil and plants and animals, no nuisance is caused through noise or odours, and there is no adverse effect on the countryside or places of special interest.

58. Therefore, by excluding projects for waste recovery installations from the environmental impact assessment, which must take place before the delivery of the decision of the competent authority or authorities which entitles the developer to proceed with the project, on the basis of the simplified procedure, the Italian legislation does not take into account all the selection criteria laid down in Annex III to Directive 85/337.

59. As a result, the criterion adopted by the Italian legislation, connected exclusively with the implementation of the simplified procedures, in order to exempt installations for waste recovery covered by point 11(b) of Annex II to Directive 85/337 from the assessment of environmental effects does not fulfil the requirements set out in paragraphs 53 to 55 above in so far as it can lead to projects which are likely to have significant effects on the environment by virtue of their size or location being exempt from an assessment of their environmental effects. Consequently, the legislation at issue is such as to undermine the objective of Directive 85/337, as stated in paragraph 36 above.

60. Having regard to the foregoing considerations, it must be stated that, by adopting Article 3(1) of the DPCM, amending Annex A(i) and (l) to the DPR, laying down, for the purposes of determining whether or not a project covered by Annex II to Directive 85/337 must be subject to an environmental impact assessment, a criterion which is inappropriate in that it may exclude projects which have a significant effect on the environment from that assessment, the Italian Republic has failed to fulfil its obligations under Articles 2(1) and 4(2) and (3) of that directive.”

74. It follows that installations which for other purposes involve waste recovery may qualify as installations for the disposal of waste within the EIA Directive and must be subject to EIA
EIA and agricultural land

75. In *Alford v Secretary of State for the Environment, Food and Rural Affairs* [2005] Env. L.R. 43, the appellant (E) appealed by way of case stated in relation to her conviction for carrying out projects on her farm without obtaining a screening decision or the grant of consent by the secretary of state, contrary to the Environmental Impact Assessment (Uncultivated Land and Semi-natural Areas) (England) Regulations 2001 Reg.19. It was not disputed that the land came within the description “uncultivated land or semi natural areas”. The projects involved the application of farmyard manure and calcified seaweed to fields. The main issue was whether E’s projects involved the use of her land for “intensive agricultural purposes” within the meaning of Reg.2(1).

76. The deputy judge considered the following questions (i) whether an increase in the productiveness of a given area, or an intensification of the agricultural purposes to which the land was put, fell within the definition of "intensive agricultural purposes", and (ii) whether E's project amounted to an intervention in the natural surroundings and landscape involving the use of uncultivated land or semi natural areas for intensive agricultural purposes. The Secretary of State argued that a project designed to cultivate previously uncultivated land was one designed for an intensive agricultural purpose and it was entitled to take the view that the project qualified for screening under the Regulations given that agricultural practice had decimated uncultivated and semi natural areas, that process had brought about the destruction of important habitats for flora and fauna, and E's intervention was intended to end the land's status as a significant habitat for acid loving flora.

77. The Divisional Court (Brooke LJ and David Steel J) allowed the appeal and held that in interpreting regulations based on EC law it was incumbent on a national court, when confronted with a dispute about the meaning of a phrase used in a directive, to identify the purpose of the directive and adopt a meaning that best promoted the wide scope of the directive. However, there was nothing in the Council Directive 92/43, which the Regulations were concerned to implement, that threw any useful light on the interpretation of the words "for intensive agricultural purposes". Also, no assistance could be obtained from the department's explanation in its guidelines that relevant cultivations could include spreading soil or other material, including fertiliser or lime in excess of existing routine application rates. Even if fertiliser and lime had not been applied for many years, that explanation of the concept of "cultivations" shed no light on the meaning of the words "for intensive agricultural purposes". E's projects did not come within the definition of "project" in Reg.2. What was done could not be described as an intervention for intensive agricultural purpose, and although Council Directive 85/337 had a wide scope and a broad purpose, its framers did not intend it to catch a project that was concerned only to bring land back to a normal level of agricultural productivity. Accordingly, unless the productivity of the land for agricultural purpose was intensified above the normal level, an increase in the productiveness of a given area did not come within the definition of "intensive agricultural purposes", and E's projects did not amount to an intervention in the natural surroundings and landscape involving the use of uncultivated land or semi natural areas for intensive agricultural purposes.

78. The HL refused leave to appeal, but the result in *Alford* has now been reversed by legislation: the Environmental Impact Assessment (Agriculture) (England) Regulations 2006 (SI 2006/2363). Under the Regulations, the meaning of “for intensive agricultural purposes” is given as “to increase the productivity for agriculture”. This is wider than the interpretation given to the phrase “for intensive agricultural purposes” in the *Alford* and thus the Regulations enable the UK to meet the aims of the EIA Directive.

**Amendments to the EIA Regulations – the PPD Directive**

79. There is no significant change from last year.

80. The Public Participation Directive 2003/35/EC (“PPD”) implements the Åarhus Convention and provides for increased public participation/consultation with regard to the drawing up of
certain plans and programmes relating to the environment and amending Directives 85/337/EEC and 96/61/EC. Significant amendments are made to the EIA Directive (85/337/EEC) including to the publicity and consultation requirements of Articles 6, 7 and 9 and to remove the absolute exemption of national defence projects, replacing it with a qualified exemption reliant on case by case screening. The PPD required the amendments to be transposed into national law by transposed by 25 June 2005.

81. In part, the PPD amendments fall to be made by Defra in the context of pollution control regimes, but they also fall to ODPM to make amendments to the planning EIA regime. An ODPM consultation paper was issued in March 2005 (consultation period ending 6 June 2005) The draft Town and Country Planning (Environmental Impact Assessment) (England) (Amendment) Regulations 2005: A Consultation Paper, containing a draft of the proposed regulations.

82. However, the planning EIA Regulations were not amended by 25 June 2005 and therefore the UK has been in breach of the PPD since that date. On the basis of R v. Durham County Council ex parte Huddleston [2000] 1 W.L.R. 1484 and Delena Wells, above, it appears to be incumbent on public authorities to give direct effect to the provisions of the PPD regardless of the absence of amending UK legislation. If that does not occur then it is conceivable that grounds for judicial review against a planning authority’s decision to grant permission may exist as in the Huddleston case.

83. Authorities should also note that the PPD Directive also contains wider requirements for publicity of EIA applications in Article which may have to be given direct effect also, notwithstanding the absence of UK legislation. It also removes the blanket national defence project exemption and substitutes a case by case exemption process.

S.106 Agreements

84. In Stroude v Beazer Homes Limited [2005] JPL 1515, it was held that a s. 106 agreement which imposed an obligation on a landowner and a developer to build a bypass before residential development could commence gave the landowner an implied right of access onto the developer’s property in order to discharge that planning obligation. The question whether it was appropriate to impose mutual rights and obligations depended upon whether they were concurrent in the sense that each party undertook the same obligation by virtue of the same agreement.

85. Warren J. made it clear that s. 106 agreements were to be approached as ordinary contracts:

“38. Some aspects of the section 106 Agreement fall, therefore, within section 106 Town & Country Planning Act 1990 and other aspects fall within section 38 Highways Act 1980. But first and foremost, the section 106 Agreement is a contract between the parties to it which, in my judgment, falls to be construed according to ordinary principles of construction. The fact that the section 106 Agreement is made in the context of the statutory provisions is, no doubt, part of the factual matrix against which it has to be construed; accordingly, it should be construed, so far as possible, in a way which enables the statutory provisions to operate. But I do not consider that there are otherwise any special canons of construction which apply to a section 106/section 38 agreement.

39. In particular, I do not consider that, simply because the section 106 Agreement is designed to create planning and highway obligations enforceable by SCDC and CCC, in each case against the Estate Owners, all other matters were to be dealt with separately …. Nor does it follow that the section 106 Agreement cannot, unless it does so expressly, also create rights and obligations as between the Estate Owners among themselves, as well as between the Estate Owners on the one hand and SCDC or CCC on the other hand. Whether any such other aspects are dealt with in the section 106 Agreement is, in my judgment, to be ascertained according to ordinary rules of construction and implication. No authority has been cited to me which leads me to reach a different conclusion and nor I can detect any policy considerations which should lead me to do so.”
The Judge held that in this case, it was both a concurrent and a joint obligation for the parties to construct a bypass even though the purpose of the s. 106 agreement was to implement the statutory planning code. At para. 76 he held:

“76. In my judgment... Mr Stroude has the right to cause the bypass to be built in accordance with the provisions of Parts II and III of the First Schedule to the section 106 Agreement. The presence of the concurrent obligations on Mr Stroude and Beazer Homes in the section 106 Agreement in the context of the factual matrix which I have discussed, leads me by a process of implication to that conclusion. It makes no difference whether one describes that as necessarily implicit, on the facts of the case, in the concurrent obligations undertaken by them as Estate Owners, or whether one implies a term to that effect into the section 106 Agreement in accordance with conventional rules. It is, in my judgment, not an answer to that conclusion to say ... that there is simply no need to introduce such a term as between the Estate Owners because, if there is a failure to build the bypass in accordance with the Estate Owners’ covenants under the section 106 Agreement, SCDC and CCC themselves can enforce the covenants or, ultimately, carry out the works themselves and charge the Estate Owners for doing so. That may, at the end of the day, produce a similar result but it is hardly consistent with any concept of business efficacy; further, the officious bystander would be likely, in my judgment, to laugh at such a proposition as being one which I, at least, think is contrary to good sense and justice…”

The landowner's rights of access were proprietary and capable of being protected by a notice on the register.

This suggests that where a number of developers contract with a LPA under s.106, their obligations to the LPA will be construed not simply as individual obligations but as concurrent obligations. Thus the landowners may create joint obligations between themselves, so that if one of them tries to frustrate the scheme of obligations for his own commercial advantage he will not be able to do so.

The Habitats Directive in Luxembourg

The issue of habitats has been proving almost as fruitful a ground for litigation as EIA, highlighting the importance of EU wide designations which, through the Habitats Regulations, require a major modification to bringing forward planning projects where European sites may be affected. See ADT Auctions v. SSETR [2000] J.P.L. 1155.

The following authorities have obvious implications for the operation and interpretation of the regs. 48, 49 and 53 of Habitats Regulations which transpose into UK law the provisions of the Directive discussed below. They each deal with the concepts found in the Regulations and underline the importance of taking a rigorous and precautionary approach to each of the requirements. See also Landelijke Vereniging tot Behoud van de Waddenzee & Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw Case C-127/02 [2005] Env. L.R. 243 and the Commission’s “Managing Natura 2000 Sites - The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC’ (2000) and the methodological guidance in the “Assessment of Plans & Projects Significantly Affecting Natura 2000 Sites” (November 2001).

In Case C-117/03 Dragaggi & Others [2005] E.C.R. I-167, the ECJ was asked to determine what obligations were placed on a Member State pursuant to Art. 6(3) and Art 21 of the Habitats Directive 92/42, once it had identified a site that it considered to be of Community importance. The question was concerned in particular with establishing whether the protective measures under Art. 6(3) were only mandatory for Member States after final approval at Community level of a Member State's list of sites that sustained priority natural habitat types or species.

The ECJ held that on a proper construction of Art. 4(5), the protective measures prescribed in Art. 6(2), Art. 6(3) and Art. 6(4) were only required in respect of sites selected as sites of Community importance as adopted by the European Commission pursuant to the procedure laid down in Art. 21. In respect of sites eligible for identification as sites of Community
importance and which were included in the national lists sent to the Commission but which had not yet been adopted, Member States were required to take such protective measures as were appropriate to safeguard the relevant ecological interest which sites had at national level. What constituted appropriate measures for this purpose had to be determined from the standpoint of the Directive's conservation objective. The early implementation of protective measures was particularly appropriate where sites hosted priority natural habitat types or priority species. The key part of the judgment reads as follows:

“21. Pursuant to Article 4(5) of the Directive, the regime for the protection of special areas of conservation that is laid down in Article 6(2), (3) and (4) thereof applies to a site once it is placed, in accordance with the third subparagraph of Article 4(2), on the list of sites of Community importance as adopted by the Commission under the procedure laid down in Article 21.

22. The fact that, according to paragraph 1 of Annex III (Stage 2) to the Directive, all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance cannot render the protection regime prescribed in Article 6(2), (3) and (4) of the Directive applicable to them before they appear, in accordance with the third subparagraph of Article 4(2), on the list of sites of Community importance adopted by the Commission.

23. The contrary proposition referred to by the Consiglio di Stato, that where a Member State has, as in the main proceedings, identified a site as hosting a priority habitat and has included it in the list proposed to the Commission pursuant to Article 4(1) of the Directive, that site must, in view of paragraph 1 of Annex III (Stage 2) to the Directive, be considered to be of Community importance and is therefore subject, pursuant to Article 4(5), to the protective measures referred to in Article 6(2), (3) and (4), cannot succeed.

24. First, this proposition clashes with the wording of Article 4(5) of the Directive, which expressly links application of those protective measures to the fact that the site concerned has been placed, in accordance with the third subparagraph of Article 4(2), on the list of sites of Community importance adopted by the Commission. Second, the proposition presupposes that, where a site has been identified by a Member State as hosting priority natural habitat types or priority species and has been referred to on the list proposed to the Commission pursuant to Article 4(1) of the Directive, the Commission is required to place it on the list of sites of Community importance which it adopts in accordance with the procedure laid down in Article 21 of the Directive and is mentioned in the third subparagraph of Article 4(2). If that were the case, the Commission would be precluded, when establishing, in agreement with each Member State, a draft list of sites of Community importance within the meaning of the first subparagraph of Article 4(2), from contemplating not including on the draft list any site proposed by a Member State as hosting priority natural habitat types or priority species, even if it were to consider, notwithstanding the contrary opinion of the Member State concerned, that a given site did not host priority natural habitat types and/or species as referred to in paragraph 1 of Annex III (Stage 2) to the Directive. Such a situation would be contrary, in particular, to the first subparagraph of Article 4(2) of the Directive, read in conjunction with paragraph 1 of Annex III (Stage 2).

25. It thus follows from the foregoing that, on a proper construction of Article 4(5) of the Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive.

26. This does not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission.

27. If those sites are not appropriately protected from that moment, achievement of the objectives seeking the conservation of natural habitats and wild fauna and flora, as set out in particular in the sixth recital in the preamble to the Directive and Article 3(1)
thereof, could well be jeopardised. Such a situation would be particularly serious as priority natural habitat types or priority species would be affected, for which, because of the threats to them, early implementation of conservation measures would be appropriate, as recommended in the fifth recital in the preamble to the Directive.

28. In the present instance, it should be remembered that the national lists of sites eligible for identification as sites of Community importance must contain sites which, at national level, have an ecological interest that is relevant from the point of view of the Directive’s objective of conservation of natural habitats and wild fauna and flora (see Case C-371/98 First Corporate Shipping [2000] ECR I-9235, paragraph 22).

29. It is apparent, therefore, that in the case of sites eligible for identification as sites of Community importance that are mentioned on the national lists transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures appropriate for the purpose of safeguarding that ecological interest.

30. The answer to the question referred must therefore be that:

– on a proper construction of Article 4(5) of the Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive;

– in the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures that are appropriate, from the point of view of the Directive’s conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.”

93. Following Dragaggi, on 14.9.06 the ECJ gave judgment in Bund Naturschutz in Bayern eV v. Freistaat Bayern Case 244/05. It repeated the importance of protecting sites hosting priority habitats or species and added:

“46 Member States cannot therefore authorise interventions which may pose the risk of seriously compromising the ecological characteristics of a site, as defined by those criteria. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics.”

94. The Court decline to specify the precise measures required to be taken but, using language echoing that used in Delana Wells, held:

“50. In that regard, the detailed procedural rules applicable fall within the ambit of the domestic legal order of each Member State, provided that such rules are not less favourable than those governing similar domestic situations of an internal nature and do not render impossible in practice or excessively difficult the exercise of rights conferred by Community law (see, to that effect, inter alia, Case C-312/93 Peterbroeck [1995] ECR I-4599, paragraph 12, and Case C-78/98 Preston and Others [2000] ECR I-3201, paragraph 31).

51. Consequently, the answer to the third question must be that Member States must, in accordance with the provisions of national law, take all the measures necessary to avoid interventions which incur the risk of seriously compromising the ecological characteristics of the sites which appear on the national list transmitted to the Commission. It is for the national court to assess whether that is the case.”

95. In Commission v Ireland Case-183/05, Advocate General Léger has recently delivered his opinion. The case concerns three complaints relating to Ireland’s implementation of the Habitats Directive. Firstly, that Ireland had failed to extend the transposition of Articles 12(2)
and 13 to species listed in Annex IV to the Habitats Directive that do not naturally occur in Ireland. Secondly, that Ireland had failed to adopt specific measures to establish a system of strict protection for the animal species listed in Annex IV(a) to the Habitats Directive, as required by Article 12(1) of that directive. Thirdly, that Ireland had failed to establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a) to the Habitats Directive, as required by Article 12(4) of that directive. Lastly, the Commission stated that there were provisions in Irish legislation which were inconsistent with both Articles 12 and 16 of the Habitats Directive.

96. The Advocate General proposed that the Court declare that, by failing to take specific measures for the effective implementation of the system of strict protection required under Article 12(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, with the exception of measures concerning the leatherback turtle and the natterjack toad and the measures to deal with threats to bats, and by retaining provisions in Irish legislation which are inconsistent with Articles 12(1)(d) and 16 of Directive 92/43, Ireland has failed to fulfil its obligations under the Habitats Directive.

97. The ECJ revisited the question of considering the questions of adverse effect on the integrity of a protected site and the requirement to demonstrate the absence of alternative solutions under Art. 6(4) in Commission v Portugal Case-239/04 (judgment 26.10.06). The Portuguese had implemented a project for a motorway whose route crossed the Castro Verde special protection area (SPA), notwithstanding negative environmental impact assessment and the existence of alternative solutions for the route.

98. With regard to the important question of adverse effect on the integrity of the SPA the ECJ held:

“18 Pursuant to Article 6(3) of the Habitats Directive, the competent national authorities are to authorise a plan or project not directly connected with or necessary to the management of the area but likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of the plan or project for the site, that it will not adversely affect the integrity of the site and, if appropriate, after having obtained the opinion of the general public.

19 That provision thus establishes a procedure intended to ensure, by means of a prior examination, that a plan or project which is 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 the site concerned. That is so where no reasonable scientific doubt remains as to the absence of such effects (Waddenvereniging and Vogelbeschermingsvereniging, paragraphs 56 and 59).

20 In that regard, the Court has already held that a plan or project such as the one in question may be granted authorisation only on the condition that the competent national authorities are certain that it will not have adverse effects on the integrity of the site concerned. That is so where no reasonable scientific doubt remains as to the absence of such effects (Waddenvereniging and Vogelbeschermingsvereniging, paragraphs 56 and 59).

21 In the present case, the environmental impact study mentions the presence, in the Castro Verde SPA, of 17 species of bird listed in Annex I to Directive 79/409 and the high sensitivity of certain of them to the disturbance and/or the fragmentation of their habitat resulting from the planned route of the section of the A 2 motorway between the settlements of Aljustrel and Castro Verde.

22 It is also apparent from that study that the project in question has a ‘significantly high’ overall impact and a ‘high negative impact’ on the avifauna present in the Castro Verde SPA. 23 The inevitable conclusion is that, when authorising the planned route of the A 2 motorway, the Portuguese authorities were not entitled to take the view that it would have no adverse effects on the SPA’s integrity.

24 The fact that, after its completion, the project may not have produced such effects is immaterial to that assessment. It is at the time 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 site in
question (see, to that effect, Case C-209/02 Commission v Austria [2004] ECR I-1211, paragraphs 26 and 27, and Waddenvereniging and Vogelbeschermingsvereniging, paragraphs 56 and 59).

25 In those circumstances, the Portuguese authorities had the choice of either refusing authorisation for the project or of authorising it under Article 6(4) of the Habitats Directive, provided that the conditions laid down therein were satisfied (see, to that effect, Waddenvereniging and Vogelbeschermingsvereniging, paragraphs 57 and 60).

99. It will be seen that the approach to adverse effect is a strict and precautionary one and consent must be refused (emphasis added) “unless the competent national authorities are certain that it will not have adverse effects on the integrity of the site concerned”. It cannot reach such a conclusion unless “no reasonable scientific doubt remains as to the absence of such effects”.

100. On the later issue of the derogation in Art 6(4) and alternatives, the ECJ held:

“34. Article 6(4) of the Habitats Directive provides that, if, in spite of a negative assessment carried out pursuant to the first sentence of Article 6(3) and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

35. That provision, which permits a plan or project which has given rise to a negative assessment under the first sentence of Article 6(3) of the Habitats Directive to be implemented on certain conditions, must, as a derogation from the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly.

36. Thus, the implementation of a plan or project under Article 6(4) of the Habitats Directive is, inter alia, subject to the condition that the absence of alternative solutions be demonstrated.

37. In the present case, it is common ground that the Portuguese authorities examined and rejected a number of solutions whose routes bypassed the settlements of Alcarias, Conceição, Aivados and Estação de Ourique but crossed the western side of the Castro Verde SPA.

38. On the other hand, it is not apparent from the file that those authorities examined solutions falling outside that SPA and to the west of the settlements referred to above, although, on the basis of information supplied by the Commission, it cannot be ruled out immediately that such solutions were capable of amounting to alternative solutions within the meaning of Article 6(4) of the Habitats Directive, even if they were, as asserted by the Portuguese Republic, liable to present certain difficulties.

39. Accordingly, by failing to examine that type of solution, the Portuguese authorities did not demonstrate the absence of alternative solutions within the meaning of that provision.

40. In those circumstances, it must be held that, by implementing a project for a motorway whose route crosses the Castro Verde SPA, notwithstanding the negative environmental impact assessment and without having demonstrated the absence of alternative solutions for the route concerned, the Portuguese Republic has failed to fulfil its obligations under Article 6(4) of the Habitats Directive.”

101. It follows that alternative solutions can only properly be considered not to exist if there has first been a thorough assessment of the possible solutions, and the ECJ will take a strict approach to ensure that such possibilities have been properly considered.

Delay

102. In last year’s paper I referred to R (Hardy) v. Pembrokeshire C.C. [2005] EWHC 1872 (Admin), in which Sullivan J. refused permission for JR for a number of delay-related reasons. His reasoning was approved in full this year by the CA at [2006] Env LR 28, [19]-
and merits revisiting.

Sullivan J followed the three-stage test set out by Laws J. in *R. v. Secretary of State for Trade and Industry, Ex p Greenpeace Ltd* [2000] Env. L.R. 221, namely:

- Is there a reasonable objective excuse for applying late?
- What, if any, is the damage, in terms of hardship or prejudice to third party rights and detriment to good administration, which could be occasioned if permission were now granted?
- In any event, does the public interest require that the application should be permitted to proceed?

The case involved a challenge on environmental grounds to a number of planning permissions as well as to consents under the Planning (Hazardous Substances) Act 1990. The claim form was filed only just before, and served shortly after, the expiry of the three month limit for challenging the latest of the decisions. It was outside the three month limit for all the other decisions (some of which had been taken more than two years before the latest decision challenged). As to the reason for applying late, Sullivan J. rejected the submission that it was justified because there had been a mass of documentary material and a labyrinthine decision-making process. The Claimants unsuccessfully contended that *R. (Wells) v. Secretary of State for Transport, Local Government and the Regions* [2004] Env. L.R. 528 required the HC to exercise its powers to extend time so as to secure compliance with the EIA Directive (85/337/EEC). Sullivan J. applied *R. (Noble Organisation Ltd) v. Thanet D.C.* [2005] EWCA Civ 782, and held that there was no suggestion in *Wells* that individuals wishing to challenge a failure to require an environmental impact assessment should not be governed by the procedural rules of each Member State, provided that those rules did not render such a challenge impossible in practice or excessively difficult. There was accordingly no good reason for non compliance with the time limit under CPR Part 54.

With regard to the question of prejudice to third parties, Sullivan J. held that promptness was not to be considered in the abstract. The Court was concerned with the practical implications of any lack of promptness. The development in question related to technically complex, large scale, very expensive gas terminals and it was clear that the grant of relief would cause significant damage in terms of hardship and/or prejudice to the rights of the developers. Although prejudice was a relative concept, and the developers were substantial commercial organisations, they had nevertheless entered into very large financial commitments and any delay would be correspondingly expensive and disruptive.

This was also a case in which it would have been detrimental to good administration to allow challenges to decisions extending so far into the past. The existence of valid planning permissions was a highly material consideration in deciding whether to grant hazardous substances consent. The planning authorities were entitled to rely on such permissions when determining hazardous substances applications. Had the permissions been challenged promptly, the consideration of the hazardous substances consents could have been put on hold until the dispute had been resolved. It was relevant that the permissions and consents were all shown in the planning register, on which members of the public were entitled to rely. The argument that the development was of great importance to the Claimants cut both ways. There were very substantial employment and economic implications of the development, not merely in the local area but also throughout the UK, since it related to the supply of natural gas. It would have been highly detrimental to good public administration to allow such challenges out of time.

Finally, the public interest did not demand that permission be granted out of time. Although the matters in question were significant for the Claimants, raising issues under the EIA Directive and Article 2 of the ECHR, their concerns were far from representative of the views expressed by the wide range of consultees.

In the CA, Keene L.J. (with whom Chadwick L.J. and Sir Peter Gibson agreed) endorsed Sullivan J’s exercise of his discretion and rejected the claim that the concept of
“promptness” was contrary to EU law and the ECHR on grounds of legal certainty:

“12. In support of these propositions reference is made by Mr Purchas to a passage in the speech of Lord Steyn in Burkett v. Secretary of State for the Environment [2002] UKHL 23, [2002] 1 WLR 1593 at paragraph 53, where it was said that

“… there is at the very least doubt whether the obligation to apply “promptly” is sufficiently certain to comply with European Community law and the Convention for the Protection of Human Rights and Fundamental Freedoms. It is a matter for consideration whether the requirement of promptitude, read with the three months limit, is not productive of unnecessary uncertainty and practical difficulty.”

Lord Hope shared those doubts, whereas Lord Slynn expressly did not comment for the reason that the question did not arise in the case. The other two members of the House of Lords were silent on this topic. Nonetheless, while conceding that Lord Steyn and Lord Hope’s comments were obiter, Mr Purchas places reliance on them.

13. There seem to me to be a number of problems with this line of argument. First and foremost, this very point has been advanced before the European Court of Human Rights in the case of Lam v. United Kingdom, Application 41671/98, and rejected. That was a case concerning an application for leave to seek judicial review of a planning decision, where leave had been refused on the ground of lack of promptness. The applicant contended before the European Court of Human Rights that the terms of Order 53, rule 4(1) of the Rules of the Supreme Court (the predecessor to CPR 54.5(1)) were contrary to the principles of legal certainty, and reliance was also, as here, placed on Article 6. The Court held that this complaint was manifestly ill-founded, stating:

“In so far as the applicants impugn the strict application of the promptness requirement in that it restricted their right of access to a court, the Court observes that the requirement was a proportionate measure taken in pursuit of a legitimate aim. The applicants were not denied access to a court ab initio. They failed to satisfy a strict procedural requirement which served a public interest purpose, namely the need to avoid prejudice being caused to third parties who may have altered their situation on the strength of administrative decisions.”

It is to be observed that Lam does not appear to have been cited to the court in Burkett.

14. Secondly, in what is perhaps the leading case on the concept of certainty as part of the principle of legality, Sunday Times v. United Kingdom [1979-80] 2 E.H.R.R. 245, the European Court of Human Rights held that, while a citizen should be able to foresee to a reasonable degree the consequences which an action of his may entail,

“those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and where interpretation and application are questions of practice.” (paragraph 49).

15. Those comments are particularly applicable to a procedural rule in applications seeking judicial review, where the degree of promptness required will vary from case to case, depending on the subject-matter and other circumstances. For example, it is well-established that a challenge to a decision of an education authority affecting the school to be attended by a child must be brought with considerable despatch, so that the matter can be resolved before the start of a new school term (see R v. Rochdale Metropolitan Borough Council ex P B, C, and K. [2000] Ed CR 117).

16. Thirdly, the requirement in CPR 54.5(1) that applications for judicial review be brought “promptly” is no more uncertain than the wording of section 31(6) of the Supreme Court Act 1981, set out earlier in this judgment, with its reference to “undue delay”. As that provision makes clear, leave to make an application for judicial review (as well as relief at a substantive hearing) may be refused by the court if there is undue delay. It is perhaps worthy of note that this wording did not cause Lord Steyn any doubts in Burkett over its compatibility with the principle of certainty. On the
contrary, at paragraph 18 of his speech in that case, Lord Steyn said this of section 31(6):

“… It is, however, a useful reserve power in some cases, such as when an application made well within the three month period would cause immense practical difficulties. An illustration is R v. Rochdale Metropolitan Borough Council Ex p B, C, and K [2000] Ed CR 117. Having referred to section 31(6), Mr David Pannick QC (sitting as a deputy judge of the High Court) stated, at p 120:

“In my judgment, it is absolutely essential that, if parents are to bring judicial review proceedings in relation to the allocation of places at secondary school for their children, the matter is heard and determined by a court, absent very exceptional circumstances, before the school term starts. This is for obvious reasons relating to the interests of the child concerned, the interests of the school, the interests of the other children at the affected school and, of course, the teachers at that school.”

Lord Steyn then added the comment:

“The good sense of this approach is manifest.”

17. Finally on this issue, it is to be observed that the European Convention on Human Rights itself employs the concept of “promptness” in its articles. Article 5(3) requires anyone arrested or detained to be brought “promptly” before a judge or other officer with judicial power; Article 6(3) confers the right on anyone charged with a criminal offence to be informed “promptly” of the nature and cause of the accusation against him.

18. Consequently, for all these reasons and despite the doubts expressed obiter in Burkett, it seems to me that there is no realistic prospect of the applicants successfully establishing that CPR 54.5(1), insofar as it requires a claim form to be filed “promptly”, is contrary to European law and unlawful.

**Hardy re-opened?**

109. The matter did not end there and earlier this year Hardy sought to persuade the CA to reopen the appeal on the basis of a letter from the Treasury Solicitor which made it clear that reference in the earlier evidence to the HSE having assessed the risk of a major release from a delivery ship tied up at a jetty had been an error and no assessment had occurred. Keene L.J. restated the principles for re-opening appeals as follows:

“2. CPR 52.17(1) provides as follows:

“The Court of Appeal or the High Court will not reopen a final determination of any appeal unless –

(a) it is necessary to do so in order to avoid real injustice;

(b) the circumstances are exceptional and make it appropriate to reopen the appeal; and

(c) there is no alternative effective remedy.”

There is no doubt that those requirements set out in sub-paragraphs (a) to (c) are cumulative, that is to say, they all have to be met. The procedure under this provision is intended to be used only in rare cases, as was made clear in Taylor v. Lawrence [2002] EWCA Civ 90, [2003] QB 528, the decision of this court which was subsequently reflected in CPR 52.17. It was there decided that this court possesses a residual jurisdiction as a court of justice to reopen a determination in order “to avoid real injustice in exceptional circumstances”: paragraph 54. That reference to “exceptional circumstances” is reflected in paragraph (b) of CPR 52.17(1), and it is a requirement which has been emphasised subsequently in a number of decisions: see Mattaszek v. Bloom Camillion [2003] EWCA Civ 154.

3. The type of cases which has so far been identified as potentially capable of giving rise to a need to exercise this residual jurisdiction tends to have been that in which the process of justice leading to the determination under challenge has itself been vitiated by bias or fraud, though the jurisdiction cannot be specifically confined to that. Thus in
Couwenbergh v. Valkora [2004] EWCA Civ 676 an application for permission was granted where there was a real prospect of successfully showing that an earlier decision had been obtained by fraud and by perverting the course of justice. I say that the jurisdiction cannot be entirely confined to cases where the process of justice has been corrupted: that reflects the fact that this is a residual jurisdiction to correct a real injustice in exceptional circumstances and the categories of such circumstances cannot be predicted in advance for all time. That was noted in this court’s decision in Re Uddin (A child) [2005] EWCA Civ 52; [2005] 1 WLR 2398.

4. However, in that same case the court in its judgment gave helpful guidance as to the approach to be adopted towards the exercise of this jurisdiction. At paragraph 18 of its judgment it said this:

“But the Taylor v Lawrence jurisdiction can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. We think this language appropriate because the jurisdiction is by no means solely concerned with the case where the earlier process has or may have produced a wrong result (which must be the whole scope of a fresh evidence case), but rather, at least primarily, with special circumstances where the process itself has been corrupted. The instances variously discussed in Taylor v Lawrence or in other learning there cited are instructive. Fraud (where relied on to reopen a concluded appeal rather than found a fresh cause of action – Wood v Gahlings); bias; the eccentric case where the judge had read the wrong papers; the vice in all these cases is not, or not necessarily, that the decision was factually incorrect but that it was arrived at by a corrupted process. Such instances are so far from the norm that they will inevitably be exceptional. And it is the corruption of justice that as a matter of policy is most likely to validate an exceptional recourse; a recourse which relegates the high importance of finality in litigation to second place.” (original emphasis)

5. The court subsequently repeated, at paragraph 22, its formulation of the test as being one of demonstrating

“that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined.”

6. As has been repeatedly emphasised in the authorities, the hurdle to be surmounted by an applicant seeking to invoke this jurisdiction has to be a very high one, since it is a jurisdiction which if exercised undermines the important principle that there has to be finality in litigation. Moreover, as was made clear in Taylor v. Lawrence at paragraph 55, the effect on others of re-opening the appeal is an important consideration on any such application.”

110. Keene L.J. (with whom the other members of the CA agreed) rejected the contention that grounds for re-opening the appeal had been made out:

“24. … I come back to the fundamental point, which I indicated earlier, namely that the mistake of fact now relied on by the applicants did not occur in an essential part of this court’s reasoning when it dismissed this application for permission to appeal. The crucial part of that reasoning, as set out earlier in this judgment, was that it was open to Sullivan J to conclude that the merits of the applicants’ claim did not outweigh the undue delay and the prejudice flowing from permission to proceed, that he made no error of principle, and that his decision was not obviously wrong. It is conceded by Mr Wolfe that Sullivan J did not make the same error of fact which forms the basis for the present applications. This court’s own reasoning that Sullivan J’s decision was open to him did not turn on any assumption about the precise studies carried out by the HSE. The mistake of fact occurred in a subsequent paragraph which formed no part of the crucial reasoning of this court in arriving at its decision, but was something of an addendum. To recognise that fact is not to construe my judgment as if it were a statute but merely to read it in a normal rational manner.

24. It seems to me that this is a case which falls far short of meeting the demanding test set out in Taylor v. Lawrence and subsequent authorities. There has been no
corruption of the judicial process and no critical undermining of the integrity of the appeal as determined by this court. In those circumstances I for my part would dismiss this application and decline to reopen the appeal.”

Human Rights

**Article 6**

111. In *Brugger v Austria* (Application no. 76293/01) the applicant had been refused a permit to build a tool shed because it would have an adverse effect on the character of the landscape. His complaint to the Administrative Court was determined without a hearing. The European Court of Human Rights held that this was a breach of Art. 6(1) ECHR stating at [24] that “The Court cannot find in such circumstances that the subject matter of the dispute was of such a nature, namely a highly technical issue or of mere legal nature, as to dispense the national authorities with their obligation to hold a hearing.”

112. On equality of arms in the planning/CPO context, see *Pascoe v. First Secretary of State* [2006] EWHC 235 (above).

113. This decision is consistent with the approach of in *R v. Secretary of State ex parte Challenger* [2001] Env. L.R. 12 and *R (Hadfield) v. Secretary of State* [2002] EWHC 1266 (Admin.) that inquiries generally do not give rise to problems with equality of arms and have for years been accustomed to hearing the evidence and representations of those who have no legal assistance. In *Hadfield* at paras. 49-51 Sullivan J. held:

“49. … The sole ground on which it is alleged that there would be unfairness is the claimant's alleged lack of means. It is said that there would not be an equality of arms between herself and her opponents and, thus, she would not be able to have a fair hearing.

50. I accept for the purposes of argument in the present case that Article 6 may in certain circumstances require parties to be provided with the means of obtaining representation in order that they can have a fair hearing. For example there may be cases involving complex legal issues. But that is very far from saying that in each and every case where there is a hearing a party must have the means to obtain representation (legal and otherwise) in order to have a fair hearing. Legal aid is not available across the whole range of tribunals: it is available in some, it is not available in others. It is not available in planning inquiries. There is of course a crucial difference between a planning inquiry and what might be described as normal civil litigation. Although the procedures are adversarial in form, the Inspector is an expert in his or her field and is expected to use his or her own planning expertise and judgment. Thus, the Inspector may raise concerns that are not raised by any of the parties, and may lawfully base his or her decision upon those matters provided always that the parties have had a proper opportunity to comment upon them. Strictly speaking, there is no *lis inter partes*, the question for the Inspector (and the Secretary of State) is whether a planning permission should be refused in the public interest.

51. The Inspector is there to ensure that the public interest in securing the correct planning decision is protected. Moreover, planning inquiry procedures are deliberately less formal than those which are customarily found in the courtroom, so that individuals can present their own cases. Claimants and third parties often represent themselves. I reject the submissions that merely because the claimant asserts that she has insufficient funds to obtain representation, there will necessarily be such unfairness as to result in a breach of Article 6.1.”

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Article 8

114. In Kay v Lambeth LBC [2006] 2 W.L.R. 570, the appellants had occupied residential premises owned by Lambeth LBC and originally licensed to a housing trust. The As became tenants of the trust when the Council granted the trust a lease of the premises. The Council subsequently terminated the lease and sought possession of the properties on the basis that the As remained as trespassers. The As sought to rely on Art. 8 ECHR as a defence to the possession proceedings. The case is relevant for its consideration of the extent of Art. 8, the relevance of the special circumstances of gipsies, and the differences of view which emerged over the application of Strasbourg authority which had seemed obvious to at least one CA.

115. A seven-judge committee heard the appeals in Kay and Price in the HL and dismissed them on the facts. However, by a majority (Lords Hope, Scott, Brown and Baroness Hale), it held that:

(1) the decision in Qazi v Harrow LBC [2004] 1 AC 983 was correct;

(2) the right of a public authority to enforce a claim for possession under domestic law would, in most cases, automatically supply the justification required by A8(2);

(3) a public authority was not required to plead or prove justification in every case – the courts were entitled to assume that domestic law was compatible with A8; and

(4) a challenge to a making of a possession order could be raised (subject to issues of jurisdiction) in the county court, if the defendant could, exceptionally, show a seriously arguable case that the relevant domestic law was incompatible with the Convention.

116. Lord Hope held that [para 110]:

"But, in agreement with Lord Scott, Baroness Hale and Lord Brown...[subject to what I say below, I would hold that a defence which does not challenge the law under which the possession order is sought as being incompatible with the article 8 but is based only on the occupier’s personal circumstances should be struck out. I do not think that McPhail v Persons, Names Unknown [1973] Ch 447 needs to be reconsidered in the light of Strasbourg case law. Where domestic law provides for personal circumstances to be taken into account, as in a case where the statutory test is whether it would be reasonable to make a possession order, then a fair opportunity must be given for the arguments in favour of the occupier to be presented. But if the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these: (a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with article 8, the county court in the exercise of its jurisdiction under the Human Rights Act 1998 should deal with the argument in one or other of two ways: (i) by giving effect to the law, so far as it is possible for it do so under section 3, in a way that is compatible with article 8, or (ii) by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court; (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable: Wandsworth London Borough Council v Winder [1985] AC 461. The common law as explained in that case is, of course, compatible with article 8. It provides an additional safeguard."

117. In the four majority judgments which adopt differing approaches to the A8 issue, the above paragraph appears to represent the main agreement in principle.

118. On the validity of the Qazi decision, Lord Hope held [paras. 111-112]:

8 The two cases were considered by different courts below: [2005] 1 W.L.R. 1825 and [2005] QB 352.
111. How then does the decision of this House in 
Qazi stand up to examination when it is 
looked at in the light of the subsequent decisions of the Strasbourg court? I would hold that there are no grounds for concluding that the decision itself, on its own facts, was unsound. I would draw support for this conclusion from the fact that the respondent's subsequent application to Strasbourg was held to be inadmissible. On the other hand I would acknowledge that Lord Scott's observation in Qazi, para 139, that in no case has article 8 been applied to detract from the contractual and proprietary rights of the person entitled to possession is no longer true. Conners was such a case. The local authority in that case was relying on its contractual and proprietary rights when it applied for the eviction order. As I have already said (see para 98, above), I agree with the Court of Appeal's conclusion in the Leeds appeal that the decision in Conners is incompatible with the extreme propositions that the exercise by a public authority of an unqualified right to possession will 
never constitute an interference with the occupier's right to respect for his home, and that it will always be justified under article 8(2): [2005] 1 WLR 1825, para 26. 

112. But it needs to be stressed that the facts in Conners were entirely different from those in Qazi. There was no need in Qazi's case to give special consideration to the needs of gypsies and their different lifestyles, and the background to the local authority's decision to seek a possession order was that a valid notice to quit had been served on the local authority by one of the tenants of the tenancy. Conners does not resolve the problem as to how the need to give special consideration to cases of that kind where the law itself is defective – and I do not confine this category to gypsies – can be fitted in to the domestic system which requires that orders for possession must be sought in the county court. So I do not think that the decision in Conners is incompatible with the view of the majority in Qazi that there is no need for a review of the issues raised by article 8(2) to be conducted in the county court if the case is of a type where the law itself provides the answer, as in that situation a merits review would be a pointless exercise. In such a case the article 8 defence, if raised, should simply be struck out."

Article 14

119. In Wilson v Wychavon DC [2006] 2 P&CR 24, the claimant, a Romany Gypsy, sought a declaration that the stop notice provision in section 183(4) of the TCPA 1990, which permits such enforcement action against caravans but not dwelling houses, was incompatible with Art. 14 of the ECHR. The local planning authority had served enforcement and stop notices as well as an injunction. Crane J held that since a higher proportion of gypsies and travellers were likely to be affected by stop notices than any other group of persons, there was indirect discrimination in relation to a group protected by Art. 14 ECHR. Accordingly, the onus was on the state to justify the provision objectively. Crane J held that the provision could be justified because generally a change of a building to a dwelling would cause less environmental damage than the stationing of a residential caravan. Proportionality did not require a regime including possible exemptions such as that which existed in the case of temporary stop notices because a stop notice was only issued after a full balancing exercise has been carried out as required for an enforcement notice. Thus, s. 183(4) TCPA 1990 was not incompatible with Art. 14 ECHR.

Protective costs orders

120. In last year's talk I discussed the important guidance given by the CA in relation to protective costs orders ("PCO") in R (Corner House Research) v. Secretary of State for Trade and Industry [2005] 1 W.L.R. 2600. Since Corner House there have been a number of decisions which show the operation of that guidance in practice. Although, they are not planning cases, the principles are generally applicable and so it is appropriate to discuss them here –especially given that the field of planning and environmental law is one in which PCOs are most likely to be sought.

121. The requirement that the applicant for a PCO have no private interest in the outcome of the case was applied restrictively in Goodson v HM Coroner for Bedfordshire [2005] EWCA Civ 1172. Mrs Goodson sought a full coroner’s enquiry into the circumstances surrounding her father's death, but was refused a PCO because the CA held that she had a private interest in the outcome. At [28] the Court stated that “a personal litigant who has sufficient
standing to apply for judicial review will normally have a private interest in the outcome of the case”. The CA appeared to consider that the only parties without an interest and who would therefore be eligible for a PCO were pressure groups such as Corner House or “a public-spirited individual...in relation to a matter in which he has no direct personal interest separate from that of the population as a whole” ([28]).

122. The restrictive approach to the no private interest criterion in Corner House will have the effect of preventing many impecunious public interest litigants from obtaining PCOs. There are good reasons to depart from the approach in Goodson:

(1) the CA considered that “the court in the Corner House case was well-placed to decide where to draw the line in terms of public interest. The requirement that the applicant must have no private interest in the outcome of the case is expressed in unqualified terms, although the court could easily have formulated this part of the guidelines in more qualified terms...if it had thought it appropriate to do so” ([27]). With respect, this part of the Corner House judgment was only obiter dicta at most given that the issue was irrelevant on the facts of the case and was not addressed by the parties;

(2) the Corner House “requirements” which the CA in Goodson referred, were only expressed to be “guidance” in Corner House itself. The overriding concern of the CA in Corner House was that the courts discretion as to costs should be exercised flexibly in the interests of justice;

(3) The HRA 1998 arguably mandates a more liberal approach in the context of investigations into deaths. The positive obligation to investigate deaths pursuant to Art. 2 ECHR, especially when read with the implied right of access to a court under Art. 6 ECHR, probably requires better provision for economic access to justice than is afforded by Goodson.

123. Goodson concerned the costs of an appeal, and perhaps this feature coloured the CA’s thinking. The claimants had lost at first instance, but had been granted permission by the trial judge Richards J who had indicated that one of the issues raised a matter of general importance. The CA considered whether a PCO was appropriate at the appellate stage and observed that there was nothing in Corner House which restricted PCOs to first instance. However, the fact that the PCO was sought at the appellate stage did have a bearing because it went to the question of whether it was in the public interest for the matter to be resolved. The issue had already been dealt with in a long and carefully reasoned judgment which would continue to be available to provide guidance for coroners. In other words, the question for the CA was whether it was in the public interest for the matter to be decided at the appellate level. In that regard, the mere fact that a case raised a matter of general importance was held not necessarily to mean that the public interest required it to be resolved.

124. The decision of the CA in Goodson may be contrasted with the more liberal approach of the Outer House in the Scottish case of McArthur v Lord Advocate [2006] SLT 170. That case involved challenges to the failure of the Scottish Ministers to hold an Inquiry into the deaths of 3 people who had been infected with Hepatitis C in the course of receiving blood transfusions. The Claimants were all close relatives of the deceased. The Outer House held that “although the petitioners are relatives of the deceased, they have no financial interest in pursuing the actions.” Indeed, those particular claimants were chosen to bring the claim rather than a pressure group because only they would have standing under Scottish law.

125. Another feature of McArthur that warrants comment is the nature of the PCO that the Outer House considered granting. The Court noted that if each of the three petitioners was ordered, at the PCO stage, to pay only her proportion of the respondent’s costs – contrary to the usual rule that paying parties are jointly and severally liable for the receiving party’s costs – then the maximum costs liability they could face would be limited to £10,000. It is unclear whether the CA in Corner House sanctioned such an order, which is not really a PCO, rather it provides a prospective exception to the general rule of joint and several liability.

126. The Corner House guidance was also applied by Bean J in R (British Union for the
Abolition of Vivisection v Secretary of State for the Home Department [2006] EWHC 250, where a PCO was granted in favour of the claimant capping its total potential costs liability at £40,000 (the respondent’s predicted that their costs would be in the order of £150,000). The claimants wished to challenge a statutory scheme on the laboratory testing of animals and Bean J held that there was no doubt that the claim met the “public interest” test since the BUAV was a responsible organisation bringing a legitimate challenge on matters of considerable public importance ([15]). He held that the reference in Corner House to PCOs being “exceptional” did not impose and additional hurdle for applicants: “it is an umbrella principle, which is defined by the five conditions…” ([10]).

127. Although BUAV’s lawyers were not acting *pro bono*, a PCO was nevertheless granted. Indeed it is arguable that the CA in Corner House erred in stating that PCOs ought more readily to be granted where the claimant’s lawyers are acting *pro bono*. Conditional Fee Agreements (“CFA”) are the government’s chosen means of facilitating economic access to justice and accordingly it ought to be possible as a matter of routine to obtain a PCO in combination with a CFA.

128. Finally in relation to the BUAV case, Bean J held that it was not a necessary condition for obtaining a PCO that the claimant’s finances be dire. The BUAV had significant financial reserves and could have afforded to pay the respondent’s projected costs without drastically scaling down its activities. Bean J held that it was sufficient to obtain a PCO that it was not “the responsible and reasonable decision…to put £150,000 or even £100,000 to £120,000 of its money at risk…in addition to the more limited but still significant costs which it will incur itself” ([18]).

129. This generous approach may be contrasted with the restrictive approach in McArthur where the Outer House held that one of the petitioners had a house worth a “significant amount of money” and the fact that she did not want to sell it did not mean that she would not be able to raise money on the security of it. Thus, while the Court was satisfied that the petitioners would discontinue proceedings if there were no PCO, it was not satisfied that they would be acting reasonably in doing so: “cannot pay” and “will not pay” are not synonymous with each other.

National Parks

130. In Meyrick Estate Management v. Secretary of State for the Environment, Food and Rural Affairs [2005] EWHC 2618 (Admin) (3.11.05) Sullivan J. quashed part of the New Forest National Park designation order on grounds which included a flawed approach by the Inspector and Secretary of State to the test for designation in s. 5(2) of the National Parks and Access to the Countryside Act 1949. Notwithstanding that in s. 5(1) it is provided

“(1) The provisions of this Part of this Act shall have effect for the purpose---

(a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and

(b) of promoting the opportunities for the understanding and enjoyment of the special qualities of those areas by the public...”

the reference to natural beauty in s. 5(2) and the purposes of designation could not encompass cultural and other issues (see s. 114(2)), notwithstanding their inclusion in s. 5(1) and the use of the phrase “the provisions of this Part of this Act shall have effect for the purpose of...”

131. Sullivan J. held:

“45. Although the Assessor said in the final sentence of paragraph 3.8 of Appendix 1 that the weight to be attached to factors such as history and cultural associations “should be carefully considered” if they were "not to be given undue attention in reaching judgments on natural beauty under the Act", it is clear from paragraph 3.9 that she did consider that (subject only to the question of weight) such factors could be taken into account, and that she agreed with the Agency’s approach to the factors mentioned in section 114(2):"
"The strict terms of the designation criteria in section 5(2) should be informed by the extended definition of natural beauty in section 114(2) even if the latter only relates to the statutory purposes set out in subsection 5(1)."

46. [Counsel for Defra] submitted that in determining the extensive tracts of country to be designated under subsection 5(2) the Agency and the Secretary of State were furthering the purposes in section 5(1)(a), and hence the expanded meaning of "natural beauty" in section 114(2) was applicable also to subsection 5(2). He further submitted that it would be surprising if "natural beauty" had a wider meaning in subsection (1) than it had for the purposes of subsection 5(2).

47. I do not accept those submissions. Parliament could easily have made provision for an expanded meaning of "natural beauty" which would have been of general application throughout the Act:

"References in this Act to the natural beauty of an area shall be construed as including references to its flora, fauna and geological and physiographical features."

48. If possible, subsection 114(2) should be interpreted in such a way as to give effect to all of the words used by Parliament, and not an interpretation which would, in effect, render the two references to "the preservation or [as the case may be] the conservation of ..." otiose.

49. While at first sight it may appear strange that "natural beauty" is given an extended meaning in subsection (1) as substituted by the Environment Act 1995, but not in subsection (2) of section 5, I accept ... that one does not have to look far for a sensible justification. Once an extensive tract of country has been designated as a National Park, that will have been not merely because of its natural beauty, but also because of the opportunities it affords for open air recreation, and the latter may well threaten not merely the natural beauty that those seeking open air recreation come to enjoy, but also the flora, fauna, geological and physiographical features within the area, even if those features do not contribute to the area's natural beauty. ...

50. It will also be noted that the ambit of what should be conserved and enhanced pursuant to section 5(1) (as amended) once a National Park has been designated extends beyond "natural beauty" to include the "wildlife and cultural heritage" of the areas in question. By contrast, the wildlife and cultural heritage of an area are not made relevant considerations for the purpose of deciding whether that area should be designated as a National Park under subsection 5(2).

51. The Assessor and the Inspector's approach effectively discarded the requirement for a high degree of relative naturalness and substituted a test of "visual attractiveness" or "landscape quality". ...

52. ... the proper interpretation of subsection 114(2) (whether it extends the meaning of natural beauty in subsection 5(2) as well as in subsection 5(1)) is not the determining issue. The Agency was contending that a broader range of factors, including, for example, historical and cultural factors, could be taken into consideration in deciding whether the "natural beauty" criterion in subsection 5(2) was met. While such factors were relevant (as the Assessor said) to an understanding of how a particular tract of countryside had evolved to its present state, they were not relevant when it came to deciding whether it possessed the necessary quality of natural beauty so as to justify designation as a National Park.

53. I realise that the defendant may well consider that this is an unduly restrictive approach to the ambit of her and the Agency's powers under section 5(2). However, it must be remembered that the question is not what factors should, as a matter of good countryside planning practice in the 21st century, be taken into consideration in designating a National Park, but what factors may lawfully be taken into consideration under an enactment that is now over 55 years old. It might well be the case that "more modern" legislation would not be satisfied with such a straightforward and simple concept as "natural beauty"...

54. The 1949 Act was a contemporary of the New Towns Act 1946 and the Town and Country Planning Act 1947. The new towns are no longer new, and a brief perusal of
today's planning Acts would be sufficient to demonstrate the extent to which relatively simple provisions which sufficed in 1947 have been repealed and replaced by far more elaborate and sophisticated controls in response to the many changes that have taken place over the last 50 years. Views as to which tracts of countryside have the quality of "natural beauty" may (or may not) have changed over the last 50 years, but the "natural beauty" criterion in subsection 5(2)(a) of the Act has not been changed to embrace wider considerations such as "cultural heritage". If the "natural beauty" criterion in subsection 5(2)(a) is to be changed to reflect 21st century approaches to countryside and leisure planning then the change must be effected by Parliament, and not by administrative action on the part of the Agency in adopting a wider range of factors for the purposes of designation…

132. Sullivan J. also went on to hold that “opportunities … for open-air recreation” in s. 5(2)(b) should not be watered down and considered against a vaguer test of “potential opportunities.”

133. Keene L.J. gave permission on paper and the case was finally heard by the CA in early November and it is an important one for national parks policy since it is the first time the designation powers have been considered in depth and it appears to upset a wider approach taken to the purposes of designation by national policy and the Countryside Agency.

134. However, since the issue was of such importance, the Government had already introduced amendments to the designation requirements in ss. 59 and 99 of the Natural Environment and Rural Communities Act 2006 which received Royal Assent before the appeal came on for hearing.

135. S. 59(1) amends s. 5 of the 1949 Act (see para. 5 of the Secretary of State’s main skeleton argument) by inserting a new s. 5(2A) so that s. 5 now reads (amendments underlined):

“5 National Parks

(1) The provisions of this Part of this Act shall have effect for the purpose—

(a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and

(b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.

(2) The said areas are those extensive tracts of country in England . . . as to which it appears to Natural England that by reason of—

(a) their natural beauty and

(b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population,

it is especially desirable that the necessary measures shall be taken for the purposes mentioned in the last foregoing subsection.

(2A) Natural England may—

(a) when applying subsection (2)(a) in relation to an area, take into account its wildlife and cultural heritage, and

(b) when applying subsection (2)(b) in relation to that area, take into account the extent to which it is possible to promote opportunities for the understanding and enjoyment of its special qualities by the public.

(3) The said areas, as for the time being designated by order made by Natural England and submitted to and confirmed by the Minister, shall be known as, and are hereinafter referred to as, National Parks.”

136. The 2006 Act received Royal Assent on 1 March 2006 and ss. 59 and 99 came into force on 30 May 2006: see s. 107(7)(a). It also creates from 1 October 2006 the new body “Natural England” which, amongst other things, discharges the functions of both the former Countryside Agency and English Nature.
137. S. 59 of the 2006 Act states that s. 5(2A) has partial retrospective effect. S. 59(2) provides:

“(2) The amendment made by subsection (1) applies for the purposes of the confirmation or variation on or after the day on which this section comes into force of orders made before that day as it applies for the purposes of the confirmation or variation of orders made on or after that day”.

138. S. 99 of the 2006 Act provides:

“99 Natural beauty in the countryside
The fact that an area in England or Wales consists of or includes-
(a) land used for agriculture or woodlands,
(b) land used as a park, or
(c) any other area whose flora, fauna or physiographical features are partly the product of human intervention in the landscape,

does not prevent it from being treated, for the purposes of any enactment (whenever passed), as being an area of natural beauty (or of outstanding natural beauty).”

139. Although s. 99 has effect in relation to “any enactment (whenever passed)” and hence now applies to the 1949 Act unlike s. 59 it does not purport to be retrospective. It presumably should be read together with s. 114(2) of the 1949 Act.

140. The Explanatory Notes to the 2006 Act state:

“Part 5: National Parks and the Broads
29. Part 5 responds to the High Court judgment of 3 November 2005 in the case of Meyrick Estate Management Ltd v Secretary of State for Environment, Food and Rural Affairs [2005] EWHC 2618 (Admin), clarifying what factors may be taken into account when designating a National Park.

Part 9: Miscellaneous
43. Various Acts, apart from the Act dealing with the designation of National Parks, refer to areas of natural beauty. Section 99 clarifies what may be taken to contribute to natural beauty for the purposes of such references. This section was included in this Act as part of the response to the Meyrick case mentioned above.”

David Elvin Q.C.
Landmark Chambers
24 November 2006