

HIGH COURT PLANNING CHALLENGES

ENVIRONMENTAL IMPACT ASSESSMENT AND PROTECTED HABITATS

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1. Failures to comply with the legal requirements of the assessment of the environmental impacts of developments continue to generate significant volumes of litigation. Both the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 (“the EIA Regulations”) and the Conservation (Natural Habitats, &c.) Regulations 1994 (“the Habitats Regulations”) with their origins in EC law, produce a double hurdle for developers and local authorities, who have found on several occasions that complying with the terms of the national law in force at the relevant time may not be enough. This paper does not attempt a complete appraisal of the law, but attempts to identify certain areas of recent, and perhaps future, litigation.

The scope of EIA

(i) Amendments to the EIA Regulations

2. In the past few weeks, the scope of the EIA Regulations has been expanded to include decisions to approve reserved matters and other approvals under conditions. I do not propose to examine in any detail the changes, engendered in part by the *Barker* litigation,¹ which have recently been made by way of the Town and Country Planning (Environmental Impact Assessment) (Amendment) (England) Regulations 2008/2093. The key change is that an “EIA application” is now defined to include “a *subsequent application* in respect of EIA development”.² Subsequent applications are:³

¹ Case C-290/03 *Barker* [2006] QB 764 and *R v Bromley LBC ex p Barker* [2006] 3 WLR 1209 and [2007] 1 AC 470. See also Case C-201/02 *Wells* [2004] 1 CMLR 31, and Case C-508/03 *Commission v UK* [2007] Env LR 1. I also note *Cooper v Attorney General* [2008] EWHC 2178 (QB), an action for damages under the *Francovich* principle of Community law, which arose as a result of the Court of Appeal wrongly deciding in 1999 and 2000 that EIA was not required for reserved matters approval. The ECJ corrected the error in *Barker* and *Commission v UK* and Mr Cooper, a disappointed litigant before the English courts, sought the recovery of his legal expenses from the Attorney General (who would foot the bill for the Court of Appeal). The claim failed at first instance.

² Reg 2(1) EIA Regulations, as amended

- a. Applications for an approval of a matter where the approval is required by or under a condition to which planning permission is subject;
 - b. Applications for an approval of a matter where the approval must be obtained before all or part of the development permitted by the planning permission may be begun. In other words, the approval of reserved matters in the context of an outline planning permission.
3. A request for a screening opinion must now identify any planning permission which has been granted for the development in respect of which the subsequent application is made. Perhaps the most alarming element of the amendments is that “Schedule 1 applications” are now defined to include “subsequent applications in respect of Schedule 1 development”. That means that any development following an approval in respect of an outline planning permission for Schedule 1 development is now itself EIA development, requiring in all cases the provision of environmental information. This will impose a considerable burden on developers of large schemes which fall within Schedule 1, and may encourage them to apply for full planning permission rather than an outline where any subsequent approvals will require an ES. It also raises the thorny question of what information will be required to be provided say, for example, where there is an approval required under condition for a matter of detail such as a junction scheme or planting.
4. The implementation of these amendments was always likely to raise difficulties – which might explain the considerable delay since the final judgment in *Barker* – and doubtless they will engender a new generation of EIA disputes. The 2008 amendments also make new provision in respect of the determination of conditions in minerals permissions, to ensure that that system of approvals is caught where appropriate by the duty to undertake an EIA.

(ii) Edwards

5. Putting those amendments to one side, in the past two years a broader issue as to the scope of EIA has arisen. It is inherent in the scheme of the EIA Regulations that, as a matter of domestic law, an EIA can only be required in the context of an application for planning

³ Reg 2(1) EIA Regulations, as amended

permission (or, following the recent amendments, applications for the approval of reserved matters or under conditions). It follows that an EIA will, as a matter of domestic law, only ever be required in the case of “development” as defined in the Town and Country Planning Act 1990. It is not clear whether that satisfies the requirements of the EIA Directive.⁴

6. In *R (Edwards) v Environment Agency* [2008] UKHL 22; [2008] Env LR, a PPC permit had been granted by the Environment Agency to the interested party, a multinational cement manufacturer, to allow them to burn tyres as a partial replacement for coke in their cement kiln. The regulations under which the permit application is considered (the Pollution Prevention and Control (England and Wales) Regulations 2000/1973) allow the EA to regulate harmful effects to the atmosphere by limiting the quantity of polluting matter that a given activity may emit and by imposing quantitative limits by reference to the surrounding air quality on how much the environment may be polluted. In other words, there is consideration of the pollution caused by the particular process which is the subject of application, and then consideration of the effect of that pollution in the context of the existing air quality.
7. The EA’s role in emissions control deserves a lecture, if not a whole seminar, in its own right. For present purposes, the important thing about *Edwards* was what was said about EIA. Part of the challenge in *Edwards* was founded on the contention that the approval for the change of fuel in the kiln was an approval for EIA development, and therefore that EIA was required. The argument was that, in terms of the EIA Directive, the use of old tyres as a fuel was a project for the disposal of waste, falling within Annex I of the Directive and therefore demanding EIA, or at least within Annex II requiring an EIA if there were likely to be significant environmental effects. On this particular point, the House of Lords were split.
8. Lord Hoffmann, with whom Lord Hope and Lord Walker agreed, concluded that a change of the fuel used in a kiln could not be a “project” for the purposes of Article 1 of the EIA Directive because the definition of project “appears to contemplate the creation of something new and not merely a change in the way existing works are operated”.⁵ Lord Hoffmann found support for that proposition in the Annexes themselves, which suggest in

⁴ Directive 85/337 EEC

⁵ [51]

their descriptions of development the creation of something new. It followed that, if the change of the fuel was to fall within the EIA Directive at all it must fall within the category in Annex II of a “change” in a project.⁶ Given that there were no significant environmental effects arising from the change of fuel, no EIA would be required. However, his lordship found that, whilst the point seemed clear to him, it could not be considered *acte claire* and therefore a reference to the ECJ would have been required if the point was necessary for the determination of the appeal.

9. Lord Mance disagreed, and Lord Brown agreed with him:

[83] ... I would have regarded it as probable that the change to tyre burning would have brought the project within Annex I para.10 (rather than Annex II para.13) of Directive 85/337/EEC . I say this for a combination of reasons. First, the language versions of Art.1 of the Directive that I have inspected appear to vary quite considerably. The German is the most sparse. But others with their various final references to “the execution of ... schemes” (English) or “the realisation of ... works” (French, Spanish, Dutch and Danish) are on their face more expansive. Further, both Annexes I and II list “projects” within Art.1 , and it seems clear from the nature of some of these projects that activities not involving construction works may be “projects”: for example, in Annex II , intensive fish farming (para.1(f)), treatment of intermediate products and production of chemicals (para.6(a)), manufacture or packing and canning of various products (para.7) or storage of various items (paras 3(c) and (e) and 11(e)).

[84] Second, the plan to change to tyre burning did in any event involve not inconsiderable physical adaptation of the company's site and plant. This is described in part 4.1 of its detailed application to allow burning of tyres. They were to be discharged into a covered reception area, from which they were to be transferred by crane or mechanical conveyors into a storage area (holding up to 300 tons) fitted with smoke detectors linked with an alarm and with a water spray system. From there they were to be extracted mechanically and conveyed to a metering system inside the pre-heater tower and then fed to the combustion chamber via an airlock system. All this, including the vital combustion chamber was new.

[85] Third, the European Court has said repeatedly that “the scope of Directive 85/337 is very wide and its purpose very broad”...

⁶ See Article 13 of Annex II

10. On the facts, the disagreement between their lordships was not material because the information provided by the applicant for the permit would have been adequate to satisfy the requirements of EIA, if EIA were required. If the change in the process to the burning of waste tyres fell within Art 13 of Annex II, the conclusion that there were no significant environmental effects meant that there would be no duty to carry out an EIA in any case. It followed that there was no need for a reference to the ECJ on this point.
11. In my view there are several important points arising from *Edwards*:
- a. Each member of the committee agreed that the process change approved by the grant of the PPC permit would be caught by the EIA Directive, whether as a project for the disposal of waste under Annex I (Lords Brown and Mance) or as a change to an Annex I project under Art 13 of Annex II (Lords Hoffmann, Hope and Walker). In other words, the EIA Directive can, *prima facie*, apply outside the context of “development” as defined in the 1990 Act;⁷
 - b. The House of Lords disagreed as to whether a process change (without significant physical development) can amount to a “project” within the meaning of the EIA Directive, and would have referred the matter to the ECJ if the matter was determinative to the outcome of the appeal;
 - c. The EIA Directive was complied with either because there were no significant environmental effects, or because the requisite environmental information was in fact taken into account.
12. The prospect of the EIA Directive applying outside the scope of development control suggests that there is at least a partial failure on the part of the UK to transpose the requirements of the Directive. The EIA Regulations only apply in the context of the planning process. The point has been canvassed before in both the English courts and at the ECJ.

⁷ There was no planning application for the change of fuel.

13. The first relevant case is *R (Lowther) v Durham CC* [2002] Env LR 13, where it was argued that a similar process change to that in *Edwards* amounted to a material change of use requiring planning permission. That of course is the way in which changes to processes can be caught by the planning regime, and therefore by the EIA Regulations. The Court of Appeal held that an alteration in the source of power or fuel used for a process is capable of constituting a material change of use, but it would always be a question of fact and degree.⁸ On the facts of that case, there was no material change of use.
14. In *R (Horner) v Lancashire CC* [2008] Env LR 10, the Court of Appeal considered whether the erection of machinery at a cement works to handle animal waste derived fuel required an EIA. The Court dismissed a challenge to the “floorspace” thresholds set out in the EIA Regulations, holding that the measure was not confined to conventional floorspace and could be given a broad interpretation. However, Sedley LJ gave this short but ominous judgment in agreement:⁹

[102] It is difficult not to have misgivings about a planning mechanism which, by being based on simple floorspace, allows single storey structures of unlimited height to escape environmental control so long as their “footprint” is less than 1000m². But it is not open to the court to scrap a criterion laid down by domestic law in presumptive conformity with the EIA Directive, and to adopt instead a default rule of its own making, even if such a rule better reflected—as it might well do—the intentions of the Directive. Where no floorspace is involved at all, for example where there is a change of system only, resort to the Directive may be legitimate. For the rest, the default process, if there is one, has to lie in the Secretary of State's power to give a direction that a particular development is an EIA development.

15. The underlined passage demonstrates that there are doubts about the adequacy of transposition of the EIA Directive in the context of process changes.
16. One way through the difficult issue raised by *Edwards* is to revert to the domestic law relating to changes of use. A change of use which has significant environmental effects would be likely to be considered a material change of use requiring planning permission. So long as

⁸ Per Lord Phillips MR, [79] – [88].

⁹ Emphasis added

the change of use did not constitute a new “project” falling within Annex I of the Directive (i.e., so long as the majority view of the House of Lords in *Edwards* wins the day, if and when there is a reference to the ECJ), that threshold would neatly dovetail with the requirements of the EIA Directive. Changes of use with no significant environmental effect would not, in any case, require EIA.¹⁰ The extent to which this reasoning shuts the gap between authorisations which may require EIA as a matter of Community law but which are not caught by the EIA Regulations remains to be seen.

17. I also note this year’s ECJ judgment in Case C-2/07 *Abraham v Wallonia* [2008] Env LR 32, which concerned an extension to Liege-Berset Airport in Belgium. The defendant regional authority had entered into agreements with freight carriers for the adaptation of the runway, the provision of a new control tower and various other works to allow the airport to operate 24 hours a day, 365 days a year for freight flights. One question referred from the national court was whether an agreement between a public authority and a freight undertaking could in itself amount to a “project” for the purposes of the EIA Directive. It was held that it could not. The ECJ stated that projects must be “works or physical interventions”, a definition which does not particularly assist in the context of the debate in *Edwards*. However, the ECJ also pointed out that such an agreement may amount to development consent, entitling the undertaking to proceed with the works, depending on the provisions of national law. Such an agreement may be an “in principle” decision, requiring EIA.¹¹ Furthermore, the provisions of the EIA Directive could not be circumvented by splitting the project up into several stages, and seemingly not by splitting the decision-making into a number of stages. The Advocate General’s view was that such a commercial agreement between a public authority and an undertaking should be regarded as the first stage of a consent procedure “if and in so far as it limits the discretion of the competent national authorities in subsequent consent procedures”.¹²

18. It is also worth mentioning *R (England) v London Borough of Tower Hamlets* [2006] EWCA Civ 1742, where the Court of Appeal held that it was potentially arguable that domestic law

¹⁰ Although the screening process would of course be lost, and one would have to revert to the doctrine of “substantial compliance”.

¹¹ On the basis of *Wells*, cited above.

¹² Opinion of AG Kokott, [77]. It can be anticipated that such a situation would not arise in the UK, where a contractual agreement could not be entered into which would fetter the discretion of a public authority when it came to dealing with a subsequent planning application.

failed to properly transpose the EIAD in respect of demolitions. Again, because the whole EIA process is premised on the need for planning permission, where demolition is exempted from the definition of “development” in the 1990 Act, there is no question of an EIA being required as a matter of domestic law. In *England* leave to appeal was refused on other grounds, but the Court expressly authorised reference to their judgment in other proceedings, as an exception to the normal rule for judgments on permission application.

19. The question of when an EIA is required cannot, because of the Community law backdrop, be answered once and for all by reference to whether planning permission is required for what is proposed. That presents a significant challenge for those bodies (such as the EA) which have to grapple with applications that are not necessarily made in parallel to a planning application. It also raises a question as to whether more should be done by local planning authorities in assessing process changes such as those in *Edwards* against the “material change of use” yardstick.

Cumulative effects

20. Schedule 3 to the EIA Regulations requires the decision-maker to have regard to the “cumulation with other development”. That raises the question of what “cumulation” is in this context. That issue is also of significance in the context of the Strategic Environmental Assessments of planning policy under the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633), which I do not consider here.
21. The question of what amounts to cumulation was addressed in *R(Tree and Wildlife Action Committee Ltd) v Forestry Commissioners* [2008] Env LR 5. That case concerned the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (SI 1999/2218) which implement Council Directive 85/337/EEC in respect of forests and which mirror the EIA Regulations on this point. The development proposed was deforestation and development of around 5ha of a 19ha area of woodland for football pitches and car-parking. Collins J held that the deforestation must be analysed in cumulation with the future use of the football pitches:¹³

it will be a question of fact in an individual case whether it can properly be said that there is a cumulation, whatever that means in the context. Clearly it would not be possible to say

¹³ [36], emphasis added

merely because there were developments proposed which were nothing to do directly with the one in question but happened to be nearby, that that would bring this into play. It is a question of fact: proximity, combined effect and so on, are all factors which would have to be taken into account. However this is an exercise which any planning authority has to carry out, because there are similar provisions under the [EIA Regulations].

22. Cumulation is not, of course, simply adding together the effects of the separate proposals. In *R (Mortell) v Olham MBC* [2007] EWHC 1526 (Admin), Sir Michael Harrison quashed three outline planning permissions where a negative screening opinions had been produced. The Council had granted three separate planning permissions for urban redevelopments at sites all governed by the same Masterplan. Each screening opinion simply referred (in identical terms in each case) to the fact that the proposal formed part of a wider redevelopment. It then concluded that, in comparison to the existing use of the sites, the proposal would have no greater impacts on the environment. The judge accepted the claimant's argument that the point about cumulative effects is that they may have a magnitude and significance which the individual components do not have. Merely simultaneously assessing the effects of three developments is simply not grappling with accumulation.
23. However, as *R (Littlewood) v Bassetlaw District Council* [2008] EWHC 1812 (Admin) demonstrates, cumulation is not a question to be answered in the abstract. In that case planning permission had been granted for part of a site which was likely to be subject to extensive redevelopment. No Masterplan had been brought forward to lay out what was to follow. It was argued that the application should be considered in light of the further development proposed. Sir Michael Harrison held:¹⁴

... at that time no proposals had yet been formulated by Laing for the rest of the site for the reasons that I have mentioned. I simply do not see how there could be a cumulative assessment of the proposed development and the development of the rest of the site pursuant to the EIA Regulations when there was no way of knowing what development was proposed or was reasonably foreseeable on the rest of the site. The site was not allocated for development in the local plan. No planning application had been made and no planning permission given in respect of the rest of the site, and no proposals had yet been formulated for that part of the site. There was not any, or any adequate, information upon which a cumulative assessment could be based. In my judgment, there was not a legal requirement

¹⁴ At [32]. Permission to appeal was refused after an oral hearing before Richards LJ last week.

for a cumulative assessment under the EIA Regulations involving the rest of the Steetley site in those circumstances.

Taking into account the mitigation of adverse effects

24. To what extent should provisions to mitigate the adverse effects of a development proposal be taken into account in assessing the environmental effects of the proposal in the context of EIA or “appropriate assessment” under the Habitats Regulations?

25. In *Gillespie v First Secretary of State* [2003] Env LR 30, the Court of Appeal quashed a grant of planning permission which had assumed that a planning condition requiring a comprehensive investigation of contaminated land provided a “complete answer” to the question of whether there were likely to be significant effects on the environment. In so doing, Pill LJ said:

[40]... In the circumstances, it was necessary to consider the stage which the site investigation had reached (condition VI requires a future site investigation in detail to be undertaken), the nature and extent of the scheme for remediation, including its uncertainties, the effects on the environment during the remediation and the likely final result. The condition is properly drafted but itself demonstrates the contingencies and uncertainties involved in the development proposal, as does the evidence of Mr Simmons already quoted.

[41] When making the screening decision, these contingencies must be considered and it cannot be assumed that at each stage a favourable and satisfactory result will be achieved. There will be cases in which the uncertainties are such that, on the material available, a decision that a project is unlikely to have significant effects on the environment could not properly be reached. I am not concluding that the present case is necessarily one of these but only that the test applied was not the correct one. The error was in the assumption that the investigations and works contemplated in condition VI could be treated, at the time of the screening decision, as having had a successful outcome.

26. *Gillespie* was taken, for a short while, to mean that conditions which effected mitigation of environmental effects should be disregarded in the screening process. In *R (Catt) v Brighton and Hove CC* [2007] Env LR 32 Pill LJ revisited the point in respect of a decision to grant planning permission for a new football stadium:

[31]... In the present case, it would be ludicrous to ignore conditions imposed as to the frequency of football matches, the days on which they may be played and the music which may accompany them. An activity involving thousands of people which occurs daily has more effect on the environment than one which occurs on a limited number of occasions a year and for no more than a few hours on each occasion.

...

[33]... There will be cases, such as *Gillespie*, where the uncertainties present, whether inherent or sought to be resolved by conditions, are such that their favourable implementation cannot be assumed when the screening opinion is formed.

[34] On the other hand, there will be cases where the likely effectiveness of conditions or proposed remedial or ameliorative measures can be predicted with confidence. There may also be cases where the nature, size and location of the development are such that the likely effectiveness of such measures is not crucial to forming the opinion. It is not sufficient for a party to point to an uncertainty arising from the implementation of the development, or the need for a planning condition, and conclude that an EIA is necessarily required. An assessment, which almost inevitably involves a degree of prediction, is required as to the effect of the particular proposal on the environment, and a planning judgment made.

27. The Court of Appeal visited the point again in *R (Dicken) v Aylesbury Vale DC* [2008] Env LR 20, where planning permission had been granted for buildings to house a chicken farm which incorporated an “oli-free roosting system”, designed to keep the environment free from odour, vermin and flies. It was argued that, in screening the development, the roosting system should have been disregarded. Laws LJ rejected this argument, holding that the roosting system was “part and parcel” of the development, which the decision-maker was entitled to bear in mind whilst screening the application.
28. The point about mitigation measures arose again in the context of appropriate assessment under the Habitats Regulations in *R (Hart DC) v SSCLG* [2008] 2 P&CR 16. That case concerned housing development close to part of the Thames Basin Heaths SPA. One potential adverse effect on the SPA of new housing was that the new residents would be inclined to walk their dogs on the SPA, running the risk of disturbing protected bird species which nest on the ground. Part of the proposal was therefore for the provision of a “Suitable Alternative Natural Greenspace” or SANG which would draw people away from the SPA. It was argued by

the local authority that the SANG should be disregarded in assessing the effects on the SPA. Sullivan J rejected that contention:

[55] The first question to be answered under Art.6(3) or reg.48(1) is: what is the plan or project which is proposed to be undertaken or for which consent, permission or other authorisation is sought? The competent authority is not considering the likely effect of some hypothetical project in the abstract. The exercise is a practical one which requires the competent authority to consider the likely effect of the particular project for which permission is being sought. If certain features (to use a neutral term) have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial, screening, stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect on the SPA.

...

[72] The underlying principle to be derived from both the *Waddenzee*¹⁵ judgment and the domestic authorities referred to above is that, as with the EIA Directive, the provisions in the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course. If, having considered the “objective information” contained in the EPR Report, and agreed by NE in the Statement of Common Ground, the first defendant, as the competent authority, was satisfied that the package put forward by the second and third defendants, including the SANGS, would avoid any net increase in recreational visits to the SPA (thereby avoiding any increased disturbance to the Annex 1 bird species), it would have been “ludicrous” for her to disaggregate the different elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered without the SANGS, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment.

29. Sullivan J revisited the point in *Millgate Developments Ltd v SSCLG*[2008] EWHC 1906 (Admin) where it was contended that a planning inspector had erred in requiring SANGs to be secured by s 106 agreement to be taken into account. Sullivan J held that that was not what the inspector was doing, but rather he was applying Natural England’s guidance that “if sufficient avoidance mechanisms were incorporated into the proposal itself so that it could be concluded on the basis of an objective assessment that there was no risk of significant

¹⁵ Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405

harm to the SPA, an appropriate assessment would not be necessary before the proposal could proceed”.¹⁶ On the facts, the inspector had simply rejected the contention of the applicants that other SANGs, some distance from the appeal site, could mitigate the effects of the development on the SPA. That conclusion was “pre-eminently a matter of planning judgment for the inspector”.¹⁷

30. Both *Hart* and *Millgate* raise a further issue, which was also dealt with by the Court of Appeal in *R (Lewis) v Redcar and Cleveland BC* [2008] 2 P&CR 21. The question essentially is, how should a planning decision-maker approach the advice received from Natural England as the statutory conservation body? In *Hart*, the Secretary of State had departed from the inspector’s conclusions on adverse effects on the SPA in favour of the analysis of Natural England. In *Lewis*, it was alleged that the local planning authority had failed to come to the conclusion for themselves that there were no adverse effects on an adjoining SPA. The argument was effectively that the discretion had been unlawfully delegated to Natural England and the RSPB, whose views were accepted without more. Pill LJ held:

[85] NE and RSPB are, of course, organisations of high repute. I have no doubt that in approving the scheme, subject to the conditions they required, they were well aware of the nature and extent of the reg.48 duty. A summary of their findings was included in the report to Committee and Committee members were entitled to rely on their recommendations. Mrs Mealing, who was aware of the test to be applied, expressed her opinion. The recommended conditions were included in the report submitted to the Committee. It is not suggested that members of the Committee failed to consider the report. One of the stated reasons for granting permission was that “subject to suitable safeguarding conditions, the integrity of the nearby protected sites will not be compromised”.

[86] In these circumstances, neither the failure to set out the reg.48 test, nor the failure to set out Mrs Mealing's opinion, in the report to Committee, in my view, require the planning decision to be quashed. The issue had received expert consideration. The Committee had expert advice and could assume from the source of that advice that the appropriate test had been applied.

¹⁶ [14]

¹⁷ [19]

31. It is clear from these cases that Natural England's analysis will often be decisive, but that the planning authority must still make its own judgment on adverse effects.

Environmental information

32. The final topic which I wish to cover concerns the nature of the environmental information provided to the local planning authority or inspector, and how that information should be dealt with by the authority which receives it. In *R (Finn-Kelcey) v Milton Keynes Council* [2008] EWCA Civ 1067, information had been provided by the applicant to the local authority in the context of an application for a wind farm in Bedfordshire. The information provided included a reference to raw wind speed data, which had been used to assess the noise which the wind farm would cause and the power which it would generate. Third party objectors had not been provided with the raw wind speed data, although they had been provided with the environmental statement and a further statement submitted by the applicant.

33. In the Court of Appeal, it was held that the EIA Regulations as in force at the time imposed no obligation on the Council or the developer to send the raw wind speed data to the objector. The duty, which arose from the direct effect of Directive 2003/35/EC amending the EIA Directive as the relevant provisions had not been transposed into UK law at that time, was merely to make the data available. A reference in the written document, which had been sent to the applicant and placed on the planning file, to CDs containing the data was sufficient for these purposes. Keene LJ held:

[41] It seems to me that the way in which technical information is "made available" is bound to vary and these days will often consist of the use of some electronic format, whether on CD, memory stick or some other method. There can be no objection to that, but it means that the traditional planning file, well-suited to hard copy paper documents, will not always be easy to use for such electronic material. No doubt the CDs sent by the IP could have been put into some plastic sleeves in the file, but there can in principle be no objection to such items of information being kept separately by a planning authority, so long as the file itself indicates their existence and availability. It is little different from the way in which physical models of a proposed development, more common in the past than today, have generally been dealt with. The important thing in such cases is that those interested should be informed that the material is available.

34. The Court of Appeal's judgment is premised on the amendments to the EIA Regulations which gave effect to Directive 2003/35/EC not being in force. Those amendments extend the requirement to distribute information which is received after the submission of the environmental statement to "any other information", rather than just information received by the decision-maker pursuant to a request under reg 19(1) of the EIA Regulations. The new reg 19(7) provides:

(7) Where information is requested under paragraph (1) or any other information is provided, the relevant planning authority, the Secretary of State or the inspector, as the case may be, shall suspend determination of the application or appeal, and shall not determine it before the expiry of 14 days after the date on which the further information or any other information was sent to all persons to whom the statement to which it relates was sent or the expiry of 21 days after the date that notice of it was published in a local newspaper, whichever is the later.

35. This is a potentially difficult provision for developers and local authorities. Often, the submission of the ES will not be the end of the story even where there is no request made for further information under reg 19(1). Eager developers may submit further evidence in respect of environmental matters through an abundance of caution or because it assists their case. Reg 19(7) seems to require that information to be sent to those to whom the ES was sent, although in my view that should only apply to the statutory consultees who are required to be sent the ES. The Court of Appeal did not have to grapple with this issue in Finn-Kelcey.

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**Extract from paper given by James Maurici, Landmark Chambers, given at this conference
last year**

Reasons for negative screening decisions?

1. Are local planning authorities or the Secretary of State required to give reasons for a negative screening opinion or direction (i.e. that development is not EIA development) pursuant to the Town & Country Planning (Environmental Impact etc.) Regulations 1999 (“the 1999 Regulations”)?
2. An examination of the 1999 Regulations themselves would suggest not. The 1999 Regulations do not state that reasons need to be given for a negative screening decision. In direct contrast under reg. 4(6) of the 1999 Regulations where a positive screening decision is given i.e. that development is EIA development there is an express duty to give “a written statement giving precisely and clearly the full reasons for that conclusion”. This would suggest that the drafter of the 1999 Regulations made a deliberate choice not to require the giving of reasons for negative, as opposed to positive, screening decisions under reg. 4.
3. However, the matter does not end there. The issue was considered by the Court of Appeal (Nourse, Pill, Mummery LJ) in the context of a renewed application for permission for judicial review in ***R v Secretary of State for the Environment, Transport and Regions, ex parte Marson*** [1998] Env LR 761. In that case, Parcellforce proposed to develop a 17 hectare site near Coventry Airport for the construction of sorting and handling depots. The Secretary of State determined that EIA was not required. This decision was challenged by way of judicial review. It was contended that he had unlawfully failed to give reasons, or to give sufficient reasons for the decision.
4. ***Marson*** in fact concerned the predecessor to the 1999 Regulations (the Town & Country Planning (Assessment of Environmental Effects) Regulations 1988) and the pre-1997 version of the EIA Directive. However, the reasoning of the Court of Appeal is equally applicable in

the context of negative screening decisions under the 1999 Regulations. Indeed Pill LJ at p. 679 expressly said so in rejecting a submission that Directive 97/11/EC was material to the decision reached by the Court of Appeal¹⁸.

5. The Court of Appeal refused permission and held that it was not arguable that reasons were required where the competent authority of a member state decides not to require an EIA in relation to a particular project:

“1) No general duty has been established under Community law or national law to give reasons for all decisions by competent authorities of Member States.

2) Neither the Directive nor the 1988 Regulations expressly require reasons to be given for a decision not to direct an environmental impact assessment.

3) The applicant’s right is not a right to an environmental impact assessment but to a decision from the Secretary of State as to whether such an assessment is required.

4) The decision requires an exercise of judgment by the Secretary of State and he is left with a discretion in its exercise. The requirement for a decision is only one part of the procedures provided for planning control and the protection of the environment.

5) Whether or not there is an environmental impact assessment, the local planning authority, in determining applications for planning permission, must have regard to "material considerations" (sections 54A and 70 of the 1990 Act) which will include environmental considerations. The applicant had the opportunity to make representations to the local planning authority and the authority were supplied with information upon environmental considerations, albeit not in the form of an assessment in the form specified in the Directive and Regulations.

6) The right concerned in the circumstances is removed from the relevant substantive decision, that is the decision whether or not to grant planning permission.

7) The right conferred is very far removed from the fundamental right considered by the ECJ in *Heylens...*¹⁹

¹⁸ See para. 5 of the judgment of Burton J. refusing permission in the case of *Probyn* (see below) where in relation to *Marson* he said:

“That decision did not relate to the identical Regulation, but it is seemingly common ground, certainly it was before me, that that does not make any difference and that the decision of the Court of Appeal has the same effect on these Regulations as in relation to the specific Regulation it was considering, and that the fundamental principle was very fully set out by the Court of Appeal in that case, namely that there was no obligation on the Secretary of State to give reasons when giving a decision as to whether or not an environmental assessment is necessary.”

¹⁹ Following what Richards J. said in *Gillespie* (see below) para. 5) of the reasoning has been undermined by the House of Lords decision in *Berkeley v. Secretary of State for the Environment* [2001] 2 AC 603 but “that does not affect the balance of the reasoning, the broad thrust of which ... hold[s] good.”

6. In **Marson** (see p. 766) the decision letter said that no EIA was required because the Secretary of State was of the opinion that the proposed development “would not be likely to have significant effect on the environment by virtue of factors such as its nature, size and location”. Pill LJ said at 766 that even if there was an obligation to give reasons “ ... that the statement gives a reason or reasons for the decision because the words of the Regulation, which are recited, set out the basic criteria for the decision”. At 770 he said that “reasons for the decision were given, albeit in summary form”.

7. **Marson** has been cited and relied upon in the following cases: **R. v St Edmundsbury BC Ex p. Walton** [1999] Env. L.R. 879 per Hooper J.; **BAA Plc v Secretary of State for Transport, Local Government and the** [2002] EWHC 1920; [2003] J.P.L. 610; **Gillespie v First Secretary of State** [2003] EWHC 8; [2003] 1 P. & C.R. 30²⁰.

8. **Marson** was recently reconsidered by Burton J in an application for permission to apply for judicial review in **R (on the application of Probyn) v First Secretary of State** [2005] EWHC 398 (Admin). A 25m high fume extraction stack had been built pursuant to planning permission at a combined slaughter house and cutting facility for chickens. The permission was subsequently quashed and an application was made for permission for retention of the stack. The claimants requested a screening direction under Regulation 4(8) of the EIA Regulations²¹,

²⁰ In that case, Richards J. said:

“Although the judgment of the Court of Appeal in **Marson** was on a permission application, it was a detailed judgment and is of strong persuasive authority. I accept that the decision of the House of Lords in **Berkeley** has undermined part of the reasoning, namely reliance on the fact that the applicant had the opportunity to make representations on the environmental considerations and the authority was supplied with information on those considerations. But that does not affect the balance of the reasoning, the broad thrust of which seems to me still to hold good.”

The Court of Appeal ([2003] EWCA Civ 400; [2003] Env. L.R. 30) upheld Richards J’s decision but did not consider **Marson** and reasons aspect.

²¹ Reg. 4(8) provides “The Secretary of State may direct that particular development of a description mentioned in Column 1 of the table in Schedule 2 is EIA development in spite of the fact that none of the conditions contained in sub-paragraphs (a) and (b) of the definition of “Schedule 2 development” is satisfied in relation to that development.” See further: **Berkeley v Secretary of State for the Environment Transport & Regions & London Borough of Richmond upon Thames** [2002] Env. L.R. 14.

but the Secretary of State declined. It was contended that he had unlawfully failed to give reasons, or to give sufficient reasons.

9. The claimants in *Probyn* relied upon two ECJ decisions post-*Marson* namely, *Commission v Italy* C-87/02 and *Commission v Italy* C-83/03, to suggest that *Marson* was wrongly decided.

In C-87/02, Advocate General Ruiz-Jarabo Colomer stated (at [36]) that:

“36. An administrative decision which concludes that the particular features of a project are not such that it is damaging to the environment must be explained by reasons. (35) According to the general rule, which I have already set out, all projects must be made subject to an assessment of their effects prior to authorisation; therefore, if a particular project is excluded from that requirement because it is not harmful, the reasons on which that finding was based must still be disclosed. Environmental protection currently occupies a prominent position among Community policies. (36) Furthermore, the Member States also have a crucial responsibility in that area. (37) Community citizens are entitled to demand fulfilment of that responsibility (38) under Article 37 of the Charter of Fundamental Rights of the European Union, (39) which guarantees a high level of environmental protection and the improvement of the quality of the environment. Accordingly, the main elements of any measure which strays from the general criteria aimed at protecting the environment must be duly specified, since that is an embodiment of the rational exercise of power, as well as being a tool which, if necessary, enables the measure to be reviewed subsequently²².”

²² Note also paras. 20 – 22 of the Advocate-General’s opinion:

“20. The Commission maintains that, pursuant to Article 4(2) of the Directive and Article 1(6) of the Presidential Decree of 12 April 1996, the Italian authorities are obliged to check the impact of the Lotto Zero route on the environment. The Commission goes on to state that the decision not to submit the project to an environmental impact assessment, adopted in Regional Decree 25/99, is not explained by reasons.

21. The Italian Government responds that the project was checked and that it was possible to adopt the decision by administrative silence, without providing reasons, but that, in any event, the decision contained in the Presidential Decree of 12 April 1996 is explained by reasons because it refers to the report from the Regional Committee for the Assessment of Effects on the Environment.

22. The Commission contends that its complaint essentially relates to the fact that the Italian authorities failed to check whether the characteristics of the project required it to be assessed for its impact, a failure which is evidenced by the absence of reasons in Decree 25/99” (emphases added).

And paras. 31 to 35:

“31. As the Commission rightly points out in the reply, the dispute therefore centres on the issue of whether the Italian competent authorities examined the characteristics of the Lotto Zero project in order to establish whether there would be any damage to the environment and, if so, whether they made their consent conditional on a prior assessment of the impact of the project on the environment.

32. That supervision was carried out, in the formal sense, inasmuch as Regional Decree 25/99 of 15 November 1999 states that it is not necessary to assess the effects of the project on the natural surroundings on the grounds that it does not affect a protected zone and the Regional Committee for the Assessment of Effects on the Environment came to a favourable conclusion in the meeting held on 22 October 1999. However, the committee’s report is as lacking in detail as the Decree, (32) in that it merely contains a reference to the positive opinion which was issued by the civil engineer on 6 July 1999, under number 8634, and which, like the administrative decision and the conclusion of the committee, is not explained by reasons. (33)

33. That document, which the defendant Member State submitted with its reply to the questions formulated by the Court, is not a report on the environmental impact of the public works under discussion. It is clear from simply

10. The ECJ's conclusion was more ambiguous ([46]-[49]):

“46. Examination of the documents produced shows that Decree No 25/99, by which the Abruzzo Region gives a favourable opinion as regards the outcome of the screening procedure and decides to exempt the project from the assessment procedure, is based on a cursory statement of reasons and merely refers to the favourable opinion by the Coordinating Committee. The latter opinion, which appears in the handwritten minutes of the Committee's meeting of 22 October 1999, contains a sentence which conveys the favourable opinion and states that in adopting that opinion, the Committee had available to it the civil engineer's opinion No 8634 of 6 July 1999.

47. As the Advocate General rightly observes in point 33 of his Opinion, that opinion by Teramo's civil engineering department, produced at the Court's request, is not an opinion on the environmental effects of the project, but merely an authorisation 'solely for hydraulic purposes' to cross the Tordino river and carry out certain works. The document attached by the Italian Republic to its defence, the cover page of which gives the necessary details as to the nature of the document and which was produced at the Court's request, does not appear to be required under the Law as part of the screening procedure. Moreover, the Court does not have information which would allow it to conclude that it was used by the competent authority as a basis for its decision.

48. That information indicates that no screening was carried out to determine whether to subject the project 'Lotto zero' to an impact study and that the failure to fulfil obligations as set out by the Commission in its claims is established.

49. It should be pointed out, however, that if the civil engineer's opinion had not been produced at the request of the Court, it would have been impossible to determine whether the screening had been carried out or not. It must be observed that a decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337.”

11. In *Probyn*, Burton J accepted that all that the ECJ decided was that it could not be satisfied that screening had actually occurred²³ – the best evidence of the absence of screening being that no reasons had been given. However, he did acknowledge (at [12]) that “it is plain that the drift of the European Courts –or, at any rate, that of those arguing before the European

reading the document that it is an authorisation, 'solely for hydraulic purposes', (34) to cross the Tordino river and to carry out work on the riverbed relating to the construction of a number of viaducts.

34. The report attached to the defence is not the opinion of the civil engineer referred to in the decision of the regional committee; instead it is an environmental compatibility study conducted in December 1997 at the request of a company called ERM Italia Srl.

35. It is clear from the foregoing considerations that, by failing to check whether the construction of the road in Teramo required an environmental impact assessment, the Italian Republic has committed the breach complained of by the Commission.”

²³ “[a]t least in fuller form, a case was put forward by the Commission that there had not been a screening at all, and that the best evidence of the absence of screening was that there had not been any reasons given.”

Court –is flowing in the other direction from **Marson**". Nevertheless, Burton J. refused permission because ([20]):

" ... it would ... be quite inappropriate, and in the interests of neither of the parties in this case for me to grant permission to send this through to a full hearing by the Administrative Court, where the overwhelmingly likely result would be that the Administrative Court would consider itself either bound or extremely persuaded by Marson, and would leave the matter to the Court of Appeal to decide whether it was or was not bound by its own previous decision, and whether it should or should not reconsider it in the light of the apparent dicta of the European Court in the Italy cases, or refer the matter to the European Court. Consequently, it is only a mercy, and a saving time and costs, if I prevent that unnecessary course now, but enable the parties to take the matter straight to the Court of Appeal by way of a renewal of this application; or, if that is the way it must be, by way of an application for permission to appeal against my refusal."

12. Laws LJ subsequently granted permission to appeal in **Probyn** saying " ... I have an uneasy sense that judicial insistence on full or fuller reasons in these cases will be an instance (in the tired phrase) of the best being the enemy of the good ...". The appeal was, however, withdrawn shortly before it was heard by the Court of Appeal.
13. However, the Court of Appeal is due to consider the issue in **Mellor (R on the application of) v Secretary of State For Communities & Local Government** [2007] EWHC 1339 (Admin). The case is listed in the new year. The appellant is seeking a reference to the ECJ
14. Furthermore, the Commission has recently announced that it will be taking infraction proceedings against the UK in relation to the failure to give reasons for negative screening decisions. The complaint that has led to these proceedings arises from the **Marson** case!
15. Given all this what in EIA Directive supports an obligation to give reasons for negative screening decisions? Not a lot. Article 4 makes no reference to a need to provide reasons in determining whether EIA is required. This is in marked contrast with the wording at Article 9 of the EIA Directive relating to decisions to grant or refuse development consent. The wording here expressly requires the competent authority to make reasons for their decision available to the public. Had it been the purpose and intention of the EIA Directive that

competent authorities were required to make available to the public reasons why, in a specific case, EIA was not required, is it not reasonable to assume the wording would have been more explicit, and in line with that used in Article 9? Furthermore, Article 3(7) of the more recent Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (“the SEA Directive”) expressly requires that reasons be given “for not requiring an environmental assessment”. The contrast with Article 4 of the EIA Directive could not be clearer.