Neutral Citation Number: [2024] EWHC 1253 (Admin)

Case No: AC-2023-LON-003033

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2024

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

THE KING on the application of CARRALYN PARKES — **Claimant**

- and -

DORSET COUNCIL — **Defendant**

- and –

(1) PORTLAND PORT LIMITED
(2) SECRETARY OF STATE FOR THE HOME DEPARMENT
(3) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Interested Parties

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Alex Goodman KC, Penelope Nevill, Fiona Petersen and Alex Shattock (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Richard Wald KC and **Jake Thorold** (instructed by **Dorset Council**) for the **Defendant**
The **First Interested Party** did not appear and was not represented
Guy Williams KC and **Nina Pindham** (instructed by the **Government Legal Department**) for the **Second Interested Party**
Richard Honey KC and **Stephanie Bruce-Smith** (instructed by the **Government Legal Department**) for the **Third Interested Party**
Sasha Blackmore (instructed by and made submissions on behalf of the

Marine Management Organisation)

Hearing dates: 27-29 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MR JUSTICE HOLGATE

Mr. Justice Holgate:

1. The central question in this claim for judicial review is what is the geographical extent of planning control in England and Wales under the Town and Country Planning Act 1990 ("TCPA 1990") where the land meets the sea? It is well-established under the parallel legislation in Scotland that planning control does not extend below the mean low water mark ("LWM") (*Argyll and Bute District Council v Secretary of State for Scotland* (1976) S.C. 248). When the modern system of planning control was enacted in 1947 for both jurisdictions, or in their subsequent iterations, did Parliament intend that the English regime should differ from Scotland by extending beyond the LWM?

2. Both jurisdictions are concerned with regulating the "development" of "land", not water. Water flowing in a river or as the sea is not land or a corporeal hereditament (*Thames Heliport plc v London Borough of Tower Hamlets* (1997) 77 P & CR 164, 168). But does "land" in England and Wales include the sea bed beyond the LWM of the foreshore?

3. This issue arises in relation to the Bibby Stockholm, a barge which has been moored in Portland Harbour, Dorset to accommodate asylum-seekers. The duties of the SSHD to provide accommodation to destitute asylum seekers under ss.95 and 98 of the Immigration and Asylum Act 1999 and the requirements which they have generated have been summarised in *Braintree District Council v Secretary of State for the Home Department* by the High Court [2023] EWHC 1076 (KB) at [11] to [28] and by the Court of Appeal at [2023] 1 WLR 3087 at [10] to [17].

4. The barge is moored adjacent to a pier above a part of the sea bed which is never exposed during the ebb and flow of the tide. That area always lies below the LWM.

5. Ms. Carralyn Parkes is a town councillor and the mayor of Portland Town Council. She brings this claim in a personal capacity as a local resident. She contends that the area of the sea bed above which the Bibby Stockholm is stationed (a) forms part of the "land" which is subject to planning control under the TCPA 1990 and (b) constitutes a material change in the use of that land so as to constitute "development" requiring planning permission. On that basis she says that it is open to the local planning authority ("LPA"), the defendant Dorset Council ("DC"), to consider taking enforcement action for any breach of planning control in respect of that use under Part VII of the TCPA 1990. The claimant seeks a declaration that DC has erred in law in deciding that the area occupied by the Bibby Stockholm falls outside planning control.

6. DC, together with the Secretary of State for the Home Department ("SSHD"), the hirer of the barge and second interested party, and the Secretary of State for Levelling Up, Housing and Communities ("SSLUHC"), the third interested party, contend that planning control under the TCPA 1990 does not extend below the LWM. Portland Port Limited ("PPL"), the first interested party, is the harbour authority for Portland Harbour. It did not take part in the proceedings.

7. On 4 December 2023, I adjourned the application for permission to apply for judicial review to a rolled up hearing.

8. The court was informed that there is a good deal of opposition to the mooring of the Bibby Stockholm in the harbour and to its use for accommodating asylum seekers. The

court has no role to play in considering the rights and wrongs of those issues. The court is only concerned with the legal questions raised by this claim.

9. I am grateful to all counsel for their researches and very considerable assistance in both oral and written submissions.

10. The remainder of this judgment is set out under the following headings:

Factual Background

11. The parties helpfully agreed a statement of facts and a plan, upon which this section of the judgment is based. Portland Harbour is naturally enclosed on three sides (north, south and west) by Dorset and the Isle of Portland. On the east side, it is partially enclosed by inner and outer breakwaters that were constructed between 1849 and 1872.

12. The two inner breakwaters are connected to the mainland. Two outer breakwaters are located between the inner breakwaters. They support a number of buildings and structures, including a functioning lighthouse and a historic fort.

13. The fort and the breakwaters are Grade II listed buildings. There are three 'gaps' in the breakwaters that allow vessels to pass. The largest gap is located between the outer fort and lighthouse and is about 200m wide.

14. The port is accessed by a road off the A354. The A354 runs between Dorchester and Weymouth, through Wyke Regis and on to the Isle of Portland. There is no pedestrian access through the working port because it is a controlled area.

15. The Bibby Stockholm is an engineless barge, which is used as an accommodation vessel. The barge has three stories of accommodation comprising 222 rooms. It is moored in a dock within Portland Port. The vessel can only be moved by tug boats.

16. PPL has given its approval as the harbour authority to the mooring of the barge.

17. The barge is tied by multiple cables and chains at different connection points on two sides to a finger pier lying to the east. The first half of the finger pier is made of solid stone and extends outwards from the harbourside and upwards from the sea bed. The remaining half of the pier extends further into the harbour and is made of wood. The barge is connected to the stone section of the pier and the beginning of the wooden section. People enter and leave the barge by one of four gangways.

18. Because the Bibby Stockholm is located in a controlled area of the port, those living on the barge have to be transported to and from the barge via the port's gates by a regular shuttle service, which provides transport into local towns (Portland and Weymouth). Occupants use a dedicated safe area on the quayside some way back from the water, to embark and disembark from the mini-buses. This safe area is also used for residents to pass through security checks and as a smoking area. There is also a shelter here to protect those waiting from adverse weather.

19. No pre-existing onshore building is used for the purposes of the residents on board the barge, or solely in connection with the use of the barge to accommodate asylum seekers.

20. Multiple cables and pipes for electricity and sewage run from the pier to the barge. There are fuel tanks and generators onshore used in connection with the barge. Lighting and fencing have been extended in and around the security check/waiting area for safety reasons. The port contains a number of quaysides at which passengers may embark and disembark and historically these areas have been fenced and lit.

21. The barge is used to accommodate only single adult males aged 18-65 who are considered suitable to reside there and have been granted s.95 support, transferring from hotels. The barge includes multiple communal spaces, a canteen and a laundry facility. There are two onboard spaces for exercise and recreation and a multi-faith room.

22. The Home Office takes the view that the barge can accommodate up to 506 persons. All cabins have partially opening windows for light and air, newly installed air conditioning units and secure storage lockers. The barge is WiFi enabled. All rooms have en-suite bathroom facilities and there are additional toilets and showers. Several rooms have been converted into double rooms by the installation of bunkbeds. The average room size for these double rooms is 8.9 sqm, the average for four-person rooms is 15.6 sqm and for six-person rooms it is 22 sqm.

23. Continuous security is provided on the barge for the safety and security of its occupants. Security is also provided to check those entering the barge and there are regular patrols to prevent unauthorised access to the barge.

24. The use of the barge is under contract for 18 months. Any extension must be agreed by June 2024. The existing contract expires in December 2024.

25. On 13 July 2023 the Leader of DC stated at a meeting of the Council that Mr. Richard Wald KC (who together with Mr Jake Thorold appeared on behalf of DC in this claim) had advised that the use of the barge in the port was not subject to planning control because it was positioned below the LWM.

26. On 8 September 2023 the claimant issued a claim for judicial review ("JR1") against the SSHD, with DC named as an interested party. It alleged *inter alia* that in deciding to use the Bibby Stockholm to accommodate asylum seekers, the SSHD had erred in law by acting on the basis that the stationing and use of the barge was incapable of constituting development within the jurisdiction of DC as the LPA under the TCPA 1990. The claimant sought a declaration that the accommodation of asylum seekers on the barge was capable of constituting development within the TCPA 1990 and could be the subject of enforcement action by DC under that Act. On 11 October 2023, following an oral hearing, I refused permission to apply for judicial review ([2023] EWHC 2580

(Admin)). I decided that the carrying out by a public authority of development without any requisite planning permission does not in itself involve an unlawful use of power by that authority. Instead it was a matter for the LPA to decide whether any development subject to control under the TCPA 1990 had taken place and, if so, whether it was expedient to take enforcement action. The judgment went on to point out difficulties in the claimant's argument that the location of the Bibby Stockholm fell within planning control.

27. As a result, the claimant brought this second application for judicial review, but in this instance against DC as the defendant. In the claim she seeks:

> "1. A declaration that the Council erred in law in determining it cannot take planning enforcement action against the use and/or stationing of the Bibby Stockholm barge connected to a finger pier and access road in Portland Harbour.
>
> 2. The Claimant further seeks a mandatory order (absent an undertaking to do so) directing the Defendant to reconsider whether to take enforcement action in the light of the judgment of the Court."

Statutory Framework

Planning legislation

28. Section 55(1) of the TCPA 1990 provides the general definition of "development":

> "**Meaning of "development" and "new development"**
>
> (1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

29. By section 57(1) planning permission is required for development:

> "(1) Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land."

30. Planning permission is generally granted by a "development order", or by the relevant LPA on application made to that authority (ss.58 to 61). A development order is made in relation to all "land", or to such "land" or "descriptions of land" as may be specified in that order. So art.1(2) of the Town and Country Planning (General Permitted Development (England) Order 2015 (SI 2015 No. 596) ("the GPDO") provides that the Order generally applies to all "land" in England. So, for example, Class B of Part 4 in sched. 2 to the GPDO confers permitted development rights for certain temporary uses of land. "Land" has the same meaning as in the primary legislation (see s.11 of the Interpretation Act 1978 and s.336(1) of TCPA 1990 below).

31. Section 62 of the TCPA 1990 provides for the making of applications to a LPA for planning permission for the development of land. In 2019 DC was established as a unitary, or single tier, local authority. It is the LPA for its area for all purposes. In other parts of the country, the county council acts as a county planning authority and district councils within that county act as district planning authorities (s.1(1)). The role of determining planning applications generally belongs to district councils, save in relation to "county matters", notably mineral and waste development. But in each case the statutory functions of the LPA are limited to exercising planning control over "land" in its area.

32. A LPA may grant planning permission on an application made to them under s.70. Section 73 enables an application to be made for planning permission for the "development of land" without complying with conditions subject to which a previous permission was granted.

33. By s.75(1) any "grant of planning permission to develop land" shall "enure for the benefit of the land and of all persons for the time being interested in it," save in so far as the permission provides otherwise.

34. In some circumstances where planning permission is refused for the development of land and that land has become incapable of reasonably beneficial use in its existing state, the owner may be entitled to serve a purchase notice requiring the LPA to purchase his interest in the land (ss.137 to 148).

35. A LPA has a power to serve an order requiring the discontinuance of a use of land (s.102).

36. Essentially, the TCPA 1990 is a regime which imposes planning control and confers rights in relation to "land". Whether a consideration is relevant to development control, or in the preparation of statutory development plans, depends on whether it serves a planning purpose, that is whether it relates to the character of the use of land (*R (Wright) v Forest of Dean District Council* [2019] 1 WLR 6562 at [36]).

37. Under s.172 a LPA may issue an enforcement notice in respect of a breach of planning control. A breach of planning control includes the carrying out of development without any required planning permission (S.171A(1)). That goes back to the fundamental requirement in s.57(1) that planning permission is required for the "development" (as defined in s.55) of "land". So, for example, a LPA cannot take enforcement action in respect of breaches of planning control outside "land" in its area (see e.g. *Wealden District Council v Krushandal* [1999] JPL 174, 180).

38. Section 336(1) of the TCPA 1990 defines the meaning of a number of expressions used in the Act, "except in so far as the context otherwise requires." It provides an overall definition of "land" which is exhaustive:

> "'land' means any corporeal hereditament including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land."

Part IX empowers planning authorities *inter alia* to buy land compulsorily and by agreement for planning purposes. But in the case of planning control, land simply

means any "corporeal hereditament including a building." Section 336(1) also provides that a "building" includes:

> "any structure or erection, and any part of a building, so defined, but does not include plant or machinery comprised in a building."

39. Section 57(1A) of the TCPA 1990 excludes nationally significant infrastructure projects from the requirement in s.57 to obtain planning permission. Instead such projects require "development consent" under the regime established by the Planning Act 2008. For certain projects, such as airports and harbour facilities (see ss. 23 and 24 of the 2008 Act), the geographical extent is greater; it expressly extends beyond England[1] to include "waters adjacent to England" up to the seaward limits of the "territorial sea".[2]

40. A LPA is obliged to prepare and adopt local development documents, including development plan documents, which "set out the authority's policies … relating to the development and use of land in their area" (s.17(3) of the Planning and Compulsory Purchase Act 2004). The decision-maker determining a planning application (or appeal) must take into account relevant development plan documents (s.70(2) of the TCPA 1990 and s.38 of the 2004 Act). By virtue of s.117(1) of the 2004 Act, "land" has the same meaning in that Act as it does in s.336(1) of the TCPA 1990.

Marine and Coastal Access Act 2009

41. In March 2007 the Government laid before Parliament "A Sea Change – A Marine Bill White Paper" (Cm. 7047). Its objects included replacing a number of separate statutory schemes for licensing works and activities in the sea with a single, integrated marine licensing regime focused on sustainable development and a series of marine plans to guide decision-making. The new regime drew upon some of the concepts in the TCPA 1990, with adaptations for the marine environment. The new licensing body was to be the Marine Management Organisation ("the MMO"), acting on behalf of the Secretary of State for Environment, Food and Rural Affairs. The landward limit of the marine licensing and planning regime was defined as the mean high water springs level, so as to create a deliberate overlap along the foreshore with the terrestrial planning system under the TCPA 1990, which was understood to extend only as far as the mean LWM. This was to avoid the new system being restricted by an artificial boundary at the coast and to promote harmonisation of planning and effective co-operation between the different authorities (White Paper para. 4.45).

42. The White Paper resulted in the Marine and Coastal Access Act 2009 ("the 2009 Act"). The background to this legislation and the statutory scheme have been summarised in *R (Powell) v Marine Management Organisation* [2017] EWHC 1991 (Admin) at [42] to [66] and *R (Tarian Hafren Severn Shield CYF) v Marine Management Organisation* [2022] PTSR 1261 at [46] to [62].

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[1] In any Act "England" means the area of the counties established by s.1 of the Local Government Act 1972, unless any contrary intention appears (see s.5 of and sched. 1 to the Interpretation Act 1978 and see below).
[2] See [45] below.

43. Section 65 of the 2009 Act prohibits the carrying on of a "licensable marine activity" defined in s.66 without a marine licence granted under s.69 by the licensing authority (in this case the MMO). Section 66 contains a list of licensable activities expressed in broad terms. Paragraph 7 of that list refers to the following activity:

> "To construct, alter or improve any works within the UK marine licensing area either (a) in or over the sea or (b) on or under the sea bed."

44. For licensing purposes the "UK marine licensing area" comprises "the UK marine area", excluding the Scottish inshore region (s.66(4)).

45. In essence, the UK marine area comprises the sea, that is any area submerged at mean high water spring tide level and the waters of estuaries, rivers and channels up to that level, out to the seaward limits of "the territorial sea adjacent to the UK", the UK's exclusive economic zone and the UK's continental shelf. The UK marine area "includes the bed and subsoil of the sea within those area" (s.42). By s.1(5) of the Territorial Sea Act 1987, the expression "territorial sea adjacent to the UK" in any enactment is to be construed in accordance with s.1 of that Act. Section 1 extended the territorial sea to 12 nautical miles measured from "baselines" established by Order in Council (see below).

46. In their written submissions filed in JR1 dated 29 September 2023, the MMO stated that it had "marine licensing jurisdiction over the Bibby Stockholm." However, it was not clear how the mere stationing of the barge and its use as accommodation could constitute a marine licensable activity within s.66 of the 2009 Act. Ms. Sasha Blackmore appeared on behalf of the MMO at short notice to assist the court at the hearing of the second judicial review. She referred to a recent report of an inspection by the MMO of the Bibby Stockholm in relation to the port. The barge is not attached to the sea bed and does not involve any marine licensable activity, other than a minor matter of no significance to this litigation. The MMO has concluded that the positioning and use of the barge is not subject to control under the 2009 Act.

Local government legislation

47. County Councils were first established by the Local Government Act 1888 ("LGA 1888"). Section 1 established a county council in every "administrative county" to "be entrusted with the administrative and financial business of that county". The term "administrative county" meant the area for which a county council is elected under the Act (s.100).

48. Part III of the LGA 1888 dealt with the boundaries of an administrative county. Section 50(1) provided that the first council elected for an administrative county should be elected "for the county at large as bounded at the passing of this Act for the purposes of the election of members to serve in Parliament for the county". Section 50(2) provided that the administrative county as so defined should be the county of that county council for all purposes of the 1888 Act and the council should have authority throughout the administrative county for which it is elected.

49. Sections 3 to 19 of the LGA 1888 dealt with the powers of a county council. Section 3 transferred to a council the "administrative business of the justices of the county council

in quarter sessions assembled" and then listed that business in sub-paras. (i) to (xvi) (see below).

50. The Local Government Act 1933 ("LGA 1933") consolidated previous legislation relating to local government. Section 1 divided England and Wales into a hierarchy of administrative areas, comprising counties, county boroughs, non-county boroughs, urban districts, rural districts and parishes. Section 1(2) provided that the administrative counties should be those listed in schedule 1, which included the then administrative county of Dorset. Schedule 1 then went on to identify each county borough and non-county borough. Section 1(2) also provided that the urban and rural districts and parishes should be those in existence when the Act was passed. Section 2 established a county council for each administrative county, including Dorset.

51. Local government was reorganised by the Local Government Act 1972 ("LGA 1972") which repealed the 1933 Act. Section 1(1) provided that with effect from 1 April 1974 England (with certain exceptions) should be divided into local government areas know as counties and within those counties local government areas known as districts.

52. Section 1(2) of the LGA 1972, dealing with non-metropolitan counties, provided *inter alia* that the area of the county of Dorset should comprise the administrative areas of the county of Dorset, the county borough of Bournemouth and the borough of Christchurch (and small areas of Hampshire) as they were immediately before the passing of the Act. Section 1(4) and para. 1 of sched. 3 provided for the sub-division of each non-metropolitan county into districts specified in orders made by the Secretary of State. Under delegated legislation one such district was created as the borough of Weymouth and Portland.

53. Section 2 of the LGA 1972 established a council for the area of each non-metropolitan county and for each district. It is common ground that the statutory scheme provided for the transfer of functions, property, rights and liabilities from predecessor authorities to successor authorities created by the LGA 1972.

54. Paragraph 1 of sched. 3 provides that "the boundaries of the new local government areas shall be mered by Ordnance Survey". But the parties are in agreement that maps published by the Ordnance Survey (and produced in the bundles before the court) do not override the correct application of the law as to the geographical extent of the area of DC and its predecessor authorities. The mere fact that those maps do not show, for example, the breakwaters of Portland Harbour as lying within any local government administrative area is not conclusive on that point.

55. DC was established by the Bournemouth, Dorset and Poole (Structural Changes) Order 2018 (SI 2018 No. 648), made under ss.7 and 11 to 13 of the Local Government and Public Involvement in Health Act 2007 pursuant to a proposal made under s.2 of that Act. The Order established two new unitary authorities on 1 April 2019 to provide a single tier of local government within their respective areas.

56. First, art. 3 established a new non-metropolitan county and district, to be known as Bournemouth, Christchurch and Poole, comprising the areas of the districts of those three towns. Article 3 also created a new district council, known as Bournemouth, Christchurch and Poole Council as the sole "principal authority" for that district and provided that there should be no county council for that area. Immediately before 1

April 2019, Bournemouth and Poole had each been unitary authorities and Christchurch had been a borough or district authority falling within the area of Dorset County Council. Articles 4 to 6 abolished the former county boroughs of Bournemouth and Poole and the borough of Christchurch as local government areas and dissolved the respective councils.

57. Second, part 3 of the Order instituted a similar regime in relation to the County of Dorset other than Christchurch. Article 7 created a new non-metropolitan county and district, each to be known as "Dorset", comprising in each case the areas of the districts of East Dorset, West Dorset, North Dorset and Purbeck and the borough of Weymouth and Portland. Article 7 also provided that there should be a new district council for Dorset to be known as "Dorset Council", but no county council for that area. Articles 8 and 9 abolished the county of Dorset and its constituent districts and borough as local government areas and dissolved the former county and district councils.

58. The effect of regs. 2 and 5 of the Local Government (Structural Changes) (Transfer of Functions, Property, Rights and Liabilities) Regulations 2008 (SI 2008 No. 2176), in combination with SI 2018 No. 648, was to transfer to the defendant the functions of its predecessor authorities, Dorset County Council (excluding the area of Christchurch Borough) and the former District and Borough Councils referred to in [57] above. The parties agree that DC succeeded to the planning functions of the former Dorset County Council and of the former District and Borough Councils.

59. The borough of Weymouth and Portland had resulted from the merger in 1974 of the Borough of Weymouth and Melcombe Regis with Portland Urban District Councils. Both Councils had been created as urban district authorities by the Local Government Act 1894. Before that they had been urban sanitary districts under the Public Health Act 1875. Section 100 of the LGA 1888 had anticipated the creation of urban districts by subsequent legislation.

60. Part IV of the LGA 1972 deals with changes in local government areas. Section 72 deals with changes in boundaries occurring as the result of an accretion from the sea:

> "**72 Accretions from the sea, etc.**
>
> (1) Subject to subsection (3) below, every accretion from the sea, whether natural or artificial, and any part of the sea-shore to the low water-mark, which does not immediately before the passing of this Act form part of a parish shall be annexed to and incorporated with—
>
> (a) in England, the parish or parishes which the accretion or part of the sea-shore adjoins, and
>
> . . . . . .
>
> in proportion to the extent of the common boundary.
>
> (2) Every accretion from the sea or part of the sea-shore which is annexed to and incorporated with a parish . . . under this

> section shall be annexed to and incorporated with the district and county in which that parish . . . is situated.
>
> (2A). . . . . .
>
> (3) In England, in so far as the whole or part of any such accretion from the sea or part of the sea-shore as is mentioned in subsection (1) above does not adjoin a parish, it shall be annexed to and incorporated with the district which it adjoins or, if it adjoins more than one district, with those districts in proportion to the extent of the common boundary; and every such accretion or part of the sea-shore which is annexed to and incorporated with a district under this section shall be annexed to and incorporated with the county in which that district is situated."

The grounds of challenge

61. There is no dispute that the quayside, its access and the finger pier are all areas of "land" within the meaning of s.336(1) of the TCPA 1990 and lie within the area to which DC's powers as a LPA apply. The claimant submits that DC has erred in law by proceeding on the basis that the area of the harbour within which the Bibby Stockholm is moored falls outside its territorial jurisdiction as a LPA and for that reason falls outside planning control.

62. In summary, the claimant relies upon five alternative grounds:

    (1) The boundaries of DC encompass Portland Harbour;

    (2) By virtue of being stationed for an indefinite period of time in its current location, the Bibby Stockholm has become an "accretion from the sea" within the meaning of s.72 of the LGA 1972, and therefore forms part of the area of DC within which its planning control powers may be exercised;

    (3) Even if the geographical extent of the administrative area of DC does not extend further into the harbour than the finger pier, DC's enforcement powers nevertheless apply to the Bibby Stockholm;

    (4) DC has erred in failing to consider taking enforcement action in respect of any breach of planning control in the form of a material change in the use of, or operational development upon, the quayside, the finger pier and access road;

    (5) If on an ordinary interpretation of the legislation, DC does not have power to take enforcement action in relation to the area in which the Bibby Stockholm is located, it does have such a power by interpreting the legislation in accordance with the *Marleasing* principle, so as to give effect to the requirement of the EIA Directive (Directive 2011/92/EU) that there be an assessment of the likely significant effects of relevant projects on the environment (see *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89); [1992] 1 CMLR 305).

A summary of the claimant's submissions

Ground (1)

63. The claimant submitted that DC's area includes the sea bed covered by the sea within Portland Harbour. But as DC, SSHD and SSLUHC pointed out, even if the claimant were to succeed on that point, she would also need to show that that area falls within the definition of "land" in s.336(1) of the TCPA 1990.

64. Ms. Nevill for the claimant referred to the Portland Harbour Revision Order 1997 (SI 1997 No. 2949) made by the Secretary of State for Transport under s.14 of the Harbours Act 1964, on the application of PPL. By art.4 PPL became the harbour authority in place of the Queen's Harbour Master. By art.2 of the 1997 Order, the harbour comprises the "inner harbour," meaning the breakwaters and the area they enclose, and the "outer harbour." The inner harbour is said to have an area of about 1000 ha and to be one of the largest man-made harbours in the world. The outer harbour includes a large area of sea to the east and north-east, defined by a series of lines drawn to specified co-ordinates. The harbour was used as a major base for the Royal Navy for much of the last century.

65. Initially the claimant contended that Dorset includes the whole of the area of the sea bed enclosed by the breakwaters, but not any part of the outer harbour. However, as we will see, when it came to her reply the claimant contended that a much larger area of the sea falls within the jurisdiction of the LPA.

66. DC is the successor to Dorset County Council and its constituent districts other than the Borough of Christchurch. The County Council was constituted by the LGA 1972 and thereby succeeded to the functions of the previous county council under the LGA 1933. That council succeeded to the county council established for Dorset by the LGA 1888.

67. Ms. Nevill relied upon Lord Hale's treatise "De Jure Maris." Chapter IV addressed "the king's interest in salt waters, the sea and its arms and the soil thereof." She relied upon the words italicised in the following passage:

> "We come now to consider the sea and its arms: and first, concerning the sea itself. The sea is either that which lies within the body of a county or without. *That arm or branch of the sea which lies within the fauces terrae [jaws of the land], where a man may reasonably discerne between shore and shore, is or at least may be within the body of a county, and therefore within the jurisdiction of the sheriff or coroner*. 8 E. 2, *Corone*, 399.
>
> The part of the sea which lies not within the body of a county, is called the main sea or ocean.
>
> The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the King of England, whether it lie within the body of any county or not."

Applying these principles, the claimant submitted that Portland Harbour fell within the body of the county of Dorset and therefore became part of the area of Dorset County Council when that authority was created by the LGA 1888.

68. In *R v Cunningham* (1859) Bell. C.C. 72 it was held that offences of wounding on board a ship in the Bristol Channel occurred within "the body of the county" of Glamorgan, so that the assize court for that county had jurisdiction to try the defendants. The sea belonged to the shores which bounded the Bristol Channel, Glamorgan on one side and Somerset on the other. The evidence before the court pointed to the location of the offence as having always been treated as part of the "parish of Cardiff."

69. In *R v Keyn* (1876) 2 Ex. D 63, the defendant was convicted at the Central Criminal Court of the manslaughter of a passenger who drowned when the ship on which she was travelling sank after colliding with the vessel under his command. The collision took place within three miles of the coast at Dover and therefore within English territorial waters as defined at that time. Cockburn CJ, with whom the majority agreed, stated that if an criminal offence is committed in a bay, gulf or estuary within "the jaws of the land" (*intra fauces terrae*), the common law could deal with it, because those parts of the sea fell within the body of the adjacent county or counties. However, along the coast facing "the external sea" the jurisdiction of the common law extended no further than the LWM (p.162). Accordingly, the Court had no jurisdiction to try the defendant. Ms. Nevill described the distinction drawn by Cockburn CJ as being between the "internal" seas or waters of the country, which formed part of the relevant county, and the "external" sea (sometimes referred to as the high seas), which did not.

70. Ms Nevill relied upon s.3 of the LGA 1888 which transferred to each newly established county council the "administrative business" previously carried out by the justices for that county in quarter sessions, such as the making, assessing and levying of all rates. She submitted that this provision should be read as treating the geographical extent of the area within which a new county council could exercise its functions as including "the body of the county", as previously established by the common law. Accordingly, she says that that area included any area falling within the jaws of the land, and, by the transfer of functions to successor authorities, that has continued to be the case down to the present day.

71. Ms Nevill submitted that the common law treated areas of ports and docks below the LWM as falling within the body of the relevant county (relying upon *The Zeta* [1892] P 285 and *The Goring* [1987] QB 687; [1988] AC 831). She pointed to a statement at first instance in *Denaby and Cadeby Main Collieries Limited v Anson* [1911] 1 KB 171, 178-9 that the area within the breakwaters of Portland Harbour lies within the "jaws of the land".

72. Ms Nevill also submitted that to treat the inner harbour of Portland as falling within the body of the county of Dorset, and now within the area of DC, accords with international law. Under the United Nations Convention on the Law of the Sea ("UNCLOS") the sovereignty of a coastal state extends beyond its "land territory" and "internal waters" to cover an adjacent belt of sea, referred to as "the territorial sea", including the airspace above and the sea bed below (art.2). The territorial sea may extend up to 12 nautical miles from baselines determined in accordance with UNCLOS (art.3).

73. Subject to Part IV of UNCLOS, waters on the landward side of the baseline of the territorial sea form part of the "internal waters" of a state (art.8). By art.5 the normal baseline for measuring the breadth of the territorial sea is the LWM along the coast. But where, for example, the coastline is deeply indented, a state may define a baseline by drawing a straight line joining "appropriate points," so long as the areas of sea lying within that line are "sufficiently closely linked to the land domain to be subject to the regime of internal waters" (art.7). Where a river flows directly into the sea, the baseline shall be a direct line across the mouth of the river between points at the LWM of its banks (art.9). Under art.10 a bay may also be treated as part of the "internal waters" of a state, and therefore outside its territorial sea, provided that *inter alia* it is a well-marked indentation constituting more than a "mere curvature of the coast" and the baseline drawn across the bay does not exceed 24 nautical miles, (drawn between the LWM of the natural entrance points of the bay or so as to enclose the maximum area compatible with a line of that length). Article 11 provides in relation to ports:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works."

74. The Territorial Sea (Baselines) Order 2014 (SI 2014 No.1353) establishes baselines from which the UK's territorial sea is to be measured, in accordance with UNCLOS ("the 2014 Order").

75. The claimant sought to extend her submissions considerably in reply, introducing new points. But it is only necessary for the court to summarise the line of argument:

(i) Contrary to the argument for DC, SSHD and SSLUHC, "land" in s.336(1) of the TCPA 1990 is not used in contradistinction to the "sea." For example, they accept that the area between the high water mark ("HWM") and LWM, which is covered by the sea for a period each day, qualifies as "land" for the purposes of s.336(1) of TCPA 1990 and therefore is subject to planning control. Similarly, land under rivers, including tidal rivers, is "land" for the purposes of the TCPA 1990. Land covered by water can fall within the definition of "land" for the purposes of TCPA 1990;

(ii) The TCPA 1990 does not exclude land under the sea, the sea bed, from the definition of "land." There is no binary distinction between "land" and the sea bed, whether in domestic legislation or in international law. For example, the juridical basis for a coastal state's rights over its continental shelf is that it represents a natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles, whichever is greater (art.76 of UNCLOS);

(iii) Section 90(2) and (6) of TCPA 1990 enables planning permission to be granted for certain generating stations and electric lines within the limits of the territorial sea, on the assumption that that involves development of "land";

(iv) The meaning of "land" in s.336(1) of the TCPA 1990 does not delimit the geographical extent of a LPA's powers of planning control. Instead, those powers are exercisable out to the baselines of the territorial sea, as defined in the 2014 Order;

(v) In legislation "England" means the area consisting of the counties established by s.1 of the LGA 1972 (plus Greater London and the Isles of Scilly) unless the contrary intention appears (s.5 and sched. 1 of the Interpretation Act 1978). The consequence of the argument advanced by DC, the SSHD and the SSLUHC is that there would be a geographical gap between England delimited by the LWM and the baselines from which the territorial sea is measured (i.e. where those baselines lie beyond the LWM). Where, for example, Parliament has created regulatory functions which apply to "England" and the territorial sea, there would be a gap between those two areas where the legislation could not apply (see e.g. the functions of the Environment Agency ("the EA") in relation to fisheries and flood defence). That could not have been intended by Parliament. The claimant also relies upon *Post Office v Estuary Radio Limited* [1968] 2 QB 740, 753-4 and *Van Elle v Keynvor Morlift* [2023] EWHC 3137 (TCC). Accordingly, England and the County of Dorset must be defined so as to extend to the baselines in the 2014 Order.

76. The claimant also submits that s.72 of the LGA 1972 should not be construed as restricting the boundaries of coastal local authorities to the LWM. Instead, the intention of that provision (and similar predecessor provisions in s.27 of the Poor Law Amendment Act 1868 and s.144 of the LGA 1933) was to extend the seaward boundaries of a local authority to the extent that they did not already encompass an accretion from the sea or the LWM.

Ground (2)

77. The expression "accretion from the sea" in s.72 of the LGA 1972 includes an accretion of land *into* the sea (*R v Easington District Council ex parte Seaham Harbour Dock Company Limited* (1999) 1 P.L.C.R. 225, 227-230). Accordingly, the construction of the finger pier is to be treated as an accretion within s.72 and therefore forming part of the area of Dorset.

78. The Bibby Stockholm itself should be treated as an accretion to the land within s.72 because it is moored to the finger pier and will be so located for up to 18 months, which is more than a temporary period. On that basis the barge forms part of "the land" for the purpose of s.336(1) of the TCPA 1990 and therefore falls within DC's planning control powers as the LPA for its area.

Ground (3)

79. If the inner harbour of Portland Harbour falls outside the boundaries of the county of Dorset and of DC, the claimant nevertheless submits that the defendant is empowered to take enforcement action within that area. Although there is a presumption that a statute only operates within the territory to which Parliament has said it extends, that is only a presumption. It follows that a statute may be expressed in sufficiently clear terms

so as to apply to a wider geographical area than the territory for which it is the law. For example, where a statute has been enacted to form part of the laws of England, it may nevertheless apply to conduct beyond that territory. Whether or not it does so is a matter of statutory interpretation (*R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153 at [11]).

80. A statute should be interpreted in accordance with its purpose, by reading the legislation as a whole (*R (PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594). The purpose of the TCPA 1990 is to control the use of land in the public interest, which includes activities in areas beyond the boundary of a LPA which have a significant impact on the community or environment of that authority's area. Since 2006 the Crown has been subject to statutory planning control (Part XIII of the TCPA 1990). The Crown owns the bed of the inner harbour at Portland.

Ground (4)

81. The claimant submits that DC has failed to consider taking enforcement action in respect of the use of the finger pier, quayside and access road in connection with the mooring of the Bibby Stockholm to accommodate asylum seekers. It is said that the impacts of the barge and its use are relevant to whether there has been a material change in the use of the finger pier, quayside and access road and, if so, whether it is expedient to take enforcement action in respect of that change. The claimant also submitted that the planning unit, by reference to which the materiality of any change of use would fall to be assessed, includes the area of the harbour in which the Bibby Stockholm is moored.

Ground (5)

82. Recital (7) of the EIA Directive states that development consent for public and private projects likely to have significant effects on the environment should be granted only after an assessment of those effects has been carried out. By art.1(2) a "project" means:

> " …
>
> - the execution of construction works or of other installations or schemes
>
> - other interventions in the natural surroundings and landscape … "

Article 2(1) requires member states to adopt "all measures necessary to ensure that before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects." The projects are defined in art.4 and in Annexes I and II. Mr. Goodman KC for the claimant relied upon the references in Annex II to "urban development projects" and to the construction of harbours and port installations. He submitted that the building of the Bibby Stockholm had involved "the execution of construction works", albeit in another part of the world and not in Portland Harbour.

83. In *Abraham v Wallonia* [2008] Case C-2/07; [2008] Env. L.R. 32 the CJEU decided that, in view of the wide scope and purpose of the EIA Directive, the term "project" included modifications to an existing airport which were intended to increase the activity and air traffic at the airport, but without extending the existing runway.

84. Irrespective of whether the use of the Bibby Stockholm qualifies as a project for the purposes of the EIA Directive, Mr. Goodman submits that the key issue is whether there is a lacuna in the TCPA 1990 because on the opposing case, an activity or operation below the LWM which does qualify as a project and is likely to have significant environmental effects is not subject under the TCPA 1990 to requirements for development consent and environmental assessment.

85. It is common ground between the parties that the *Marleasing* principle continues to be applicable for the purposes of the current application for judicial review. On that basis, the court's interpretive obligation is to construe planning legislation compatibly with EU law in so far as it is possible to do so. The techniques available include choosing an interpretation of the language used in the national measure which is compatible with EU law, or reading words into that measure or reading it down. But the court must not interpret domestic legislation incompatibly with any of its fundamental features, or so as to go against its grain (*Gilham v Ministry of Justice* [2019] 1 WLR 5905 at [39] and *Vidal-Hall v Google Inc. (Information Commissioner intervening*) [2016] 1 WLR 1003).

86. In an Appendix to the Amended Statement of Facts and Grounds the claimant put forward a range of interpretations to address the alleged lacuna. They focus on bringing a harbour, or land over which a barge floats, within the scope of planning control or s.72 of the LGA 1972, or on treating such a barge as a "building" and therefore "land."

87. Mr. Goodman submits that the type of activity involved in the case of the Bibby Stockholm is the sort of activity which is controlled as a use of land, for example, where it occurs on an inland river. Accordingly, he says that the submissions advanced for the claimant do not go against the grain of the legislation.

Grounds (1) and (2) – whether Portland Harbour forms part of Dorset

Introduction

88. Under the common law, the realm of England extended to the LWM. Broadly speaking, beyond the LWM lay the high seas. International law, governing the relationships between nation states, has allowed the UK and other countries to exercise sovereignty over a coastal belt of the sea, previously 3, and now 12, nautical miles broad ("the territorial sea"). However, that sea does not form part of the realm within which our domestic law applies, save and in so far as Parliament legislates to that effect (*Keyn* (1876) 2 Ex. D 63, 198-199 and 238-239). The foreshore is that portion of the realm which lies between the HWM and LWM. The foreshore forms part of the body of the adjoining county and therefore was always an area within the jurisdiction of this country's criminal courts. There is a presumption that the foreshore belongs to the Crown, but it could be alienated by grant, charter or prescription. (Coulson and Forbes on Waters and Land Drainage (6th edition) pp. 1, 5-8, 12, 14-17 and 22-26; Halsbury's Laws (5th edition) paras. 38-39 and 41-45).

The UN Convention on the Law of the Sea

89. The Preamble explains that UNCLOS is concerned to establish, with due regard to the sovereignty of nations, a legal order for the seas which will *inter alia* facilitate international communication, promote the peaceful use of seas and oceans, and the equitable and efficient use of their resources.

90. The Convention sets out principles of international law which apply as between different contracting states. Under international law "the high seas" refers to the seas lying beyond a state's internal waters, territorial sea and any exclusive economic zone (art. 86). Within the area of each state's sovereignty, it is a matter for that state to decide, subject to UNCLOS, what laws shall apply and their geographical coverage, including whether they shall extend as far as the outer limits of sovereignty.

91. The Convention establishes a distinction between a state's territorial sea and its "internal waters" in order to apply two different types of management or regulatory regime.

92. Within the territorial sea of a state, ships of all countries enjoy the right of "innocent passage" (art.17). "Passage" means navigation through the territorial sea for the purposes of (a) crossing that sea, without entering internal waters or calling at a roadstead or port facilities outside internal waters, or (b) proceeding to or from internal waters or such a port facility or roadstead (art.18). Article 19 defines how passage qualifies as "innocent." No charge may be levied upon a foreign ship by reason only of their exercising the right of innocent passage (art.26) and a state may not hamper the innocent passage of foreign ships through its territorial sea, save in accordance with UNCLOS (art.24). So, for example, art.21 allows a state to adopt laws, in conformity with UNCLOS and international law, relating to innocent passage through the territorial sea for *inter alia* the safety of navigation and the regulation of maritime traffic, the protection of cables and pipelines and the protection of the environment and fisheries. In addition, a state may require foreign ships exercising the right of innocent passage to use designated sea lanes (art.22).

93. Within the internal waters of a state, the right of innocent passage under UNCLOS does not apply. So the Convention does not prohibit a state from levying charges for the use of its internal waters, for example, a harbour or port. Article 27(1) restricts the circumstances in which a state can exercise its criminal jurisdiction on board a foreign ship passing through its territorial sea, but not where the ship is passing through that sea after leaving that state's internal waters (art.27(2)). Similarly, a state cannot arrest any person or investigate any crime committed before a foreign ship entered its territorial sea if the ship, coming from a foreign port, is only passing through that sea without entering internal waters (art.27(5)). Article 28(1) provides that a coastal state should not stop or divert a foreign ship passing through its territorial sea in order to exercise civil jurisdiction in relation to a person on the ship. By art. 28(2) and (3) a coastal state may not levy execution against or arrest that ship for the purpose of any civil proceedings, except *inter alia* where the ship is passing through the territorial sea after leaving internal waters.

94. Accordingly, the use of baselines under UNCLOS to distinguish the territorial sea of a state from its internal waters is for the purpose of giving effect to international rights of navigation or passage, and the rights and obligations applicable within internal waters

and the territorial sea respectively. The Convention itself has nothing to do with the geographical extent of the powers of a local administrative body in a coastal location, for example, to operate a terrestrial system of planning control.

95. But in reply the claimant submitted that if the TCPA 1990 is interpreted as treating "England" and its constituent LPAs as extending only to the LWM, and not to the baselines from which the territorial sea is measured, there will be unintended gaps in the geographical coverage of other regulatory regimes. This argument is misconceived for a number of reasons.

96. As art.5 of UNCLOS states, the normal baseline is the LWM along the coast. In those locations there is no gap. It is only where the baseline lies further out from the LWM that the alleged gap is said to arise.

97. The claimant emphasises that a port is treated as forming part of a state's internal waters (art.11), but ignores art.7, the effect of which is that very large bays will also form part of those internal waters. The present case illustrates the point. Here, the territorial sea does not begin on the seaward side of the breakwaters of Portland Harbour or even at the boundary of its outer harbour. Instead, Weymouth Bay forms part of the UK's "internal waters". It is a vast area defined by a line from a point on the eastern side of Portland Island (to the south of Portland Harbour) running north-eastwards across that bay to Lulworth.

98. There are many other internal waters shown on the UK's official map (produced by the claimant) which are even larger than Weymouth Bay, such as the sea separating the southern coast of England from the Isle of Wight (and further to the east and west of the Isle), the Wash, the Bristol Channel out to the Gower Peninsula and Ilfracombe, and the outer reaches of the Thames Estuary at least as far as the islands of Sheppey and Mersea. Thus, the claimant's argument in reply that "internal waters" within the meaning of UNCLOS and the 2014 Order must be treated as included in England and also Dorset, goes much further than the jaws of the land argument she initially advanced.

99. In opening her case, the claimant appeared to suggest that a "port" could form part of England and the relevant local authority area, but not a bay. But this was only a self-serving argument for the purposes of this claim. The claimant advanced no principled basis, and I can see none, upon which the court could be asked to accept her "internal waters" argument, derived from international law, but then "pick and choose", so as to include only some smaller internal waters within the meaning of "England", but not the larger areas. Perhaps that is why in reply Ms. Nevill submitted that "England" extends as far as *all* baselines from which the territorial sea is measured. However, the implications of this argument have been overlooked by the claimant's legal team.

100. As we shall see, the correct legal principle is that it is generally a matter for Parliament to determine whether *statutory* functions are exercisable as far as the outermost reaches of territorial sovereignty, or to some lesser extent such as the LWM (see e.g. *The Keyn* at [134] – [136] below). The legal materials which the parties have put before the court show that where Parliament intends that a statutory function is applicable beyond the LWM it says so expressly.

101. The claimant selected two examples to show that England, and its constituent local authority areas, must extend to the baselines of the territorial sea in order to avoid unintended gaps in the geographical coverage of other regulatory regimes and therefore, that approach must also apply to the TCPA 1990. The Environment Act 1995 requires the EA to discharge functions regarding fisheries and flood defence in England and "the territorial sea adjacent to England" (s.6(4), (5) and (7)). In my judgment it is obvious that Parliament has used the words "*adjacent* to England" as meaning contiguous with, and not neighbouring, England in order to avoid a gap in coverage. It therefore follows ineluctably that England in that context must extend to the baselines where the territorial sea begins. The definition of "England" in schedule 1 to the Interpretation Act 1978 must yield to this express provision in the 1995 Act, an interpretive step expressly contemplated by s.5 of the 1978 Act. There is no geographical gap in the coverage by the EA's functions because of the express language used by Parliament. Given the subject-matter of those two regulatory regimes, it comes as no surprise to find that Parliament has provided for the geographical scope of the regulator's powers to extend to internal waters as well as the territorial sea.

102. Plainly, by the Interpretation Act 1978 Parliament decided that "England" in legislation should mean the area of the counties established by the LGA 1972 (plus Greater London and the Isles of Scilly), unless a contrary intention appears. The meaning of "England" is not fixed for all enactments. So where legislation, such as the Environment Act 1995, confers or requires functions to be exercised over England and the "adjacent territorial sea", that it a clear indication that the definition of England in the 1978 Act does not apply. But where the wording of an enactment (such as the TCPA 1990) does not provide for functions to be exercisable within the territorial sea (or adjacent territorial sea) as well as England (or the area of a local authority), there is no reason to treat them as exercisable in "internal waters", unless the statutory language contains some other sufficiently clear indication that that was Parliament's intention. The same goes for any suggestion that those functions are exercisable over some, but not other, internal waters.

103. One of the flaws in the claimant's argument is that it suggests that England generally extends to the baselines marking the start of the territorial sea, even where the operation of the legislation only covers England, or "land" in England. That approach would render the definition of "England" in the Interpretation Act 1978 nugatory.

104. As is correctly stated in Bennion, Bailey and Norbury on Statutory Interpretation (8th edition) at section 6.24:

> "While the internal waters clearly form part of the national territory, it does not follow that their area will be included in some local government district. That depends on whether the boundary of the district was drawn with internal waters in mind."

I address the common law position in the following section on the jaws of the land concept.

105. Likewise, the authorities cited by Ms. Nevill do not assist the claimant's case. *Post Office v Estuary Radio Limited* was concerned with whether the Post Office was entitled to an injunction under s.14(7) of the Wireless Telegraphy Act 1949 to restrain broadcasting without a licence from a radio station in a disused fort in the mouth of the Thames estuary, in breach of s.1(1) of that Act. By s.6(1) that control applied to the UK

and "the territorial waters *adjacent thereto*." The Post Office contended that the fort was either within the UK's "internal waters," applying the definition of a "bay," or within its "territorial sea." At pp.752G and 754F Diplock LJ (as he then was) noted that it was common ground that "territorial waters" in the 1949 Act included the UK's "internal waters" and "territorial sea." The Court of Appeal held that because the fort lay within a bay, and therefore was within the UK's "internal waters", the Post Office was entitled to its injunction.

106. In the *Post Office* case the 1949 Act expressly applied to *adjacent* territorial waters as well as to the UK. Like the claimant's examples taken from the Environment Act 1995, the 1949 Act expressly displaced the standard concept of the "UK" based upon its constituent countries and local authority areas. The *Post Office* case cannot be treated as an authority on the extent of the UK or England (or a local authority area) whenever such terms are used in any enactment. The *Post Office* decision provides no help on the issue in the present case, namely whether "land" in the TCPA 1990 includes England's "internal waters" or its ports, or extends beyond the LWM.

107. *Van Elle Limited* concerned the territorial application of Part 2 of the Housing, Grants, Construction and Regeneration Act 1996 in relation to adjudications upon disputes under construction contracts. HHJ Davies (sitting as a High Court Judge) decided that the expression in the statute "construction operations in England…" was not limited to the area defined by sched. 1 of the Interpretation Act 1978, but also included land covered by internal waters up to the baselines laid down by the 2014 Order. The judge appears to have been influenced by the same passage which Ms. Nevill cited from the judgment of Diplock LJ in the *Post Office* case at p.754F (see [39], [41] and [70] to [71]), without noting that the 1949 Act expressly applied to the UK's "adjacent territorial waters". It does not appear that the 1996 Act contained any such language. At all events, the judge's decision turned on the language and purposes of the 1996 Act and affords no guidance on the geographical extent of statutory powers conferred on local authorities, specifically planning control under the TCPA 1990.

108. In the Planning Act 2008 Parliament has laid down a dedicated regime (which includes planning control) for nationally significant infrastructure projects. They require approval from a Secretary of State under a development consent procedure. As mentioned in [39] above, for airports and harbours Parliament has extended this jurisdiction to include territorial "waters adjacent to England", using similar language to that which we have seen in the Environment Act 1995 and the Wireless Telegraphy Act 1949.

109. Section 90(1) of the TCPA 1990 provides for the grant of deemed planning permission where the "authorisation" of a government department is required for a development carried out by a statutory undertaker or a local authority. Where the Secretary of State grants a consent under s.36 or s.37 of the Electricity Act 1989 for a generating station or electric line in "England or Wales", by s.90(2) he may direct the grant of a deemed planning permission. Section 90(6) provides that in this context "England or Wales" includes adjacent waters up to the seaward limit of the territorial sea. This by now familiar drafting formula is a clear indication of Parliament's intention to distinguish in the TCPA 1990 between the "land" of "England and Wales" and its "adjacent waters", so that activities in those waters do not fall within planning control in the absence of a dedicated provision to that effect. Parliament has used express language where it intends to confer jurisdiction extending beyond the LWM.

110. Planning control under the TCPA 1990 applies to "land" (as defined in s.336(1)) within the areas of LPAs. If Parliament had intended the geographical scope of that control to extend beyond the LWM to include the territorial sea and/or the intervening internal waters (or some part thereof) it is reasonable to expect that Parliament would have said so clearly, as it has done in other legislation. But it did not do so for general planning control under the TCPA 1990. That expectation is reinforced by the fact that the Scottish courts have decided authoritatively that the parallel planning system in that country does not extend beyond the LWM.

111. There is no rational basis for thinking that Parliament would have intended LPAs to exercise general planning control over large areas of the sea up to the baselines for the territorial sea and so far away from the coast. Marine construction works and activities raise very different regulatory issues from those which arise under the terrestrial planning system. Self-evidently LPAs, unlike the MMO, do not have the expertise and resources to exercise control over works and activities in such areas of the sea, or indeed the sea bed.

112. For completeness I note the claimant's additional argument that the area covered by "internal waters", the underlying sea bed, falls within the definition of "land" in the TCPA 1990. But, of course, the sea bed carries on beyond the internal waters. On the claimant's argument, the baselines set by the 2014 Order would not be a logical stopping point. If the sea bed underlying internal waters qualifies as "land", it is difficult to see why the sea bed under the territorial sea (and beyond) does not also qualify. The claimant did not identify any legal distinction between the two for the purposes of the definition of "land" in the TCPA 1990.

113. Although a substantial part of the claimant's oral case was devoted to UNCLOS and the implications of the definition of "internal waters", this does not help the court to resolve the issues of domestic law in this legal challenge. The claimant's argument based on UNCLOS and the 2014 Order is not a proper basis for determining the geographical extent of the functions of a local authority on the coast, whether for planning or for local government purposes more generally.

The "jaws of the land" and "the body of a county"

114. Ms. Nevill placed a great deal of emphasis upon the passage cited from Hale (see [67] above). Hale did not identify his sources in any detail or discuss them. Instead he said that the passage was based upon another treatise by Selden "Mare Clausam", to which the court was not referred. Moreover, the passage quoted from Hale appears in a chapter mainly dealing with the monarch's interest in salt waters, the sea, its arms and the soil.

115. Hale made the following points:

(i) The sea could lie either within the "body of a county" or without;

(ii) The jaws of the land was a term used to define an "arm of the sea", where a person might reasonably discern between one shore and another;

(iii) An arm of the sea, as so defined, *might* fall within the body of a county;

(iv) An arm of the sea which did fall within the body of a county fell within "the jurisdiction of the sheriff or coroner";

(v) The part of the sea falling outside the body of a county is the main sea or ocean;

(vi) The narrow sea adjoining the coast of England was part of the dominions of the King, whether it lay within the body of a county or not.

116. Hale went on to say that in "this sea," presumably referring to the "narrow sea", the King has a "double right": (a) a right of jurisdiction ordinarily exercised by his Admiral and (b) a right of property or ownership. He says "the latter is that which I shall meddle with." The remainder of the chapter does indeed focus on the monarch's property rights in relation to *inter alia* the foreshore and fishing. The "narrow sea" appears to refer to what we now call the territorial sea. The court was not shown any further discussion by Hale of the King's jurisdictional right exercised by his Admiral, or of the meaning and use of the term "body of a county".

117. As a legal source relied upon by the claimant to define the extent of the jurisdiction of the English planning system in coastal areas, the passage in Hale is subject to much uncertainty and, as we shall see, of no real assistance. The jaws of the land expression is used to describe an area of the sea, but the test is visibility from one shore to another. Visibility is a question of degree. Visibility of what? It is not a sensible test for deciding in the twenty first century whether a local authority's functions are exercisable over an area of the sea and, if so, to what extent.

118. Even then, Hale states that an arm of the sea which passes the jaws of the land test *may* fall within the body of a county. The implication is an area of the sea could not have been treated as part of the body of the county unless it passed that test. But if it did, it would not follow automatically that it would form part of the county. It is unclear how that issue was to be resolved, one way or the other. In what circumstances, or by reference to what factors, would an arm of the sea be treated as falling, or not falling, within the body of a county?

119. However, for those legal subjects with which Hale was concerned, two points are reasonably clear. First, the consequence of an area falling within the body of a county was that it fell within the jurisdiction of the sheriff or coroner. The sheriff was concerned with the execution of the King's justice, notably the orders, writs and warrants issued by his courts. Second, the King's jurisdiction over the territorial sea was exercised by his Admiral. But nothing has been shown to this court to indicate that the concept of "the body of a county" was concerned with the exercise of administrative functions of the kind for which local authorities in the nineteenth century were becoming responsible.

120. I will address the case law cited by the claimant. *The Goring* was concerned with a salvage dispute in non-tidal inland waters. Sir John Donaldson MR (as he then was) gave a helpful explanation of the background to the passage in Hale [1987] Q.B. 687, 701-4. The jurisdiction of the Lord High Admiral was of great antiquity, possibly even going back to Saxon times. Originally it extended to only criminal offences, but by the late 14th century it included all civil disputes connected with the sea. Gradually he asserted jurisdiction not only over matters occurring on the high sea, but also on the sea

within the body of a county. There were disputes as to the demarcation between the jurisdiction of the common law courts and that of the Lord High Admiral, with different legal principles being applied. In 1389 an Act was passed providing that the Admiral should not "meddle" with anything done upon the realm but only upon the sea. A further statute passed in 1391 reinforced the point: "all manner of contracts, pleas and quarrels and all other things arising within the bodies of the counties", whether on land or on water, and also "wreck of the sea" should be tried and determined by the laws of the land, that is in the common law courts, not by the Admiral. The Admiral's jurisdiction (which came to be known as the High Court of Admiralty) was restricted to the high seas until 1840.

121. When *The Goring* reached the House of Lords, Lord Brandon gave a similar account ([1988] AC 831, 846-7). He added that the geographical extent of the body of a county to define matters excluded from the jurisdiction of the High Court of Admiralty was not wholly clear. But it seems that over time the Admiral's jurisdiction did not apply to salvage of ships cast on the sea shore, or within a port or harbour, or a haven, channel or estuary, which was treated as falling within the body of a county and hence the common law courts (p.846E). Subsequently, the Admiralty Court Act 1840 removed the restriction on that court's salvage jurisdiction to the high seas and extended it to salvage within the body of a county. After a detailed review of much subsequent legislation, the House of Lords held that salvage law was never extended to cover wrecks in non-tidal waters. *The Goring* casts no light on whether the body of a county was ever relevant for determining the geographical extent of administrative functions.

122. The issue decided in *The Zeta* is of no relevance to the present case. The question was whether the claim could, and therefore should, have been brought in the County Court, exercising its Admiralty jurisdiction, rather than the High Court, so that the trial judge had been entitled to deprive the successful claimant of his costs. The ship owner sued in respect of damage to his ship, sustained when it was in the Liverpool docks, caused by the negligence of the harbour board. The majority of the Court of Appeal decided that whether on the high seas, or within the body of a county, Admiralty jurisdiction did not cover damage caused to a ship other than by another ship (see e.g. pp. 297 and 303). Although it was not drawn to the attention of this court, I note that the House of Lords reversed the Court of Appeal on that issue ([1893] AC 468).

123. So far as the present case is concerned, neither the Court of Appeal nor the House of Lords decided that the Liverpool docks fell within the body of a county. All that can be said is that Lord Esher MR described the Liverpool docks as not being either in the sea, nor in the River Mersey. The collision took place in an "inside basin of the system of the Liverpool dock, which basin is not upon any navigable waters at all." This was a basin situated on land, in the county of Lancaster and within the borough of Liverpool ([1892] P at 295). It seems that the Stanley Dock was built inland, so there was no need for the court to apply the "jaws of the land" principle, or to decide that the land fell within the body of a county. There was certainly no issue about that.

124. In *Denaby and Cadeby Main Collieries Limited* the claimant brought an action against the King's Harbour Master at Portland for an injunction to restrain him from removing their coal hulk which was being used for bunkering ships in the harbour. The claimant maintained that it was entitled to keep the hulk permanently moored in the harbour to the harbour bed. The injunction was refused. The judge at first instance decided that the permanent mooring of the hulk was not an incident of any right of navigation. The other

main point of decision was that harbour master was entitled to remove the hulk as a trespass. This was because the soil of the harbour was vested in the Crown. Although A.T. Lawrence J did also say that the harbour lay within the jaws of the land, he did not offer any explanation. In any event, the longstanding presumption was that the soil of a harbour belonged to the Crown and, in this instance, Acts of Parliament had recognised that the harbour was Crown property. It was a major naval dockyard.

125. The Court of Appeal upheld that decision relying upon the powers of the harbour master to remove the hulk. They did not mention the jaws of the land principle. In so far as that principle had been referred to at first instance, it simply formed a limited part of the court's reasoning to establish the Crown's ownership of the soil. *Denaby* did not address the use of that principle for any wider purpose.

126. There remain the criminal law cases, *Cunningham* and *Keyn*. They have been the subject of subsequent judicial analysis and, in the case of *Keyn*, Parliamentary intervention. I deal with *Cunningham* first (see [68] above).

127. *Cunningham* was discussed by the Privy Council in *The Direct United States Cable Company Limited v the Anglo-American Telegraph Company Limited* (1877) 2 App. Cas. 394. The issue was whether Conception Bay formed part of Newfoundland, so that the respondent could rely upon a statutory prohibition of any other person using any part of that Province for telegraphic communications to obtain an injunction against the appellant in relation to the laying of a telegraphic cable across the bay. The appellant's project avoided laying the cable within 3 miles of the shore.

128. Lord Blackburn described the English authorities as relating to the specific question as to where the boundary of a county ended and the exclusive common law jurisdiction of the Admiralty Court began, rather than the boundaries of a Dominion or nation state (p.416). He pointed out that Hale had not explained what is meant by seeing or discerning from shore to shore. If it means to see what another person is doing on the other shore, the size of the gap would be very limited. If it means to see the manoeuvres of ships the distance would be extensive (p.417). The Court did not indicate which approach should be taken.

129. Lord Blackburn stated that *Cunningham* did not decide that the whole of the Bristol channel fell within the body of each adjoining county; rather that a particular location in the Channel fell within Glamorganshire. He also explained that evidence on usage, and the manner in which that part of the Channel had been treated, were significant for the decision in *Cunningham.* Similarly, after pointing to the difficulties in identifying principles for determining whether a bay forms part of a state, the Privy Council relied upon the long period over which the British Government had exercised dominion over the bay with the acquiescence of other nations, amounting to exclusive occupation.

130. Both *Cunningham* and the *Cable Company* case make plain the uncertainty involved in the physical "jaws of the land" test, save perhaps in obvious cases. Not surprisingly, the courts have relied substantially upon other more objective evidence, such as the actual usage of an area, its treatment for tax purposes and, crucially in the *Cable Company* case, the exclusive occupation of the Bay by the British Government which had been recognised by other nation states.

131. In *The Fagernes* [1927] P 311 the judge at first instance had decided that a claim relating to a collision between two ships in the Bristol Channel did fall within the jaws of the land and therefore the jurisdiction of the High Court. He said that he had been guided by *Cunningham.*

132. In the Court of Appeal Bankes LJ stated that there was no clear authority for determining what inland waters, such as bays, gulfs and estuaries are contained within the jaws of the land, except where effective occupation or statutory recognition has been established, or the opening is so narrow as to admit of no doubt (p.321). That observation echoed the Privy Council's reasoning in the *Cable Company* case.

133. The Court of Appeal reiterated that *Cunningham* had not decided that the whole of the Bristol Channel lies within the jaws of the land. In *The Fagernes* the collision between two vessels had occurred much further down the Channel (about 20 miles east of Lundy Island) where its width was so much greater and there was no effective occupation by the state of that area. Bankes LJ pointed out that in *Cunningham* there was evidence that the relevant location had been treated as part of the parish of Cardiff and the County of Glamorgan. Lawrence LJ expressed similar views (p.329). It is worth recalling that in *Cunningham* the ship had been anchored in anchorage grounds, the Penarth Roads, used by ships going to and from Cardiff docks. The anchorage was a roadstead lying within the limits of the port of Cardiff, but not a part of a harbour. Taxes and local rates had been levied on the occupiers of an island nearby, which formed part of the parish of Cardiff. But in *The Fagernes*, ultimately the court acted upon a statement by the Attorney General that the Crown did not claim any jurisdiction over the location in question.

134. I return to the case of *Keyn* (see [69] above). The thirteen judges divided seven to six. As Lord Wilberforce said in *Pianka v The Queen* [1979] AC 107 at 118, there were a number of differing reasons given in support of each opinion which have proved difficult to analyse. But it was clear that if an offence was committed within the body of a county, the assize court for that county would have jurisdiction in respect of it (see Cockburn CJ at p.168). Conversely, the assize court would have no jurisdiction to try an offence committed outside the body of a county, because the commission from the monarch to the judge of assize applied only to the relevant county and juries were summonsed only to try cases within that county (Cockburn CJ at pp.162 and 167). The body of a county included land down to the LWM and areas of the sea (a bay, gulf, estuary or harbour) between the jaws of the land. But otherwise along the coast facing the "external sea", the jurisdiction of the common law courts extended no further than the LWM (p.162 and 166).

135. In *Keyn* the collision between the two ships had taken place where the coastline faced the external sea and so the jaws of the land principle was not in point. Given that the incident had taken place outside the body of the county of Kent, the issue was whether it fell within the jurisdiction of the Central Criminal Court as the statutory successor to the criminal jurisdiction of the Lord High Admiral. On that point, the majority held that the Admiral had had no jurisdiction to try offences by foreign nationals on board foreign ships, whether inside or outside the territorial limits of England.

136. The Court in *Keyn*, apart from two judges, agreed that by 1876 international law allowed coastal states to exercise powers over territorial waters, including the imposition of criminal liability. Most of the minority held that the sea within 3 miles of

the English coast already formed part of the territory of England and that English criminal law had extended over that area to include foreign ships, formerly under the jurisdiction of the Admiral, but then the Central Criminal Court. However, the majority held that the state's ability to confer jurisdiction on criminal courts depended upon Parliament enacting legislation to that effect (see also *Pianka* [1979] AC at 119-120).

137. Parliament passed the Territorial Waters Jurisdiction Act 1878 in order to overcome that jurisdictional issue. How this was done has been discussed in *Pianka* and *R v Kent Justices ex parte Lye* [1967] 2 QB 153. But in summary, section 2 provided that an indictable offence committed by a person, whether or not a UK citizen, on the open sea within 3 nautical miles of the coast measured from the LWM, even if committed on board or by means of a foreign ship, was an offence within the jurisdiction of the Admiral. The 1878 Act left untouched the jurisdiction of an assize court to try an offence occurring within the body of a county. In its current form the Act now applies to the territorial sea as defined by the Territorial Sea Act 1987 and the jurisdiction to try a case on indictment has been vested in the Crown Court (s.46(2) of the Senior Courts Act 1981).

138. To summarise, the general position was that the area of a county next to the sea extended as far as the LWM, together with, for certain purposes, additional areas falling within the jaws of the land (e.g. estuaries and bays). The application of the "jaws of the land" principle is subject to considerable uncertainty and in some cases has had to be supplemented by other factors to which substantially greater weight has been given. The principle has been used to determine for certain parts of the coast the extent of the monarch's property rights and potentially whether an area of sea fell within the body of a county. The concept of the body of a county was used to establish whether conduct in a coastal location could be tried as a crime under English law and also whether the common law courts or the Admiralty Court had jurisdiction to try such an offence or to entertain certain civil proceedings. The coroner of a coastal county had no jurisdiction over the high seas, but he did have jurisdiction within the body of that county, including an arm of the sea or a port or harbour (Halsbury's Laws of England (3rd edition) vol. 8 p. 468 and *R v Soleguard* (1738) Andr. 231).

139. The case law demonstrates the need to keep in mind the distinction between international law determining the area of this country's sovereignty as between nation states and domestic law determining the geographical extent of any functions exercisable within that area. The concept of the body of a county was used to resolve certain jurisdictional issues about the geographical extent of the powers of criminal and civil courts and of coroners. But although that concept originated in the common law, it has been for Parliament to determine how far within this country's area of sovereignty the powers and duties it creates extend.

140. It is not difficult to see why the judges decided that coroners and common law courts should have jurisdiction over deaths and crimes occurring within ports and harbours and potentially areas lying within the jaws of the land. But no authority has been cited showing that that case law has ever been applied to determine the geographical extent of administrative or local government functions.

141. Similarly, it comes as no surprise that ports and harbours have formed part of the realm or dominion, so that the monarch or the state could exercise control over navigation and activities within those areas and could levy tolls and duties. But it does not follow that

a harbour forms part of a local government area for the purposes of any of its statutory functions. Different considerations are likely to apply. In my judgment, these issues depend upon the language used by Parliament when enacting the relevant power or duty and not upon an ancient and somewhat uncertain concept used to determine the extent of the jurisdiction of the criminal and admiralty courts and of coroners.

142. For these reasons, the case law on the circumstances in which the historical term "the body of a county" may include coastal waters, does not provide any support for the claimant's argument that Portland Harbour forms part of the area of DC for the purposes of exercising its administrative functions, such as planning control under the TCPA 1990.

Local authority coastal boundaries and accretions from the sea

143. Section 3 of the LGA 1888 transferred to the council of each county the "administrative business" of the justices in county quarter sessions as set out in paras. (i) to (xvi). That included the making, assessing and levying of rates, the grant of entertainment licences, the provision of asylums for the mentally ill and certain types of school, responsibility for highways and the organisation of Parliamentary elections. No case law has been cited to show that any coastal waters below the LWM fell within the jurisdiction of county quarter sessions as regards "administrative business" as opposed to criminal matters.

144. In the nineteenth century, the parish was the administrative unit for rating purposes, even where rates were levied by, for example, county quarter sessions (see the County Rates Act 1852 and Amies Law of Rating (1967) pp.114-115). It was well-established at common law that the boundary of a parish did not extend below the LWM. But there was no presumption that the foreshore between the HWM and LWM formed part of the parish. Whether that was so in any particular case depended upon proof by evidence to that effect. Accordingly, in *R v Musson* (1858) 8 E. & Bl. 900 it was held that the occupier of a pier was only liable for rates in relation to that section of the pier erected on land above the HWM (see also *The Trustees of the Duke of Bridgewater's Estates v Bootle* (1866-67) L.R.2 Q.B.4 dealing with a dock).

145. This principle was altered by s.27 of the Poor Law Amendment Act 1868 which provided that every accretion from the sea, whether natural or artificial, and any part of the seashore to the LWM, which on 25 December 1869 did not form part of any parish, should be annexed to and incorporated within the adjoining parish.

146. In *Barwick v South Eastern and Chatham Railway Companies* [1921] 1 KB 187 Earl Reading CJ stated that because the statute applies to both natural and artificial accretions, any distinction between a slow and gradual accretion and a rapid or immediate one is to be disregarded (p.198). The Harbour Board at Dover had reclaimed 11 acres of land below the LWM in order to widen an existing pier and accommodate a railway station and sidings. The engineering of this solid structure excluded the sea which had previously flowed over the site. The bed of the sea had become dry land. Accordingly, the whole of the reclaimed area was held to be an accretion from the sea within s.27 of the 1868 Act and the occupier was rateable in respect of its occupation of that area.

147. By contrast, a pier comprising a wooden walkway supported by iron pillars around which the sea continued to flow was held not to be an accretion from the sea within s.27 (*Blackpool Pier Company v Fylde Union* (1877) 46 L.J. (M.C.) 189). The operator was only rateable in respect of that part of the pier which lay within the LWM. The same approach was applied to harbour infrastructure such as quays (Ryde on Rating (10th edition) p.533 et seq.)

148. In *Easington* the court decided that works for the creation of a dock amounted to an accretion from the sea, by analogy with *Barwick*.

149. Section 27 of the 1868 Act was repealed and replaced by s.144 of the LGA 1933. Section 144 added that a part of the foreshore or an accretion treated as annexed to a parish, should also be treated as annexed to and incorporated in the county district and county, or the county borough, in which that parish is situated. Section 144 was itself repealed and replaced by s.72 of the LGA 1972 which is to similar effect (see [60] above).

150. I agree with the claimant that s.72 of the LGA 1972 does not have the effect of restricting the area of a coastal local authority to the LWM (or to accretions from the sea). Instead, it declares that that area shall *include* the foreshore down to the LWM (as well as accretion from the sea). On the basis of the case law referred to above, an accretion from the sea will often be a structure above the LWM, around which the sea flows.

151. Applying *Barwick*, I agree that the inner breakwaters are accretions to the land within s.72 of the LGA 1972. They are solid structures constructed on an area of the seabed from which the sea had been excluded. They are connected to the land mass.

152. However, I am doubtful as to whether the outer breakwaters constitute accretions from or into the sea. They are separated from the inner breakwaters by substantial gaps for ships to pass. The outer breakwaters do not represent a building out of the land into the sea. Unlike the inner breakwaters, they are not connected to the main land. "Accretion" refers to a process of growth by enlargement (Oxford English Dictionary), in this context enlargement of the mainland (see e.g. Megarry & Wade: The Law of Real Property) (10th edition) p.40).

153. However, it is unnecessary for me to decide that point. Even if all of the breakwaters are to be treated as accretions from, or into, the sea, that would only mean that those *structures* form part of the area of Dorset. But the claimant needs to establish that the area of the sea bed above which the Bibby Stockholm is moored falls within s.72 of the LGA 1972. However, in this respect, that area of seabed is no different from any other part of the seabed inside the breakwaters of Portland Harbour. The claimant therefore needs to establish that the whole of the seabed inside the Inner Harbour falls within s.72. That is impossible. The whole of that area is below the LWM. It is never exposed and cannot be described as an accretion from the sea. It is simply part of the sea bed and not land formed from, or into, the sea.

154. It is common ground that the finger pier to which the Bibby Stockholm is moored is an accretion from the sea falling within s.72 of the LGA 1972 and so falls within DC's area. The claimant goes on to submit that because the barge is moored to that pier and will be so located for up to 18 months, which is more than a temporary period, the barge

itself should be treated as an accretion within s.72 of the LGA 1972 and therefore within DC's area. No authority has been cited to support this argument. It is unsound.

155. A barge or ship is a chattel. It can move or be towed to a different location. Even if a ship or barge be moored in one location for a sufficiently long period of time that its occupier is in rateable occupation of the underlying soil and so liable for business rates under the Local Government Finance Act 1988, the vessel does not cease to be a chattel (see e.g. *Rudd (Valuation Officer) v Cinderella Rockerfellas Limited* [2003] 1 WLR 2423). No one could say that a boat moored to a river bed, even for a lengthy period of time, becomes a fixture and therefore part of, and an addition to, the land. The boat remains a chattel (*Holland and Hodgson* (1872) L.R. 7 C.P. 328, 335; *Chelsea Yacht and Boat Company Limited v Pope* [2000] 1 WLR 1941, 1944).

156. Section 1 of the LGA 1972 divided England into local government areas, counties and then districts. Section 72 of that Act appears in Part IV which deals with changes in local government areas, including the role of the Local Government Boundary Commission. There is nothing in the legislation to suggest that the extent of a local government area could be influenced by the positioning of a chattel over land.

157. The claimant has not shown that the sea bed within the harbour formed part of the county for the purposes of local government administration or rating when the LGA 1888 was enacted or subsequently.

Conclusions on Grounds (1) and (2)

158. For the above reasons neither the area of the sea bed above which the Bibby Stockholm is moored, nor Portland inner harbour, nor the "inner waters" in Weymouth bay extending to the baselines of the territorial sea, form part of the area of DC.

159. In any event, even if the claimant had succeeded on that issue, I agree with DC, SSHD and SSLUHC that that would be insufficient to make the location of the Bibby Stockholm subject to planning control. It is not enough that a site should fall within the area of a LPA. It must also constitute "land" (see the definition in s.336(1) of the TCPA 1990 at [38] above), the subject to which I turn next.

The definition of land in the TCPA 1990

160. It is necessary to place the definition of "land" in s.336(1) of the TCPA 1990 into a broader statutory context.

161. By s.5 and sched. 1 of the Interpretation Act 1978, "'land' includes buildings and other structures, land covered with water, and any estate, interest, easement servitude or right in or over land" unless the statute in question shows a contrary intention. Plainly the TCPA 1990 does just that, because the definition of "land" in s.336(1) is limited to "any corporeal hereditament, including a building." Before we consider the significance of the reference to corporeal hereditaments, it is necessary to see how the concept of land has been treated in earlier planning legislation and in Scotland.

Definitions of land in English and Scottish planning legislation

162. The Town and Country Planning Act 1932 (which applied in England and Wales) was a forerunner of the modern system of planning control. It too applied to "land" but s.53 defined "land" as follows:

> "'Land' includes land covered with water and any right in or over land."

That should be read alongside s.3 of the Interpretation Act 1889 which defined land as including "messuages, tenements and hereditaments, houses and buildings of any tenure". The key points are that those definitions were not limited to corporeal hereditaments and the 1932 Act expressly included "land covered with water." Parliament passed a similar statute in 1932 introducing planning control in Scotland and employing the same definition of "land."

163. However, s.119(1) of the Town and Country Planning Act 1947 defined "land" in essentially the same language as we find in s.336(1) of the TCPA 1990.

164. By contrast, when in the same year Parliament introduced for Scotland a similar system of planning control, it enacted a different definition of "land" to that contained in the English statute of the same year. Section 113(1) of the Town and Country Planning (Scotland) Act 1947 provided:

> "'land' includes land covered with water and any buildings as defined by this section."

"Building" was defined in the same terms as in s.119(1) of the English statute of 1947 (and as set out in s.336(1) of TCPA 1990). When read with s.3 of the Interpretation Act 1889, the definition of land in the Scottish Act of 1947 was similar to that contained in the 1932 Act.

165. The definition of "land" in the Scottish planning statute of 1947 was carried forward into the consolidating statutes, the Town and Country Planning (Scotland) Act 1972 and the Town and Country Planning (Scotland) Act 1997.

166. In 1947 why did Parliament change the definition of "land" for planning control in England so as to differ from the 1932 Act and from the parallel legislation in Scotland? Why has that difference been maintained? Counsels' researches have not yielded any explanation in any authority or any *Pepper v Hart* material. Fortunately, however, the court's task in this case is greatly assisted by the decision of the Inner House of the Court of Session in *Argyll and Bute District Council.*

The decision in Argyll and Bute District Council

167. The LPA challenged the decision of the Secretary of State that the construction of concrete oil production platforms in two locations within Loch Fyne fell outside the geographical extent of "land" subject to planning control. Loch Fyne is a sea loch extending about 40 miles inland from the Sound of Bute. A concrete production complex was developed near the village of Portavadie, on the eastern side of the loch, just over half way along its length. One location lay about 500 yards west of the

mainland in 25 fathoms of water and the other 1 mile west of the mainland in 100 fathoms. The platforms were to be secured to moorings in the seabed and an island nearby. The LPA argued that planning control extended to development on, over, or under the sea bed between the jaws of the land and for at least 3 miles from the LWM. It was also argued that because the bed of the loch was vested in the Crown and so formed part of the realm and of the adjoining county, it fell within the planning control exercisable by the LPA. The Secretary of State submitted that planning control extended up to but not beyond the LWM.

168. Lord Wheatley, the Lord Justice-Clerk, stated that it was unnecessary for the court to decide whether the *general* jurisdiction of the local authority extended across the bed of the loch because, even if it did, the authority's jurisdiction for a particular statutory purpose depended on the "provisions and purpose" of that statute. A local authority's jurisdiction may not be coterminous for all purposes. It was therefore essential to ascertain whether the jurisdiction of a LPA was expressly or by necessary implication restricted to exclude the area and sea bed below the LWM (p.252).

169. The Court referred to ss.19 and 20 of the 1972 Scottish Act which imposes planning control on the development of land in terms not materially different from ss.55 and 57 of the TCPA 1990. The jurisdiction of the LPA related to the development of "land." The Court referred to two provisions. First, the Scottish definition of "land" included "land covered with water." Secondly, para.71 of Schedule 22 to the 1972 Scottish Act indicated that planning control applied to "tidal lands" below the HWM. That provision in sched. 22 to the 1972 Scottish Act referred to "tidal lands" below the HWM without expressly defining that term. Accordingly, the Court decided that the legislation did not *expressly* exclude the sea bed below the LWM (pp.252-3). It remained necessary to determine what was meant by "tidal lands".

170. The Court then decided that the sea bed below the LWM was excluded from planning control by *necessary implication* because:

(i) The history of planning legislation, its concept and purpose do not *prima facie* comprehend the sea bed below the LWM. That coverage had been extended by the 1932 Acts, before the enactment of the 1947 legislation, without including the sea bed (pp.253 and 255).

(ii) On the LPA's submission, planning control would extend to the then 3-mile limit of the territorial sea or to areas within the jaws of the land, which would be contrary to the concept of town and country planning as intended by Parliament (pp.255-6).

(iii) Legislation applicable in Great Britain (and not just Scotland) such as the Coast Protection Act 1949 and The Sea Fisheries (Shellfish) Act 1967, distinguish between the seashore (i.e. the area between HWM and LWM or foreshore) and the sea bed. There is a basic distinction between "land" and the sea. The definition of "land" in the Scottish Act of 1972 includes "land covered by water", whether sea or freshwater. That includes the foreshore which, according to the tides, may or may not be covered by water. But land covered by seawater, as opposed to fresh water, is confined to "tidal lands" (pp.254 and 256).

(iv) The provision relating to "tidal lands" in para. 71 of sched. 22 to the 1972 Act had a recognised meaning established by earlier usage in legislation applicable in Great Britain (and not just Scotland), such as the Railway Clauses Act 1863 and the Bridges Act 1929. "Tidal lands" means such part of the bed, shore or banks of a tidal water as are *covered and uncovered* by the ebb and flow of the tide. That definition clearly excludes from planning control the bed of the sea below the LWM. The expression "tidal lands" contrasts with the definition of "tidal waters" in the Acts of 1863 and 1929, which refers to "waters", in the sense of any part of the sea or any part of a river within the flow and ebb of the tide. Unlike "tidal lands", "tidal waters" are not confined to the area between HWM and LWM (*Ingram v Percival* [1969] QB 548, 554).

171. The effect of the analysis in *Argyll and Bute District Council* is that Parliament found it necessary to include a provision in the Scottish planning legislation which treated "tidal lands" (the area between the HWM and LWM) as being subject to planning control. That clearly indicated that the sea bed below the LWM was not subject to planning control.

172. In *Lerwick Port Authority v Scottish Ministers* [2007] SLT 74 Lord Reed, sitting in the Outer House, stated that *Argyll and Bute District Council* established that "land" as used in the definition sections in the 1972 and 1997 Scottish Planning Acts, does not include the seabed below the LWM.

173. There is no material difference between the nature of planning control in Scotland as compared to England and Wales. It imposes control over the development of land. "Development" has the same meaning in both regimes. The statutory purposes of planning legislation in both jurisdictions are the same. The "tidal lands" provision is not peculiar to Scotland. It was contained in both the English and Scottish versions of the 1932 Planning Acts - ss.44 and 43 respectively. It was also included in para.49 of schedule 11 to the English Act of 1947, para.51 of schedule 14 to the English Act of 1962 and para.84 of schedule 24 to the English Act of 1971. It does not seem to have been repeated in the English consolidation of 1990, but that cannot be taken to suggest that Parliament intended to alter the geographical scope of the planning system along the coast of England and Wales. If Parliament had intended to do this, departing from earlier English statutes and from the law in Scotland, it would have said so in clear and express terms. The principle that planning control does not extend beyond the LWM was, and remains, well-entrenched in our legislation. The claimant did not identify any proper basis on which the essential reasoning in *Argyll and Bute District Council* could be distinguished in relation to the meaning of "land" in the TCPA 1990.

174. The definition of "land" in s.336(1) of the TCPA 1990 is expressed in narrower terms than the Scottish definition, in that it does not include the words "land covered by water." There is no dispute that land covered by a lake or by a river within the area of a LPA is a corporeal hereditament and therefore falls within "land" in the English planning statute. But the narrower wording of the English definition lends no support to the claimant's argument that the English planning regime, unlike the Scottish regime, applies to the sea bed beyond the LWM.

The claimant's reliance upon permitted development rights for harbours

175. The claimant submitted that a harbour or port should be treated as "land" within the ambit of the TCPA 1990. Mr. Goodman relied upon permitted development rights conferred by part 18 class A in schedule 2 to the GPDO, for development authorised by a local or private Act, an order approved by Parliament or an order under ss.14 or 16 of the Harbours Act 1964, which designates specifically the nature of the development authorised and "the land" upon which it may be carried out. This does not assist the claimant's case. The primary authorisation for such a scheme comes from the Act of Parliament or the order. The permitted development right, where it applies, simply removes the need to obtain an express grant of planning permission where that would otherwise be required. The GPDO does not alter the definition of "land" in s.336(1) of the TCPA 1990.

176. Planning permission would only be necessary for, and permitted development rights would only authorise, that part of the scheme which would involve development of "land". Quays, docks and breakwaters, for example, may be "land" or may become part of the land as accretions. Planning control is exercisable in relation to such areas of land. But it is not exercisable in relation to areas which are below the LWM or to the underlying sea bed which is never uncovered.

177. In any event, delegated legislation is generally not an aid to the construction of primary legislation unless the former was promulgated at a time roughly contemporaneous with the latter. Secondary legislation may assist in resolving an ambiguity in primary legislation where it was introduced at about the same time as the latter, as part of a single scheme which could be reviewed by the same Parliament (*R (PACCAR Inc) v Competition Appeal Tribunal* [2023] 1 WLR 2594 at [44] to [46]) but the claimant has not sought to show that that principle applies here. At all events, the permitted development right in Part 18 Class A is capable of being read compatibly with the interpretation adopted in *Argyll and Bute District Council*. It should not be treated as enlarging the meaning of "land" in s.336(1).

The potency of the term "land"

178. In *PACCAR* the Supreme Court also held that the potency of the term being defined may provide some guidance as to the meaning of that term as set out in the statutory definition. In the case of a statutory definition, the defined term may itself colour the meaning of the definition. This principle is not confined to cases where there is an ambiguity in the language used in the definition section. Instead, when the definition is read as a whole, the ordinary meaning of the word or phrase being defined forms part of the material which might potentially be used to throw light on the meaning of that definition. Whether and to what extent it does so depends on the circumstances and, in particular, on the terms of the legislation and the nature of the concept referred to by the word or phrase being defined ([48]).

179. I accept the submission of Mr. Honey KC for the SSLUHC that "land" in s.336(1) of the TCPA 1990 is such a potent term. It refers to the solid part of the earth's surface as opposed to the sea (Oxford English Dictionary). The sea must include the underlying sea bed. That was the approach adopted by the Inner House in *Argyll and Bute District Council*. Indeed, if land were to be treated as including the sea bed, there would be no logical stopping place before the limits of this country's territorial sovereignty are

reached. That approach would be inconsistent with the legislature's intention to enact a system of development control in relation to the land, not the sea. It is logical to include the foreshore within the area referred to as "land" because it is not always covered by the sea.

180. For the reasons set out above, I reject the claimant's contention that the sea bed above which the Bibby Stockholm is moored is "land" within s.336(1) of the TCPA 1990. Those reasons are sufficient to enable me to determine that issue without needing to go any further.

Why does s.336(1) refer to "any corporeal hereditament"?

181. However, Mr Honey assisted the court on the effect of the specific definition in s.336(1) that "land" means "any corporeal hereditament, including a building." In essence, I accept his analysis.

182. In the context of property law, "hereditament" refers to an estate in land which before 1926 was capable of being inherited. It concerns realty as opposed to personalty. A *corporeal* hereditament refers to lands, buildings, minerals and all other things which are part of, or are fixed to, land. A corporeal hereditament entitles its owner to possession of the land. An incorporeal hereditament refers to a right over land, such as an easement, and does not give a right to possess the land (see Halsbury's Laws (5th edition) Vol.87 para. 11; Megarry & Wade paras.1-013 and 22-001 et seq.).

183. Section 205(i)(ix) of the Law of Property Act 1925 defines "land" for the purposes of that statute as follows:

> "(ix) "*land*" includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also, a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land;
> and "*mines and minerals*" include ….. ;
> "*manor*" includes …. ; and
> "*hereditament*" means any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir"

It will be noted that this definition of "land" includes incorporeal hereditaments. Similarly, the draftsman of s.336(1) of the TCPA 1990 (and its predecessors) found it necessary to include "any interest in or right over land" for the purposes of the provisions dealing with the acquisition of land under Part IX of the Act (likewise in the Scottish legislation). But for all other purposes in the TCPA 1990, including development control, interests in or rights over land are excluded from the concept of "land"; the definition of land is restricted to *corporeal* hereditaments.

184. Like a hereditament, the concept of a "fee" refers to real property capable of being held and inherited (Coke: First Part of the Institutes of the Laws of England). "Land held" is held by tenure from a superior title, the Crown, so that where the owner of a freehold

dies without any heirs, that estate escheats to the Crown (Halsbury's Laws (5th ed.) Vol. 29 paras. 119 and 134; Megarry & Wade paras 20-010, 20-020 to 2-025 and 3-001).

185. Land "held" is distinguished from allodial land. The latter refers to land of the monarch which is not subject to any superior title. It is not held under any form of tenure. The interest of the Crown in such land is referred to as its "radical title." It is not a fee. Crown land that has never been granted to a subject, or which has returned to the Crown because the tenure previously granted has ceased (e.g. by escheat), is allodial. However, the Crown may also hold the freehold of land in fee simple, for example, where the Crown purchases land by a conveyance or transfer. Often this happens where a Government Department acquires land. Accordingly, allodial land is said to comprise primarily the ancient possessions of the Crown, the foreshore and the sea bed below LWM extending to the seaward territorial limits (Halsbury's Laws (5th edition) Vol. 29 paras. 134 and 161 and Jessel: Crown and Government Land (2023)).

186. The Crown owns the foreshore and seabed by virtue of a prerogative right, an allodial right. Contrary to the claimant's assertion, this ownership is not attributable to the fee system of tenure (see *Shetland Salmon Farmers Association v Crown Estate Commissioners* [1991] SLT 166, 169-174, 185).

187. Although the Crown is one and indivisible (*Town Investments Limited v Department of Environment* [1978] AC 359), for some purposes it is necessary to identify the two bodies of the monarch, the "body personal" or natural and the "body politic". The body politic is eternal or perpetual. Land held in right of the Crown is vested in the Crown as the body politic. Upon the demise of the monarch the successor accedes to the Crown and all its prerogatives and property. The notion of "perpetual succession" applies to allodial land (Halsbury's Laws (5th edition) Vol 29 para.14; Jessel Appendix 1). Accordingly, allodial land has never been capable of inheritance. It is not a corporeal hereditament.

188. This division between corporeal hereditaments and allodial land is consistent with the conclusion I reached previously, that Parliament has never intended the sea bed beyond the LWM to be subject to planning control. However, I should make it clear that that conclusion does not depend upon this analysis.

189. Mr. Goodman says that there are two flaws in relying upon the distinction between corporeal hereditaments and the Crown's allodial land as informing the definition of "land" in the s.336(1) of the TCPA 1990. First, he says that it is inconsistent with the generally held view that the foreshore to the LWM lies within planning control. I observe that even if that were so, it would not assist the claimant's contention that the location of the Bibby Stockholm is subject to planning control.

190. But there is no such inconsistency. The "tidal lands" provisions contained in the 1932, 1947, 1962 and 1971 English planning statutes make it clear that Parliament intended the foreshore (but not the seabed beyond the LWM) to fall within planning control. From 1947 onwards those provisions sat alongside the statutory definition of land to mean "any corporeal hereditament." Therefore, in accordance with the opening words of s.119(1) of the 1947 Act (and now s.336(1) of the TCPA 1990), that definition of "land" had to give way, and still has to give way, to two matters: (i) the treatment in the statutory scheme of the foreshore as being subject to planning control (which was

unaltered by the 1990 consolidation); and (ii) the potency of the term "land" itself, which includes the foreshore between HWM and LWM.

191. By contrast, planning legislation has never contained a general provision, like the "tidal lands" clauses, which expressly treated the sea bed beyond the LWM as being subject to planning control. Accordingly, "land" in s.336(1) is limited to corporeal hereditaments and does not include the sea bed as allodial land. But even if the Crown should grant ownership of part of the sea bed to a subject, that area is still excluded from planning control by the potency of the term "land".

192. Second, Mr. Goodman submits that Mr Honey's analysis of the allodial nature of the Crown's ownership of the foreshore and the seabed below the LWM is inconsistent with the amendments of Part 13 of the TCPA 1990 made by the Planning and Compulsory Purchase Act 2004. He says that it would negate Parliament's intention to subject Crown land to planning control.

193. It is necessary to consider first the position before the 2004 Act amended TCPA 1990. The 1947 Act did not bind the Crown. But, in general terms, the legislation applied planning control to Crown land to the extent of any interest therein *held otherwise than by or on behalf of the Crown* (see e.g. s.296). That remained the position through successive Planning Acts, including the TCPA 1990 as originally enacted (see e.g. *Ministry of Agriculture, Fisheries and Food v Jenkins* [1963] 2 QB 317; *Lord Advocate v Dunbarton District Council* [1990] 2 AC 580). This statutory regime, which applied planning control to non-Crown interests in Crown land, was compatible with the distinction between allodial land and corporeal hereditaments. It was also compatible with planning control extending to the foreshore, but not to the area beyond the LWM.

194. Part 7, Chapter 1 of the Planning and Compulsory Purchase Act 2004 amended Part 13 of TCPA 1990. The new s.292A of the 1990 Act provides that that statute "binds the Crown", subject to any express provision in Part 13. It is s.292A which has the general effect of requiring the Crown to comply with planning control, just as any person, natural or legal, must comply with planning control. But neither s.292A nor any other provision of Part 13 alters the geographical scope of planning control or, in particular, the legal definition of "land" to which that control applies. Simply to say that the TCPA 1990 binds the Crown, does not alter the meaning of "land" in the Act or the legal distinction between allodial land and corporeal hereditaments. A corporeal hereditament which is owned by the Crown is subject to planning control. But because the 2004 Act did not alter the definition of "land" or the geographical extent of planning control, the analysis set out above of how that control applies to the foreshore, but not to the area beyond the LWM, still holds good.

195. Even if I am wrong about the distinction between allodial land and corporeal hereditaments in relation to the TCPA 1990, that does not alter the legal position that the seabed above which the Bibby Stockholm is moored, is not land subject to planning control, for the reasons given in [160]-[180] above.

Ground (3) – A broader purposive interpretation

196. The claimant submits that, even if the Bibby Stockholm falls outside the boundaries of Dorset, the defendant is nevertheless empowered by the TCPA 1990 to take enforcement action against the siting and use of the barge, because the statute may apply

outside the territory for which it is the law (*Al-Skeini*); on a purposive construction it should be read as if it does so apply, in particular to the area of the inner harbour at Portland.

197. I am not convinced that the principle in *Al-Skeini* (discussed in Bennion, Bailey and Norbury at sections 6.1 et. seq) is in point. There is no dispute that the TCPA 1990 represents the law of England and Wales. No issue is raised in this case as to whether the Act also controls activities outside the territorial sea of England and Wales, or in another country. The issue is what is the geographical area to which planning control applies *within* the territorial limits of England and Wales. The claimant has gone no further than to say that that control extends to the baselines established under the 2014 Order, alternatively the inner harbour at Portland.

198. So the issue is simply whether a purposive construction supports the claimant's reading of the TCPA 1990. Such a construction may involve a strained reading of the language used, but it must nevertheless be a proper reading of that language. The court cannot rewrite the legislation (Bennion, Bailey and Norbury at section 12.2).

199. The claimant submits that the purpose of the TCPA 1990 is to control the use of land in the public interest, which includes activities beyond the boundary of a LPA having a significant impact on the community or environment of that authority's area, or a part thereof. There are two flaws in this argument.

200. First, a LPA does not have power to serve an enforcement notice in relation to development outside its area, even if that development has an impact inside its area (see e.g. *Wealden* at [1999] JPL 174, 180; *R (North Wiltshire District Council) v Cotswold District Council* [2009] EWHC 3702 (Admin) at [116]; *Fenland District Council v CBPRP Limited* [2022] EWHC 3132 (KB) at [12]). The LPA which has the power to serve an enforcement notice is the district planning authority for the district (s.1(1) and sched. 1 para.11 of the TCPA 1990), that is the district in which the development has occurred. The claimant's suggestion that DC can issue an enforcement notice in relation to development in Portland Harbour depends upon the proposition that a LPA has a general power to take enforcement action against development outside its area in, for example, the area of an adjoining district. That is contrary to the statutory scheme and the authorities cited above. The purpose upon which the claimant relies cannot be found in the language used by Parliament. Indeed, the claimant made no attempt to do this.

201. Second, the claimant's reading is inconsistent with the language used by Parliament, which confines planning control to "land", including "tidal lands", but not the sea bed below the LWM. A purposive construction cannot involve rewriting the legislation.

202. Accordingly, ground (3) must be rejected.

Ground (4) – Enforcement action on the quayside

203. I see no merit in the complaint that DC has failed to consider taking enforcement action in respect of those areas of land at the port which are used in connection with the Bibby Stockholm, for example the finger pier and quayside. DC has stated that it is considering that issue. It is not refusing to do so.

204. An allegation that an authority has *failed* to take action depends upon a correlative obligation or duty to take that action. But the claimant has not identified any timescale within which DC was legally obliged to reach a decision on enforcement. Accordingly, she has not advanced any proper legal basis for saying that DC has acted unlawfully, and that the court is entitled to intervene, because the authority has not already reached a decision on enforcement action or issued an enforcement notice.

205. Furthermore, it is understandable that DC has preferred to await the outcome of the present litigation. Indeed, the claim form asks the court for an order directing DC to reconsider its decision that it cannot take enforcement action in the light of this court's judgment.

206. The claimant also suggested that, in considering enforcement action, DC has failed to take into account the whole of the planning unit occupied for the purposes of accommodating asylum seekers, including the area over which the barge is moored. But a planning unit is a tool for defining an area of land, or a building, by reference to which the issue of whether there has been a material change of use is determined (*Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207; *R (Ocado Retail Limited) v Islington Borough Council* [2021] PTSR 1833 at [175] to [177]). No authority has been cited to support the proposition that a planning unit can include an area outside the geographical scope of development control in order to decide whether a breach of planning control has taken place. I do not accept that proposition. It would involve the imposition of planning control over an area which is not within the scope of that regime.

207. Accordingly, ground (4) must be rejected.

Ground (5) – The *Marleasing* principle

208. The claimant submits that the *Marleasing* principle remains part of our domestic law for the purposes of this claim. Because there has been no argument to the contrary and ground (5) fails in any event, I will assume that the claimant is correct without deciding the point.

209. The focus of the claimant's pleaded case has been to obtain (a) a declaration that DC erred in law in deciding on 13 July 2023 that it has no power under the TCPA 1990 to take enforcement action in respect of the stationing and use of the Bibby Stockholm and that DC does have such a power and (b) a mandatory order requiring DC to reconsider whether to take enforcement action in respect of the barge in the light of the court's judgment. Although the *Marleasing* argument has only been raised in support of this site-specific claim, the implications of the claimant's submissions are much broader and should not be ignored in the submissions made to the court.

210. The claimant did not bring her claim in order to obtain wider relief, namely that the TCPA 1990 would be incompatible with the Directive if planning control were to be read as extending no further than the LWM. Nor did she ask for a declaration as to how the TCPA 1990 should be interpreted so as to be fully compatible with the EIA Directive, or for an order disapplying any language of that Act which could not be read compatibly with the Directive. Indeed, most of the interpretations put forward by the claimant in the Appendix to the Amended Statement of Facts and Grounds continue to focus on the Bibby Stockholm and Portland Harbour or harbours. It is as if the claimant is seeking to shy away from the implications of raising the *Marleasing* point.

211. The claimant submits that the TCPA 1990 fails to give effect to Article 2(1) of the EIA Directive because "projects" located beyond the LWM, which are likely to have significant effects on the environment, are not made subject to a requirement for development consent and an environmental impact assessment.

212. This contention gives rise to three issues:

(i) Is the mooring and use of the Bibby Stockholm in Portland Harbour a "project" within the meaning of the EIA Directive? If not, the *Marleasing* argument is wholly academic for the purposes of this claim. It would not support the relief sought by the claimant, which is focused on the taking of enforcement action under the TCPA 1990 in respect of the Bibby Stockholm;

(ii) The EIA Directive does not indicate the geographical extent of the obligation imposed on Member states by art. 2(1). For example, it is not limited to harbours or ports. If that obligation applies to those parts of a state which lie beyond the LWM, then potentially it applies throughout the territorial seas of that state;

(iii) On the court's reading of the TCPA 1990 and the Marine and Coastal Access Act 2009, neither regime requires a development consent or EIA in respect of the stationing and use of the Bibby Stockholm within Portland Harbour. There is therefore an important issue as to whether any lacuna which is demonstrated should be addressed in the TCPA 1990 or the 2009 Act, or possibly in some other way. The 2009 Act was enacted, and the MMO established, to deal with the licensing *inter alia* of marine projects. It could be said, therefore, that a *Marleasing* interpretation should be applied to the 2009 Act rather than the TCPA 1990. On 11 October 2023 the Court raised concerns in JR1 about the potentially wider implications of the claimant's argument (see [2023] EWHC 2580 (Admin) [33] to [35]).

213. The claimant has not considered issues (ii) and (iii), because the focus of the claim has been on the exercise of planning control in relation to the Bibby Stockholm. But it would be wholly unprincipled and improper for the court to deal with the relatively limited aspect in which this claimant is interested without submissions being made on these wider issues. They cannot properly be separated.

214. DC, SSHD and the SSLUHC suggested that any *Marleasing* argument should be directed at the 2009 Act rather than the TCPA 1990. But although the claimant had previously raised issues about the application of the marine licensing regime in correspondence with the MMO, she did not join the Secretary of State for the Environment, Food and Rural Affairs (who is responsible for the operation of the 2009 Act) as an Interested Party.

215. A *Marleasing* argument would require a careful examination of firstly, the regimes of the TCPA 1990, the 2009 Act and for the authorisation of port and harbour schemes[3], secondly, the types of project falling within the EIA Directive and thirdly any justification for the approach which has been taken in the drafting of our domestic legislation. These matters have not been addressed, which reinforces the view that the

[3] Pat I of sch.3 to the Harbours Act 1964 gives effect to the requirements of the EIA Directive as regards "projects" the subject of applications for harbour revision orders.

court should not entertain the claimant's *Marleasing* argument if it is academic in this case.

216. I agree with DC and the Interested Parties that the positioning of the Bibby Stockholm in Portland Harbour and its use to accommodate asylum seekers, even for 18 months or so, does not qualify as a project for the purposes of the EIA Directive.

217. It is not suggested by the claimant that the circumstances of this case fall within the second limb of the definition of a project in Art. 1(2)(a), that is an "other intervention in the natural surroundings and landscape." Rather Mr. Goodman submits that the first limb is engaged: "the execution of construction works or of other installations or schemes." He relies upon the onshore works on the quay and the connection of the barge to the shore. But in case they do not suffice, he also throws into the mix the construction of the barge, apparently in an overseas location in 1976 (and presumably its subsequent conversion into accommodation in 1992). However, it is also necessary to show that the project falls within one of the categories defined in art. 4 and Annexes I or II. The claimant relies upon the "urban development project."

218. The minimal works carried out on the quayside could not conceivably have amounted to an "urban development project" within Annex II, even on a broad purposive interpretation. The claimant has not provided any real information about the construction of the barge. But no doubt it was the sort of work which would typically be carried out in whichever shipyard was involved. Any environmental effect of that work would have been an effect of the use *of that shipyard* as part of the construction of any number of vessels. That effect would not be relevant to determining whether the mooring of the Bibby Stockholm in Portland Harbour involved the carrying out of a project there, any more than if some other vessel were to be moored and used in the Harbour for a substantial period of time. "Project" in the present context refers to alterations to the physical state of the site in question, Portland Harbour (see e.g. *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* [2011] Env. L.R. 26 at [20] to [30]; *Inter-Environmental Wallonie ASBL v Conseil des Ministres* [2020] Env.L.R. 9 at [62]).

219. Even if the court were to entertain the claimant's *Marleasing* argument, there is a further difficulty. *Marleasing* cannot be used to read words into legislation that are inconsistent with the scheme of the statute, or which go against its grain or fundamental or essential principles (*Ghaidan v Godin-Mendoza (FC)* [2004] 2 AC 557 at [33], [121]; *Vidal-Hall v Google* [2016] QB 1003 at [88]-[90]). Fundamentally planning control is only concerned with the carrying out of operations on, and the use of, "land".

220. For these reasons, ground (5) must be rejected.

Delay

221. For the reasons already given, this claim fails. It is therefore unnecessary for the court to address the submissions on delay made against the claim. It is sufficient for me to say at this stage that I am not impressed by those delay arguments. It seems to me that a decision by a LPA that a particular subject-matter falls outside planning control, and for that reason the powers to take enforcement action under the TCPA 1990 are not available, is not a decision "made *under* the Planning Acts" for the purposes of CPR 54.5. Accordingly, the time limit for filing the claim form was 3 months, rather than 6 weeks, after the grounds for making the claim form first arose. On that basis the claim

form was just inside that time limit. I would not have been inclined to say that it was out of time because of a lack of promptitude.

Conclusions

222. I consider ground (1) to have been arguable and I grant permission to apply for judicial review to that extent only. However, for the reasons set out above ground (1) must be rejected. In any event, the location of the Bibby Stockholm does not fall within the definition of "land" in the TCPA 1990 and for that further reason this part of the claim must fail.

223. For the reasons set out above, grounds (2) to (5) are unarguable and I refuse permission to apply for judicial review in relation to those matters.

224. The application for judicial review is dismissed.