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No Adastral New Town Limited v Suffolk Coastal District Council, [2015] EWCA Civ 88

Purpose and the Habitats Directive

The Court of Appeal has been given the opportunity to consider the recent guidance of the ECJ (in C-258/11 *Peter Sweetman and Others v An Bord Pleanala* and C-521/12 *TC Briels v Minister van Infrastructuur en Milieu*) concerning the Habitats Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora). In *No Adastral New Town Limited v Suffolk Coastal District Council*, the court was required to assess whether the Council's core strategy, which proposed to site new houses in the vicinity of a Site of Special Scientific Interest (SSSI), which was also a Special Protection Area (SPA), was in breach of EU law, both in terms of Strategic Environmental Assessment (SEA), and in terms of the Habitats Directive. Specifically, No New Adastral Town's (NANT) complaints related to the procedures followed by the Council. This note will focus on those procedures as relating to the Habitats Directive (HD).

There were two questions to be decided by the Court. Firstly, the question arose as to the timing of the screening assessment for the purposes of the HD. Secondly, the question arose as to the extent to which mitigation measures should be assessed in detail at an early stage of the development of any plan.

On the first question, the court was required to assess whether the screening assessment carried out by the Council, for the purposes of article 6(3) HD, was carried out too late in the development of the plan. This provision states that:

> "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives".

Regulation 102(1), The Conservation of Habitats and Species Regulations 2010 (S.I. 2010/490) confirms that such an assessment is required for a land use plan. Specifically, this provision requires that the assessment is made, "before the plan is given effect".

The procedural history of the development of the Council's core strategy, and of the granting of planning permission for development, is highly complex, and it is not necessary to go through this here. NANT argued however that the screening assessment (to determine whether an appropriate assessment (AA) was needed) was carried out too late. The purpose of the screening assessment is to ascertain whether the plan is "likely to have a significant effect" on the conservation objectives of the site. The essence of the argument was that the council had determined its preferred option regarding meeting its housing targets before the screening assessment was carried out.

Richards LJ, giving judgment for the Court of Appeal, began his assessment of this question by considering the purpose of article 6 as a whole. He stated that:

> "the language of Article 6 focuses on the end result of avoiding damage to an SPA and the carrying out of an AA for that purpose" [63].

Ultimately, the issue was whether, even in cases where the conclusion in the screening assessment was that no AA was needed, or indeed where the need for an AA was obvious, it was nevertheless necessary to carry out such an assessment early in the process. In short, is the timing of the screening assessment itself significant, regardless of the end result? The court concluded that it was

not.

Richards LJ reasoned that the judgment of the ECJ in *Sweetman* did not dictate otherwise:

> "The Court's judgment... gives no support to the contention that there must be a screening assessment at an early stage in the decision-making process." [66].

Nothing in *Briels* altered this.

The judge then went on to reach a perhaps surprising (albeit *obiter*) conclusion:

> "In none of this material do I see even an obligation to carry out a screening assessment, let alone any rule as to when it should be carried out. If it is not obvious whether a plan or project is likely to have a significant effect on an SPA, it may be necessary in practice to carry out a screening assessment in order to ensure that the substantive requirements of the Directive are ultimately met. It may be prudent, and likely to reduce delay, to carry one out an early stage of the decision-making process. There is, however, no obligation to do so". [68]

In other words, although it may be necessary in practice to carry out a screening decision if there is some uncertainty as to the existence of significant effects, where such effects are obvious, the decision-maker can proceed straight to an AA, without a screening decision. What this overlooks, however, is that the presence or absence of the screening decision may indeed have a conscious or unconscious effect on the shape of the final plan or project. By insisting on an early screening decision, the court would have ensured that the environmental concerns highlighted by the screening decision would be integrated into the project throughout, allowing it to be molded and adapted as the process continued into a final outcome which is compliant with the HD, immune to challenge, and, most importantly, environmentally and socially sensitive.

To dispense with the screening decision is to forestall the need to engage with environmental factors. This may have no substantive effect at all on the environment, as the Court of Appeal here highlights, but what it does do is make it more likely that the eventual plan will fall foul of article 6(3) when the AA is finally carried out. Part of the difficulty with compliance with the HD is that projects may emerge as breaching its provisions only late in the day. This requires constant re-designing of projects once they are at a late stage, leading to increased cost, and here, litigation. The advantage of an early screening decision is primarily procedural, but in this context procedure, and the cost of those procedures, make this significant. Thus, whilst the court may be right to conclude that there is no obligation to carry out a screening assessment early, or indeed at all, it is also right to say that such an assessment is prudent.

The second element of the appeal in relation to the HD concerned when mitigation measures should be taken into account. The Council had left the assessment of such measures to specific planning applications, rather than considering them as part of the Core Strategy. NANT argued that since the scientific information regarding these measures was at a high degree of certainty, they should have factored into the assessment earlier in the process.

In order to determine whether this was correct, the court turned, once again, to the purpose of the Directive. Richards LJ then concluded that:

> "In my judgment, the important question in a case such as this is not whether mitigation measures were considered at the stage of CS in as much detail as the available information permitted, but whether there was sufficient information at that stage to enable the Council to be duly satisfied that the proposed mitigation could be achieved in practice. The mitigation formed an integral part of the assessment that the allocation of 2000

> dwellings on Area 4 would have no adverse effect on the integrity of the SPA. The Council therefore needed to be satisfied as to the achievability of the mitigation in order to be satisfied that the proposed development would have no such adverse effect." [72]

Thus, because the council could determine on the basis of the information before them that the mitigation measures would in fact take place, and ensure that no adverse effects would occur, then it was possible to leave the specifics of those measures until later in the planning process.

The court, in taking a purposive approach to interpretation of the provisions, has produced an outcome which is highly flexible, and very discretionary, in terms of process. This is not necessarily to be criticised. But, it must be said that this approach sits somewhat at odds with the prescriptive (albeit oddly uncertain) approaches advocated by the ECJ where purpose is equated with formulaic procedural controls. Thus, in *Sweetman* and *Briels*, we see an approach to the HD which puts the achievement of environmental goals at the forefront, and extrapolates from that a series of tight (if unpredictable) controls on development decisions in relation to protected land. By contrast, the Court of Appeal in this case has used the purposive approach to focus on outcome, rather than process. They ask, what is the process designed to achieve?, not how can we ensure that the processes followed guarantee that outcome. The approach of the Court of Appeal may, therefore, be less costly, but it does not require a necessarily integrated approach to protection of the environment.

As part of my on-going research I am considering the relationship between UK case law and ECJ case law in relation to interpretation of the HD, and this case will filter into that discussion. For local authorities the key point to take forward will be that screening decisions are only required where there is some practical uncertainty as to the likelihood of environmental effects – if such effects are likely, then they can wait until later in the process to proceed to an AA. For those, like me, who consider the process of interpretation of these provisions, the lesson to be learned is that purposive interpretation as an approach tells us nothing about the appropriate allocation of power between decision-makers. Although, as the Court of Appeal highlights, there is no direct conflict as a matter of precedent in terms of allocation of power, the ECJ has tended to allocate power to itself, and to the courts, to direct administrative decision-making. The English courts, by contrast, as I have argued in my book (E Lees, *Interpreting Environmental Offences: The Need for Certainty*, Oxford: Hart, 2015), abdicate responsibility for decision-making to the local authority. This produces some uncertainty, but may be permitted in a context of planning decisions. What is critical however is that we examine the balance of power that exits, rather than seeing the purpose of environmental protection as a guide to such power allocation.