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Introduction

1. In this paper I address the following recent developments and the area of environment and planning, most of which generate continuing questions:

   (1) Environmental impact assessment (EIA) in the wake of the judgments of the ECJ and House of Lords in ***Commission v. UK*** Case C-508/03 and ***Barker*** Case C-290/03 [2006] Q.B. 764 and in ***R. v Bromley LBC Ex p. Baker*** [2006] 3 W.L.R. 1209;

   (2) The interrelationship of environmental assessment, pollution control and planning control;

   (3) Implications of Áarhus and the Public Participation Directive for EIA and decision-making;

   (4) The impact of the Habitats Directive and the Conservation (Natural Habitats &C.) Regulations 1994 ("the Habitats Regulations");

   (5) Other recent cases.

(1) EIA and reserved matters post-*Barker* and *Commission v UK*

2. As was prefigured in the judgment of the ECJ in ***R (Delena Wells) v. Secretary of State*** Case C-201/02 [2004] 1 C.M.L.R. 31, the ECJ in ***Commission v. UK*** Case C-508/03 and ***Barker*** Case C-290/03 [2006] Q.B. 764 and the House of Lords in ***R. v Bromley LBC Ex p. Baker*** [2006] 3 W.L.R. 1209 have worked a minor transformation on domestic development control. They have introduced the possibility of EIA at stages in the planning decision-making after an in-principle decision granting outline planning permission. As ***Wells*** itself shows, the implications are not limited to reserved matters alone but may also extent to cases where approvals under negative conditions, effectively conditions precedent to development proceeding, are required.

3. Moreover, there are further considerations which a similar approach might suggest in the case of subsequent stages in multi-stage decision-making in connection with the requirements of the Habitats Directive and Regulations.

4. The circumstances of the judgments are well known, involving significant development projects at Crystal Palace and White City, given they had been thoroughly litigated in the national courts[1]. The ECJ summarised the issue raised by the art. 234 reference from the House of Lords 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?"

5. 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 C508/03 ***Commission v United Kingdom*** [206] ECR I-0000 paragraphs 101 and 102).
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> 47. Secondly, as the Court of Justice explained in ***Wells*** [2004] ECR I-723, 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.
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> 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 103-106. That 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.
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> 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."

6. 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.
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> 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.
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> 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

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[1] See e.g. ***R v. Hammersmith & Fulham LBC ex p. CPRE*** [2000] Env. L.R. 532 and 549 (Court of Appeal) and [2000] Env. L.R. 544 (dealing with the White City development, now substantially under way) and ***Barker*** in the Court of Appeal [2002] Env. L.R. 631. The ***Barker*** challenge was the second set of proceedings, the Court of Appeal having previously rejected a challenge to the original grant of planning permission.

> 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).
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> 104. In that regard, the Court stated in Wells, at paragraph 52, that 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.
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> 105. In the present case, the rules at issue provide that an environmental impact assessment in respect of a project may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage.
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> 106. Those rules are therefore contrary to Articles 2(1) and 4(2) of Directive 85/337, as amended. The United Kingdom has thus failed to fulfil its obligation to transpose those provisions into domestic law." Challenges by the Commission to the decisions not to have EIA on the facts in both the White City[2] 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).

7. Following the ECJ judgments, on 30 June 2006 DCLG issued interim guidance pending consideration by the House of Lords and amendments to the regualtions, **Applications for Outline Planning Permission, Applications for approval of reserved matters and EIA procedure; The Effect of ECJ judgments in the cases of Ex parte Barker and Crystal Palace/White City[3]**. Although a replacement circular to DOE 2/99 has been consulted upon[4], but not yet issued in final form, it did not deal with ***Barker*** although noted that it would have to be considered.

8. When the House of Lords heard further argument on 6 November the Claimant had abandoned her claim for a quashing order (which would have revived the expired outline permission) and she sought 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.

9. In the House of Lords[5], Lord Hope (who gave the only substantive speech) held that the Secretary of State had been right not to oppose a declaration that the 1988 Regulations failed properly to implement the EIA Directive:

> "21. It is clear that the effect of regulation 4(2) of the 1998 Regulations, read together with the definition of "Schedule 2 application" in regulation 2(1), was that any consideration of the need for an EIA was precluded at the reserved matters stage. The Regulations overlooked the fact that the relevant development consent may, as the Court of Justice said in ***Commission v United Kingdom*****,** para 102, be a multi-stage process. That situation is demonstrated by the terms in which outline planning permission was given in this case. In its notification of grant of outline planning permission the council stated that the grant was subject to conditions, which

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[2] Rejected by the High Court and Court of Appeal in ***R v. LB of Hammersmith & Fulham, ex p CPRE*** (2000) 81 P. & C.R. 61 and [2000] Env. L.R. 532.

[3] See www.communities.gov.uk/index.asp?id=1501525.

[4] See also the consultation paper (Dec. 2006, closed 12.3.07) *The application of the Environmental Impact Assessment Directive to 'stalled' reviews of old mineral permissions and periodic reviews of mineral permissions in England*.

[5] See forthcoming article in JPL for May 2007 by Elvin & Maurici which considers the implications of the judgments.

> included the following: "01 (i) Details relating to the siting, design, appearance, access, landscaping shall be submitted to and approved by the local planning authority before any development is commenced." The effect of that condition was that the consent which would have entitled [the developer] to proceed with the project was withheld until the details referred to were approved by the local planning authority. Any grant of planning permission which contains a condition in these terms must be regarded as a multi-stage development consent for the purposes of the Directive".

10. The reasoning plainly applies to the current Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the EIA Regulations").

11. Lord Hope interpreted the ECJ judgments so that it seems clear that the approach in the ***Rochdale*** cases is still generally applicable subject to the need now to consider EIA in some reserved matters cases. This appears consistent with the interim guidance issued by DCLG following the ECJ's judgments[6]. Lord Hope explained when further EIA might be required:

> 22. It does not follow however, where planning consent for a development takes this form, that consideration must be given to the need for an EIA at each stage in the multi-consent process. …. An application for outline planning permission should be accompanied by sufficient information to enable that question to be answered and an EIA, if needed, to be obtained and considered before outline planning permission is granted. The need for an EIA at the reserved matters stage will depend on the extent to which the environmental effects have been identified at the earlier stage.
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> 23. If sufficient information is given at the outset it ought to be possible for the authority to determine whether the EIA which is obtained at that stage will take account of all the potential environmental effects that are likely to follow as consideration of the application proceeds through the multi-stage process. Conditions designed to ensure that the project remains strictly within the scope of that assessment will minimise the risk that those effects will not be identifiable until the stage when approval is sought for reserved matters. In cases of that kind it will normally be possible for the competent authority to treat the EIA at the outline stage as sufficient for the purposes of granting a multi-stage consent for the development: ***R v Rochdale Metropolitan Borough Council, Ex p Milne*** (2001) 81 P & CR 365, para 114, per Sullivan J.
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> 24. As the European Court said in para 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an EIA was overlooked at the outline stage, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier. In that event account will have to be taken of all the aspects of the project that are likely to have significant effects on the environment which have not yet been assessed or which have been identified for the first time as requiring an assessment. The flaw in the 1988 Regulations was that they did not provide for an EIA at the reserved matters stage in any circumstances.
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> 28. In my opinion the answer to the question whether the outline planning permission and the decision to approve the reserved matters in this case constituted, as a whole, a "development consent" for the purposes of the Directive is now plain. It is conveniently set out in the court's judgment in ***Commission v United Kingdom***, paras 101 - 102. L & R were told in condition 01 (i) of the outline planning permission that they were not entitled to proceed with any development until details relating to the reserved matters had been submitted to and approved by the local planning authority. That being so, the decisions to grant outline planning permission and to approve the reserved matters must be considered to constitute, as a whole, a multi-stage development consent for the purposes of the Directive.

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[6] This was provided to the House of Lords, though not commented on. The parties to the hearing did not criticise or challenge the guidance.

> 29. It is no longer possible to challenge the grant of outline planning permission on the ground than an EIA was required at the outline stage, and we lack the information that would be needed for finding as a fact that an EIA was required at the reserved matters stage. These issues have in any event been rendered academic by the lapse of planning permission for the development. But the appellant is entitled to a declaration that the advice that the officials gave to the committee that an EIA could not as a matter of law be required at the stage of approving the reserved matters was wrong. Sullivan J's observation in ***R v Rochdale Metropolitan Borough Council, Ex p Tew*** [1999] 3 PLR 74, 97 that, if significant adverse impacts on the environment are identified at the reserved matters stage and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding must now be regarded as unsound. If it is likely that there will be significant effects on the environment which have not previously been identified, an EIA must be carried out at the reserved matters stage before consent is given for the development."

12. The main effect of the judgments is that:

(1) EIA may be required for subsequent stages in a multi-stage consent process in order to ensure that the objectives of the Directive are properly met. The principle was initially established in ***Wells*** in the context of the imposition of new conditions on an old mining permission under the procedure established by the Planning and Compensation Act 1991;

(2) The general approach, however, 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 still holds good subject to the additional possible requirement for EIA in the context of reserved matters. This therefore does not justify a more relaxed approach to EIA at the outline permission stage and a failure to do so may lead to quashing of the permission if a challenge is brought in good time. A proper approach to EIA following those authorities will limit the possibility for EIA subsequently;

(3) 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 is likely to include those effects which were not identified as well; or

(b) Were present but simply not identified at the outline stage, through erroneous screening or failure to consider at all; or

(c) Were identified and assessed but which now require "a fresh assessment". This is likely to apply where there has been some material change of circumstances since the grant of planning permission.

(4) Where a reserved matters EIA is required, then the ECJ held that what was required was[7]

> "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."

13. What is the scope of the cases where EIA may be needed? Lord Hope in para. 24 of his speech made clear that where the ***Tew*** and ***Milne*** approach is followed the need for EIA at the reserved matters stage will only arise if it is not until that later stage that it becomes

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[7] ***Barker*** judgment para. 48.

apparent that the project is likely to have significant effects on the environment. He considered this was only likely to happen where "*the need for an EIA was overlooked at the outline stage*" or where "*because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier*".;

14. The cases appear to include the following:

    (1) A "fresh assessment" may be warranted, for examples, where new evidence shows the existence of rare habitat, or a protected species, not previously considered, or there has been a new designation, or simply that new survey evidence plainly requires the reappraisal of one of more environmental impacts. It would, of course, be necessary that such effects would have to meet the threshold requirements of being likely and of significance before EIA would be necessary.

    (2) The need for EIA may also arise because the decision to grant outline permission was flawed either because the need for EIA was incorrectly screened out or was overlooked altogether[8]. As the ***Barker*** case itself shows, given that the original challenge to the outline permission failed, it allows a second attempt to review the development consent on the issue of EIA. Indeed, although a failure to carry out EIA properly at the time of the original grant of permission, as in cases such as ***R v. Cornwall CC ex parte Hardy*** [2001] Env. L.R. 26, will still justify an application to quash, judicial review may not be brought in good time and thus rule out an application to quash the permission. Nonetheless, if good ground existed for JR for failure to carry out EIA properly at the outline stage, this would be a strong indicator that there is likely to be a requirement to consider EIA at reserved matters or, possibly, for the approval of details under negative conditions precedent;

Procedure

15. Where EIA is required at reserved matters (or discharge of conditions), the question arises as to how this is to be carried out pending regulations to amend the EIA Regulations. The doctrine of direct effect[9] does not allow planning decision-makers to escape the effects of the new judgments until new regulations are made.

16. Pending amending The DCLG interim guidance advises as follows:

> "(6) DCLG considers that when a LPA receives an application for approval of reserved matters, regardless of whether EIA was carried out at the OPP stage, it should screen the development again to determine whether all of the likely environmental significant effects have been considered in order to satisfy the requirements of the EIA Directive. Where the detail at reserved matters has revealed new or additional likely significant effects on the environment not identified and/or assessed at the OPP stage, the approval of reserved matters without obtaining the necessary environmental information is likely to be in breach of the Directive and thus unlawful. In determining whether EIA is required at the approval of reserved matters stage planning authorities should have regard to the guidance on screening in Circular 02/99 as applying to the approval of reserve matters until such time as the Circular and the EIA Regulations are amended.

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[8] It still occurs – see the ***John Catt*** case considered in the final section of this paper.

[9] See e.g. ***Wells*** and ***R v. Durham County Council ex parte Huddleston*** [2000] 1 W.L.R. 1484.

(7) If it is determined by a LPA that EIA is required at the approval of reserved matters it should request the developer to provide such an EIA which, depending on the circumstances, could take the form of a supplemental EIA or addendum to an existing EIA. Whichever approach is considered most appropriate, the EIA must be "comprehensive". Until the EIA Regulations are amended the basis for such a request will have to be the EIA Directive itself which has direct effect.

(8) If a developer disagrees with a request for an EIA to be carried out at the approval of reserved matters stage then having regard to the obligations on LPAs to give effect to the EIA Directive and the ECJ's decisions it must either:

a. refuse the approval of reserved matters outright; or

b. defer determination of approval until such time as an EIA is provided.

On appeal where an EIA is requested but not provided the Secretary of State and Inspectors are likely to take a similar approach since the Directive is directly effective and binding on the Secretary of State (and Inspectors) to the extent it has not been transposed. In practice this means that the Secretary of State may notify developers either that EIA is or is not required at the reserved matters stage where an appeal comes before her since she must determine whether the conditions set out by the ECJ arise.

(9) Where an EIA is provided the LPA must have regard to it in determining whether to grant the approval of reserved matters."

What if subsequent EIA requires a reappraisal of the decision to grant permission?

17. The judgments do not address the tricky question of what happens if the additional environmental information produced at the reserved matters stage points towards an error in the decision to grant permission in the first place. Logically, applying the purpose of the Directive to produce an assessment at the earliest point in the decision-making process, it should be taken into account before the outline permission was granted and therefore the initial failure might not prevent the outright refusal of reserved matters in a manner which effectively amounts to a refusal of permission, by blocking its implementation. However, such an approach is inconsistent with domestic planning law which holds that a reserved matters decision may not derogate from the principles established by the outline permission[10].

18. The ECJ in accepting the consequences of a multi-stage process and that the subsequent stages were "implementing decisions"[11] might be taken to have accepted that the EIA at the later stage would not impinge on the decision "". This assumption might be strengthened by the fact that the point was drawn to the ECJ's attention, the Court included at least one member familiar with the UK planning system (Judge Schiemann) and the fact that EIA is a process which secures the provision of information to inform decision-making, and does not (unlike the Habitats provisions) directly dictate the outcome.

EIA and conditions precedent

19. In the light of ***Wells***, and Lord Hope's reasoning as to the application of the principles in ***Barker*** by reference to the form of a reserved matters condition which makes their approval a precondition of the commencement of development, it appears that EIA could be required in the circumstances indicated by the ECJ where approvals are required under negative, ***Grampian***-style, conditions (i.e. preconditions to development proceeding).

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[10] See e.g. Latham L.J. in the Court of Appeal in ***Barker*** [2002] Env. L.R. 631 at para. 27.

[11] See ***Commission v. UK***, above, para. 104.

20. As with reserved matters, the matters stipulated by such conditions need to be determined before the development can proceed and are therefore fall within the principle in para. 101 in ***Commission v. UK*** (above) – i.e. "[u]ntil such approval has been granted, the development in question is still not (entirely) authorised".

(2) The interrelationship of environmental assessment, pollution control and planning

21. 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.

22. The judge had found that the Agency, by withholding certain interal reports from the consultation process, had not been in breach of any EU obligation but has 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.

23. The Court of Appeal dismissed the appeal, holding that:

    (1) The proposal to burn shredded tyres as a partial substitute fuel in the manufacture of cement at an existing 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[12]. There was no need for a reference to the ECJ.

    (2) Lyndsay J. had been correct 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 the company 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.

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[12] See ***Commission v. Italy***, below, judgment 23.11.06.

(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.

24. 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, attempting (unsuccessfully) to withdraw his appeal and they then successfully sought the addition of a new appellant, Lilian Pallikaropoulos, which was ironic given that his standing (as someone who had been sought specifically to be able to obtain legal aid) had been raised before Keith J. and which he had rejected at [2004] 3 All E.R. 21. The House of Lords have recently granted leave to appeal and are considering an application for a protective costs order for the new appellant.

25. The relationship between EIA and PPC, also in the context of substitute fuels, was considered by the ECJ in ***Commission v. UK*** Case 199/04. In 1997 and 1998 the Commission received two complaints regarding the authorisation granted to a cement manufacturing plant to burn, in partial substitution for its conventional fuel, a mixture of industrial liquid waste, known as Cemfuel. According to the complainants, the competent national authorities did not address the issue whether the project in question had to be subject to an environmental impact assessment prior to granting such authorisation.

26. In 1999 the Commission also received a complaint concerning another cement manufacturing plant. In that case, although the construction of an additional kiln and the substitution of conventional fuel by Cemfuel, whole tyres and a mixture of waste paper and plastic, known as Profuel, were the subject of an environmental impact assessment, the National Assembly for Wales granted permission for them, before the Environment Agency had determined the application for the authorisation.

27. The Commission took the view, first, that the use by the competent national authorities of the test of 'material change in the use of any buildings or other land' contained in the TCPA 1990 meant that certain projects, including in particular a change in the fuel burnt in a cement manufacturing plant, were not subject to the procedures provided for by Directive 85/337. Second, the United Kingdom had not coordinated its planning and pollution-control rules adequately so as to ensure compliance with the obligations and objectives laid down by that directive. Accordingly, it requested the ECJ to declare that the United Kingdom has failed to take all the measures necessary to ensure the complete and correct implementation of Articles 2 to 6, 8 and 9 of Directive 85/337.

28. The ECJ held the complaints inadmissible:

> "23. In support of its action, the Commission puts forward two complaints: the first puts in issue sections 55 and 57 of the TCPA 1990 pursuant to which planning authorities use the nationally applicable test of 'material change in the use of any buildings or other land' when application is

made for planning permission, having the effect, according to the Commission, of excluding certain projects from the field of application of Directive 85/337, while the second complaint alleges that, when Directive 85/337 was transposed into national law, the United Kingdom Government did not coordinate planning and pollution-control rules adequately so as to ensure compliance with all the obligations laid down in Articles 3 and 8 of that directive.

24. However, in its application the Commission expressly acknowledged that, by the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 and the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, the United Kingdom has adopted the necessary legislation to implement Directive 85/337 into domestic law.

25. Consequently, since the present action for failure to fulfil obligations is founded on contradictory arguments, it does not satisfy the requirements of coherence and precision referred to in paragraph 21 of this judgment."

29. 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 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).

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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."

30. 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 accordingly. This is contrary to the obiter views expressed by Lyndsay J. and the Court of Appeal in ***Edwards*** although the EIA submissions were rejected for other reasons, in particular that the application would have fallen within the project amendment provisions of Annex 2 para. 13 of the EIA Directive.

(3) Implications of Åarhus and the Public Participation Directive for EIA and decision-making

31. 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

32. In part, the PPD amendments fall to be made by Defra in the context of pollution control regimes, but they also fall to DCLG to make amendments to the planning EIA regime.

33. An ODPM consultation paper was issued in March 2005 (consultation ended 6 June 2005) *The draft Town and Country Planning (Environmental Impact Assessment) (England) (Amendment) Regulations 2005: A Consultation Paper*, with new draft regulations. The new regulations were not made until The Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006 S.I. 3295, coming into force on 15 January 2007.

34. However, the planning EIA Regulations were not amended by 25 June 2005 and therefore the UK was in breach of the PPD from that date until 15 January 2007. On the basis of ***R v. Durham County Council ex parte Huddleston*** [2000] 1 W.L.R. 1484 and ***Delena Wells***, above, on general principles of EU law public authorities were required to give direct effect to the provisions of the PPD regardless of the 19 month absence of amending UK

legislation. If that did 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.

35. Authorities should also note that the PPD Directive also contains wider requirements for publicity of EIA applications which may have to be given direct effect also, notwithstanding the absence of UK legislation.

36. The requirements of Article 6 as amended by the PPD/ Åarhus provide:

> "1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To this end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.
>
> 2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:
>
> (a) the request for development consent;
>
> (b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;
>
> (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;
>
> (d) the nature of possible decisions or, where there is one, the draft decision;
>
> (e) an indication of the availability of the information gathered pursuant to Article 5;
>
> (f) an indication of the times and places where and means by which the relevant information will be made available;
>
> (g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.
>
> 3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:
>
> (a) any information gathered pursuant to Article 5;
>
> (b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;
>
> (c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (1), information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.
>
> 4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.
>
> 5. The detailed arrangements for informing the public (for example by bill posting

within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision- making subject to the provisions of this Article."

37. Much of the above could be said to have been achieved by the planning process, although the following should be noted:

(1) The public are to be informed of applications at an early stage, the decisions, availability of information and details of public participation;

(2) Notice may be given electronically, e.g. via local authority websites;

(3) There is a duty to make available within a reasonable time environmental information, the various authority reports and advice;

(4) The public must be given early and effective opportunities to participate in the decision-making process and be entitled to express comments and opinions which are taken into account;

(5) Sufficient time must be allowed to the public to prepare and participate effectively. In some cases this is capable of having some impact on local authority decision-making in complex cases where it might be unreasonable to expect the public to digest complex reports quickly.

38. The importance of consultation can also be seen from the ***Edwards*** decision discussed above, where the Court of Appeal (per Auld LJ) held that the authority had breach its common law duty of fairness:

> "105. In my view, on this issue of consultation there is force in the two points relied upon by Mr Wolfe, principally in relation to the claim that the application did not comply with the PPC Regulations, and taken up by the Judge in this context in para 63 of his judgment (see paras 96 and 97 above). First, AQMAU, in conducting its modelling, did so only in relation to the predicted emissions from the burning of waste tyres and, for the purpose, obtained additional information from Rugby Ltd going to the predicted environmental impact of the proposals, which was not put in the public domain until the Agency issued its Decision Document. Secondly, for the reasons given by the Judge in that paragraph, the highly technical nature of AQMAU's predictions and the possible significance of their conclusions were such that their non-disclosure in the consultation process cannot be dismissed as unimportant. For one thing, as Mr Wolfe emphasised, the Agency, in its Decision Document, distanced itself from AQMAU's predictions. Morever, those predictions were, as the Judge described them, highly specialised, breaking new ground and going beyond merely testing or verifying material in the application and in the public domain. They clearly raised subjects potentially - I stress the word 'potentially' - important to an adequate assessment of the proposal of which interested members of the public were unaware and might well fail to examine for themselves. The fact that no environmental damage has, as yet, resulted from the proposal is, it seems to me, no more of an answer to a finding of a breach of a common law obligation in such a context than it is to a breach of a legislative obligation; cf ***Thornby Farms v Daventry DC*** [2002] EWCA Civ 31, [2003] QB 503, [2002] 3 WLR 875 (CA), per Pill LJ at para 60.
>
> 106. In short, the non-disclosure of the AQMAU Reports left the public in ignorance, until the Agency's grant of the permit, of the only full information as to the extent of the low level emissions of dust and the only information at all on their possible impact on the environment. I agree with the Judge that such information was potentially material to the Agency's decision and to the members of the public who were seeking to influence it, and that failure by the Agency to

disclose it at the time was a breach of its common law duty of fairness to disclose it. It does not follow, however, that they were thereby 'clearly and materially disadvantaged' as Mr Wolfe maintained."

39. However, the Court of Appeal in the exercise of its discretion refused to quash the decision on this basis since the reports were effectively out of date and "water under the bridge", and new reports were about to be made available (see Section (2), above).

(4) The Impact of the Habitats Directive and Regulations on planning

40. The issue of habitats is proving as fruitful a ground for litigation as EIA, highlighting the importance of EU wide designations which, through the Habitats Regulations require major modifications to bringing forward planning projects where European sites may be affected. See ***ADT Auctions v. SSETR*** [2000] J.P.L 1155, in which the High Court put down a clear marker that planning cases under Habitats provisions did fall to be addressed by reference to those specific requirements and not by the normal approach to applications.

41. The Habitats Regulations implement the Wild Birds Directive and the Habitats Directive by providing for the protection of "European sites"[13] - including Special Protection Areas classified under the Birds Directive. Reg. 47(1) states:

> "**47. Application of provisions of this Part**
>
> (1) The requirements of -
>
> (a) regulations 48 and 49 (requirement to consider effect on European sites), and
>
> (b) regulations 50 and 51 (requirement to review certain existing decisions and consents, &c.),
>
> apply, subject to and in accordance with the provisions of regulations 54 to 85, in relation to the matters specified in those provisions."

42. Reg. 48 of the Habitats Regulations provides that:

> "**48. Assessment of implications for European site**
>
> (1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which-
>
> (a) is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of the site,
>
> shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.
>
> …
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site.
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the authority shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given."

43. Reg. 54 provides:

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[13] Defined by reg. 10(1)(c) as including an SPA i.e. "an area classified pursuant to Article 4(1) or (2) of the Wild Birds Directive."

"(1) Regulations 48 and 49 (requirement to consider effect on European site) apply, in England and Wales, in relation to -

(a) granting planning permission on an application under Part III of the Town and Country Planning Act 1990;

(b) granting planning permission, or upholding a decision of the local planning authority to grant planning permission (whether or not subject to the same conditions and limitations as those imposed by the local planning authority), on determining an appeal under section 78 of that Act in respect of such an application;

(c) granting planning permission under -

(i) section 141(2)(a) of that Act (action by Secretary of State in relation to purchase notice),

(ii) section 177(1)(a) of that Act (powers of Secretary of State on appeal against enforcement notice), or

(iii) section 196(5) of that Act as originally enacted (powers of Secretary of State on reference or appeal as to established use certificate);

(d) directing under section 90(1), (2) or (2A) of that Act (development with government authorisation), or under section 5(1) of the Pipe-lines Act 1962, that planning permission shall be deemed to be granted;

(e) making -

(i) an order under section 102 of that Act (order requiring discontinuance of use or removal of buildings or works), including an order made under that section by virtue of section 104 (powers of Secretary of State), which grants planning permission, or

(ii) an order under paragraph 1 of Schedule 9 to that Act (order requiring discontinuance of mineral working), including an order made under that paragraph by virtue of paragraph 11 of that Schedule (default powers of Secretary of State), which grants planning permission, or confirming any such order under section 103 of that Act;

(2) [Scotland only]

(3) Where regulations 48 and 49 apply, the competent authority may, if they consider that any adverse effects of the plan or project on the integrity of a European site would be avoided if the planning permission were subject to conditions or limitations, grant planning permission or, as the case may be, take action which results in planning permission being granted or deemed to be granted subject to those conditions or limitations.

(4) Where regulations 48 and 49 apply, outline planning permission shall not be granted unless the competent authority are satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site could be carried out under the permission, whether before or after obtaining approval of any reserved matters.

In this paragraph "outline planning permission" and "reserved matters" have the same meaning as in section 92 of the Town and Country Planning Act 1990 or section 39 of the Town and Country Planning (Scotland) Act 1972."

44. Where there is a negative appropriate assessment, planning permission must be refused unless the exceptional provisions of regs. 49 and 53 are applied.

45. Overall, the procedure is a clearly structured one and the Regulations are closely modelled on the language of Articles 6(3) and (4) of the Habitats Directive. The most significant guidance on the application of those provisions is found in the ECJ's judgment in ***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 (***"Waddenzee***"). It is worth recapping on the structure which requires, before granting consent for a project:

(1) There must be an assessment by the competent authority (generally the LPA) as to whether a project is likely to have "a significant effect" on a European Site (providing it is not directly connected with or necessary to the Site's management) whether in combination with other plans or projects or alone. This is carried out on a precautionary basis. The trigger for assessment does not presume that the plan or project considered definitely has such effects, but rather follows from the mere possibility that such effects attach to the plan or project, so that an assessment is required if there is a probability or risk that the plan or project will have an effect on the site concerned (reg. 48(1) and Art. 6(3)) [14].

(2) If there is likely to be such a significant effect, the competent authority (in this case the Secretary of State) must carry out an appropriate assessment (reg. 48(1) and Art. 6(3)).

(3) The appropriate assessment must consider the implications for the European Site "in view of" that site's conservation objectives (reg. 48(1) and Art. 6(3)). Where a plan or project has an effect on a site, but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned but, conversely, where a plan or project is likely to undermine the conservation objectives it must be considered as likely to have a significant effect on the site concerned.

(4) There are obligations with regard to information and consultation (reg. 48(3) & (4) and Art. 6(3)).

(5) The competent authority must have regard to the manner in which the project is proposed to be carried out or to any conditions or restrictions subject to which it is proposed that the consent, permission or other authorisation should be given (reg. 48(6)).

(6) In the light of the conclusions of the assessment, the competent authority shall agree to the project only after having ascertained that it will not adversely affect the integrity of the European Site (reg. 48(5) and Art. 6(3)). This imposes a stringent requirement, the ECJ in ***Waddenzee*** (below) holding that the project in question may be only be authorised where the competent national authorities "are convinced that it will not adversely affect the integrity of the site concerned"[15]. The full passage is worth recalling, particularly in the context of the Thames Basin Heaths SPA referred to below –

> "56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.
>
> 57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.
>
> 58. In this respect, it is clear that the authorisation criterion laid down in the second

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[14] ***Waddenzee***, below, paras. 40-54 of the judgment.
[15] ECJ, para. 56.

> sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle … and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.
>
> 59. Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the sites conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects …"

(7) If it cannot be ascertained that the project will not adversely affect the integrity of the European Site, the authority must then consider whether there are any alternative solutions (reg. 49(1) and Art. 6(4)). In the Dibden Bay decision letter, the Secretary of State considered that alternatives should be considered on a broad basis: see paras. 51 and 52 of the decision letter in particular. This is consistent with Commission guidance in **Managing Natura 2000** para. 5.3.1[16]:

> "5.3.1 … They could involve alternative locations (routes in case of linear developments), different scales or designs of development, or alternative processes. The 'zero-option' should be considered too."

Alternative solutions are those which satisfy the need, as identified by the competent authority, but which also better respect the integrity of the site in question. This means that a competent authority must consider the comparative ecological impacts on European sites arising from alternatives in order to identify alternative solutions[17].

(8) If there are no alternative solutions (Art. 6(4) uses the language "in the absence of alternative solutions") and "notwithstanding a negative assessment of the implications for the site" consent or authorisation etc may be granted for the project but only "for imperative reasons of overriding public interest" (IROPI) (reg. 49(1) and Art. 6(4)).

(9) IROPI may be of a social or economic nature (unless the site hosts a priority natural habitat type or a priority species in which case the considerations are significantly restricted) (reg. 49(1) and Art. 6(4)).

(10) Even if the authority is satisfied that there are IROPI etc., notwithstanding a negative assessment of the implications for a European Site, the Secretary of State is under a duty to secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected (reg. 53 and Art. 6(4)).

46. The following recent authorities have obvious implications for the operation and interpretation of regs. 48, 49 and 53. They follow on from the approach set out by the ECJ in ***Waddenzee***.

47. 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

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[16] See also the Commission's *Methodological Guidance* set out in its *Assessment of plans and projects significantly affecting Natura 2000 sites* (November 2001) para. 3.3.2.

[17] See ***Commission v Portugal*** Case-239/04 (judgment 26.10.06) paras. 34-40.

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.

48. 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 selected as 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."

49. ***Commission v Ireland*** Case-183/05 concerned 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.

50. Advocate-General Léger 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.

51. Finally, in relation to the Habitats Directive, the ECJ considered both the duty under art. 6(3) 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. On the question of adverse effect on integrity, the ECJ held (emphases added):

> "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 that site ...
>
> 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.
>
> ...
>
> 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 ..."

52. The ECJ also considered the exceptional authorisation procedure in article 6(4):

> "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."

Thames Basin Heaths SPA

53. A particularly topical issue in relation to the Habitats Directive concerns the Thames Basin Heaths Special Protection Area (SPA) which consists of some 8,400 hectares of lowland heath across Surrey, Hampshire and Berkshire and affects 15 local planning authorities. Currently provision for over 40,000 new homes has been delayed because of Natural England's ("NE") concern that the three protected birds present in the SPA (the Dartford Warbler, the Nightjar and the Woodlark) would come under threat from increased recreational pressure. Under NE's Draft Delivery Plan, all new residential development within 400 metres of the edge of the SPA would be restricted. Development above a specified threshold within a zone between 400m and five kilometres of the SPA would require special mitigation measures, principally the provision of "suitable alternative natural green space". Local authorities are already experiencing difficulties in the context of permitting residential development which may given rise to difficulties with the SPA and the Habitats Regulations.

54. NE's strategy has been criticised by an inspector acting as assessor for the South East Local Plan examination in public. According to his recent 87-page report NE's plan was "unsound in its present form, due to its misapplication of the requirements of European and UK legislation, its weak evidential base, its disproportionate blanket inclusion of all housing within five kilometres of the edge of the SPA, its excessive requirements for SANGS and its failure to give sufficient weight to other avoidance and mitigation measures, particularly access management." He agreed that a strategic approach is needed to mitigate the potential impacts of large scale housing on the SPA, but he concluded that NE's Draft Delivery Plan, designed to safeguard nesting birds in the designated area was "unsound" and the measures proposed "excessive". The inspector recommended a different zonal approach with less restrictive thresholds, a wider range of mitigation measures and a co-ordinated planning regime.

55. It is not clear that the assessor has correctly applied the very strict legal thresholds imposed by the ECJ and recognised by PINS own guidance[18]. At 4.1.1-4.1.11 the Assessor's consideration of the legal requirements does not recognise the high threshold applicable when the appropriate assessment is reached i.e. that competent authorities may only authorise a project where they "are convinced that it will not adversely affect the integrity of the site concerned"[19]. It may also prove difficult to reconcile his approach and conclusions with the precautionary approach required to be taken to the whole exercise, although that approach is acknowledged in the report. A combination of an assumption of significant effects if they cannot be ruled out and the need to be convinced of no adverse effects at the appropriate assessment stage do lead to a high threshold than appears to have been adopted. The conclusions (on pressure on the SPA caused by new housing) at 4.4.45 and 4.4.46 give a flavour of his approach:

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[18] www.planning-inspectorate.gov.uk/pins/appeals/thames_decisions/thames_basin_heaths_protection.htm (published 9.3.06): see Annex A, para. (d). See also PINS Advice Note 2, following the assessor's report.
[19] ***Waddenzee*** ECJ, para. 56.

> "4.4.45 Although the bird populations of all three species have increased over the last 12 years, they are still subject to considerable fluctuations. I find therefore that this increase is not sufficient, in itself, to conclude that additional housing would be unlikely to have a significant ***effect*** on the SPA. Although the overall increase in visits to the SPA is likely to be quite small I conclude that they could have a detrimental impact in areas that already suffer from high levels of visitor pressure or are close to this level."

56. However, despite the high threshold applicable he then concluded:

> "4.4.46 Accordingly I consider that large developments, and smaller developments in the immediate vicinity of such areas, should make appropriate provision for avoidance or mitigation. However, I find that there is sufficient objective evidence to conclude that developments of 10 dwellings or under would be unlikely to have a significant impact if they are located a sufficient distance from sensitive parts of the SPA. None of the other factors that were raised alters my view."

57. He criticised NE's approach to the precautionary principle at 4.1.29 to 4.1.39, by reference to the Commission's structured approach in its February 2000 *Communication from the Commission on the Precautionary Principle*, without analysing in that context the clear and broader statements of principle by the ECJ in ***Waddenzee*** (see above) and subsequent decisions or **Managing Natura 2000**[20] which states at 4.4.2:

> "The safeguards set out in Article 6(3) and (4) are triggered not by a **certainty** but by a **likelihood** of significant effects. Thus, in line with the precautionary principle, it is unacceptable to fail to undertake an assessment on the basis that significant effects are not certain."

58. It is possible that his approach was flawed from an early point (although later eschewing any attempt at definition):

> "4.1.8 In reaching this conclusion I have had regard to the representations that were made at the meetings as to what constituted a "significant effect". In particular, I have noted the interesting translation of the similar requirement in German law[21], which was given on the first day, that seems to imply that it sets a much higher threshold than UK law before an appropriate assessment is required."

59. This is difficult to reconcile with the ECJ's approach, especially in paras. 55-59 of the ECJ's judgment, or with **Managing Natura 2000** at 4.4.1:

> "The notion of what is a 'significant' effect cannot be treated in an arbitrary way. In the first place, the directive uses the term in an objective context (i.e. it does not qualify it with discretionary formulae). In the second place, a consistency of approach to what is 'significant' is necessary to ensure that Natura 2000 functions as a coherent network."

60. PINS Advice Note 2 makes it clear that the report should not be relied upon for the moment:

> "The report is likely to be cited as a material consideration in the conduct of Section 78 and Section 77 casework and to that extent parties may suggest that it should carry some weight. However, given its purpose in informing the SEP Panel, who will in turn report to the Secretary of State (SoS), decision-makers are currently not in a position to rely upon the Assessor's conclusions and recommendations."

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[20] Which is, after all, specific to this Directive and was approved by the ECJ.

[21] "*considerable harm or damage*". However, he does not consider other language versions e.g. the French version "*susceptible d'affecter ce site de manière significative*" or the Italian "*che possa avere incidenze significative su tale sito*" which appear less supportive of his view.

Does the Barker approach have any application to Habitats issues?

61. It appears that an issue is surfacing concerning the application of the general approach in ***Barker*** and ***Commission v. UK*** concerning the possible requirement to consider screening and appropriate assessment under reg. 48 of the Habitats Regulations/Art. 6(3) of the Habitats Directive at subsequent stages in a multi-stage authorisation process e.g. reserved matters of a development project which has implications for a European Site as defined in reg. 10 of the Habitats Regulations.

62. While it is undoubtedly the case that ***Barker*** and ***Commission v. UK*** cases were confined to a consideration of the specific question under the EIA Directive of whether a reserved matters approval was a "development consent", what should be remembered is the importance which the ECJ attaches to giving full effect to the purpose of directives and of its willingness to take a broad, protective stance in environmental cases.

63. Policy is strong in the context of the Habitats and Wild Birds Directives. Note the following from the Preamble to the Habitats Directive:

> "Whereas, the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities;
>
> Whereas, in the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; whereas given that the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them;
>
> …
>
> Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable;
>
> …
>
> Whereas sites eligible for designation as special areas of conservation are proposed by the Member States but whereas a procedure must nevertheless be laid down to allow the designation in exceptional cases of a site which has not been proposed by a Member State but which the Community considers essential for either the maintenance or the survival of a priority natural habitat type or a priority species;
>
> Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future…"

64. As the Commission states in **Managing Natura 2000**, Section. 1.1:

> "Article 6 is a key part of the chapter of Directive 92/43/EEC entitled 'Conservation of natural habitats and habitats of species'. It sets out the framework for site conservation and protection, and includes proactive, preventive and procedural requirements. It is relevant to special protection areas under Directive 79/409/EEC as well as to sites based on Directive 92/43/EEC. The framework is a key means of achieving the principle of environmental integration and ultimately sustainable development."

65. Further, as ***Waddenzee*** and ***Commission v. Portugal*** both show[22], and the line of cases on designation[23], the approach adopted by the ECJ to habitats is strongly protective. In fact, when examined, the language of Art. 6(3) of the Habitats Directive is even wider than that of the EIA Directive. In place of the "development consent" concept, Art. 6(3) states

> "(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

66. The phrase "shall agree to the plan or project" is very wide, and to be read in the context that projects should only proceed if properly screened and, where necessary, subject to appropriate assessment. It is difficult to see how or why the ECJ would take in this context a significantly different approach to multiple stages of the planning authorisation process than it took under the EIA Directive.

67. Moreover, it could be said that the requirements of Art. 6(3) and (4) are stronger than the EIA provisions since they do not merely set out the appropriate procedure for the gathering of information and making an assessment, but dictate the outcome of the application. While both procedures prohibit the grant of consent until the relevant procedures are complied with, Habitats goes an important step further by requiring the refusal of authorisation in certain circumstances i.e. if there is an adverse effect on integrity and the exceptional requirements of reg. 49/53 and Art. 6(4) do not apply.

68. If they key consideration is, as it was in EIA, that in an authorisation process involving several stages more than one authorisation is required before the project can proceed, then this is a characteristic of the domestic system which also falls to be considered in the context of the Habitats provisions.

69. The opening sentence of reg. 48(1) is also potentially wide in its scope –

> "before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project…"

70. The language of reg. 54(1) seems restrictive of the application of the procedure to applications which lead to planning permission of one form or another[24]. It is possible that the wording would be approached broadly taking the approach to sympathetic interpretation required by ***Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A.*** Case 106/89 [1990] E.C.R. I-4135, ***Duke v. G.E.C. Reliance Systems Ltd.*** [1988] A.C. 618, at 639-640, and ***Webb v. Emo Air Cargo Ltd.*** [1993] 1 W.L.R. at 59. However, the use of

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[22] See, e.g., the passages quoted above.

[23] See, e.g., ***Commission v. Germany*** C-57/89[1991] E.C.R. I-883 ("Leybucht Dykes"), ***Commission v. Spain*** C-355/90[1993] E.C.R. I-4221 ("Santoña Marshes") and ***Commission v. France*** C-374/98[2000] E.C.R. I-10799 ("Basses Corbières").

[24] ODPM Circular 06/05 paras. 9 and 11, and Figure 1, deal with the Habitats Regulations procedure only in terms of "planning permission":

"planning permission" in reg. 54(1) may prove too much even for a flexible approach to interpretation.

71. In that event, if Art. 6(3) and (4) do apply to stages subsequent to the grant of permission, then the Habitats Regulations would be in a similar position to the EIA Regulations in making no provision for reserved matters/subsequent stages in the authorisation process. In that event, direct effect would have to be given to the provisions and the Habitats Regulations would require amendment. The ECJ has already held that Art. 6(3) meets the requirements for direct effect, in ***Waddenzee*** at paras. 66-70.

72. If the Habitats provisions required an approach similar to that taken by the ECJ in ***Barker***, then the need to follow the Art. 6(3) and (4) procedure would only arise where significant effects are identified at the subsequent stage (whether reserved matters, approval of negative conditions or s. 73 application) which were –

    (1) not identifiable at the outline or original planning permission stage. This is likely to include those effects which were not identified as well, such as cases decided before the implications of designation may have been understood; or

    (2) previously identified but which now require "a fresh assessment". As noted above, this could mean where there has been some material change of circumstances since the grant of planning permission. This could include the change of policy.

73. The effect of the Habitats provisions requiring screening and appropriate assessment is that if the application cannot be screened out, and the authority is not convinced that there will not be an adverse effect on the integrity of the site in question, then it must refuse the approve the reserved matters. The effect of this would be that, by a decision on a subsidiary element of a consent process, the project can be rejected. Although this runs contrary to the normal principle of UK planning law, considered in Section (1) above, that a reserved matters decision cannot go back on the principle of outline planning permission, it seems a clear consequence of the specific legal duty in art. 6(3) and reg. 48(5), if applicable.

(5) Recent cases

Enforcement and EIA

74. In C-98/04 ***Commission v UK***, also delivered on 4 May 2006, the ECJ rejected as inadmissible infraction proceedings under Article 226 EC. In that infraction, the Commission alleged that the lawful development certificate regime being applied in UK under ss. 191 and 192 of the 1990 Act, whereby an application could be made for a certificate concerning a project within the meaning of the EIA Directive but without an EIA, meant that the UK had failed to ensure the correct application of its obligations under Articles 2(1) and 4 of that Directive.

75. The ECJ held:

> "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."

76. Advocate-General Ruiz-Jarabo Colomer's opinion had been that UK law was in breach of the EIA Directive for reasons which may be relied on at a later date since they suggest that the UK planning enforcement regime (as opposed to the LDC procedure) may not be compliant with the EIA Directive. He identified 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. <u>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</u>."

77. Of course, this criticism is more properly applicable to the fact that it is the non-enforcement and the application of the immunity rules in ss. 171B and 191(2) of the 1990 Act which effectively confers "development consent" in recognising lawful development, not the mechanism of seeking and granted LDCs (as the ECJ recognised).

78. However, it raises the question of whether action must be taken to remedy the omission so far as the steps of non-enforcement leading to the conferral of status of lawful development. This is less of an issue where a local authority makes a decision not to enforce, since that could be the subject of EIA, although there are logistical and conceptual problems if the decision is simply one not to take action for the present and a substantial period remains to run of the period for enforcement (given that an enforcement notice might be served on the last day of the period). Geater difficulties arise where no action is taken because the authority simply lacks knowledge of the breach.

National park designation

79. 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…"

80. 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…"

81. 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).

….

59. 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". ...

60. … 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.

61. 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"…

62. 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…"

82. 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."

83. Before the hearing in the Court of Appeal, ss. 59 and 99 of the Natural Environment and Rural Communities Act 2006 ("**the 2006 Act**") were enacted to ensure a reversal of the substance of the decision of Sullivan J. As amended by the 2006 act, s. 5 of the 1949 act 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 <u>Natural England</u> 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.

<u>(2A) Natural England may—</u>

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

(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."

84. 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). 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".

85. 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)."

86. Although s. 99 has effect in relation to "any enactment (whenever passed)", and hence 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.

87. The Court of Appeal [2007] EWCA Civ 53 upheld Sullivan J's decision to quash the New Forest National Park (Designation) Order in part. Chadwick LJ, giving the judgment of the Court considered the 1949 Act as it was in force at the time of the Designation Order and he also considered the new provisions inserted, in response to Sullivan J's judgment, into the 1949 Act by the 2006 Act. He concluded:

> "[55] …I would hold that the judge was correct to hold that the estate owner's challenge to the order was entitled to succeed on the basis that, on the material before the Secretary of State at the relevant time, the criterion in s 5(2)(b) of the 1949 Act - opportunities for open air recreation - had not been met.
>
> [56] That conclusion makes it necessary to consider whether - on the basis that the law has been changed by the 2006 Act - this court should, nevertheless, vary the judge's order so as to delete the direction that the order dated 1 March 2005 be quashed so far as it concerns the area of land in contention in these proceedings. As I have said, the Secretary of State invites the court to take that course for the reasons set out in his supplementary skeleton argument dated 27 October 2006.
>
> [57] If I were persuaded that, in applying s 5(2)(b) of the 1949 Act to the facts found by the inspector, the Secretary of State, taking into account the matters which s 5(2A)(b) now requires to be taken into account ('the extent to which it is possible to promote opportunities for the understanding and enjoyment of [the area's] special qualities by the public') would, necessarily, reach the conclusion that the statutory criterion was met, I would see much force in the submission that this court should recognise that a quashing order can now serve no sensible purpose. But I am not so persuaded. As I have sought to point out, the lacuna in the inspector's report, in the present context, is that he failed to explain why he took the view that the opportunities for open air recreation, in relation to Hinton Park, went beyond 'vague or unrealistic aspirations'. To my mind, it is far from self evident that that lacuna would no longer

> exist if the s 5(2)(b) test required consideration of 'the extent to which it is possible to promote opportunities . . .'. In that context, the question, as it seems to me, would be whether the inspector had explained how it is possible to promote opportunities for the understanding and enjoyment of the area's special qualities by the public in the absence of public access. Without seeking to suggest an answer to that question - which would be outside the proper scope of this appeal - I am satisfied that the estate owners are entitled to require that it be addressed before the Designation Order is varied by the Secretary of State.
>
> [58] Given that I would dismiss the appeal - and uphold the judge's order - on the ground that that the judge was correct to hold that the estate owners' challenge was entitled to succeed on the basis that the criterion in s 5(2)(b) of the 1949 Act had not been met, I do not think that it would serve any useful purpose to extend this judgment by addressing the question whether the judge was also correct to hold that the challenge was entitled to succeed in relation to the natural beauty criterion in s 5(2)(a). On any future consideration of the question whether the Designation Order should be varied, the Secretary of State will be required to take into account the area's wildlife and cultural heritage -s 5(2A)(a) of the 1949 Act - and will have regard to s 99 of the 2006 Act. Without intending to prejudge any issues which may arise in that context, it seems to me that there is force in the submissions advanced in paras 21 and 22, and 26, of the Secretary of State's supplementary skeleton argument dated 27 October 2006."

EIA screening judgment

88. In ***R (o.a.o John Catt) v. Brighton and Hove CC and Brighton and Hove Albion Football Club*** [2006] EWHC 1337, temporary permission was given for the use of Withdean Stadium as a football stadium and for the provision of a further 960 seats. Neither of those permissions received an EIA. A further permission was granted to add 1966 seats and the Council assumed that no EIA was required. This assumption was wrong and the Council consented to judgment when challenged. The Council then, in the light of a screening opinion, proceeded to grant permission without conducting an EIA. The Claimant contended that the effects of the project were defined too narrowly and that the author of the screening opinion should have considered the effect of the use as a football stadium not merely the effect of the proposals for additional seating and works. The second issue was whether the mitigation measures proposed, in particular traffic management, could legitimately be taken into account in deciding whether there were likely to be significant effects.

89. Collins J dismissed the claim. He considered that the Council should ask itself whether the environmental effects of the whole project, including that which had already been approved, were likely to be significant. On the facts, he held that it had done so[25]. In relation to the second issue, Collins J held that the mitigation measures could be considered:

> "[22] The opinion takes the mitigation measures particularly in relation to traffic congestion, into account. Mr Upton submits that this was improper. Effects on the environment must be considered independently of whether those effects can be mitigated or even avoided, at least unless the measures are plainly established and uncontroversial. These were not; indeed, the traffic measures which had been in place had not been entirely successful and the proposals were accompanied by a Traffic Control measure which, as it has turned out, has had to be abandoned following a challenge by a body adversely affected by it. Mr Upton relies on a decision of the Court of Appeal, *Bellway Urban Renewal Southern v Gillespie* [2003] 2 PTCR 236. While the three members of the court did not speak in precisely the same terms, it is plain that it was accepted that the decision maker (in that case, the Secretary of State) was not required to ignore proposals for renewal measures. If they are included as part of the development proposal itself, it would be strange if they had to be ignored. Whether they would be likely to achieve the result suggested would be a matter to be considered and any doubt on that should be resolved against the Applicant. Here it was accepted and anticipated that similar measures to those which had been required for the earlier permissions would apply. The Defendants had had experience of how they worked. That experience could properly be relied

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[25] Of course, such judgments are essentially a matter for the decision maker: see ***Milne***, above.

> on in assessing whether the environmental effect was significant enough to require an environmental statement. While the Claimant takes issue with their effectiveness, Mr Walke was in my judgment entitled to have regard to them in deciding whether this was EIA development.
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> [23] It follows that I am not persuaded that there was an error in the conclusion that this was not EIA development. I understand and entirely sympathise with the Claimant. He has to live with a stadium which he reasonably believed would have reverted to its pre-1998 level of use by 2001. As the IP became more successful the adverse effects on his amenities increased. But, as I indicated, I can only act if there has been an error of law and I see none in the screening opinion."

Delay in challenges

90. Challenges to planning decisions based on environmental grounds are frequently brought by concerned residents or local groups who take time to consider their position with regard to challenging the decision and who may face problems in raising funds to obtain initial advice and subsequently to mount a challenge. Delay is therefore an important matter to consider.

91. In ***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[26]. His reasoning was approved in full last year by the Court of Appeal ([2006] Env LR 28, [19]-[20]) and so it merits restating.

92. 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:

    (1) Is there a reasonable objective excuse for applying late?

    (2) 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?

    (3) In any event, does the public interest require that the application should be permitted to proceed?

93. 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 High Court to exercise its powers to extend time so as to secure

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[26] See also Davis J.'s judgment in ***R. (Candlish) v. Hastings B.C.*** [2005] EWHC 1539 (Admin) where in considering whether a challenge brought two days before the expiry of the three month limit was sufficiently prompt, took account of the fact that developers often had commercial reasons to press on with development as soon as permission had been obtained. Davis J. held that it was of "the greatest importance" in planning that challenges should be notified at the earliest practicable moment. It was not necessarily appropriate to defer the intimation or issue of a claim to the end of the three-month period. On the facts, however, the developer had not established sufficient prejudice to warrant the refusal of permission.

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.

94. 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.

95. 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.

96. 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.

97. In the Court of Appeal, 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.

David Elvin Q.C.

Landmark Chambers

21 March 2006 (revised 28 March 2007)