Neutral Citation Number: [2011] EWHC 1908 (Admin)

Case No: CO/7555/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2011

Before:

MR JUSTICE WYN WILLIAMS

- -

Between:

BRITANNIA ASSETS (UK) LIMITED	**Applicant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT	**First Respondent**
(2) MEDWAY COUNCIL	**Second Respondent**

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- -

Matthew Horton QC (instructed by **Goldkorn Mathias Gentle Page LLP**) for the **Applicant**
Hereward Phillpot (instructed by **Treasury Solicitor**) for the **First Respondent**
Neil Cameron QC (instructed by **Legal Services Medway Council**) for the **Second Respondent**

Hearing dates: 5 April – 7 April 2011
Further written representations received

- -

Approved Judgment

Mr Justice Wyn Williams:

Introduction

1. In a decision letter dated 14 June 2010 Dr Jane Styles, an Inspector duly appointed by the First Respondent, quashed an enforcement notice issued by the Second Respondent on 13 July 2007 (notice A) but upheld 11 other enforcement notices which the Second Respondent issued on 3 November 2008 (notices B to L). In these proceedings, brought under section 289 Town and Country Planning Act 1990 (hereinafter referred to as "the 1990 Act"), the Appellant seeks an order that the decision of the Inspector to uphold notices B to L should be quashed and remitted for further determination.

2. Section 289(6) of the 1990 Act provides that no proceedings shall be brought under section 289 except with the permission of the court. On 15 November 2010 Deputy Master Knapman directed that there should be a 'rolled up' hearing i.e. that the application for permission to appeal and the substantive appeal should be considered at the same hearing. That being so and to avoid a minute examination of each of the numerous grounds of appeal advanced by the Appellant (except where that is necessary for a proper resolution of the competing arguments) I propose to grant permission on all grounds. The Appellant's Skeleton argument for the hearing before me identified 51 separate grounds of appeal based upon approximately 60 individual alleged errors of law. As will become apparent, however, the success of the Appellant's proposed appeal depends upon my determination of far fewer but, nonetheless, crucial issues. That is why an individual assessment of whether permission should be granted on each ground would be unduly onerous, extremely time consuming and ultimately, would achieve no particular purpose.

3. However, before turning to each of the crucial issues in this case it is necessary to set the scene by setting out the relevant factual background.

Factual background

4. The Appellant is the owner of an area of land which is known as Thameside Terminal (in her decision letter from time to time the Inspector refers to it as TT); it is also known as the former Conoco site. It is situated at Salt Lane, Cliffe near Rochester in the county of Kent. Henceforth in this judgment the land as a whole is referred to as "the appeal site."

5. The history of the appeal site is as follows. At the start of the 20th century it was in use as chalk quarry and cement works. A plan which came into existence in 1908 showed that there were large buildings upon the site along with a series of kilns and tramway sidings. A plan produced in 1939 showed that the tramway sidings and kilns had been removed. However, the buildings were still shown as existing. The plan contained the annotation "old quarry".

6. During the Second World War and for some time thereafter the site lay derelict. However, in 1962 planning permission was obtained so that the site could be used for the storage and distribution of petroleum products. I will return to the precise terms of the planning permission later in this judgment. An aerial photograph dated 1967 shows eight fuel tanks, buildings and hard standings. Aerial photographs dated,

respectively, 1985, 1990 and 1999 show nine fuel tanks together with buildings, other structures and hard surfacing.

7. It is common ground that over many years after 1962 petrochemicals were received on site from ships via a pipeline which had been specially constructed. The storage tanks on site existed to facilitate the handling of such products; the products were stored in the tanks pending their distribution in road tankers to filling stations and other depots. The planning permission obtained in 1962 was granted to Jet Petroleum Limited.

8. By 1999 the ownership of the appeal site had passed to Conoco; in that year Conoco ceased its operations. However, it continued to keep the site secure in the sense that the site was kept under close surveillance by security personnel.

9. In February 2003 Conoco sold the appeal site to a firm known as Elridge and Jones. As of that date there were still nine fuel storage tanks on site together with buildings and hard standings. On the same day that Conoco sold the site to Elridge and Jones they sold it on to the Appellant. The controlling mind of the Appellant's activities was and still is a Mr. Andrews.

10. Following the sale to the Appellant the fuel tanks were dismantled and removed. Further, most of the buildings on site were demolished. This activity took place in 2003 and perhaps in early 2004. Some time in 2003 a company known as D. Andrews Haulage Ltd began operating from the site. This company was also controlled by Mr Andrews, the controlling mind of the Appellant. In evidence to the Inspector Mr Andrews described the business of D. Andrews Haulage Ltd as being that of a haulage contractor. Lorries would depart from and return to the site empty; there was no storage and distribution of any of the materials which were transported by means of the lorries. Mr Andrews produced evidence to the Inspector to the effect that the vehicle operator's licence issued to the company specified the appeal site as an operating centre for 30 vehicles as from December 2003.

11. An aerial photograph taken on 14 March 2005 shows that D. Andrews Haulage Ltd was making use of part of the site; the photograph also shows that a small area was being used as a compound for demolition equipment.

12. By the date that notice A was issued the site was laid out quite differently. Eight identifiable specific areas (plots 1 to 8) had been created; the Appellant had also constructed a section of road to facilitate the use of the plots. The Appellant's aim was to use the site as a small trading estate; the plan was that there would be individual occupiers of the plots which had been created on site each conducting his/its own business.

13. Notice A was served on a total of 10 persons/companies. For the purposes of this judgment it is sufficient to record that those persons included the Appellant and the then occupiers of the 8 plots.

14. All of the persons served with the notice appealed to the First Respondent. An appeal commenced by way of public local inquiry on 24 June 2008. There was a debate at the commencement of the inquiry about whether or not notice A was a nullity. The inquiry sat for 4 days and was then adjourned. Following the adjournment a decision

was issued to the effect that notice A was not a nullity. The Appellant sought permission to apply for judicial review of that decision but permission was refused. However, it was not until 26 January 2010 that the inquiry resumed. In the interim period the Second Respondent issued notices B to L.

15. The Inspector quashed notice A essentially because she considered it was a duplicate of Notice B. She upheld notices B to L although she exercised her power to correct and vary each of the notices which she upheld.

16. Notice B relates to the whole of the site. It alleged the following breaches of planning control:-

> "i) Material change of use
>
> Without the benefit of planning permission, change of use of the Site to use as a business/industrial estate, including plant hire, highways maintenance depot and manufacturing uses.
>
> ii) Operational development
>
> Without the benefit of planning permission,
>
> a) the construction of a roadway, with block paved footways and lighting columns in the position shown hatched black on the Plan.
>
> b) the erection of palisade fencing in the positions indicated by thick black lines on the Plan.
>
> c) the erection of permanent buildings in the position shown coloured pink on the Plan and on plans TT03, TT04, TT05, TT06, TT07, TT08 attached hereto being a security building for the Site in the position shown coloured pink on the Plan and a workshop building on plot 3, a workshop building and an electricity sub-station on plot 4, a workshop building, a wash down area and a sewerage treatment plant on plot 5, a salt store and three other building on plot 6, a workshop building on plot 7 and two workshop buildings on plot 8.
>
> d) the fixing of static portakabins on the Site in the position shown coloured green on plans TT02, TT03, TT04, TT05, TT06 and TT07 attached hereto
>
> e) the construction of a septic tank on plot 2 of the Site (which plot is shown edged red on plan TT02 attached hereto)
>
> f) the construction of a cesspit on plot 6 (which plot is shown edged red on plan TT06 attached hereto)
>
> g) the construction of storage bays on Plot 6 in the position shown coloured blue on plan TT06 attached hereto

> h) the laying of hardstanding on the Site other than in those areas shown crosshatched black on the plans TT02 and TT08 attached hereto."

Notices C to L were notices which were specific to the 8 plots which had been created on site, a section of the roadway and an area of hard standing.

17. I next turn to the grounds of challenge. As I have said there are a number of issues which are crucial to whether this appeal succeeds or fails and I propose to deal with each of these issues in the next ensuing sections of this judgment.

Did the Second Respondent act unlawfully when it issued the enforcement notices?

18. Section 172(1) of the 1990 Act provides as follows:-

> "1. The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them –
>
> a. that there has been a breach of planning control; and
>
> b. that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations."

19. Mr Horton QC, on behalf of the Appellant, submits that the Second Respondent acted unlawfully when it issued all the notices in this case since it failed to have regard to a number of material considerations when determining that it was "expedient" that notices should be issued. He further submits that it is open to him to take this point in proceeding under section 289 of the 1990 Act.

20. Part VII of the 1990 Act contains a number of provisions relating to enforcement notices. It spans sections 171A to 196C. Section 174(1) confers a right of appeal against an enforcement notice upon the owner of the land which is the subject of the notice; an occupier of the land also has a right of appeal. The appeal is made to the First Respondent. Section 174(2) provides that an appeal may be brought on seven specified and separate grounds. They are:-

> "a. that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;
>
> b. that those matters have not occurred;
>
> c. that those matters (if they occurred) do not constitute a breach of planning control;
>
> d. that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;

e. that copies of the enforcement notice were not served as required by section 172;

f. that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which had been caused by any such breach;

g. that any period specified in the notice……falls short of what should reasonably be allowed."

21. Section 176 of the Act is headed "General provisions relating to determination of appeals". The material parts of the section read:-

> "(1) On an appeal under section 174 the Secretary of State may –
>
> a) correct any defect, error or mis-description in the enforcement notice; or
>
> b) vary the terms of the enforcement notice, if he is satisfied that the correction or variation will not cause injustice to the Appellant or the local planning authority.
>
> (2) Where the Secretary of State determines to allow the appeal, he may quash the notice.
>
> (2A) The Secretary of State shall give any directions necessary to give effect to his determination on the appeal.
>
> (3) ….
>
> (4) ….
>
> (5) Where it would otherwise be a ground for determining an appeal under section 174 in favour of the Appellant that a person required to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the Appellant nor that person has been substantially prejudiced by the failure to serve him."

22. Section 285 of the 1990 Act provides that the validity of an enforcement notice shall not be questioned in any proceedings on any of the grounds on which an appeal may be made to the Secretary of State except by way of an appeal under section 174 of the Act.

23. Section 289(1) of the act provides:-

> "(1) Where the Secretary of State gives a decision in proceedings on an appeal under Part VII against an enforcement notice the Appellant or the local planning

> authority….may…..appeal to the High Court against the decision on a point of law…."

By virtue of section 289(5) Rules of Court may be made prescribing the powers of the High Court on an appeal. PD52 22.6 (C14) provides that where the court is of the opinion that the decision appealed against was erroneous in point of law, it will not set aside or vary that decision but will remit the matter to the First Respondent for re-hearing and determination in accordance with the opinion of the court.

24. In the light of provisions contained within section 174 of the 1990 Act both Mr Phillpot, for the First Respondent and Mr Cameron QC for the Second Respondent submit that it is not open to an Inspector appointed by the First Respondent who is conducting an appeal under section 174 to consider whether or not the local authority which has issued the notice considered it expedient to do so "having regard to the provisions of the development plan and to any other material considerations." They submit that an Inspector is constrained by the statutory language simply to consider whether any of the grounds of appeal specified in section 174 of the Act are made out.

25. They submit, further, that this court's jurisdiction on an appeal under section 289 of the Act is confined to investigating whether or not an Inspector's decision – to uphold or refuse an appeal – is vitiated by an error of law; if it is the court is bound to remit the matter to the First Respondent for re-determination in the light of the court's conclusions.

26. In the context of the instant case Mr Phillpot and Mr Cameron QC submit that it was not open to the Inspector to consider whether the Second Respondent had acted lawfully when it determined to issue the notices. They submit that this court, when seized of an appeal under section 289 of the Act, is in an identical position. Both Mr Phillpot and Mr Cameron QC submit that if a person aggrieved by the issue of an enforcement notice wishes to challenge the notice on the grounds that the local planning authority concerned has failed to act in accordance with section 172 of the Act that person should challenge the legality of the notice in judicial review proceedings. Such proceedings would have to be issued promptly and in any event within 3 months of the date of the issue of the notice unless a court was persuaded to grant an extension of time.

27. In my judgment, the statutory language supports the stance adopted by Mr Phillpot and Mr Cameron QC. However, Mr Horton submits that the statutory language is not interpreted in this way in practice. He submits that it is commonly the case that points about the validity of an enforcement notice are taken before an Inspector on an appeal under section 174 of the Act even though such points do not fit within the language of section 174. He points out that in this case, for example, a point was taken on behalf of the Appellant that notice A was a nullity. The Inspector determined that point even though there is no ground of appeal under section 174 of the Act which suggests that an Inspector can be asked to determine whether or not an enforcement notice is a nullity. Mr. Horton submits that I should be slow to decide the point in issue in this ground of challenge in such a way that undermines a practice which is settled and can be justified by reference to sound practical considerations.

28. I was shown a number of authorities which bear upon the point. An important case, without doubt, is the decision of the House of Lords in R v Wicks [1998] A.C. 92. In

Wicks the issue before the court was whether or not it was open to a Defendant charged with the offence of failing to comply with an enforcement notice to raise the defence that the enforcement notice was invalid. Mr Wicks wished to present a defence to the charge of failing to comply with an enforcement notice to the effect that the decision of the local planning authority to issue it had been improper; it had not been genuinely considered, in accordance with section 172(1)(b) of the Act, whether the issue of the notice was "expedient". According to Mr Wicks the local planning authority had acted in bad faith and had been motivated by immaterial considerations when it had decided to issue the notice.

29. The House of Lords upheld earlier decisions to the effect that such a defence was not available in the criminal proceedings. The important passages in the speech of Lord Hoffman (which was the leading speech in the House) are these:-

> "In my view the question in this case is likewise one of construction. What is meant by "enforcement notice" in section 179(1) of the Act 0f 1990? Does it mean a notice which is not liable to be quashed on any of the standard grounds in public law? Or does it mean a notice issued by the planning authority which complies with the formal requirements of the Act and has not actually been quashed on appeal or judicial review? The words "enforcement notice" are in my view capable of either meaning. The correct one must be ascertained from the scheme of the Act and the public law background in which it was passed.
>
> In my view, when one examines part VII of the Town and Country Planning Act 1990, the scheme of enforcement of planning control which it exhibits and the history of its provisions, one is driven to the conclusion that "enforcement notice" means a notice issued by the planning authority which is formally valid and has not been quashed."
>
> ……
>
> "The history shows that over the years there has been a consistent policy of progressively restricting the kind of issues which a person served with an enforcement notice can raise when he is prosecuted for failing to comply. The reasons for this policy restriction are clear; they relate, first, to the unsuitability of the subject matter for decision by the criminal court; secondly, to the need for the validity of the notice to be conclusively determined quickly enough to enable planning control to be effective and to allow the timetable for service of such notices is in the Act to be operated; and thirdly, to the fact that the criminal proceedings are part of the mechanism for securing the enforcement of planning control in the public interest.
>
> First, then, the suitability of the subject matter. The Act of 1960 recognised that the planning merits of the enforcement

> notice were unsuitable for decision by a Magistrates' Court. It not only transferred the right of appeal to the Minister (now the Secretary of State) but excluded challenge on most such grounds than any other proceedings. The present position is that no challenge is possible on any ground which can form the subject matter of an appeal.
>
> On the other hand, there remain residual grounds of challenge lying outside the grounds of appeal in section 174(2) of the Act of 1990, such as mala fides, bias or other procedural impropriety in the decision to issue the notice. I shall call these the "residual grounds." Mr Speaight says that the fact that the residual grounds were not swept up in the appeal procedure supports his argument. If section 285(1) says that the notice cannot be questioned on certain grounds, it follows that it *can* be questioned on any other ground. But the fact that the residual grounds are not altogether excluded does not necessarily mean that they can be raised as a defence to a prosecution. They may be available only by some other procedure. The reason, as it seems to me, is obvious. Questions of whether decision to issue a notice was based upon irrelevant or improper grounds are quite unsuitable for a planning Inspector. The question then is whether Parliament regarded them as suitable for decision by a criminal court."

Later in his speech Lord Hoffman said:-

> "I do not think that in practice hardship will be caused by requiring the residual grounds to be raised in judicial review proceedings. The statutory grounds of appeal are so wide that they include every aspect of the merits of the decision to serve an enforcement notice. The residual grounds within practice be needed only for the rare case in which enforcement is objectively justifiable but the decision that service of the notice is "expedient" (section 172(1)(B)) is vitiated by some impropriety. As Keene J said in the Court of Appeal, the owner has been served with the notice and knows that he has to challenge it or comply with it. His position is quite different from that of a person who has contravened a bye-law, who may not have heard of the bye-law until he contravened it.
>
> All these reasons lead me to conclude that "enforcement notice" in section 179(1) means a notice issued by a planning authority which on its face complies with the requirements of the Act and has not been quashed on appeal or by judicial review……."

30. Section 179(1) of the Act (read in conjunction with sub-section 2) is the means by which the offence of failing to comply with an enforcement notice is created. In my judgment, however, the term "enforcement notice" must bear the same meaning whenever it appears in Part VII of the 1990 Act. Thus, in section 174(1) the

"enforcement notice" against which an appeal can be made must be interpreted to mean a notice issued by a planning authority which on its face complies with the requirements of the Act and has not been quashed by way of judicial review.

31. In the light of the analysis in Wicks an enforcement notice which is a nullity on the grounds that its terms are uncertain or that it fails to comply with the requirements of the Act is not an enforcement notice at all. Inevitably, therefore, from time to time an Inspector has to grapple with the issue of whether a notice is a nullity since, if it is, it has no legal existence and an Inspector has no jurisdiction to consider the merits of the appeal against the notice.

32. Section 176 of the Act is also important in this context. There may be circumstances in which an Inspector has to consider the use of the power conferred upon him to correct or vary the terms of the enforcement notice under appeal. Inevitably, cases will arise in which the argument is presented on behalf of the Appellant is that the notice cannot be corrected or varied because, in reality, it is a nullity.

33. For my part, therefore, I can see good reasons why there will be cases from time to time in which an Inspector is bound to consider whether an enforcement notice is a nullity as a means of determining the extent of his jurisdiction.

34. However, in my judgment once an Inspector determines that the notice is not a nullity (if that point is raised) his jurisdiction thereafter is governed by the terms of section 174 read in conjunction with section 176 of the Act. This conclusion is consistent with the recent decision in Gazelle Properties Ltd & Another v Bath & North East Somerset Council [2010] EWHC 3127 (Admin). At paragraph 55 of his judgment Lindblom J said this:-

> "…section 285 leaves for the court, on a claim for judicial review, grounds of challenge to the decision of a local planning authority take enforcement action which are not within the compass of a statutory appeal as provided in section 174. Such grounds were described by Lord Hoffman in *Wicks* as "residual". Nowhere in the relevant authorities are they precisely or comprehensively defined. But, as Lord Hoffman emphasised, the deliberate inclusion by Parliament of the words "on any of the grounds on which such an appeal may be brought" in the preclusive provision in section 285(1) is recognition of the fact that there is a category of challenge to an enforcement notice which is not within the ambit of section 174. The specific grounds in section 174 are for decision-makers on appeals, not for the courts. This much is effectively acknowledged in the statutory code itself. Where the line is to be drawn between the statutory grounds and the residual category is for the court to determine. And the court has been cautious in drawing that line no further than the traditional boundaries of judicial review…."

At paragraph 57 the Learned Judge continued:-

> "The residual category of grounds is not so narrowly confined as being limited only to cases of bad faith or bias. It may safely be said to include the exceptional case where, as Lord Hoffman put it in *Wicks*, "the decision to issue the notice was based upon a relevant or improper grounds". One illustration of the kind of case that falls on this side of the line is to be seen in *ex parte Knott*. Another, in my judgment, would be the case where a local planning authority's consideration of the question of expediency – an exercise embracing the factors mentioned by Ouseley J in *Usk* – was vitiated by irrationality or unfairness. Moreover, if matters relevant to the question of expediency beyond the reach of the statutory rungs of appeal are ignored, or, as a corollary, if matters not relevant to that question are taken into account, the court's jurisdiction is not excluded by section 285. In my view therefore Mr Towler was right to acknowledge, without conceding their merit, that there are some matters raised in the present claim which are susceptible to judicial review. Those matters are clearly to be distinguished from the appraisal of planning merit required by an appeal on ground (a) in section 174(2) (which is equivalent to the task facing an authority dealing with an application under section 70), from the fact-finding exercise entailed in considering an appeal on ground (b), (c), (d) or (e), and from the judgments called for by an appeal on ground (f) or (g). So to conclude is, I believe, wholly consistent with the principles to which I have referred in *Wicks*….."

35. In my judgment the Inspector in this case had no jurisdiction to determine whether or not the Second Respondent had complied with its obligation under section 172 of the Act.

36. In fact the Inspector was invited to consider whether the Second Respondent had complied with its duty under section 172. The Inspector's decision letter dealt with this issue in the following three paragraphs:-

> "**Authority to issue the enforcement notices**
>
> 12. The Appellant queried the authority to issue the enforcement notices. I shall deal with it for the sake of completeness.
>
> 13. The Council's scheme of delegation gives particular officers the power to authorise the taking of enforcement action. Furthermore, under that scheme of delegation, on 5 July 2007, the case officer and the development control officer authorised the service of notice A. On 3 November 2008, a consultant working for the Council presented a report to the officers of the Council who then authorised the service of notices B to L.

> 14. The issue of whether or not it was expedient to issue the notices was considered in the reports presented to the officer who authorised the decision to take enforcement action. As such, the notices were issued in accordance with the requirements of section 172 of the Act and with the relevant authority."

37. It seems to me to be clear that the Inspector has determined that the Second Respondent acted in accordance with section 172 of the Act. I appreciate that the Inspector has expressed that view "for the sake of completeness" but, in my judgment, the Inspector has accepted that she had jurisdiction to deal with the issue. As I have said, I do not consider that she did.

38. Does this court have jurisdiction to deal with the point in an appeal under section 289 of the Act? In a sense, it must have jurisdiction. The Inspector erred in law when she decided that she had jurisdiction to determine whether the Second Respondent had acted in accordance with section 172 of the Act. All that this court can do, however, is to remit the case to the First Respondent so that the Inspector can determine that she had no jurisdiction to deal with the issue. That would achieve nothing.

39. No doubt that is why Mr Horton QC submits that even if it was not open to the Inspector to consider whether the Second Respondent had complied with section 172 of the Act it is open to me to proceed as if the Appellant had taken the point by way of judicial review. If I were to adopt that course I would be in a position to quash the Inspector's decision if I took the view that the Second Respondent had acted unlawfully when it issued the notices. Further, presumably I would be invited to declare that the Second Respondent had acted unlawfully and quash the enforcement notices.

40. At the forefront of Mr. Horton's submission is the decision in Rhymney Valley DC v the Secretary of State for Wales [1985] JPL 27. In that case Rhymney Valley DC served an enforcement notice on a Mr Isaac alleging unauthorised tipping on land. Mr Isaac appealed against the notice and an Inspector was appointed to hear the appeal. Although the point was not argued at the appeal, the Inspector concluded that one of the remedial steps specified in the notice was ambiguous and uncertain thus rendering the enforcement notice a nullity. The Council appealed to the High Court under section 246 of the Town and Country Planning Act 1971 (the predecessor to section 289 of the 1990 Act).

41. Nolan J concluded that the Inspector had fallen into error by treating the enforcement notice as a nullity. However, he was troubled by the fact that the Council had appealed to the Secretary of State in reliance upon section 246 of the 1971 Act. The report of his observations upon this issue read as follows:-

> "…the appropriate course, forming the view which he had, must therefore be formally to send the matter back to the Secretary of State for further consideration of the appeal.
>
> The form in which he did so gave rise to some procedural difficulty. The matter came before him by way of appeal brought in reliance on section 246 of the Town and Country

> Planning Act. That did not appear to be an appropriate provision under which to bring proceedings based on a decision that the enforcement notice was a nullity. He had been assisted by Mr Brown [Counsel for the Respondent] in this matter, and proposed to follow the course suggested which was treat the proceedings as an application for judicial review, the form of relief sought being certiorari to quash the decision of the Inspector, and that was the order which he made."

42. There are a number of important differences between the Rhymney Valley case and the instant one. First, the issue of whether or not the enforcement notice was a nullity arose, for the first time, when the Inspector issued his decision letter. Until that time there had been no suggestion of any kind that the notice was a nullity. Second, the time for bringing proceedings to challenge the conclusion of the Inspector began with the decision letter. Consequently the time for bringing judicial review proceedings to challenge the Inspector's decision began at exactly the same time as was allowed for bringing an appeal under the 1971 Act. Third, the proceedings under the 1971 Act were brought within the time allowed for bringing judicial review proceedings. Fourth, the nullity issue was the only point in the case. No conceivable injustice could have arisen by the court proceeding on the basis that judicial review proceedings had been commenced as opposed to an appeal under the 1971 Act.

43. In the instant case the Appellant has been asserting that the Second Respondent did not comply with its duty under section 172 of the 1990 Act from the time that it was served with notice A. The time for bringing a challenge by way of judicial review to notice A and notices B to L had long since expired by the time proceedings under section 289 of the 1990 Act had been commenced. No proper reasons have ever been advanced which would justify the grant of an extension of time to bring judicial review proceedings.

44. There is also the difficulty that every point taken by the Appellant in support of his appeal (other than the point now under consideration) is properly brought under section 289 and, indeed, could only be brought under section 289 of the Act. I know of no basis whereby proceedings can be treated both as brought under section 289 of the 1990 Act and, in relation to a discrete point raised in the proceedings, as if the proceedings had commenced by way of an application for judicial review.

45. I have reached the clear conclusion that no reliance can be placed upon the Rhymney Valley District Council case to clothe this court with jurisdiction to determine whether the Second Respondent complied with its duty under section 172 of the Act. In my judgment the challenge to the issue of the enforcement notices ought to have been made by way of judicial review at the latest within three months of the issue date of each notice.

46. All that said, I agree with both Mr Phillpot and Mr Cameron QC that on the basis of the information available in these proceedings the Appellant would not establish that the Second Respondent failed to act in accordance with section 172 of the Act so that the Inspector was entitled to conclude that the Second Respondent had complied with its statutory duty. I deal with this matter quite shortly since, essentially, I adopt the reasons contained in the Skeleton Arguments of both counsel for reaching that conclusion. The complaints made by Mr Horton QC were that the reports produced

by an officer or officers of the Second Respondent which preceded the decisions to issue enforcement notices did not refer to every consideration which was material to the decision about whether notices should be issued. That is true. In my judgment, however, it would be highly surprising if reports of that nature did refer to each and every relevant matter. The obligation upon the person making a decision whether to issue an enforcement notice is to consider whether it is expedient to do so having regard to the provisions of the development plan and to any other material considerations. In this case the person making the decision was a senior planning officer in the employment of the Second Respondent. Reports were prepared by another officer or officers to assist the decision-maker but the writer or writers of the report were obviously entitled to proceed on the basis that a senior planning officer would know the material parts of the development plan and the other factors which were relevant to his decision. The authors of the reports were entitled to highlight those points which they considered most germane. They could reasonably assume that the decision maker would familiarise himself with all relevant considerations before making a decision. There is no evidence before me which suggests that the decision maker failed to proceed in the manner which the authors of the reports might reasonably assume. Further, there is no sound basis to conclude that the reports deflected the decision maker, in any way, from a proper appraisal of that which was material.

The challenge to the Inspector's conclusions upon the appeal under section 174(2)(C) of the 1990 Act

47. Section 174(2)(C) of the 1990 Act permits an appeal to be brought on the ground that the matters stated in the notice (if they occurred) do not constitute a breach of planning control. As it seems to me, during the course of his oral submissions Mr Horton QC was forced to accept that many, if not all, of the matters specified in notices B to L did constitute a breach of planning control. However, he submits that it is important to analyse, with care, the Inspector's conclusions on this topic for this reason. Even if the Inspector was correct to conclude that the matters (or most of them) contained within notices B to L constituted a breach of planning control nonetheless she was wrong to conclude, in effect, that no use could be made of the site without planning permission. Mr Horton QC submits that is not right; he submits that the Appellant has the right to use the site in ways which will be identified, shortly. That is important, submits Mr Horton QC, because account must necessarily be taken of this "fall-back" position when considering the appeal under ground (a); the Inspector was bound to take account of this "fallback position" when consideration whether or not planning permission should be granted for the development specified in the notices has having occurred without planning permission.

48. The starting point in relation to ground (c) is the planning permission granted by Kent County Council on 15 August 1962. On that date the Council granted planning permission to Jet Petroleum Ltd in the following terms:-

> "…for development of land situate at Cliffe Marshes in the parish of Cliffe and being the erection of storage tanks for petroleum products with ancillary equipment to receive by water, store and distribute by road ….. referred to in your

> application for permission dated the 30th day of November 1961."

The phrase "the erection of storage tanks for petroleum products with ancillary equipment to receive by water, store and distribute by road" was taken word for word from the terms of the application for planning permission. It is common ground that the permission properly interpreted authorised the use of the appeal site for the activity of storing and then distributing the "petroleum products."

49. Mr Horton QC submits that, properly interpreted, the planning permission permits the use of the site for storage and distribution of products other than "petroleum products." He submits, that the use permitted falls squarely within what is now class B8 of the Town and Country Planning Act (Use Classes) Order 1987, namely "use for storage or as a distribution centre". That being so, submits Mr Horton QC, use of the site for any use falling within class B8 would not involve development and, consequently, planning permission would not be required for such use.

50. In my judgment, and as a matter of first principles, it cannot be correct to seek to interpret a planning permission granted in 1962 by reference to a statutory instrument which came into force on June 1 1987. The Town and Country Planning (Use Classes) Order 1987 revoked the Town and Country Planning (Use Classes) Order 1972. The 1972 Order, in turn, revoked the Town and Country Planning (Use Classes) Order 1963 and amendments made thereto in 1965. The very first Order of this type was made in 1948 and it was the 1948 Order which was in force at the time this planning permission was granted.

51. In my judgment this is no technical, sterile point. Although it is reasonable to suppose that the 1948 Order contained some use class which was in some degree similar to B8 of the 1987 Order it is by no means clear to me that its terms would have been more than that. For example, the 1972 Order contains no use class in identical terms to B8; as it seems to me the nearest class is class X – "use as a wholesale warehouse or repository for any purpose."

52. In her decision letter the Inspector categorised the planning permission as permitting a use which was *sui generis*. That Latin phrase is a term of art in planning law. In essence in the current context it means that the specific use permitted by virtue of the planning permission is the only use which is permitted.

53. The Inspector provides cogent reasons why she was of the view that the planning permission created a permitted use which was *sui generis* (see her decision letter at paragraphs 111 to 122). In my judgment there is nothing in those paragraphs which even hints that she has erred in law in concluding that the use permitted by the planning permission was *sui generis*.

54. In any event, to repeat, whether any use was permitted by the planning permission which was wider in its scope than use for the storage and distribution of petroleum products had to be judged by the use class Order in existence in 1961 – namely the Order of 1948. So far as I am aware that Order was not placed before the Inspector and no point was ever argued before her in relation to that Order. Obviously, it is far too late now to raise any argument based upon the terms of that Order.

55. At paragraph 122 of her decision letter the Inspector advances an additional reason why the planning permission granted in 1962 could not have authorised a B8 use. She points to the fact that by virtue of Article 3(6)(g) of the 1987 Order no class specified within the Order includes use as "a yard for the storage or distribution of minerals…" In the view of the Inspector that which was authorised by the 1962 planning permission was the use of the appeal site for the storage and distribution of a mineral.

56. In light of my conclusion that the 1987 Order has no relevance in this case the Inspector's finding on this point is academic. However, as a matter of impression it seems to me to be clear that the planning permission did authorise the use of the site for the storage or distribution of a mineral. The planning permission permitted the storage and distribution of petroleum products. Obviously, crude oil would be regarded as a mineral for the purposes of the Use Class Order and, in my judgment, the products of crude oil also fall into that category. Like the Inspector, however, I do not base my decision on the interpretation of Article 3(6)(g). My primary conclusion is that the Inspector made no error of law when she categorised the use permitted by the planning permission as *sui generis*.

57. On 14 April 1972 Conoco Ltd applied for planning permission to "grade site and surface with macadam provide additional lorry parking space." The plan which accompanied the application demonstrated, quite clearly, that the application related to a defined area within the appeal site as a whole. On 17 April 1973 Kent County Council granted planning permission in terms which precisely mirrored the description of the development contained within the application.

58. The Inspector's observations about the relevance of this permission are contained within paragraph 123 of her decision letter. I quote:-

> "The Appellant contends that the area now covered by plot 8 had the benefit of a separate permission as a lorry park. However, having inspected both the application documents and the planning permission itself (TH/6/72/21) it is clear to me that the lorry park to be extended form part of the Thameside terminal. The lorry park and the OSD were all occupied by the same occupier and form part of a single planning unit. The use of that unit being for an OSD. The extension to the lorry park was situated on a piece of land which itself was located towards the centre of the Thameside Terminal site. It is clear to me that it was, as a matter of fact, for an extension to an existing lorry park. As such, the permission for the extension to the lorry park adds nothing to the Appellant's case."

59. The probability is that the Inspector was entitled to interpret the planning permission both by reference to the permission itself but also by reference to the application which preceded it. I say that since the terms of the permission properly incorporate the terms of the application. Even looked at alone, however, it seems to me to be clear that the planning permission authorised the provision of an "additional" lorry parking area. The use of the word additional to my mind, clearly conveys that the lorry parking area to be provided was inextricably linked to the existing lorry park which, in turn, served the use then being made of the site namely the storage and distribution of petroleum products.

60. Before me, Mr Horton QC also sought to rely upon a third planning permission in respect of the site. It is now common ground that a planning permission was granted in respect of the site in 1966. However, Mr Horton QC was frank enough to acknowledge that he could not prove that the documents relating to this permission were ever placed before the Inspector at the public inquiry. That being so I am satisfied that it is not open to me to take account of this documentation.

61. Conoco Ltd implemented each of the planning permissions which it obtained. Petroleum products were stored on site and then distributed to other outlets from the site over many years. As is common ground, however, the uses had ceased by 1999.

62. The next uses of the appeal site were those instigated by Mr. Andrews acting through companies which he controlled. Given my conclusions to date, all the uses instigated by Mr. Andrews must have constituted a material change of use. Far from continuing the use of the appeal site for the storage and distribution of petroleum products, he set about dismantling all the structures on site which had been used in conjunction with that use while at the same time and thereafter uses were commenced which had no connection with the storage and distribution of petroleum products. Inevitably, therefore, in my judgment all the matters referred to in the notices B to L constituted material changes of use and, inevitably, the Inspector was correct to dismiss the appeal under section 174(2)(c).

63. However, the Inspector also concluded that the right to use the site as for the storage and distribution of petroleum products had been abandoned and extinguished. Mr Horton QC submits that in so finding the Inspector fell into error. It is to this issue which I next turn.

64. It is now well established and, indeed, common ground, that a particular use of land which is lawful can, nonetheless, be abandoned. That proposition was established, authoritatively, in Hartley v Minister of Housing and Local Government & Another [1970] 1 QB 413. Since Hartley there have been a number of decisions in which the criteria necessary to establish abandonment have been discussed and elucidated. The most recent statement of law on the test of abandonment is to be found in Hughes v Secretary of State for the Environment, Transport & Regions [2000] 80 P. & C.R. 397. Whether or not a lawful use has been abandoned is to be judged by reference to the view objectively to be taken by a reasonable man with knowledge of all the relevant circumstances. In seeking to ascertain the view of the reasonable man there are usually four factors which fall for consideration; they are a) the physical condition of the site, b) the length of time over which the site has not been used, c) whether the land has been used for any other purpose following the cessation of the use and d) the intentions of the owner of the site. It is also important to note that the intention of the owner is to be judged objectively. In a given case an Inspector or court is entitled to find that the use has been abandoned notwithstanding that the owner asserts that he has never intended to abandon the use.

65. In this case no one made use of the appeal site for the purpose of storing and distributing petroleum products over a period of some years. As soon as the Appellant bought the site it set about dismantling and removing the means by which that use could take place i.e. the storage tanks were dismantled and removed, the associated pipe work was removed and other works were undertaken to the site which were wholly inconsistent with its use for storage and distribution of petroleum

products. The Inspector specifically records in her decision letter that Mr Andrews told her in terms that he had no intention of using the site for the storage and distribution of petroleum products.

66. In the face of all this evidence there is no possible basis for concluding that the Inspector erred in law when she decided that the Appellant had abandoned the one lawful use of the site. Once the lawful use of the site had been abandoned it had no lawful use; any use of the site following abandonment would require planning permission. Mr Horton QC also makes various submissions about the notices which were issued in relation to the individual plots. He seeks to argue that no material change of use took place on some of the individual plots since the uses instigated could properly be categorised as falling within class B8 of the 1987 Order. None of these points has validity given my conclusions as expressed above. For that reason it would be otiose, in a judgment of this length, to deal in detail with the points raised in relation to the individual notices.

67. I should mention one further point so far as it relates to the appeal under ground (c). Under the heading extinguishment the Inspector wrote as follows:-

> "127. Mr Andrews' oral evidence confirmed that first, following the purchase of the site by [the Appellant], it was solely occupied by D. Andrews Haulage Ltd tipper hire business operating a maximum of 12 lorries and utilising the existing workshop and office building. Secondly, his use (i.e. D. Andrews Haulage Ltd use) was spread over the whole site. Thirdly, his vehicle operator's licence specified the appeal site as an operating centre for 30 vehicles as from December 2003. In evidence, Mr Andrews described the business he conducts as being that of a haulage contractor, or as a haulage business. His vehicles both arrive and depart empty. That use is, therefore, not storage and distribution but rather a haulage depot. Paragraph 8.21 of C10/97 states that a haulage yard can be considered as ***sui generis.***"

The Inspector went on to consider an argument raised on behalf of the Appellant namely that the use of the appeal site by D. Andrews Haulage Ltd was the first step in the transition to the trading estate use which the Appellant wished to maintain.

68. In my judgment there is no basis for concluding that the Inspector's appraisal as set out in paragraph 127 of her decision letter contained any error of law. On the facts presented to her, her conclusions were obviously justifiable. She was also correct, in my judgment, when she concluded that by using the appeal site as a haulage depot (a use which was *sui generis*) any ability to revert to the previous lawful use of the site was lost – a conclusion which she had reached by an alternative route, in any event, namely that the previous lawful use had been abandoned. Given the facts as found by the Inspector it is unnecessary for me to consider the legal intricacies which might have arisen on facts found differently as in cases such as Burdell v Secretary of State for the Environment [1992] 2 P& CR 174 and Beach v Secretary of State for the Environment Transport & the Regions [2001] EWHC (Admin) 381.

Is the Inspector's conclusion that the appeals under ground (a) should be dismissed vitiated by any error of law?

69. At paragraph 185 of her decision letter the Inspector identifies all the main issues in relation to the appeals under ground (a). In the appeal grounds and in his Skeleton Argument Mr Horton QC takes a number of points in order to justify his submission that the Inspector fell into many errors of law when determining the ground (a) appeals. During the course of his oral submissions, however, he acknowledged that if the Inspector was correct on one issue then she was bound to dismiss all the appeals on ground (a). For obvious reasons, I deal with this issue first. It was identified by the Inspector in the following terms:-

> "i) the effect of the appeal development on the adjacent sites of nature conservation interest and in particular whether the current use of the site is likely to significantly affect a European site (see below)."

70. The Inspector dealt with this issue at paragraphs 186 to 258 in her decision letter. Obviously, it is not appropriate to set out the whole of that section of the letter in this judgment. I make it clear, however, that this section of the decision letter must be considered as a whole when determining whether or not it contains any error of law. That said, it is instructive to set out paragraphs 186 to 190 of the decision letter since those paragraphs identify the sites of nature conservation interest which were, potentially, under threat of harm as a consequence of the appeal development and, further, they identify the steps which the Inspector considered she was obliged to take in reaching a judgment about the effect of the appeal development upon the sites of nature conservation interest. The paragraphs read:-

> "186. I need to consider the effect of the appeal development on the adjacent sites of nature conservation interest, and in particular:
>
> a. The Thames Estuary and Marshes Special Protection Area (SPA) (Classified on 31 March 2000) (European site)
>
> b. The Thames Estuary and Marshes Ramsar Site (Classified on 31 March 2000) (international site)
>
> c. The South Thames Estuary Site of Special Scientific Interest (SSSI) (Notified in 1984 under Wildlife and Countryside Act 1981) (national site).
>
> 187. It falls on me as the competent authority to determine whether the plan or project is likely to have a significant effect on a Natura 2000 site (which includes SPAs designated under the Birds Directive) – in this case, The Thames Estuary and Marshes Special Protection Area (TEM SPA) – either alone or in combination with other plans and projects that have been approved or are likely to take place.

188. Furthermore, as a matter of policy set out in paragraph 5 of Circular 06/05, the procedures applicable to a European site apply to the Thames Estuary and Marshes Ramsar site (TEMRS) (which is an international site, not a European site).

189. I also need to consider the duty imposed by section 28G(2) of the Wildlife and Countryside Act 1981 and the consequent duty on the Secretary of State to give notice to Natural England; and the duty to have regard to the purpose of conserving biodiversity (section 40(1) of the Natural Environment and Rural Communities Act 2006).

Habitats Regulations Assessment (HR Assessment)

190. The legislation makes no provision for development to be carried out in the absence of planning permission or in advance of an HR Assessment. Therefore, the circumstances of this case are unusual. Nevertheless, The Habitats Regulations Assessment involves 7 steps as set out in Circular 06/2005:

Step 1 Is the proposal directly connected with or necessary to the management of a protected site? (*If the answer is yes, then PP can be granted, providing no other harm is identified*).

Step 2 Is the proposal likely to have a significant effect on the interest features of a Natura 2000 site, alone or in combination? (*If the answer is no, PP can be granted subject to the same caveat as above*).

Step 3 If it is, or such a risk cannot be excluded on the basis of objective information, an *appropriate assessment* (AA) must be undertaken to determine whether or not the development will have an adverse affect on the integrity of the site. (*If the AA result is that there are no risks of adverse effects, PP can be granted as above*).

Step 4 If any adverse effects are identified, can they be mitigated or overcome by conditions or other restrictions such as s106 agreement or undertaking? (*If adverse effects can be sufficiently reduced or overcome through mitigation measures, such that the integrity of the site is not adversely affected, then PP many be granted subject to the necessary conditions being attached and/or the requisite s106 being signed and sealed*).

Step 5 If not, are there alternative solutions that would have a lesser effect on the integrity of the site? (*If the answer is yes, then the appeal must be dismissed*).

If there are no alternative solutions that would have either no effect, or a lesser effect on the integrity of the site, then the next step is

> dependent on whether or not a priority habitat or species would be adversely affected.
>
> **Step 6a** If a priority habitat or species would not be affected, are there imperative overriding reasons of public interest (which could be of a social or economic nature) sufficient to override the harm to the site? (*If the answer is no, the appeal must be dismissed*).
>
> **Step 6b** If a priority habitat or species would not be affected, are there imperative overriding reasons of public interest relating to human health, public safety or benefits of primary importance to the environment? (*Again, if the answer is no, the appeal must be dismissed*).
>
> **Step 7** If there are imperative reasons of overriding public interest can it be determined that compensatory measures necessary to ensure the overall coherence of the Natura 2000 network have been undertaken or at least secured?"

71. The Inspector reached the following conclusions. The appeal proposal was not directly connected with or necessary to the management of a protected site. Second, the appeal proposal was likely to have a significant effect (either alone or in combination) on the interest features of a Natura 2000 site or, at least, such a risk could not be excluded on the basis of objective information. The interest features identified by the Inspector were "birds present in nationally or internationally important numbers. Accordingly, third, "an appropriate assessment (AA)" was necessary to determine whether or not the development would have an adverse affect on the integrity of the site. The Inspector herself undertook the AA. Her AA is contained within paragraphs 216 to 254 of the decision letter. Paragraph 254 is in these terms:-

> "On the basis of that evidence, it cannot be excluded on the basis of objective information, that the continued use of the TT site for the development which has already been carried out will have an adverse affect on the integrity of the designated site either individually or in combination with other plans or projects."

The Inspector next asked herself whether the adverse affects upon the site could be mitigated or overcome by conditions or other restrictions and answered that question in the negative. She noted, finally, that no alternative solutions had been put forward by the Appellant. Those steps which she identified as steps 6 and 7, (see paragraph 70 above), did not fall to be considered.

72. Paragraph 258 of the decision letter is as follows:-

> "As a consequence of my conclusions on the AA, planning permission should be refused on this ground alone. I have also had regard to the duty imposed in section 28G of the Wildlife & Countryside Act 1981 and to paragraph 61 of C06/05, but given my conclusions in respect of the SPA/Ramsar site a

> decision to grant planning permission would not avoid adverse affects on the SSSI. Furthermore, it would not conserve biodiversity (section 40(1) Natural Environment & Rural Communities Act 2006)."

73. In his oral submissions Mr Horton QC struggled to advance any persuasive reason why the Inspector had fallen into error when determining that planning permission should be refused on the basis of her conclusion that the continued use of the appeal site for the development already undertaken would have an adverse impact on the integrity of protected sites. In his reply he came very close to acknowledging that he could not identify an error of law on the part of the Inspector in relation to this issue. Indeed, he began his reply with what he described as a *cri de Coeur* essentially arguing that it was simply unfair that the Appellant should be subject to enforcement action given the effect such action would likely have upon his own business and those of the other occupiers of the site.

74. In the original grounds of appeal Mr Horton QC identified a number of potential errors of law. First, it was suggested that the Inspector had wrongly assumed that if the enforcement notices were confirmed the Appellant would have no right to revert to any previous use of the site which would be capable of disturbing the birds. It is true that the Inspector made that assumption but for reasons which I have explained her assumption was correct. Second, the Inspector failed to take account of the disturbance which would arise from the works which would be undertaken in order to comply with the enforcement notices and she failed to consider whether such works would pose a greater threat in relation to the disturbance of the birds than permitting the Appellant's use of the site to continue. It is true that the Inspector did not ask herself that question. Both Mr Phillpot and Mr Cameron QC submit that such a question was not relevant. I agree. The Inspector was considering a deemed application for planning permission in respect of matters stated in the enforcement notices as constituting a breach of planning control. When considering the appeals under ground (a) the plan or project to be considered was that for which the deemed planning application was made, which did not include any restoration proposals.

75. The third ground advanced by Mr Horton QC was that the Inspector considered the impact of the development upon the appeal site not by reference to the designated site as a whole but by reference to a small part of it. In my judgment, that criticism is not made out if consideration is given to the whole of the relevant section of the decision letter. On a fair and proper reading of her reasoning as a whole the Inspector was considering the whole of the protected site or sites.

76. The next ground relied upon by Mr Horton QC was that the Inspector had not correctly applied Article 6(3) of the Habitats Directive 92/43/EEC and Article 48(1) of the Conservation (Natural Habitats etc) Regulations 1994 which transposed the Directive into English law.

77. Article 6 of the Directive is in the following terms:-

> "1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites for integrated into other development plans, and

> appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex i and the species in Annex ii present on the sites.
>
> 2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant affect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
>
> 4. If, in spite of the negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State should take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

78. Regulation 48 of the 1994 Regulations provides:-

> "A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which –
>
> a. is likely to have a significant affect on a European site in Great Britain or a European off-shore marine site (either alone or in combination with other plans or projects), and
>
> b. is not directly connected with or necessary to the management of the site,
>
> i) shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

> ii) a person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable the competent authority to determine whether an appropriate assessment is required.
>
> iii) the competent authority shall, for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority may specify.
>
> iv) they shall also, if they consider it appropriate, take the opinion of the general public; and if they do so, they shall take such steps for that purpose as they consider appropriate.
>
> v) in the light of the conclusions of the assessment, and subject to Regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or European off-shore marine site (as the case may be).
>
> vi) in considering whether a plan or project will adversely affect the integrity of the site, the authority shall have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given."

79. The Directive was subject to scrutiny by the European Court of Justice in Waddenzee & Another v Staatssecretaris van Landbouw [2004] EMVLR 14. In particular, the first sentence of Article 6(3) was considered and interpreted as follows:-

> "45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Art.6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective evidence, that it will have a significant effect on that site, either individually or in combination with other plans or projects."

Earlier, in paragraph 41, the Court observed:-

> "Therefore, the triggering of the environmental protection mechanism provided for in Art.6(3) of the Habitats Directive does not presume – as is, moreover, clear from the guidelines for interpreting that Article drawn up by the Commission, entitled "Managing Natura 2000 Sites: the provisions of Article A6 of the 'Habitats' Directive (92/43/EEC)" – that the plan or

> project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project."

80. Further, Regulation 48 of the 1994 Regulations has been the subject of analysis in R (Hart) DC v Secretary of State [2008] EWHC 1204. At paragraph 78 of his judgment Sullivan J (as he then was), considered the meaning of the word likely as it appears in Regulation 48(1). He said:-

> "78. To an English lawyer, a need to establish a likelihood imposes a more onerous burden than a need to establish risk. The concept of a "standard of proof" is of little if any assistance in environmental cases, but the nearest analogy would be the difference between the balance of probability (more likely than not) and the real risk standards of proof. Since the ECJ's decision Waddenzee, it has been clear that, applying the precautionary principle, significant harm to an SPA is "likely" for the purposes of Article 6 and Regulation 48 if the risk of it occurring cannot be excluded on the basis of objective information. Since the Waddenzee test is set out in Circular 06/2005, which was specifically referred to in paragraph 10 of the minded to grant letter, which was in turn incorporated into the decision letter (see paragraph 6 of the letter), and Circular 06/2005 is also referred to in NE's Draft Delivery Plan (paragraph 1.5.3), it is impossible to conclude that, when using the correct statutory formulation, both the First Defendant and NE did not appreciate that the issue of likelihood had to be approached on the basis set out in Waddenzee."

81. The written grounds of appeal presented by Mr Horton QC suggest that the Inspector erred in her consideration of the expression "likely to have a significant effect" in the Directive and the Regulations. It is clear, in my judgment, that that is not correct. Far from straying into error, the Inspector followed the approached identified in Waddenzee and Hart. No other reading of her decision letter is tenable and, to be fair to Mr Horton, by the time of his oral submissions he recognised as much.

82. The other points taken in writing by Mr Horton QC about the nature conservation are answered, fully, in the written responses of Messrs Phillpot and Cameron QC. They do not advance Mr Horton's case in light of the conclusions previously expressed.

83. During the course of oral submissions I invited the parties to consider whether it was necessary for an Inspector to consider a "fall back" position when applying Article 6 of the Habitats Directive and/or Regulation 48 of the 1994 Regulations. At that stage, of course, I had not determined whether or not the Appellant's position, namely, that it was entitled to use the appeal site, lawfully, for a variety of uses was sustainable. Accordingly, I invited the parties to make written representations on this discrete point.

84. I should record that each party provided written representations well within the time limited for making those representations. Unfortunately, however, the representations did not reach me until a date in June. That is explains, at least in part, the substantial

period of time which has elapsed between the hearing of the case and the production of this judgment.

85. In the light of my conclusions earlier in this judgment the issue of whether a "fall back" position should be taken into account when the Directive/Regulations are applied does not arise for consideration. What follows, therefore, is a tentative expression of view which I make only because the parties were good enough to provide written representations. The position of Messrs Phillpot and Cameron QC are encapsulated in paragraphs 23 and 24 of Mr Phillpot's further submissions. He argues that the Directive and Regulations leave no room for doubt as to the subject of the "appropriate assessment" under Article 6(3) which is the plan or project that the authority is being asked to approve. The authority is not being asked to approve alternative projects or current activities which already enjoy planning permission and which would be replaced by the proposed project in question. Alternative projects would be subject to assessment under Article 6(3) when they came forward. The consequence, submits Mr Phillpot, is that it is not correct as a matter of law to take account of a "fall back" position in assessing whether a plan or project would be likely to have significant affects or in assessing whether the plan or project would adversely affect the integrity of a protected site. Mr Phillpot's skeleton is supported by reference to Waddenzee, Hart and the decision of the European Court in Stadt Pappenburg v Bundes Republic Deutschland.

86. Mr Horton disagrees. He submits that the assessment under the Directive/Regulations falls to be made by reference to the integrity of the site in the "actual real world" prior to the initiation of the plan or project and in the "plan or project world" subsequent to such initiation. He submits that it is unreasonable to proceed on the basis that such a comparison is not allowed when a retrospective assessment is being undertaken as is the case here.

87. I am inclined to think that Mr Horton QC is correct on this issue. In my judgment it would be strange, to say the least, if a proposal were refused planning permission on the grounds of its impact upon a protected site even though the reality might be that an existing lawful use might have a much greater impact upon nature conservation interests upon the protected site. In this case, for example, if the reality was that the Appellant could revert to using this site for the storage and distribution of petroleum products and it could be demonstrated that the trading estate use now in existence had significantly less effect upon the birds upon the protected site it would be an odd result, indeed, if the Directive/Regulations required that planning permission be refused.

88. As was to be expected, Mr Horton QC prepared a detailed Skeleton Argument in advance of the hearing before me. In that Skeleton he suggested that the Inspector's decision on the nature conservation issue could be challenged on an additional ground, namely a lack of proportionality. Mr Horton's Skeleton reads as follows:-

> "In an important respect, the Inspector's conclusion is challenged on a basis which is of uncertain application in English law, namely "*proportionality".* Proportionality as a ground of challenge in English administrative law is recognised as being relatively recent and as having its origins in European jurisprudence. The doctrine closest to it in English law is that

> of "perversity"; which allows a court to quash a decision on the ground that it was one which no reasonable person could have made. Proportionality by contrast is a doctrine which involves balancing the purpose of a law and the effect of its application in a particular case. Furthermore, in European law the court is allowed to arrive at its own judgment of such proportionality. The Claimant submits that at least in relation to that issue of nature conservation, it is legitimate for an English court to apply the doctrine of proportionality, for the reason that the substantive English law on nature conservation derives from European Directives."

89. This point was not taken at any time, as I understand it, before the inspector; it was hinted at but not developed in the original grounds of appeal. It appeared in greater detail in the Skeleton Argument prepared by Mr. Horton QC in readiness for any hearing scheduled to consider the issue of whether permission to appeal should be granted and as I have said it appeared as part of a detailed argument in the Skeleton prepared for this hearing.

90. Section 289 permits this court to intervene if an Inspector has made an error of law. At first blush it is difficult to see how an Inspector has erred in law in relation to a concept which is "of uncertain application in English law" and which was never drawn to her attention.

91. I am prepared to accept that there may be instances where it would be open to this court to determine that an Inspector has erred in law by failing to have regard to a settled legal principle even if that settled legal principle was not drawn specifically to the Inspector's attention by the parties. An Inspector is a specialist tribunal and is taken to be familiar with the legislation and settled legal principles which are relevant to his specialist jurisdiction. On any view, however, Mr Horton's point about proportionality does not fall into such a category.

92. For that reason, alone, I would not entertain this aspect of Mr Horton's case. However, the plain fact is that proportionality is a settled feature of the jurisprudence of the European Court. It is inconceivable, in my judgment, that the European Court did not take account of the principle of proportionality in Waddenzee when interpreting the Directive. Despite that principle, the Court interpreted the Directive in the way it did and, of course, Sullivan J interpreted the Regulations in the way that he did on the basis of an approach which derived from Waddenzee.

93. I have reached the conclusion that there was no legal error in the Inspector's reasoning as it related to the impact of the development upon the appeal site upon nature conservation interests on protected sites. She was correct to conclude that on this ground alone the ground (a) appeals must fail.

94. In the light of this conclusion and the significant length of this judgment, even to this point, no useful purpose would be served by any kind of detailed discussion of the Appellant's other grounds for submitting that the Inspector fell into legal error when considering the ground (a) appeals. It is acknowledged that the Inspector considered all the issues which were important to whether or not planning permission should be granted. Essentially, all the grounds allege irrationality, unreasonableness or a lack

of adequate reasons. Challenges of this type are difficult at the best of times; they are the more difficult when, as in this case, many of the alleged grounds depend upon impugning what is, in reality, an exercise of planning judgment on the part of the Inspector. I content myself by saying that I reject all the grounds advanced by Mr Horton QC as to why the Inspector erred in law when rejecting the ground (a) appeals for the reasons which are contained in the skeleton arguments of Messrs Phillpot and Cameron QC.

95. It is right that I should record that Mr Horton QC sought to introduce the concept of proportionality not just as it impacted upon the ground of challenge discussed in detail above but also in relation to all aspects of his challenge to the Inspector's decision on the ground (a) appeals. I have already explained why it is not appropriate for me to entertain a challenge based upon the concept of proportionality. In those circumstances it would not be right for me to offer a view of the concept of proportionality; the plain fact is that my views would be strictly *obiter*. This point, if it is to be taken full square, is much better taken in a case where a decision upon the point is likely to have some impact on the result of the case.

The appeals under ground (b)

96. I propose to address the issues arising very shortly. I say that for this reason. Ground (b) requires the Inspector to consider the evidence and reach conclusions of fact. The circumstances in which this court will elevate an erroneous factual finding to an error of law are strictly defined. I quote verbatim, from Mr Phillpot's Skeleton Argument. In order to establish that a decision is lawful on the basis of an error of fact, four conditions must be satisfied. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the Appellant (or his advisors), must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Inspector's reasoning. Those propositions are justified by the decision of the Court of Appeal in E v Secretary of State for the Home Department [2004] 2WLR 1351.

97. None of the alleged mistakes of fact in this case fall into that category. The Inspector heard the evidence and reached conclusions upon it. Mr Horton's complaints about the Inspector's findings of fact pale into insignificance compared with the other issues raised in this appeal. They relate to areas of hard standing, a section of road and the like. I do not wish to trivialise these complaints; it is sufficient, however, that I indicate that I reject the allegations of error of law for the reasons set out in the skeleton argument of Mr Phillpot and Mr Cameron QC.

Bias

98. The grounds of appeal submitted by Mr Horton QC alleged that the Inspector was biased. In the Skeleton prepared in advance of a permission hearing Mr Horton QC wrote:-

> "This ground alleges that the Inspector was biased. The nature of the bias alleged is thought to be novel in English law, in that it alleges that she had a predisposition in favour of the return of

> the site to an undeveloped state. It is self-evident that every judge may have private predispositions which are capable of affecting his or her judgment. Judicial duty requires, however, that the judge does not allow such predispositions to affect his or her judgment. Reading the DL as a whole, it is submitted, with regret, that the Inspector had the predisposition alleged but failed to prevent it affecting her judgment. That amounts to bias in the legal sense."

99. In the Skeleton produced for this hearing Mr Horton QC reproduced the paragraph set out above except that he added this sentence:-

> "It may be that bias in this sense is no more than another formulation of a complaint that the decision-maker did not take into account the proportionality of the decision arrived at."

Mr Horton then set out 12 points in support of his contention.

100. Not surprisingly, the First Respondent takes exception to an allegation that the Inspector was biased. He submits that the articulated complaint amounts to no more than a submission that the Inspector must have been biased because she rejected the Appellant's case. Mr Phillpot submits that it is not acceptable to make such a serious allegation without proper particulars. In any event he submits that there is no properly arguable basis for advancing an allegation of bias in this case. Even adopting the less onerous test of apparent bias, he submits that it is inconceivable that a fair-minded and informed observer, having considered the Inspector's decision letter in full, would conclude that there was a real possibility that the Inspector was biased.

101. In Sager House (Chelsea) Ltd v First Secretary of State [2006] EWHC 1251 Sir Michael Harrison commented as follows:-

> "The sixth round of the application alleges that the Inspector's decision was infected by bias so as to be unlawful. That is a serious allegation but there are no particulars of the allegation at all contained in the claim form. This is wholly unacceptable. A serious allegation of that kind should have been properly particularised in the claim form. At the hearing, the Claimant sought to rely on section 11 of Mr Cooper's written statement. That is a section of his witness statement which, as I have mentioned previously, contains some 20 pages constituting a detailed critique on Mr Coey and his evidence. It is quite wrong to leave the parties and the judge to have to pick through a witness statement in that way to seek to deduce how the case of bias is put. The Claimant's skeleton argument does, however, specify the acts of the Inspector which are alleged to show bias…
>
> 119. Those are all matters which are the subject of independent grounds of challenge. I find it extraordinary to allege that those matters either singularly, or cumulatively, show bias on the part of the Inspector. I have regard to Mr Cooper's witness

> statement and I have read the decision letter as a whole. I have also had regard to the test of Porter v McGill [2002] 2AC 357, namely whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Inspector was biased. The answer to that question is 'no'. Although I appreciate that the Claimant and their expert witnesses feel very aggrieved by the Inspector's decision, it is unfortunate that this ground of appeal was raised at all."

102. In this case there was no allegation of bias specified in the grounds of appeal. The allegation of bias made in the first Skeleton Argument was unparticularised. The only particularisation of the allegation came very late in the day and, in truth, the particularisation amounts to asserting that since there are a number of individual grounds of challenge, cumulatively, they amount to sufficient to establish bias on the part of the Inspector.

103. It is true that in his most recent Skeleton Mr Horton QC "waters down" the allegation of bias by suggesting that it may be seen as a failure on the part of the Inspector to act proportionately. Further, in his oral submissions Mr Horton QC was at pains to submit that the point he was raising was novel; the reality was that he was striving to find a legal description for his complaint.

104. I make due allowance for the fact that Mr Horton QC and his client feel strongly that the Inspector's decision was wrong. It may very well be that they take strong exception to the Inspector's conclusions upon the planning merits. Mr Horton QC clearly feels strongly that his client has been "let down" by the way this case has unfolded. That said, in my judgment there was never a proper basis for an allegation of bias in whatever sense that word is used. A glance at the particulars belatedly provided show that each and every one was an individual ground of challenge. In reality, many of them are comparatively hopeless. Those which are genuinely arguable do not begin to support the notion that the Inspector is to be categorised as producing a decision which is lacking in objectivity and fairness.

105. I have reached the clear conclusion that although some of the grounds raised on behalf of the Applicant are arguable i.e. they would satisfy the test for the grant of permission to appeal in the result this appeal fails. I propose to dismiss it.

106. I am unable to hand down this judgment before the end of term but I understand that it will be handed down on my behalf. There remains the challenge to the costs decision and there may be issues such as costs and/or permission to appeal against my judgment which need to be ventilated. I will next sit in the Administrative Court for 2 weeks beginning 15 August 2011. I appreciate that Counsel may be on holiday during this period and I do not suggest that any kind of hearing should take place during that time.

107. I make the following directions so that this case and the related challenge to the costs decision can be brought to finality.

    a) Any application by the Respondents for an order for costs shall be notified to the Appellant by the date of the hand down of this judgment;

any response by the Appellant shall be filed and served by 4.00pm 27 July 2011; any submissions by way of reply shall be filed and served by 4.00pm 29 July 2011.

b) Any application by the Appellant for permission to appeal against this judgment shall be served and filed by 4.00pm 25 July 2011; any response on behalf of either Respondent shall be served and filed by 4.00 pm 29 July 2011.

c) The Appellant shall notify the court by 4.00pm 25 July 2011 whether it wishes to pursue a challenge to the costs decision; if it does the case will be listed before me when next convenient in the new term; if it does not any issues of costs relating to that decision shall be determined after written submissions from the parties which must be served and filed by 4.00pm 29 July 2011.

Note: As well as filing hard copies of any documents at the Administrative Court Office all documents shall be filed electronically with my Clerk.