Inclusivity and integration: some recent legal developments

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1. This paper considers some important recent developments in a number of areas, which I have grouped under the above rubric, since they all involve to a large extent the integration with the UK development system of other subject matter, whether European environmental legislation, human rights, or Crown development. The legal developments are grouped under the following headings:

- Environmental impact assessment of projects ("EIA").
- Environmental assessment of plans and programmes (otherwise, strategic environmental assessment) ("SEA").
- Application of the Conservation (Natural Habitats, etc.) Regulations 1994, SI 1994 No 2716 ("the Habitats Regulations") and Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora ("the Habitats Directive").
- The treatment of human rights issues in planning cases following *Lough v First Secretary of State* [2004] EWCA Civ 905.
- Development of Crown Land both before and after the Planning and Compulsory Purchase Act 2004 ("the 2004 Act").

European law and planning

2. The effects of European environmental legislation remain a source of debate and litigation, despite it now being over 16 years since the Directive 85/337 ("the EIA Directive"). It may be that the initial signs were not good since that directive was originally transposed some days after the final date set by the EIA Directive. Whatever the case, EIA has been and remains a constant source of concern and litigation.

3. The importance of European environmental legislation is that it offers and provides something which national legislation can not, namely a pan-European approach to the protection of the environment not only in the regulation of emissions and prevention of pollution but through EIA, SEA, protection of nature conservation interests and waste regulation. Its direct impact on the planning system is obvious from cases such as *Berkeley v Secretary of State* [2000] 3 W.L.R. 420, *R. v Rochdale BC Ex p. Tew* [2000] Env. L.R. 1, *R. v Rochdale BC Ex p. Milne* [2001] Env. L.R. 22 and *R. (Delena Wells) v Secretary of State* [2004] Env. L.R. 528. The efficacy of the protection of natural habitats and the European network of habitats, Natura 2000, was recently seen in the rejection by Government of proposals for a new container terminal at Dibden Bay in Southampton. The failure by the developer to meet the requirements of the Conservation (Natural Habitats etc.) Regulations 1994 was the key reason for the rejection of the project.

4. Whilst EU environmental law may cause a series of problems in transposition, integration and enforcement, it nonetheless appears to be an effective and rational means to consider and thus control

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impacts on the environment the effects of which cannot be confined within narrow national boundaries and which often call for greater integration and enforcement than is available through the means of international treaties.

Environmental Impact Assessment

5. EIA has been transformed in the last 10 years from what was regarded almost as an unnecessary adjunct to the already well-regulated planning process,[2] to a procedural requirement that is important in its own right. It is no longer the case that failure to comply will be regarded as unlikely to make a difference to the outcome as a result of the evidence and information already before the decision-maker. EIA is an integral feature of the planning and related systems.[3] This not only fulfils the requirements of a systematic assembly of data on environmental impacts, but also the important function of informing members of the public of such matters in advance of the decision. Members of the public are thus not only provided with properly assembled data but also given an important opportunity to submit their own evidence as part of the assessment process.[4] This feature of EIA rules out widespread reliance on the argument that failure to carry out EIA would not have made a difference to the substantive decision, except in those cases where an EIA has been carried out in all but name.[5] However, there have been recent signs that *Berkeley* and discretion should be approached more flexibly: see e.g. *per* Carnwath L.J. in *Bown v Secretary of State* [2004] Env. L.R. 509 at para. 47 and in *R (Jones) v Mansfield* [2003] EWCA Civ. 1408, paras 57–59. In *Jones*, Carnwath L.J. noted at para. 58 that "the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle-race."

Direct effect of the EIA Directive

6. The concept of direct effect in the case of directives is that, although the directive is a legislative measure which requires to be transposed by national measures into a form which operates within the legal systems of the Member States, it may take effect and be relied upon by individuals against the emanations of the state where it has not been properly transposed (which may include either complete failure to transpose by the date set by the directive or a failure to transpose correctly). Whether a provision is directly effective depends on whether it fulfils certain requirements, principally whether its provisions are unconditional and sufficiently precise[6]. However, that is not enough and it is also necessary to look at the context in which the Directive is invoked and in particular the characteristics of the parties involved. The following principles can be derived from the ECJ's case law:

(1) An individual can rely on a non-implemented (or inadequately implemented) Directive against emanations of the state (which include local authorities) intending to apply their purely national law: see *Ratti*[7] ("vertical direct effect").

(2) The direct effect of a directive can only be relied upon by an individual against an emanation of the state and it cannot be relied on by the state against an individual or other non-state entity so as to impose obligations. See *Marshall* and *Johnson v RUC*[8] (no "inverse direct

[2] Early decisions such as *R. v Poole BC Ex p. Beebee* [1991] 2 P.L.R. 27 and *Wychavon DC v Secretary of State* (1993) 2 Env. L.R. 239 can no longer be regarded as good law so far as their approach to EIA and discretion is concerned. See also Elvin & Robinson in [2000] J.P.L. 876.

[3] For example, highways order procedures: see the Highways (Assessment of Environmental Effects) Regulations 1999 S.I. 369. Its relevance to pollution control is discussed below.

[4] *Berkeley v Secretary of State* [2001] 2 A.C. 603 and *R. v Durham County Council Ex p. Huddleston* [2000] 1 W.L.R. 1484.

[5] *Commission v Germany* (Case C–431/92) [1995] ECR I–2189 and *Berkeley v Secretary of State*, above, at pp. 616–618.

[6] See, e.g., *Becker v Finanzamt Münster-Innenstadt* [1982] E.C.R. 53 and *Marshall v Southampton Area Health Authority* [1986] 1 Q.B. 401.

[7] [1979] E.C.R 1629.

[8] [1986] 3 C.M.L.R. 240 at pp. 269–70.

effect"). This limitation also applies to the *Marleasing* principle[9] as the ECJ held in *Luciano Arcaro*[10];

(3) Individuals cannot invoke the direct effect of Directives against other individuals (no "horizontal direct effect").[11] However, the fact that action against an emanation of the state may also have a significant effect on individual interests does not fall within this prohibition (below).

7. Although the ECJ had reaffirmed the above limits of direct effect on many occasions, in a number of cases it held that direct effect should be given in an action against an emanation of the state, even though that would have the incidental effect of depriving an individual of a valuable right or privilege: see *e.g. Fratelli Costanzo SpA v Comune di Milano*,[12] *R. v Medicines Control Agency, Ex p. Smith and Nephew*[13] and *Pafitis v Trapeza Kentrikis Ellados AE*[14] (sometimes referred to as "triangular" direct effect).[15] This line of authority was a critical factor in *R. v Durham CC Ex p. Huddleston*[16] in which the Court of Appeal gave direct effect to the EIA Directive so as to disapply the provision in Sch.2 to the Planning and Compensation Act 1991 deeming the approval of conditions on old mining permissions (a form of development consent) at least until there had been an EIA. The Secretary of State's submission that what was sought was either impermissible inverse direct effect or horizontal direct effect was rejected.

8. The ECJ in *R. (Delena Wells) v Secretary of State* [2004] Env. L.R. 528 confirmed in unequivocal terms that cases where such indirect effects occur to the prejudice of individuals, including the loss of substantial property rights, does not prevent the giving of direct effect to directives:

> "56. ... the principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights (see Case 152/84 *Marshall* [1986] ECR 723, para.48). Consequently, an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party (see, to this effect, Case C–221/88 *Busseni* [1990] ECR I–495, paras 23 to 26, and Case C–97/96 *Daihatsu Deutschland* [1997] ECR I–6843, parags 24 and 26).
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> 57. On the other hand, mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned (see to this effect, in particular, Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paras 28 to 33, *WWF and Others*, cited above, paras 69 and 71, Case C–194/94 *CIA Security International* [1996] ECR I–2201, paras 40 to 55, Case C–201/94 *Smith & Nephew and Primecrown* [1996] ECR I–5819, paras 33 to 39, and Case C–443/98 *Unilever* [2000] ECR I–7535, paras 45 to 52).
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> 58. In the main proceedings, the obligation on the Member State concerned to ensure that the

[9] *Marleasing v La Comercial Internacional de Alimentación* [1990] E.C.R. I–4153: "In applying national law, whether the provisions in question were adopted before or after the Directive, the National Court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the results pursued by the latter and thereby comply with the third paragraph of article 189 of the Treaty". See also, e.g., *Duke v Reliance* [1988] A.C. 618, 639–640 and *Webb v Emo* [1993] 1 W.L.R. 49, 59–60.

[10] [1996] E.C.R. I–4705.

[11] See Marshall pp.421–2 and Advocate General Sir Gordon Slynn pp. 411–413, *Faccini Dori v Recreb* [1994] E.C.R. I–3325 and Lord Hoffman in *R. v Secretary of State, Ex p. Seymour-Smith* [1997] 1 W.L.R. 473 at 478.

[12] [1989] E.C.R. 1839.

[13] [1996] E.C.R. 5819.

[14] [1996] E.C.R. I–1347.

[15] The difficulties of reconciling these cases with traditional doctrine are highlighted by Professors Craig & De Burca in European Law, Text Cases & Materials (3rd ed.) pp. 380–387. See Sedley L.J. at para.11 of his judgment (considering the 2nd edition). Those difficulties were not regarded as overriding either by the Court of Appeal, or the ECJ in Wells.

[16] [2000] 1 W.L.R. 1484.

> competent authorities carry out an assessment of the environmental effects of the working of the quarry is not directly linked to the performance of any obligation which would fall, pursuant to Directive 85/337, on the quarry owners. The fact that mining operations must be halted to await the results of the assessment is admittedly the consequence of the belated performance of that State's obligations. Such a consequence cannot ... be described as inverse direct effect of the provisions of that directive in relation to the quarry owners."

9. This approach is likely to blur the distinctions between types of direct effect and limit the limitations on subsequent inverse direct effect and horizontal direct effect. Providing there is a public authority decision (or failure to take action) for a claimant to target, the incidental consequences appear now to be irrelevant to a directive having direct effect. The motive for such a challenge (*e.g.* to deprive an individual of the benefit of a planning decision) is irrelevant.

Multi-stage planning decision making

10. An important question is whether the Directive/Regulations allow consent to be granted in stages for the same physical part of a project. An example of this question in English planning law is whether outline permission can be granted for projects requiring EIA and at what level of specificity the application must be submitted in order to enable proper compliance with the Regulations. Schedule 4 to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the 1999 Regulations")[17] sets out the requirements for an ES. In *R. v Rochdale BC Ex p. Tew*, Sullivan J. held that the EIA of an outline planning permission, albeit accompanied by an illustrative masterplan, did not comply with the requirements of the 1988 Regulations since:

> "the description of the proposed development must be sufficient to enable the main effects which that development is likely to have on the environment to be identified and assessed, to enable the likely significant effects on such matters as flora, fauna, water, air and the landscape to be described, and to enable mitigation measures to be described where significant adverse effects are identified. Whilst, a bare outline application is permissible on a purposive approach to Regulation 3 of the Applications Regulations; an Environmental Statement based upon such an application could not begin to comply with the requirements of Sch.3 to the Assessment Regulations, whether one adopts a literal or a purposive approach to para.2(a) of Schedule 3."

11. The *Tew* approach plainly required a change in the approach to outline schemes.[18] The solution adopted was to modify the previous approach to outline applications schemes, which effectively rules out wholly outline schemes which are subject to EIA, and put forward enforceable scheme parameters, e.g. in the form of a masterplan which is not illustrative (as in *Tew*), but which forms part of the permission granted and provides a sufficiently clearly defined basis for carrying out an EIA.

12. This prevents a situation where there arises a significant degree of uncertainty in the terms of the project or important issues are left resolved, given that the likely significant environmental effects of a project should be assessed *before* the grant of permission. Paragraph 2(d) of Schedule 4 requires that "where significant adverse effects are identified" there should be a "description of the measures

[17] Formerly Schedule 3 of the predecessor 1988 Regulations. After Brown and Huddleston the 1999 Regulations were amended to include a procedure for the review of old minerals permissions by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2000 SI 2867.

[18] It has been consistently applied since then, though now subject to consideration by the ECJ and House of Lords in *Barker*. See *R. v Rochdale BC Ex p. Milne* [2001] Env. L.R. 22, *R. v Cornwall CC Ex p. Hardy* [2001] Env. L.R. 26, *R. v Bromley LBC Ex p. Barker* [2002] Env. L.R. 631 and *Smith v Secretary of State* [2003] Env. L.R. 693.

envisaged in order to avoid, reduce or remedy those effects"—it is difficult to comply with this important requirement if the proposals are not sufficiently well defined. However, in *Tew* Sullivan J. did not consider that such a rigid approach should be adopted to that question:

> "I would not wish to go as far . . . and say that it is not possible to make any application for outline planning permission for a development that falls within Sch.1 or Sch.2. An outline application with only one or two matters reserved for later approval might enable the Environmental Statement to provide a sufficient description of the development proposed to be carried out. I would not dissent from the approach suggested in para.42 of Circular 15/88, subject to the proviso that the description in the outline application of the development proposed to be carried out must be such as to enable the Environmental Statement to comply with the requirements of paragraph 2(a) of Schedule 3."

13. Returning to the issue in *Milne*, Sullivan J. combined principle with pragmatism:

> "Since the "description of the project" required by Art.5(2) is a means to that end, in that it provides the starting point for the assessment process, there is no reason to believe that the directive was seeking to be unduly prescriptive as to what would amount to an appropriate description of a particular project. The requirement in Art.5(2). . . to provide "information on the site, design and size of the project" is, and is intended to be, sufficiently flexible to accommodate the particular characteristics of the different types of project listed in annexes I and II (schs 1 and 2 to the assessment regulations). It may be possible to provide more or less information on site, design and size, depending on the nature of the project to be assessed.
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> If a particular kind of project, such as an industrial estate development project (or perhaps an urban development project) is, by its very nature, not fixed at the outset, but is expected to evolve over a number of years depending on market demand, there is no reason why "a description of the project" for the purposes of the directive should not recognise that reality. *What is important is that the environmental assessment process should then take full account at the outset of the implications for the environment of this need for an element of for flexibility*. The assessment process may well be easier in the case of projects that are "fixed" in every detail from the outset, but the difficulty of assessing projects that do require a degree of flexibility is not a reason for frustrating their implementation. It is for the authority responsible for granting the development consent . . . to decide whether the difficulties and uncertainties are such that the proposed degree of flexibility is not acceptable in terms of its potential effect on the environment."

14. Sullivan J. also considered whether the approval of reserved matters necessarily amounted to "modifications" of the project, thus requiring their own EIAs in future, but concluded that they did not:

> "Provided the outline application has acknowledged the need for details of a project to evolve over a number of years, within clearly defined parameters, provided the environmental assessment has taken account of the need for evolution, within those parameters, and reflected the likely significant effects of such a flexible project in the environmental statement, and provided the local planning authority in granting outline planning permission imposes conditions to ensure that the process of evolution keeps within the parameters applied for and assessed, it is not accurate to equate the approval of reserved matters with "modifications" to the project. The project, as it evolves with the benefit of approvals of reserved matters, remains the same as the project that was assessed."

15. The principal consequences of this approach are as follows:

(1) the more detailed the proposal, the easier it will be to ensure compliance with the Regulations;

(2) the permission (whether in the nature of the application or achieved through "masterplan" conditions) must create "clearly defined parameters" within which the framework of development must take place. It is plainly to be inferred that those parameters much achieve a level of detail that is likely to exceed what would be required as a matter of domestic planning law. It is for the local planning authority in granting outline planning permission to impose conditions to ensure that the process of evolution keeps within the parameters applied for and assessed;

(3) taken with those defined parameters of the project, the level of detail of the proposals must be such as to enable a proper assessment of the likely environmental effects, and necessary mitigation—if necessary considering a range of possibilities[19] –

> "The assessment may conclude that a particular effect may fall within a fairly wide range. In assessing the "likely" effects, it is entirely consistent with the objectives of the directive to adopt a cautious "worst case" approach. Such an approach will then feed through into the mitigation measures envisaged under paragraph 2(c). It is important that they should be adequate to deal with the worst case, in order to optimise the effects of the development on the environment."

(4) The level of information required is[20] –

> "sufficient information to enable "the main," or the "likely significant" effects on the environment to be assessed under paras 2(b) and (c), and the mitigation measures to be described under para.2(d)."

(5) The "flexibility" referred to is not to be abused[21] –

> "This does not give developers an excuse to provide inadequate descriptions of their projects. It will be for the authority responsible for issuing the development consent to decide whether it is satisfied, given the nature of the project in question, that it has "full knowledge" of its likely significant effects on the environment. If it considers that an unnecessary degree of flexibility, and hence uncertainty as to the likely significant environmental effects, has been incorporated into the description of the development, then it can require more detail, or refuse consent."

(6) It is for the planning authority to determine what degree of flexibility can be permitted in the particular case having regard to the specific facts of an application.[22] It will clearly be prudent for developers and authorities to ensure they have assessed the range of possible effects implicit in the flexibility provided by the permission. In some cases, this may well prove difficult; and

(7) Reserved matters are not modifications requiring their own EIA, since they are part of the same project that has been assessed. Variations in the permission might well be modifications and require EIA. An application under s. 73 of the 1990 Act would lead to the grant of a new

[19] *Milne*, para. 122.
[20] *Milne*, para. 104.
[21] *Milne*, para. 95.
[22] The legality of the judgment is approached on a Wednesbury basis. See, e.g., the "football stadium" cases *R. (Malster) v Ipswich BC* [2001] EWCA Civ 1715 and Sullivan J. at [2001] EWHC Admin 711 and *R. (Bedford & Clare) v Islington LBC & Arsenal FC* [2002] EWHC 2044 Admin (Ouseley J.) and [2002] EWCA Civ 1969 (permission to appeal refused). As Ouseley J. held in the *Arsenal* case, at para. 203, the fact that the terms of the ES are controversial does not make the ES invalid or reliance upon it unlawful.

planning permission—a fresh development consent—and would equally be subject to EIA in principle as a new scheme or a modification to an existing scheme.

16. The approach in the above cases was approved and adopted by the Court of Appeal in *Barker* [2002] Env. L.R. 631 and in *Smith v Secretary of State* [2003] Env. L.R. 693. However, the correctness of the current approach in requiring EIA only at the stage of the initial grant of permission, and not subsequently, is under review before the House of Lords and the ECJ in *Barker*. Indeed, the issue will come before the ECJ both as part of the Art.234 preliminary reference in *Barker* and as a result of infraction proceedings under Art. 226 EC brought by the Commission against the UK in both respect of the decision underling the *Barker* litigation at Crystal Palace and the White City redevelopment which was the subject of the *CPRE* litigation 4 years ago: see, respectively, Commission Press Releases IP/03/117 (24.1.03) and IP/03/502 (7.4.03). Since proceedings were also announced at the same time against seven other Member States[23] and further EIA Directive infraction proceedings have been taken against the UK since then, relating to lawful development certificates,[24] pollution control,[25] and Crown immunity[26], it is fair to conclude that the Commission is carefully monitoring compliance with the EIA Directive at present[27] with regard to individual projects as well as with regard to transposition.

17. The ECJ's judgment in *Wells* casts some light as to the likely approach where there is a multi-stage consent process. However, because of its specific context, the judgment is not definitive. *Wells* was not concerned with the approval of reserved matters under an outline planning permission but the approval of a new scheme of conditions on an Interim Development Order pursuant to s.22 and Sch.2 of the Planning & Compensation Act 1991. The Secretary of State's decision to approve a new scheme of minerals conditions was reached without any consideration of whether EIA should be required.[28]

18. The Advocate General's view appears consistent with the line taken in the national courts (at where EIA has been considered):

> "55. It is for national courts to decide, in the particular circumstances of the case, at what stage of the administrative procedure the objectives of Directive 85/337 were achieved. (38) In the present case, as no environmental impact assessment was carried out, it is difficult to see how the national court could take the view that the objectives of the directive were achieved on the adoption by the Secretary of State of the decision of June 25, 1997. Consequently, if the conditions determined by the MPA in its decision of July 8, 1999 were likely to have significant effects on the environment, the MPA, pursuant to the directive, was required to have a prior assessment of those effects carried out. It will be for the national court to appraise whether the conditions determined by the MPA on July 8, 1999 were likely to have significant effects on the environment."

19. The ECJ held:

> "52. Accordingly, where national law provides that the consent procedure is to be carried out in several stages, 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

[23] Luxembourg, Austria, Italy, Spain, Finland, Germany and Greece.
[24] IP/03/117.
[25] IP/03/1070.
[26] IP/04/933, IP/03/1070.
[27] Environment Commissioner Margot Wallström stated: "I regret that the Commission has had to once again take action against Member States in order to ensure that they carry out impact assessments on environmentally significant projects, in accordance with the Directive. Impact assessment helps achieve sustainable development throughout the European Union and is vital to maintaining the high standards of protection set by the EU legislation."
[28] It predated the decision in *R. v North Yorkshire CC Ex p. Brown* [2000] 1 A.C. 397.

which the 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.

53. The answer to the first two questions must therefore be that Art.2(1) of Directive 85/337, read in conjunction with Art.4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as s.22 of the Planning and Compensation Act 1991 and Sch. 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, comprise, as a whole, a development consent within the meaning of Art.1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations.

In a consent procedure comprising several stages, that assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment."

20. From these passages, the following conclusions appear reasonable (albeit awaiting definitive consideration by the ECJ and House of Lords):

(1) The current view under national law that in a multi-stage consent procedure EIA should be carried out fully at the earliest stage is consistent with the EIA Directive;

(2) If the likely 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. Nonetheless this means that if the approach to outline permissions set in the *Rochdale* cases, *Hardy* and others, is followed correctly then –
   (a) the range of relevant effects appropriate for the width of the outline permission should be assessed at the outset otherwise the grant will be unlawful; and
   (b) any significant revisions to the permission will require a new application which will itself be subject to EIA. The judgment whether the revision is inconsequential or will require permission/development consent is therefore a highly significant one.

(3) It nonetheless appears arguable that an additional EIA could be required at the detailed stage although there is no UK procedure to deal with this. The difficulty with this is that the purpose of the environmental information under the EIA Directive is to inform the decision whether to grant development consent. Information provided at a later stage would not be able to influence the decision to grant consent in principle.

21. However, more difficult questions arise where there has been no proper consideration of EIA at all.[29] These will be considered in the next section of this paper.

Duty to take steps to amend a breach of the Directive

22. In the third round of the *CPRE* litigation[30] it was argued that the planning authority, having granted outline permission in breach of the Regulations and EIA Directive, were under a duty to pursue revocation of the planning permission. Harrison J. rejected the contentions on the footing that since the Directive had been correctly transposed, the only enforceable rights were those arising in respect of the Regulations and not EC law rights under the Directive:

[29] It is an issue in *Barker* whether there was such consideration.
[30] *R. v Hammersmith & Fulham LBC Ex p. CPRE* [2000] Env. L.R. 565. For the earlier decisions see [2000] Env. L.R. 532 (Richards J.) and 549 (Court of Appeal) and [2000] Env. L.R. 544.

> "In the absence of authority to the contrary, I would have held that an individual does not have an enforceable Community law right where those preconditions are not satisfied and that, once a directive has been correctly transposed into domestic legislation, an individual is thereafter confined to his remedies under the domestic legislation and no longer has an individually enforceable Community law right under the directive."

23. This approach is consistent with Lord Hoffman in *Berkeley* and his view that once the member state has transposed a directive, there is no longer discretion to argue for compliance in some other respect. It also appears to be consistent with EC authority and, in particular, the fact that direct effect of directives only arises where they have not been properly transposed.

24. However, in *Barker*, Latham L.J. noted (*obiter*) the possibility of revocation or modification to deal with the fact that mistakes do occur in practice:

> "45. Whilst acknowledging that there may well be circumstances in which, either because the planning authority realises that it made a mistake in the first instance, or alternatively as a result of changed circumstances, the environmental impact of the development turns out to be significantly greater than originally envisaged, this cannot, it seems to me, affect our answer to the issue in this case. Whilst the fact that reserved matters have been left until a later point in time may give an opportunity to reconsider the environmental effects, that does not mean that a further EA is the necessary or appropriate solution. The planning authority is not powerless. It can revoke or modify the permission, subject to the payment of compensation. If it be the case that full consideration can be given to the environmental issues at the time of the grant of outline planning permission, there can be no difference in principle between the grant of outline planning permission and full permission in this respect. There may well be occasions when after the grant of full permission it is appreciated that either a mistaken assessment has been made or circumstances have changed. Neither event could trigger a requirement for a further EA pursuant to the Directive in those circumstances, whatever other steps the planning authority might seek to take in order to mitigate those environmental effects. It is inevitable that mistakes may sometimes be made by planning authorities in their evaluation of environmental effects; and it is also inevitable that on occasions circumstances will change. But neither of these matters can, for the reasons that I have given, detract from the legal effect of the grant of planning permission whether full or outline . . ."

25. Absent the intervention of the ECJ, or a reassessment of domestic planning law and policy, modification and revocation is usually confined to cases where the decision under consideration was "grossly wrong": see *Alnwick BC v Secretary of State* (1999) 79 P. & C.R. 130. This is capable in some cases of being based on a seriously erroneous view of the requirements of EIA but would be less likely to deal with simple differences of judgment.

26. The question arose in *Wells* where the claimant argued that, having failed to require or consider an EIA at the stage of imposing a new scheme of conditions, the Secretary of State should revoke the permission as an alternative to requiring EIA in approving the various details under the conditions which remain to be approved (see above).

27. The Advocate General's opinion did not address this issue other than indirectly (emphasis added):

> "72. In view of the foregoing, I suggest that the Court's answer to the fourth question referred for a preliminary ruling should be that Arts 1(2) and 2(1) of Directive 85/337 are to be interpreted as meaning that, where their provisions have not been complied with, individuals may rely on them before the court of a Member State against the national authorities and the limits laid down by the

Court on the direct effect of directives do not preclude decisions incompatible with those provisions *from being set aside or modified*."

28. The ECJ, however, went much further and held (emphases added):

"63. The United Kingdom Government contends that, in the circumstances of the main proceedings, there is no obligation on the competent authority to revoke or modify the permission issued for the working of Conygar Quarry or to order discontinuance of the working.

64. As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Art.10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 *Humblet* [1960] ECR 559, at 569, and Joined Cases C–6/90 and C–9/90 *Francovich and Others* [1991] ECR I–5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C–8/88 *Germany v Commission* [1990] ECR I–2321, paragraph 13).

65. *Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment* (see, to this effect, Case C–72/95 *Kraaijeveld and Others* [1996] ECR I–5403, paragraph 61, and *WWF and Others*, cited above, paragraph 70). *Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.*

66. The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.

67. The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see to this effect, inter alia, Case C–312/93 *Peterbroeck* [1995] ECR I–4599, paragraph 12, and Case C–78/98 *Preston and Others* [2000] ECR I–3201, paragraph 31).

68. So far as the main proceedings are concerned, if the working of Conygar Quarry should have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 85/337, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment."

29. The effect of this is unclear since, on the one hand, the ECJ appears to insist upon the national authorities taking such action as may be required to comply with the EIA Directive and, on the other, acknowledges the limitations of national procedural requirements[31]. The implication is that the mere existence of delay, although a relevant issue in domestic judicial review proceedings, may not be sufficient to preclude the duty under Art.10 EC to ensure compliance with the EIA Directive and to nullify the unlawful consequences of a breach of Community law. Depending on the circumstances,

[31] See *R. (Prokopp) v London Underground Ltd & Others* [2004] Env. L.R. 170 where the Court of Appeal, albeit in the alternative, were clearly opposed to granting relief where the failure to comply with the EIA Directive (had one been found to exist) would extend significantly beyond the concerns voiced by the claimant. See Buxton L.J. at paras. 57–63, 74–78. See also *R. (Noble Group) v Thanet B.C.* [2004] EWHC 2576 (Admin).

this may give rise to a number of possibilities including revocation, modification, discontinuance or damages. The issue of compensation to the minerals operator/landowner will also arise if steps are taken which affect the value of his interest.

30. Among the difficulties which arise in cases where a decision has been taken a significant time before any challenge is made are:

(1) Revocation appears disproportionate where the decision under consideration is not one which would have led to the refusal or loss of the basic permission (as would be the case in old mining permission cases). Modification may be the more appropriate course in such cases; and

(2) In order to determine whether a permission should be revoked or modified, because the failure to carry out EIA may make it "grossly wrong", it would logically be necessary to carry out the EIA first in order to determine whether it has lead to an incorrect determination of conditions and then to determine whether to revoke or modify in the light of the environmental information supplied. However, there is currently no domestic legal mechanism which would enable the First Secretary of State to require EIA to be carried out. It may be that, short of the introduction of such a mechanism, the landowner or operator should be invited to provide an ES failing which the Secretary of State makes the draft revocation or modification order in the course of which, unless the ES is provided, there may be little option other than to revoke. The difficulty with that course of action is that the owner may prefer to allow revocation and to claim compensation. It may be possible to modify the permission to impose a negative condition which prevents further development (or the commencement of development) in the absence of (a) the provision of an ES (b) an EIA process and (c) the imposition of further conditions in the light of that EIA process.[32] The mechanism in that case would have to be imposed by the condition which would need to comply with the requirements of the EIA Directive.

31. In *Wells* itself the question remains to be resolved since, following the ECJ's ruling, the First Secretary of State agreed in June 2004 to reconsider the question of what his approach should be to deal with the absence of an EIA some years after a new scheme of conditions was imposed on a minerals permission. Before any decision is taken, there will be consultation with not only the complainant and the minerals planning authority but the owner/operator and other interested persons.

EIA and pollution control

32. In *Wells* the ECJ has made it clear that the concept of "development consent" is not confined to what is regarded as planning permission under UK planning law. Issues as to both "development consent" and "project" have now been raised in the context of pollution control under Pt.I of the Environmental Protection Act 1990 and the replacement regime under the Pollution Prevention and Control Regulations 2000.[33] So far, this issue has been the subject of an inconclusive challenge that was

[32] See *R. v Oldham MBC & Pugmanor Properties Ltd, Ex p. Foster* [2000] J.P.L. 711 in which Keene J. considered, *obiter*, that the Court appeared to accept that EIA could be required by virtue of the conditions imposed by the minerals planning authority when determining the conditions under Sch.13. At p. 724, Keene J. said "in the peculiar circumstances of a Sch.13 application in the current state of domestic law, I accept that it is theoretically open to an MPA to determine conditions which themselves require all the remaining information for environmental assessment to be submitted and for detailed schemes to be improved in the light of such information before the minerals operations can proceed. The issue is whether the conditions which were determined in this case do that."

Unfortunately, Keene J. did not consider in detail the extent to which this power could be exercised. In particular, could conditions be imposed by an authority which not only required that an EIA should be carried out, and then a scheme of conditions submitted for determination following the completion of the EIA, but which also effectively caused operations to cease until such the new conditions were determined by that process?

[33] S.I. 2000 No 1973.

dismissed prior to final decision[34] and a new challenge that is still awaiting determination.[35] In those cases the argument is that the burning of substitute fuels is:

(1) a "project" within the EIA Directive; and

(2) the authorisation under the EPA or PPC regime is also a "development consent" as it is a prerequisite to carrying on the process or activity in question.

33. The Commission has also taken up the issue and has commenced infraction proceedings under art. 226. As Press Notice IP/03/1070 states:

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

34. This issue is, therefore, whether the UK was entitled to implement the EIA Directive primarily (though not exclusively) through the EIA Regulations. This in turn gives rise to consideration of the extent of the margin of appreciation as to transposition by Member States, the extent of overlap between planning and pollution control regimes and the degree to which it might be said that matters triggering pollution control decisions should also give rise to the need for planning permission if those matters are likely to give rise to significant environmental effects.

Strategic Environmental Assessment[36]

35. The Environmental Assessment of Plans and Programmes Regulations 2004 SI 2004 No. 1633[37] ("the SEA Regulations") implements Directive 2001/42 of the European Parliament and Council on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive"). ODPM has recently (21.7.04) published "*A Draft Practical Guide to the Strategic Environmental Assessment Directive*" which closes for consultation on October 29, 2004 ("the Draft Guidance"). The Commission also issued guidance on the SEA Directive in 2003 "*Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment*" ("the Commission's Guidance").[38]

36. Regulation 8 prohibits the adoption (or submission for adoption) of those plans and programmes, for which the "*first formal preparatory act*"[39] occurred after July 21, 2004 (except where reg. 6 applies) and;

[34] *R. v Environment Agency & Others Ex p. Horner* dismissed (and Art. 234 reference revoked) by Sullivan J. in July 2003. The case was dismissed since the IPC permit under the 1990 Act under challenge was now academic since it had been replaced by a PPC consent under the 2000 regulations.

[35] *R. (Edwards) v Environment Agency* (CO/5702/2003). This JR seeks to challenge a PPC consent granted in August 2003 which authorises the trial burning of chipped scrap tyres as a substitute fuel at a cement works. An IEA was carried out at the planning stage in this case and an issue arises as to substantial compliance given the terms of Schedule 4 para. 1 to the 2000 Regulations which requires an application including detailed information and a non-technical summary. The case is currently listed for hearing in November 2004.

[36] See Robinson & Elvin [2004] J.P.L. 1028 which considers the SEA Directive and SEA Regulations in greater detail. "Strategic environmental assessment" or "SEA" is commonly used to refer to the process in the SEA Directive and Regulations but does not appear in them: see para. 2.2 of the Draft Guidance.

[37] For a list of the regulations applying to the other parts of the UK see para. 1.3 of the Draft Guidance.

[38] Copies can be downloaded from http://europa.eu.int/comm/environment/eia/sea-support.htm.

[39] Not defined and not considered in detail in the Draft Guidance. See para. 2.12.

(1) which require SEA, until the requirements of the SEA Regulations relating to Environmental Reports and consultation procedures have been met and account has been taken of the Environmental Report and consultation responses;

(2) which may not be likely to have significant environmental effects, until a determination to that effect has been made.

37. The SEA Regulations came into force on July 20, 2004 and create another layer of information assembly and consultation with regard to the production of plans, policies and programmes falling within its scope. Following the reforms in the 2004 Act, SEA is likely to be required not only for local development frameworks but for regional spatial strategies and, possibly, national policy. The objective to extend EIA in that SEA requires an assessment before adoption of the environmental implications of the plans and policies which form the context in which are made development control decisions which would be subject to EIA.

38. The Director General of the Environmental Directorate of the Commission explained the importance of SEA as follows[40]:

> "The Strategic Environmental Assessment (SEA) Directive is an important step forward in European environmental law. At the moment, major projects likely to have an impact on the environment must be assessed under Directive 85/337. However, this assessment takes place at a stage when options for significant change are often limited. Decisions on the site of a project, or on the choice of alternatives, may already have been taken in the context of plans for a whole sector or geographical area. The SEA Directive . . . plugs this gap by requiring the environmental effects of a broad range of plans and programmes to be assessed, so that they can be taken into account while plans are actually being developed, and in due course adopted. The public must also be consulted on the draft plans and on the environmental assessment and their views must be taken into account.
>
> Whilst the concept of strategic environmental assessment is relatively straightforward, implementation of the Directive sets Member States a considerable challenge. It goes to the heart of much public-sector decision-making. In many cases it will require more structured planning and consultation procedures. Proposals will have to be more systematically assessed against environmental criteria to determine their likely effects, and those of viable alternatives. There will be difficult questions of interpretation, but when properly applied, these assessments will help produce decisions that are better informed. This in turn will result in a better quality of life and a more sustainable environment, now and for generations to come."

39. The objective of SEA is set out in Para.5 to the preamble to the SEA Directive:

> "(5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision-making. The inclusion of a wider set of factors in decision-making should contribute to more sustainable and effective solutions."

40. Article 1 of the SEA Directive states:

> "The objective of this Directive is to provide for a high level of protection of the environment

[40] Foreword to the Commission's Guidance. For the application and scope of SEA prior to the coming into force of the SEA Directive, see the ICON Final Report "SEA and Integration of the Environment into Strategic Decision-Making" (May 2001) (European Commission Contract No. B4–3040/99/136634/MAR/B4).

> and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

41. In many respects, the content, procedure and form of the SEA environmental report will closely resemble an environmental statement under EIA.[41] A detailed analysis of the SEA Directive and Regulations is beyond the scope of this paper, but it is useful to consider the scope of SEA.

42. Unlike the various EIA Regulations, the SEA Regulations are general in form and closely follow the structure and terminology of the Directive. Since the Regulations simply follow the broad definition of "plans and programmes" given in Art.2(a) of the SEA Directive, the same issues arise with respect to these key concepts under the Regulations as they do in respect of the directive.

43. The effect of this is that the application of the SEA Regulations is not confined to specific areas of law, for example planning, as with the various EIA Regulations, but is of general effect. This ensures to a great degree the achievement of the full transposition of the SEA Directive, which is the subject of dispute in the case of the EIA Directive. It also ensures a wide application of the provisions of the SEA Directive. Indeed, despite the fact that development plans and planning guidance are principal targets of the SEA Directive, the SEA Regulations and the new development plan provisions of the 2004 Act appear to have been drafted independently and without reference to each other. The most recent guidance in PPS11 and PPS12 do not take matters significantly further and do not appear well-informed as to the SEA Regulations and Draft Guidance. At p.33 of PPS11, the guidance as to relevant matters affecting sustainability appraisals omits reference to the Commission's Guidance, the Draft Guidance and even fails to mention the SEA Regulations, whilst referring to the SEA Directive. PPS12 at paras 3.14–3.18 ("*Sustainability Appraisal and Strategic Environmental Assessment*") is little better informed, and does not even refer to the SEA Regulations by their correct title. The more recent consultation paper "*Sustainability Appraisal of Regional Spatial Strategies and Local Development Frameworks*",[42] which seeks to integrate SEA within the broader framework of sustainability appraisal of development plans, appears better informed, though still not greatly co-ordinated with other papers. At para.1.2.18, the paper states:

> "1.2.18. It is intended that SA conducted in accordance with this guidance should meet the requirements of the SEA Directive for environmental assessment of plans. SEA is focused primarily on environmental effects. While the Directive defines the environment broadly, including population, human health, cultural heritage and material assets as well as biodiversity, air, water and soil, SA goes further by examining all the sustainability-related effects of plans, whether they are social, environmental or economic. Those undertaking the SA should check to ensure that in doing so they meet the requirements of the SEA Directive."

44. Article 2(a) of the SEA Directive applies the requirements of SEA to "plans and programmes" which are defined by article 2(a) as:

> "(a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
>
> - which are subject to preparation and/or adoption by an authority at national, regional, or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

[41] See the SEA Regulations, regs 12–15 and the Draft Guidance, Chapter 5.
[42] September 2004.

- which are required by legislative, regulatory or administrative provisions".

45. The Art.2 definition is applied almost exactly by reg. 2(1) of the SEA Regulations.

46. The requirements of SEA apply to any plans, programmes and their modifications:

> "Which are required by legislative, regulatory or administrative provisions; and
> Which are –
>
> subject to preparation and/or adoption at national, regional or local level; or prepared by an authority for adoption through a legislative procedure."

47. There is a duty to carry out SEA under Art. 3(2) and reg. 3:

> "Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
>
> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annex I and II to Directive 85/337 EEC, or
>
> (b) which, in view of the likely effects on site, have been determined to require an assessment pursuant to article 6 or 7 of Directive 92/43/EEC."

48. The potential width and interpretation of the requirements of Arts 2 and 3 is likely to give rise to the most significant difficulties in the application of the SEA Directive and SEA Regulations. Indeed, the Draft Guidance[43] goes so far as to produce an "*indicative list of plans and programmes subject to the SEA Directive*" though it is noted that[44]

> "It is not possible to give a definitive list because of the number of plans and programmes in existence and the varying extent to which the Directive's criteria apply, either to types of plan or programme or to individual plans or programmes within a type."

49. Although many other issues arise, this paper focuses on the main threshold question of which plans or programmes are subject to SEA. The Draft Guidance is a practical guide to strategic assessment and provides little assistance with regard to the threshold question. The Commission's Guidance does address these issues and, given the direct transposition of the language and concepts of the SEA Directive into the SEA Regulations, is more useful in approaching the difficulties which arise.

Which plans and programmes?

50. There can be no doubt that the requirements apply to the preparation of the elements of development plans since these are either prepared/adopted at local or regional level and are required by legislative provision. This includes not only LDFs, but regional spatial strategies[45], and other spatial strategies, such as the London Plan, which now form part of the statutory development plan under s.38 of the 2004 Act.

51. Apart from the plans which clearly require SEA, the open-ended definition of "plans and

[43] This produces a flow chart of the main threshold issues which have to be considered at Appendix 1.
[44] Draft Guidance, p. 35. See also Appendix 2 which makes a similar point.
[45] This is confirmed, in any event, by para. 1.2 of ODPM's "The Strategic Environmental Assessment Directive: Guidance for Planning Authorities" (October 2003), which also considers existing RPG to fall within the scope of the SEA Directive. Interestingly, RPG (as opposed to RSS) does not appear in the "indicative list" of plans subject to the SEA regime at pp. 35–36 of the later Draft Guidance except by reference to its revision through RPG. This may simply be due to the fact that no new RPG is proposed to be issued except in the form of RSS.

programmes" creates an area of wide and uncertain application which is underlined by the Commission's Guidance:

> "3.5 The kind of document which in some Member States is thought of as a plan is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas, or giving criteria which should be taken into account in designing new development . . ..
>
> 3.6 In some Member States, programme is usually thought of as the plan covering a set of projects in a given area, for example a scheme for regeneration of an urban area, comprising a number of separate construction projects, might be classed as a programme. In this sense, 'programme' would be quite detailed and concrete . . . But these distinctions are not clear cut and need to be considered case by case. Other Member States use the word 'programme' to mean 'the way it is proposed to carry out a policy'—the sense in which 'plan' was used in the previous paragraph . . .."

52. One important question is the extent to which the making of national policy may be subject to SEA. The application of SEA to RPG or RSS shows that its application extends to more than purely local policy-making. Indeed, development plan policies frequently apply or adapt national and/or regional policies and the only distinction between them is that national policy as such does not have a specific statutory role except as a "material consideration" whereas development plan policy has a specific role under s.54A and 70(2) of the Town and County Planning Act 1990.

53. The 2004 Act removes at least one critical distinction between regional and local policy since, in England, RSS becomes one element of the development plan.[46] In connection with the width of application of these provisions, it is interesting to note that para.1.2 of ODPM's October 2003 SEA Guidance considers even current RPG to fall within the scope of the SEA Directive, although not apparently in the latest Draft Guidance.

54. The distinction between regional and national policy is not particularly strong to the extent that the former carries into effect on a detailed regional basis the requirements of national policy. RSS is legally required to do so.

55. National policy as well as regional policy can be regarded as setting the framework for development control decisions since, even if there is no specific duty with regard to applying national policy, the duty to have regard to all material considerations in determining planning applications brings in such policy. Moreover, in practice, national policy is often a significant or determining consideration particularly on appeal or call-in. National and regional policies also provide the context for the formulation and adoption of development plan policies.

56. In functional terms, it is therefore difficult to draw a clear distinction between national and regional policy. Indeed, 1.6 of Draft PPS 1 makes the point:

> "Planning operates in the public interest to ensure that the development and use of land takes place to meet these broad objectives. This is done through the structure of national policies and regional and local plans, which provide the framework for planning for sustainable development and for development to be managed effectively. Regional plans build on and reflect national policies, and local plans deliver strategic policies as well as local policies for their areas. . ."

57. The boundary between national/regional planning policy and development plan policy as plans or

[46] Section 38(3)(a).

programmes which "set the framework for future development control decisions" of EIA development and which are "subject to preparation and/or adoption at national, regional or local level" is not therefore a clear one. There is scope for argument that some forms of regional or national policy ought to be considered "plans" within Art.2(a), given a broad approach to interpretation. The point at which it may be possible to draw a line is in considering whether they are "required by legislative, regulatory or administrative provisions", considered below. National policy does not appear in the "indicative list" in the Draft Guidance at p.35 but in Appendix 2 the Draft Guidance nonetheless requires the environmental report to consider the relationship of the subject plan or programme to other relevant plans and programmes" to which the environmental report should refer include;

> "● The UK Sustainable Development Strategy, and those of England, Wales, Scotland, and Northern Ireland
>
> ● White Papers setting out policies (*e.g.* Urban, Rural, Aviation)
>
> ● Planning Policy Statements and Minerals Planning Guidance . . ."

This appears to acknowledge that these documents may have a significant role to play in setting the framework for development control decisions.

58. A further category of policy, which is placed on a much more formal footing under the new regime, is that of supplementary planning guidance, SPD in the new terminology. Although they will not form part of development plans, SPD will still form part of LDFs as PPS 12 makes clear[47]:

> "Where prepared, supplementary planning documents should be included in the local development framework and will form part of the planning framework for the area. They will not be subject to independent examination and will not form part of the statutory development plan. However, they should be subjected to rigorous procedures of community involvement.. . ."

59. The category of SPD is potentially very wide[48]:

> "Supplementary planning documents may cover a range of issues, both thematic and site specific, which may expand policy or provide further detail to policies in a development plan document. They must not however, be used to allocate land. Supplementary planning documents may take the form of design guides, area development briefs, master plan or issue-based documents which supplement policies in a development plan document.. . ."

60. SPD is now subject to a statutory procedure under Pt.5 of the Town and Country Planning (Local Development) (England) Regulations 2004 SI 2204. The process is a simplified version of the development plan process, lacking consideration by an inspector. Nonetheless, a detailed procedure is provided, including for adoption, and the Secretary of State may intervene.

61. In the context of SEA, although the SPD does not have the formal weight of development plan policy, it nonetheless appears to be plan or programme which is adopted at local level and which may set the framework for future development consent of EIA projects. If it is "required", as considered in the following section, it will be subject to SEA where it may set the framework for future EIA development.

[47] Para. 2.42.
[48] Para. 2.43.

Which plans are required by legislative, regulatory or administrative provisions?

62. The important question here is not whether development plan provisions fall within SEA, which they plainly do, but the extent to which non-statutory policy (such as national policy) or planning instruments (such as SPG/SPD) may require SEA.

63. The terms "legislative" and "regulatory" provisions cover a range of legal requirements, including both primary and delegated legislation. However, the "administrative provisions" category is far less clear and gives rise to the greatest area for debate—especially since it does not appear as a distinct category in some of the authentic language versions of the Directive.[49]

64. The approach to "required" is also an important concept in approaching the width of the obligation under the SEA Directive. The term, applied directly by the SEA Regulations, doubtless has an autonomous EC law meaning having regard to the objectives of the Directive. Such an approach is likely to focus on the end product of a plan or programme which sets a framework for granting consents rather than on drawing fine distinctions between the various means by which they might be brought into existence.

65. "Required" could be approached as including, *inter alia*, only plans which arise from a legal requirement to produce them. However, "required" might be approached more broadly to include administrative or policy guidance which urges the production of a plan or programme[50], *e.g.* where a development plan policy requires the production of a development brief (which will be SPD) for a particular site. The development plan policy itself would be a "regulatory or administrative provision" and whether the brief itself was potentially subject to SEA would depend on whether the policy obligation meant it was "required" in terms of the Directive and Regulations.

66. The Commission's Guidance unsurprisingly adopts a broad approach at para.3.16 which supports the view that a requirement may exist even if it is not legally binding:

> "3.16. Administrative provisions are formal requirements for ensuring that action is taken which are not normally made using the same procedures as would be needed for new laws and which do not necessarily have the full force of law. Some provisions of 'soft law' might count under this heading. Extent of formalities in its preparation and capacity to be enforced may be used as indications to determine whether a particular provision is an 'administrative provision' in the sense of the Directive. Administrative provisions are by definition not necessarily binding, but for the Directive to apply, plans and programmes prepared or adopted under them must be required by them, as is the case with legislative or regulatory provisions."

67. Since the Commission clearly considers that "required" in this context should be read broadly and only imports some form of non-binding administrative "requirement", this leads to the conclusion that the following may well be sufficient "requirements" to bring those matters within the SEA regime:

(1) A stipulation requiring SPD in the form of a development brief or masterplan in a development plan or other policy; and

(2) The production of supplementary guidance anticipated or required by policy (whether as SPD or otherwise).[51]

[49] The ECJ generally has regard to other language versions in interpreting legislation. Here, the structure of the different versions varies significantly, the Dutch and German texts omitting entirely as a distinct third category what is rendered in the English version as "administrative provision" while the French and Italian versions correspond closely with the English.

[50] The broader interpretation is supported by at least the Italian version which uses "previsti" ("foreseen") in place of the English "required".

[51] Although a procedure is provided for the adoption of SPD, guidance and the regulations do not in terms rule out the ability of authorities to produce guidance which is not SPD. However, given the terms of draft PPS 12 s.2.4, it would be unlikely that future non-SPD guidance would be considered to possess significant weight.

68. Moreover, if "required" does not need the underpinning of a legal duty, then the question also arises whether planning policy adopted by the First Secretary of State constitutes an "administrative provision". If national policy requires the adoption of a plan or programme, there will be an issue whether that plan or programme falls within Art.2(a).

69. It might be argued that national policy itself falls within the requirements for SEA. Statute recognises that national policy has an important role to play:

(1) in the formulation of the development plan[52]; and

(2) in planning decision making.[53]

It might therefore be said that national policy is thus "required" by implication.

70. However, it seems unlikely that national policy could be regarded as "required" even with a broad approach to interpretation. The fact that modern government would find it hard to function without policy of some kind is a concept which seems too remote even for a broad interpretation. While statute requires national policy to be taken into account in formulating development plan policies there is no general requirement that there be national policy at all. There is therefore a valid distinction between RPG and RSS, which might be considered to be "required" by, respectively, administrative and legal provisions and national policy generally which is not required at all but merely to be taken into account if it is produced.

Which qualifying plans or programmes should be the subject of SEA?

71. As Art.3(2) and reg. 3 provide, SEA is required for all plans and programmes to which the Directive and Regulations apply;

> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annex I and II to Directive 85/337, or
>
> (b) which, in view of the likely effects on site, have been determined to require an assessment pursuant to article 6 or 7 of Directive 92/43.

72. The breadth of the subject-matter of the plans and programmes is clear, and is underlined by paras. 2.6–2.12 of the Draft Guidance. They are not confined to land use planning issues. The concept of "*development consent*" may be interpreted broadly (probably consistently with decisions under the EIA Directive[54]) as the Draft Guidance states under "Frequently Asked Questions" at p.37 –

> "... 'Consent' here refers not only to formal planning consent but more broadly to all consents, permits, licences and other permissions necessary for the establishment of a new activity... "

73. It is not wholly clear under the SEA Directive whether there is a discretion to require SEA since Art.3(1) requires assessment only of plans and programmes "referred to in paras 2 to 4 which are likely to have significant environmental effects". The correct approach (and that adopted in framing the SEA Regulations[55]) is likely to be that Art.3(2) should be regarded as defining those projects where SEA is in any event considered to fall within Art.3(1).

[52] See ss.12(6), 31(6), 36(9) of the Town and Country Planning Act 1990, reg. 20 of The Town and Country Planning (Development Plan) (England) Regulations 1999 S.I. 1999 No. 3280. See s.5(3) of the 2004 Act with regard to RSS and section 19(2) with regard to local development documents.

[53] Through s.70(2) of the 1990 Act.

[54] See *e.g.* the Wells and Huddleston cases, above, and *R. v North Yorkshire CC Ex p. Brown* [2000] A.C. 397.

[55] See para.3.4 of the Explanatory Memorandum to the SEA Regulations dated June 23, 04.

74. Reg. 5[56] adopts the approach there is no discretion in the cases described in reg. 5(2) and (3) which transpose the provisions of Art.3(2)(a) and (b). For those post-21.7.04 plans and programmes which do not fall within reg. 5(2) and (3) there is a requirement to carry out an SEA if there has been a determination[57] that it is likely to have significant environmental effects.

75. Whether the plans or programmes "set the framework" for future EIA projects appears to be an issue which should be approached as a matter of fact and degree. The Commission's Guidance[58] explains it as follows –

> "The words would normally mean that the plan or programme contains criteria or conditions which guide the way the consenting authority decides an application for development consent. Such criteria could place limits on the type of activity or development which is to be permitted in a given area; or they could contain conditions which must be met by the applicant if permission is to be granted; or they could be designed to preserve certain characteristics of the area concerned (such as the mixture of land uses which promotes the economic vitality of the area). . .
>
> . . . Whether particular criteria or conditions set the framework in individual cases will be a matter of fact and degree in each case: a single constraining factor may be so significant that it has a dominant influence on future consents. On the other hand, several rather trivial or imprecise factors may have no influence on the granting of consents."

76. A similar approach is adopted in the Draft Guidance: see p. 37.[59]

77. SEA is not required in the small number of cases set out in reg. 5(5) and (6).[60]

Protection of Habitats

78. The impact of the Habitats Directive on the application of national development consent procedures which concern a "European Site"[61] is a major one, though not one which has always been fully appreciated: see *ADT Auctions v Secretary of State* [2000] J.P.L. 1155 and *Newsum & Others v Welsh Assembly* [2004] EWHC 50 (Admin). The refusal of consent for the Dibden Bay project is an object lesson.

79. Before granting consent for a project[62]:

> (1) There must be an assessment by the competent authority 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. 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 concerened[63] (reg. 48(1) and Art. 6(3)).

[56] The temporal application of the SEA Regulations depends on the "first formal preparatory act" of a plan or programme falling after 21.7.04 with additional provision in the case of plans which are not adopted by July 21, 06, reg. 5(6).

[57] See regs 9 and 10.

[58] Paras. 3.23–3.28.

[59] Under the fourth "frequently asked question".

[60] Principally specialist plans for national defence, civil emergency, budget plans, and those which otherwise fall within reg. 5(2) and (3) but which determine the use of "a small area at local level" or are "a minor modification" to a plan or programme of the description set out in those paragraphs.

[61] See reg. 10 of the Habitats Regulations.

[62] The appropriateness of this structured approach can be seen from the provisions of Art.6 of the Habitats Directive from which regs 48, 49 and 53 principally derive. See the detailed guidance in Commission's own Managing Natura 2000. See also Pitchford J.'s comments in *Newsum* at paras. 83–88.

[63] *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw* C–127/02 (ECJ, unreported, 7.9.04), para.s 41 and 43.

(2) If there is likely to be such a significant effect, the competent authority must carry out an appropriate assessment (reg. 48(1) and Art. 6(3)). This will include SEA– see reg. 5 of the SEA Regulations.

(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.[64]

(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)).[65]

(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)). The Dibden decision shows that the consideration of alternatives must be approached broadly and not simply by reference to local conditions.

(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)).[66]

(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, 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)).[67]

80. At Dibden Bay, ABP sought a Harbour Revision Order (as well as other ancillary TWA orders) to

[64] *Waddenzee*, above, para.s 47–48.

[65] A strong line of ECJ authority including *Commission v Germany (Leybucht Dykes)* Case C–57–89R [1991] ECR 1–883 and *Commission v Spain (Santoña Marshes)* Case C–355/90 [1993] ECR 1–4221 shows that an important purpose of habitat designation and preservation is as a preventative measure to avoid harm occurring as well as protecting that territory most necessary to ensure their survival.

[66] IROPI does not apply where an SPA is concerned and the original version of Art. 4(4) of the Wild Birds Directive applies. See *Commission v France* Case C–374/98 ("Basses Corbières").

[67] The significance of compensatory measures is referred to by Managing Natura 2000 para.5.4.1 as "Compensatory measures sensu stricto: independent of the project, they are intended to compensate for the effects on a habitat affected negatively by the plan or project. For example, general tree-planting to soften a landscape impact does not compensate for the destruction of a wooded habitat with quite specific characteristics."

construct a new deep water facility. The location comprised part of an SPA and, latterly, a candidate SPA. The Secretary of State for Transport refused to confirm the Order (agreeing with the Inspector's Report) principally due to a failure to meet the requirements of the Habitats Regulations (and hence the Habitats Directive):

> "39. The Inspector identified the third and last main issue to be whether the offsetting measures proposed by the Applicant would be adequate in environmental terms. The Inspector considered the answer to be clear-cut, namely that the proposals advanced by the Applicant would not be adequate to permit the Secretary of State to meet the requirements of reg.53 of the Habitats Regulations... The Inspector considered that this should be determinative and, accordingly, recommended against the HRO being made...
>
> ....
>
> 60. The Secretary of State as a competent authority is required under reg.48 (1) of the Habitats Regulations to undertake an Appropriate Assessment of the likely impact of the proposals on designated European sites should he be minded to consider consent for a project affecting such sites.
>
> 61. The Secretary of State has in any case as a matter of policy sought advice which would be relevant to an Appropriate Assessment of the proposed project under Regulation 48 (1) and (3) of the Habitats Regulations. In the opinion of English Nature, as the Secretary of State's statutory adviser, which was presented in evidence to the Inquiries, the Dibden terminal project would have a likely significant effect alone and in combination with other plans or projects on each of the Solent and Southampton Water SPA, the Solent and Southampton Water Ramsar site, the Solent Maritime cSAC and the River Itchen cSAC.... However, even after taking account of the measures relating to the River Itchen cSAC, English Nature advises that in respect of the other European and Ramsar sites, there is no new information that could affect the content or conclusions of an Appropriate Assessment of the implications for any of these sites and that it is not possible for the proposals to avoid an adverse effect on their integrity. It remains the position of English Nature that the package of measures offered by the Applicant at the Inquiries is inadequate to provide compensatory measures required by reg.53 of the Habitats Regulations 1994.
>
> 62. Having taken the advice of his statutory advisers, the Secretary of State concludes, in agreement with the Inspector, that the proposal would have negative consequences for international and European conservation sites. He further concludes, in agreement with the Inspector, that the compensatory measures proposed by the Applicant would not adequately off-set the detriment caused to natural habitats were the proposed terminal to go ahead."

81. The Secretary of State also took a broader view of the need to consider alternatives than urged by the developer[68], but which is consistent with the Commission's *Managing Natura 2000*:

> "50. The Secretary of State agrees with the Inspector's assessment of the alternatives to the project in so far as they are required to be considered for the purposes of Schedule 3 to the Harbours Act 1964, namely that it is legitimate to consider only those which would meet the needs of the port of Southampton...and that no suitable alternative which would meet that need exists within the locality...
>
> 51. The Secretary of State notes, however, that the consideration of alternatives for projects

[68] The position of the developer complicated by the existence of other port proposals in the South East *e.g.* at Shellhaven.

> which would have a significant impact upon a site designated in accordance with the Habitats Regulations must necessarily range more widely. The Secretary of State agrees with the Inspector's conclusion that the Applicant's proposal would have a significant effect upon the integrity of designated sites. It follows that consideration of alternatives must concern alternative ways of avoiding impacts on the designated sites. The Secretary of State considers that such alternatives would not be confined to alternative local sites for the project. He draws attention to the European Commission's methodological guidance on the Assessment of Plans and Projects significantly affecting Natura 2000 sites, which interprets article 6 (4) of the Habitats Directive. The guidance states that a competent authority should not limit consideration of alternative solutions to those suggested by a project's proponents and that alternative solutions could be located even in different regions or countries. . ."

82. The lesson of Dibden Bay is a clear one, namely that compliance with the Habitats Regulations is not optional, must be approached on a wide basis so far as consideration of alternatives is concerned, and that adverse effects cannot be overcome without appropriate compensatory measures.

83. Finally, as Press Release IP/03/1109 (24.7.03) makes clear, the Commission is also alive to failures to apply the Habitats Regulations (and hence Directive) appropriately.

The consideration of Human Rights issues in planning

84. The decisions of the House of Lords in *Alconbury* [2003] 2 A.C. 295 and *Begum* [2003] 2 A.C. 230 established clearly in the UK context that the protection of human rights in the planning and administrative decisions generally did not lie high on the scale of rights requiring the greatest protection and intervention by the courts: see *e.g.* Lord Hoffmann in *Begum* at paras. 29–35. The courts will not conduct their own merits-based consideration of the application of Convention rights and, in general, will confine themselves to traditional "judicial review" type questions.

85. In *Lough v First Secretary of State* [2004] EWCA Civ 905[69] the Court of Appeal have made it clear that it is unnecessary for a planning decision maker to articulate in explicit terms the carrying out of a proportionality balancing exercise, providing that it is clear in substance that the decision has adopted the correct approach. It is not necessary to follow the more explicit, structured approach required by Dyson L.J. in *Samaroo* [2001] U.K.H.R.R. 1150, at para. 45, in this area of the law.

86. Pill L.J. held, having concluded that there was no breach of Art.8(1):

> "48. Recognition must be given to the fact that Art.8 and Art.1 of the First Protocol are part of the law of England and Wales. That being so, Art.8 should in my view normally be considered as an integral part of the decision maker's approach to material considerations and not, as happened in this case, in effect as a footnote. The different approaches will often, as in my judgment in the present case, produce the same answer but if true integration is to be achieved, the provisions of the Convention should inform the decision maker's approach to the entire issue. There will be cases where the jurisprudence under Article 8, and the standards it sets, will be an important factor in considering the legality of a planning decision or process. Since the exercise conducted by the inspector, and his conclusion, were comfortably within the margin of appreciation provided by Art.8 in circumstances such as the present, however, the decision is not invalidated

[69] Compare the earlier (pre-Samaroo) approach in *R. (Malster) v Ipswich BC* [2002] P.L.C.R. 14 (Sullivan J.) and [2001] EWCA Civ 1715 (Court of Appeal) and in *Buckland v SSETR* [2001] 4 P.L.R. 3, *Egan v SSTLGR* [2002] EWHC 389 and *Gosbee v SSETR* [2003] EWHC 770 Admin.

by the process followed by the inspector in reaching his conclusion. Moreover, any criticism by the Appellants of the inspector on this ground would be ill-founded because he dealt with the Appellants' submissions in the order in which they had been made to him.

49. The concept of proportionality is inherent in the approach to decision making in planning law. The procedure stated by Dyson L.J. in *Samaroo* . . . is not wholly appropriate to decision making in the present context in that it does not take account of the right, recognised in the Convention, of a landowner to make use of his land, a right which is, however, to be weighed against the rights of others affected by the use of land and of the community in general. The first stage of the procedure stated by Dyson L.J. does not require, nor was it intended to require, that, before any development of land is permitted, it must be established that the objectives of the development cannot be achieved in some other way or on some other site. The effect of the proposal on adjoining owners and occupants must however be considered in the context of Article 8, and a balancing of interests is necessary. The question whether the permission has "an excessive or disproportionate effect on the interests of affected persons" (Dyson L.J. at paragraph 20) is, in the present context, no different from the question posed by the inspector, a question which has routinely been posed by decision makers both before and after the enactment of the 1998 Act. Dyson L.J. stated, at paragraph 18, that "it is important to emphasise that the striking of a fair balance lies at the heart of proportionality".

50. I am entirely unpersuaded that the absence of the word "proportionality" in the decision letter renders the decision unsatisfactory or liable to be quashed. I acknowledge that the word proportionality is present in the post-*Samaroo* decisions and the judgments of Sullivan J. in Egan and Elias J. in *Gosbee* but I do not read the conclusion reached by either judge as depending on the presence of that word or on the existence of a new concept or approach in planning law. The need to strike a balance is central to the conclusion in each case. There may be cases where the two-stage approach to decision making necessary in other fields is also appropriate to a decision as to land use, and the concept of proportionality undoubtedly is, and always has been, a useful tool in striking a balance, but the decision in *Samaroo* does not have the effect of imposing on planning procedures the straight-jacket advocated by Mr Clayton. There was no flaw in the approach of the inspector in the present case."

87. Keene L.J. added:

"55. I agree with Pill L.J. that the process outlined in *Samaroo*, while appropriate where there is direct interference with Art.8 rights by a public body, cannot be applied without adaptation in a situation where the essential conflict is between two or more groups of private interests. In such a situation, a balancing exercise of the kind conducted in the present case by the inspector is sufficient to meet any requirement of proportionality. . ."

88. It does not appear that the existence of human rights issues requires any different approach to the giving of reasons following Lord Brown's restatement of the orthodox test for the giving of reasons in planning cases in *South Bucks DC v Porter (FC) (No.2)* [2004] 1 W.L.R. 1953, at para.36:

"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a

substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Development of Crown Land

89. The issues to be considered are:

(1) Crown development prior to the 2004 Act. See *Lord Advocate v Dumbarton DC* [1990] 2 A.C. 580, *Hillingdon LBC v Secretary of State* (unreported, July 30, 1999 *per* Forbes J.) and, most recently, *R (Cherwell DC) v FSS & Home Secretary* [2004] EWCA Civ 1420.

(2) The inclusion of Crown development into mainstream development control, the 2004 Act.

(3) The enduring effects of Crown immunity, lawful uses of Crown land arising before the 2004 Act comes into force.

Prior to the 2004 Act

90. The general statutory control of development embodied in the Town & Country Planning Act 1990 and its predecessors is not applicable to the Crown (including Government Departments[70]) or those acting as servants or agents of the Crown. See in *Ministry of Agriculture v Jenkins* [1963] 2 Q.B. 317,[71] *Lord Advocate v Dumbarton DC* [1990] 2 A.C. 580,[72] *Hillingdon* and *Cherwell*.

91. The position prior to the 2004 Act can be summarised as follows:

(1) The Crown does not require planning permission in order to carry out "development", as defined by s.55 of the 1990 Act. As a matter of administrative practice, however, the Crown follows the non-statutory "notice of proposed development" procedures in DOE Circular 18/84.

(2) The Crown is immune from enforcement action for what would otherwise be a breach of

[70] Forbes J. in the *Hillingdon* case noted that the nature and extent of that rule "is conveniently and succinctly stated" in para.1321 of Volume 44(1) of Halsbury's Laws of England (4th Edition).

[71] Lord Denning M.R. at p.325 stated "Looking at the whole of the Town and Country Planning Act, 1947, I am satisfied that the Crown does not need to get planning permission in respect of its own interest in Crown lands. The reason it is exempt is, not by virtue of any provision in the Act itself, but by reason of the general principle that the Crown is not bound by an Act unless it is expressly or impliedly included. Section 87 (2) (b) does not exempt the Crown. It proceeds on the assumption that the Crown is already exempt. It says that, "Notwithstanding any interest of the Crown in land being Crown land . . . any [planning] restrictions . . . shall apply and be exercisable in relation to the land, to the extent of any interest therein . . . held otherwise than by or on behalf of the Crown . . ." That provision assumes that the Crown is already exempt in respect of its own interest in Crown land. All it does is to make sure that other persons (*e.g.*, its tenants) have to get planning permission in respect of their interests: and it preserves the Crown exemption in respect of its own interests."

[72] At p.604 Lord Keith stated "it is preferable, in my view, to stick to the simple rule that the Crown is not bound by any statutory provision unless there can somehow be gathered from the terms of the relevant Act an intention to that effect. The Crown can be bound only by express words or necessary implication. The modern authorities do not, in my opinion, require that any gloss should be placed upon that formulation of the principle."

planning control for any development carried on by or on its behalf. This is both an aspect of the common law and the application of s.294(1) of the 1990 Act.[73]

(3) Enforcement of any non-statutory approval via the NOPD procedure could only be by means of judicial review for breach of legitimate expectation that the terms of the procedure and any approval would be complied with. This somewhat crude means of control contrasts with the flexible range of enforcement tools available to a planning authority for breaches of statutory development control under Part VII of the 1990 Act.

(4) Where what would otherwise be development carried out by the Crown, if the land subject to the development is subsequently transferred to a non-Crown person that development is lawful for the purposes of the planning regime. See *per* Robert Goff J. in *Newbury DC v Secretary of State* (1977) 35 P. & C.R. 170[74] at 180 (which went to the House of Lords on other issues).

(5) There are limited exceptions in the 1990 Act to the non-application of the system of development control contained in Part XIII of the 1990 Act. One example is s.299 which has effect for the purpose of enabling Crown land, or an interest in Crown land, to be disposed of with the benefit of planning permission or a certificate of proposed development. s.299A allows the Crown to enter into Crown planning obligations under s.106 (proceeding on the apparent basis that the Crown could otherwise not do so) which are enforceable to the limited extent set out in s.299A(3) *i.e.* by injunction by the planning authority "against any person with a private interest deriving from the Crown or Duchy interest" stated in the obligation. However, the appropriate Crown authority must still give its consent before enforcement action by injunction can be brought.

92. The extent of the immunity (or, more accurately, non-application of the statutory regime of land use control) for development "by or on behalf of the Crown" was considered by Forbes J. in *Hillingdon* and by the Court of Appeal in *R. (Cherwell D.C.) v FSS & Home Secretary* [2004] EWCA Civ. 1420.

93. In *London Borough of Hillingdon v SSE* (unreported July 30, 1999) Forbes J. (followed by the Court of Appeal in *R. (Cherwell DC) v FSS & Home Office*) e.g. at paras. 39 and 56 adopted a broad approach to whether development was on behalf of the Crown and considered the question of control and benefit to the Crown to be of considerable relevance:

> "Accordingly, Mr Elvin submitted that the expression "by or on behalf of the Crown", in relation to the Crown Immunity Issue in this case, is not limited to the strict private law definitions of master and servant and principal and agent, but has a wider meaning of the type referred to in the judgment of Dixon J in *R. v Portus*, whether its meaning is considered in the context of the common law principle of Crown immunity or in the context of s.294 of the TCPA 1990. Mr Elvin stressed that there can be no sensible argument that Crown development of land, such as the construction of the Incinerator in the present case, must be undertaken by the Crown either personally or by the Minister or by his Civil Servants or by an agent of the Crown in the strict legal sense in order to enjoy Crown immunity. Such a narrow approach to the question of Crown immunity would, he suggested, have very serious implications for many Government projects which, as a matter of fact, involve the works necessary for such a development being carried out by independent contractors on behalf of the Government department in question. So it was that Mr Elvin submitted that, although it is clear that the law

[73] See Forbes J. in *Hillingdon*.
[74] Considered below.

> adopts a restrictive approach to the question of who is included in the concept of "the Crown", *a wider approach than one based simply on the strict legal definitions of master and servant or principal and agent must be adopted, when considering the issue whether the development in question is being or has been carried out "by or on behalf of the Crown*".
>
> In my judgment, Mr Elvin's submissions are correct. . .
>
> . . . I am satisfied that the expression "by or on behalf of the Crown" is not to be interpreted, whether for the purposes of the common law principle of Crown immunity or for the purposes of s.294 of the TCPA 1990, by a strict application of the private law definitions of master and servant and principal and agent. I agree with Mr Elvin that *a wider and less restricted interpretation of those words is appropriate*, at the very least when considering whether, as in the present case, the method whereby the Crown seeks to achieve its purpose in the development of land is "development by or on behalf of the Crown".
>
> Where (as in the present case) the context and subject matter, which is provided by the contractual provisions and other relevant circumstances relating to the development in question, *demonstrate a significant degree of control by the Crown over the work being or to be carried out by the independent contractor and show that the purposes of the Crown, from which it will derive significant benefit, are to be achieved by the particular method which has been adopted for developing Crown land*, the essentially factual conclusion, that the development in question is "development by or on behalf of the Crown", may well be justified—as in the present case."

94. Following the judgment of the Court of Appeal in *Cherwell*, even the grant of an independent and valuable interest in land will not prevent development by a lessee from escaping the statutory development control regime under the pre-2004 Act law providing that development is carried out "by or on behalf of" the Crown albeit with a substantial commercial benefit to the lessee. In *Hillingdon* there was significant contractual control by the Crown over the work and the lease was only granted following practical completion. In *Cherwell*, even the draft contract was not available to the Inspector or the Secretary of State, but only to the Court and development could only be carried out *following* the grant of the lease to the private sector developer.

Crown Development after the 2004 Act

95. S.79(1) of the 2004 introduces a new s.292A to the 1990 Act which states:

> "292A Application to the Crown
>
> (1) This Act binds the Crown.
>
> (2) But subsection (1) is subject to express provision made by this Part."

96. In contrast, the amendments to the listed buildings and hazardous substances legislation are more circumscribed: see s.79(2) and (3).

97. S.79(4) introduces Sch.13 which makes the following amendments to the 1990 Act:

> (1) Clarification that ss.226 and 228 compulsory purchase powers only apply to interests in Crown Land which are "for the time being held otherwise than by or on behalf of the Crown" and where the appropriate authority consents.
>
> (2) Revised definitions of "Crown Land" in s.293 are introduced.
>
> (3) Ss 294 and 295 are omitted but not with respect to development which occurred prior to commencement (see further below).

(4) S.299 is omitted but a new s.298A is inserted which contemplates that the First Secretary of State may introduce a separate application and determination regime for Crown development;

> "298A Applications for planning permission by Crown
>
> (1) This section applies to an application for planning permission or for a certificate under s.192 made by or on behalf of the Crown.
>
> (2) The Secretary of State may by regulations modify or exclude any statutory provision relating to the making and determination of such applications.
>
> (3) A statutory provision is a provision contained in or having effect under any enactment."

(5) S.293(4) of the principal Act (certain persons treated as having an interest in Crown land) is omitted.

(6) S.297 (agreements relating to Crown land) is omitted.

(7) S.298 (supplementary provisions as to Crown and Duchy interests) is amended to omit subs. (1) and (2) and amend subs.(3).

(8) S.299A (Crown planning obligations) is omitted.

(9) S.300 (TPOs in anticipation of disposal of Crown land) is omitted although the repeal does not affect its operation in relation to a TPO made by virtue of s.300 before commencement.

(10) S.301 (requirement of planning permission for continuance of use instituted by the Crown) is omitted. This does not affect its operation in relation to an agreement made before commencement.

(11) Powers of entry and the service of notices on the Crown are heavily modified so that:

(a) Crown land may not be entered except with the consent of the appropriate authority or by "a person appearing to the person seeking entry to the land to be entitled to give it" (s.325A);

(b) Notices must be served on the appropriate authority and not pursuant to s.329 (s.329A);

(c) Information will be provided as to interests in Crown Land pursuant to a request by the Secretary of State only (s.330A) and s.330 does not apply.

98. The enforcement regime is modified by a new ss.296A & B which:

(1) Requires the consent of the appropriate authority for the taking of any step in enforcing planning control except the issuing of a notice or taking a decision (s.296A(2) and (6));

(2) Decriminalises any acts or omissions of the Crown under the 1990 Act (s.296A(1)).

99. The general effect of the provisions is to subject the Crown to the regime of the 1990 Act with modifications appropriate to the Crown.[75] However, there are special procedures for:

(1) for development required for national security (s.80 of the 2004 Act introducing new s.321(5)-(12) and separate provisions for England and Wales at ss.321A, 321B).

[75] There is a power to modify subordinate legislation in Crown cases: see s.88 of the 2004 Act.

(2) urgent Crown development (s.293A introduced by s.82 of the 2004 Act).

(3) for trees in conservation areas (TPOs do not apply to the Forestry Commissioners by virtue of an amended s.200) (ss.85 and 86 of the 2004 Act).

(4) old Mining Permissions (s.87 of the 2004 Act).

Enduring effects of pre-2004 Act Crown development

100. Where an application is pending under Circular 18/84. Part 1 of Sch.4 provides that where a determination of a notice of proposed development is pending under Circular 18/84 and has neither been determined by the commencement of Pt.7 of the 2004 Act nor would be permitted development, then:

(1) If it is before the local planning authority, it is to be treated as a pending planning application; and

(2) If it is the subject to objection and before the Secretary of State, it is to be treated as an appeal under s.78 of the 1990 Act.

Generally

101. The Crown does not require planning permission in order to carry out development. In such circumstances, a private owner taking land from the Crown does not require planning permission to continue the use established during the period of Crown occupation, and benefits from the same immunity from enforcement as applied to the Crown. The relevant question is whether there was a change of use or operational development during the Crown occupation which may be subsequently relied upon by a non-Crown individual or body.

102. Although s.294 is omitted from the 1990 Act prospectively by virtue of para. 9 of Schedule 13 to the 2004 Act, its effect is preserved:

> "9 (1) ss.294 and 295 of the principal Act (control of development on Crown land: special enforcement notices) are omitted.
>
> (2) But the repeal of ss.294 and 295 does not affect their operation in relation to development carried out before the commencement of this paragraph."

103. In *Newbury District Council v SSE* (1977) 35 P. & C.R. 170, Robert Goff J. considered an argument by counsel for the appellant that where a use of land had been established by the Crown (and no planning permission had been granted in respect of it due to Crown immunity from planning permission requirements), a private interest could not, subsequent to acquiring the land from the Crown, claim that it too did not require planning permission to continue the use established during Crown ownership. Robert Goff J. rejected this argument (with Lord Widgery C.J. in support), citing what was then s.266(3) of the TCPA 1971:

> "No enforcement action shall be served under the s.87 of this Act in respect of development carried out by or on behalf of the Crown after the appointed day on land which was Crown land at the time when the development was carried out."

104. Robert Goff J. held at p.180:

> "The subsection provides that no enforcement notice shall be served in respect of such a development. It does not provide, as it easily could have done if such had been the intention, that

> no enforcement notice shall be served on the Crown in respect of such development. It follows that, if a private citizen should subsequently acquire any such land from the Crown, he would not have to apply for planning permission in respect of development within the subsection. He too would be protected from the service of an enforcement notice by the terms of the subsection which are quite explicit."

105. The current equivalent of s.266(3) of the 1971 Act is s.294(1) TCPA, which is worded almost identically to the former provision (see above). As such, the judgment of Robert Goff J. continues to be relevant[76] to development to which s.294(1) applies up to the commencement of Pt.7 of the 2004 Act. It is worth noting that, as Forbes J. held in *Hillingdon*, s.294(1) is simply declaratory of the common law position with regard to the application of the planning legislation to the Crown. See also *Cherwell*, per Chadwick L.J. at paras. 51–56.

106. Further, since anything which might amount to development within the 1990 Act can be carried out by the Crown without planning permission, any "development" carried out would be lawful and could not thereafter be the subject of a requirement for planning permission.[77] It was for that reason, among others, which lead to the introduction of the non-statutory procedure currently found in Circular 18/84.

107. Notwithstanding the general application of the regime of the 1990 Act to Crown Development in future, therefore, material changes of use and operations which were lawful by virtue of their being carried out by or on behalf of the Crown prior to commencement of Pt 7 of the 2004 Act will remain lawful.

[76] It was relied upon by all sides, and by the Court, in the *Cherwell DC* case.

[77] The only exception to this is s.301 of the TCPA, which provides for agreements between the Crown and a local planning authority, with respect to a development proposal involving a material change of use, that the Crown will limit its rights to continue that use to the period of its ownership. The result of such an agreement is that on disposal of the Crown land to the purchaser the Crown's use rights expire and planning permission will be required for continuance of the use by the purchaser.