Neutral Citation Number: [2012] EWCA Civ 379

Case No: C1/2011/2958 & 2972

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE COLLINS
CO/6088/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2012

Before :

LADY JUSTICE ARDEN
LORD JUSTICE CARNWATH
and
LORD JUSTICE MOORE-BICK

- -

Between :

CORNWALL WASTE FORUM ST DENNIS BRANCH	**Respondent**
- and -	
THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**1st Appellant**
- and -	
SITA CORNWALL LIMITED	**2nd Appellant**

- -
- -

Rupert Warren (instructed by **Treasury Solicitors**) for the **1st Appellant**
Richard Phillips QC & Mark Westmoreland Smith (instructed by **Bond Pearce LLP**) for the **2nd Appellant**
David Wolfe (instructed by **Leigh Day & Co, Solicitors**) for the **Respondent**

Hearing date : Monday 27th February, 2012

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Approved Judgment

Judgment Approved by the court for handing down.

Carnwath LJ :

Introduction

1. These are appeals by the Secretary of State and by SITA Cornwall Ltd ("SITA") against the judgment of Collins J on 13 October 2011, on an application under section 288 of the Town and Country Planning Act 1990 by Cornwall Waste Forum St Dennis Branch ("the Forum"). The judge quashed a planning permission granted to SITA by the Secretary of State, for a waste treatment plant on land at St Dennis, Cornwall. The judge held, in short, that the Secretary of State had acted unfairly in his treatment of the Forum's arguments relating to the European Habitats Directive (92/443/EEC), and regulations made under it.

2. The site lies on the edge of an extensive area of existing and former china clay workings to the north and north-west of St Austell. It is close to two Special Areas of Conservation (SACs) designated under the Habitats Directive. One, St Austell Clay Pits SAC, is notable for a particularly rare species, the Western Rustwort ("Marsupella profunda"), which attracts the strongest level of protection under the Directive. The Directive is transposed into domestic law by the Habitats and Species Regulations 2010, SI/2010 No 490 (replacing 1994 Regulations in similar terms, which were in force in the earlier part of the inquiry).

3. The proposal required two forms of consent: planning permission, granted by the relevant planning authority (the County Council) or by the Secretary of State; and an environmental permit, granted by the Environment Agency. The procedures were operated in parallel:

   i) On 20 March 2008 SITA applied to the County Council for planning permission, which they refused on 31 March 2009. SITA's appeal was on 9th October 2009 recovered for determination by the Secretary of State (rather than an inspector) as a development of more than local significance. A public inquiry was held over 36 days, beginning on 16th March and ending on 7th October 2010. On 3rd March 2011 the inspector reported to the Secretary of State, who on 19th May 2011 issued his decision granting permission.

   ii) SITA applied to the Environment Agency for an environmental permit in July 2008. On 28 January 2010 the Agency indicated that it was minded to issue the permit. On 8 July 2010 an advance copy of the draft permit was provided to the inquiry, and on 20 August 2010 the draft permit was issued for public consultation. Comments on the draft permit were received by the Inspector both before and after the end of the inquiry. The final permit was issued on 6th December 2010, after the close of the inquiry, but all parties were notified and offered a further opportunity to comment to the inspector.

4. Underlying the arguments is an issue as to the allocation of responsibility, as between the Secretary of State and the Environment Agency, to undertake the assessment required by the Habitats Regulations. To show how this arises I turn to the relevant regulations.

The Habitats Regulations

5. There is no dispute that both the Secretary of State and the Environment Agency were "competent authorities" as defined (reg 7). Decision-making was governed by Part 6, in particular regulations 61 and 65:

i) *Regulation 61* ("Assessment of Implication for European Sites..."):

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which —
>
> (a) is likely to have a significant effect on a European site ..... (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site must make an appropriate assessment of the implications for that site in view of that site's conservation objectives...
>
> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.
>
> (4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site..."

ii) *Regulation 65* ("Co-ordination where more than one competent authority is involved"):

> "(1) This regulation applies where a plan or project —
>
> .....
>
> (b) requires the consent, permission or other authorisation of more than one competent authority; .....
>
> .....
>
> (2) Nothing in regulation 61 (1) ..... requires a competent authority to assess any implications of a plan or project which would be more appropriately assessed under that provision by another competent authority...."

6. It can be seen that regulation 61(1) envisages a two-stage approach: first, consideration whether the proposal is "likely to have a significant effect"; secondly, if it is, an "appropriate assessment" of its implications for the SAC.

7. I note here a criticism made by Mr Phillips (for SITA) of the judge's summary of the two stage-approach. He had said (para 12):

> "First, consideration... is given to whether it can be shown that no adverse effect can possibly result. This is a negative consideration; that is to say if it is not possible to say that no adverse effect might be occasioned then appropriate assessment must be made. That appropriate assessment will then decide whether the project is likely to have a significant effect on the site."

This, says Mr Phillips, misstates the test at both stages. At stage one, the test is not whether *no adverse effect* can *possibly* result, but whether there is a *likelihood* of *significant* effects. Conversely, at stage two, likelihood of significant effects is not the question; this has been decided at stage one. The question is the implications of those effects in relation to the conservation objectives of the site. He makes a similar criticism of the judge's comments at paragraph 36 ("the approach should be that if it is not possible to rule out any adverse effects then appropriate assessment should be made...")

8. While I see some force in this criticism, it is clear that the first stage sets a lower hurdle that the strict wording might be thought to imply. This appears from the decision of the European Court in *Waddenzee* (2004) Case 127/02. According to that judgment (para 45), an "appropriate assessment" will be required in relation to any project–

> "... if it cannot be excluded on the basis of objective information that it will have a significant effect on that site..."

9. In any event the arguments in the present case have turned not on the nature of the test, but on allocation of responsibility for applying it. This depends principally on regulation 65(2). On its face that allowed, but did not require, the Secretary of State to leave the assessment under the regulations to the Environment Agency, if in the circumstances the project would be "more appropriately assessed" by them.

10. The Forum's case was that, as a result of representations express or implied, made before and during the inquiry, the inspector and through him the Secretary of State were legally committed to making the assessment themselves, but failed to do so. More specifically, it is said, they failed to address an important issue, raised by the objectors, as to the methodology adopted by the Agency for assessing significance.

11. This was the so-called "1% rule": that is, that if the long term "process contribution" for a pollutant is less than 1% of the relevant Air Quality Standard, its effects are deemed "insignificant" (see Environmental Permit para A3.1(ii)). It was the case of the County Council at the inquiry, supported by the Forum, that this rule should not be applied where pollution levels were already substantially above the "critical load" (see e.g. Power of Cornwall "Post-Closing response" para 4-3-4).

Representations

12. The sequence of exchanges on which the Forum relies is set out in the judgment. A summary here is sufficient. The following occurred before the opening of the inquiry:

i) In November 2009, when rejecting an email request from the objectors that an appropriate assessment be carried out before the inquiry, Mr Bolton for the Planning Inspectorate said:

> "The inspector, on behalf of the Secretary of State, cannot... carry out an appropriate assessment before the inquiry. Evidence of discussion at the inquiry may contribute to the judgment on any likely significant effect..."

ii) In an email of 20th November 2009 the Environment Agency agreed with the Council that the Agency should not be "the lead authority" for assessment under the regulations.

iii) An email from Natural England dated 12th January 2010, commenting on the latest assessment of significant effect, stated that "the Planning Inspectorate is now the competent authority...", and suggested that a conclusion on significance should await the outcome of the planning inquiry.

iv) A "Procedural Note" dated 4th February 2010, issued by the inspector himself in response to an email from a Miss Larke of the objectors, indicated the procedure by which he expected the issue of appropriate assessment to be considered at the inquiry, concluding:

> "6 The question of appropriate assessment is a matter at first instance for the inspector in making a report to the Secretary of State. However the ultimate decision on this point, as on the appeal itself, lies with the Secretary of State. In coming to a view on appropriate assessment the inspector will rely on the evidence that has been placed before the inquiry and tested by cross-examination."

v) Finally on 15th March 2010, the day before the inquiry began, the Chief Executive of the Inspectorate wrote in response to a letter from the local MP, who was concerned that, if the appropriate assessment were left until after the inquiry, information from it would not be fed into the planning decision. She said:

> "I can confirm that as part of the inquiry process the inspector will consider the effect of the proposal under the Habitats Directive. If he deems it to have significant adverse effect he will undertake an appropriate assessment, having first ensured that he has the necessary evidence to do so. The appropriate assessment will then form part of the inspector's report to the Secretary of State."

13. I say at once that the last seems to me the most significant. Unlike the earlier statements which read as relatively informal exchanges in the run-up to the inquiry, the last is a clear and considered representation, made in response to a question from an MP with the authority of the Chief Executive of the Inspectorate. As Mr Warren for the Secretary of State accepts, it reflects what was indeed the expectation at that time: that is, that the evidence necessary for an assessment of significance under the regulations, and if required the appropriate assessment, would be collected at the inquiry, and that the decision on those matters would be made by the Secretary of State on the basis of the Inspector's report. On the other hand, the context of the letter is also relevant. The MP's concern was the timing of the assessment, not who was to carry it out. Further, it was written at a time when the environmental issues included the effects of traffic pollution from outside the site and other matters, as well as those of emissions from the stack.

14. As to what was the understanding at the inquiry itself, we heard conflicting submissions. Mr Phillips pointed to the evidence of his planning witness, Mr Picksley, who had proposed that the appropriate authority should be the Environment Agency. On the other hand, the Inspector's list of topics to be included in closing submissions, issued on 29th July 2010, included no indication that allocation of that responsibility, as between the Secretary of State and the Agency, was itself a live issue on which submissions were required. It included the following topic:

> "The weight to be given to the views of the Environment Agency and Natural England in making an appropriate assessment under the Habitats Regulations".

To my mind, this formulation implies that, even at this late stage (after the draft Environmental Permit had become available), the Inspector was still anticipating that he would be advising the Secretary of State on this issue, taking account of the Environment Agency's views, rather than leaving the decision to them.

15. The scope of the debate between the parties on these issues is apparent from the inspector's record of the final submissions of the main parties. SITA noted the acceptance by the County Council witnesses that impacts in relation to hydrology, water quality and dust, and also traffic emissions, were insignificant, while the question of emissions from the stack was "manifestly the territory of the Environment Agency and not the Waste Planning Authority" (para 187). Reference was made to the respective roles of the "competent authorities" under regulation 65(1). As I read the report, this was not so much to support a submission that the Secretary of State should leave this issue to the Agency, but rather that the pollution control regimes should "complement rather than duplicate each other", and that the authorities should work effectively together to ensure best use of expertise (IR para 189).

16. There was extensive discussion also of the appropriateness of the 1% rule. The record of the Council's submissions included a lengthy attack on the use of the rule (paras 839-872), leading to the submission that the Secretary of State "cannot soundly conclude that Reg 61(5) of the Habitats Regs is satisfied and that permission must be refused on this basis alone." SITA's submissions on this issue are also lengthy. They asserted that their reliance on the 1% rule had been known to the Council since 2008 and had not been questioned (para 183-4), and that it had been referred to since 2001 in Joint Guidance issued by the Environment Agency and Natural England, and had never before been the subject of legal challenge; the guidance made clear that it applied "irrespective of background levels" (paras 193-4).

17. As to the exchanges after the inquiry, I have already noted that consultation on the terms of the draft Environmental Permit was continued after the close of the planning inquiry itself. The Permit itself was issued on 6th December 2010. In January comments on the permit were submitted to the inspector by groups within the Forum, again challenging the use of the 1% rule, as one aspect of more specific submissions on the environmental issues. Although the inspector's report was submitted at the beginning of March, it would not have been seen by the parties until it was published along with the Secretary of State's decision on 19th May.

The inspector's conclusions

18. The report was as the judge said "very lengthy and detailed". It is an impressively comprehensive treatment of a wide range of issues covered at the inquiry, of which the effect on the SACs was but one. The relevant conclusions on these issues come at

paragraphs 1970-80. The passage starts with a reference to a submission by the Council that on appeal the Secretary of State became the competent authority. The inspector responded by noting that under regulation 65(2), there may be more than one competent authority. He continued:

> "The question arises as to who should be the competent authority when considering a particular impact, in this case the Secretary of State in determining a planning appeal or the Environment Agency when considering an application for a permit. It is recognised that there might be bases which give rise to a number of impacts. Where there are impacts which would be more appropriately assessed by the Secretary of State then he would be the competent authority leaving other impacts to be assessed by a different competent authority." (para 1970)

19. He noted that in the present case, following cross-examination of the Council's witnesses, it had been accepted that there were no remaining concerns on issues such as water quality, hydrology or dust, or traffic emissions. This "narrowing of the issues" was significant in his view, because those matters related to "impacts that may emanate from outside the boundary of the CERC plant and are thus matters for planning control." (paras 1971-2) He continued:

> "1973 The concern of the Council and others is focused on air quality, that is the substances that would be emitted by the stack from the combustion process. Air quality in this regard is wholly a matter for the Environment Agency through the environmental permitting system. Permit controls the materials to be accepted for incineration, the incineration process and the nature and extent of processes to deal with emissions to air from the incineration process. These controls involve setting limits for the substances that are to be emitted to air and establishing a monitoring regime. As the Council of Nature Conservation witness accepted, it is the Environment Agency which has the expertise to deal with air quality issues.
>
> 1974 The control of emissions to air in this case is not a matter for the planning system. The emissions arise from a process which is wholly within the control of the Environment Agency through the environmental permitting system. In addition, I am doubtful whether the council in its role as the planning authority has the degree of expertise that the Environment Agency possesses in assessing air quality impacts.
>
> 1975 Accordingly I am satisfied that, in respect of assessing the impact of the CERC proposal on the SACs in the vicinity of the site, the EA through the environmental permitting system is the competent authority. PPS10 and PPS23 stress

> the importance of the planning system not duplicating the controls exercised by others. In this case, the environmental permitting regime is the appropriate vehicle for making a proper assessment of the air quality impact on the SACs."

20. He referred to the issue of the draft permit in August for consultation. He noted the lack of any comment on it from the Council at the inquiry, and on the other hand the further work undertaken in respect of comments received from Natural England, which was included in the final permit. He concluded:

> "1978 In the permit the EA says that it is possible to conclude that there would be no likely significant effect alone and/or in combination within the context of prevailing environmental effects on any interest feature of the protected sites. The additional assessments undertaken by the EA in response to the comments made by Natural England have not changed the EA's conclusions as to the impact on protected species or areas.
>
> 1979 The EA's decision to issue the permit was taken after consultation with Natural England, the statutory body charged with the designation and protection of sites of nature conservation interest in England. It is inconceivable that the EA, as the competent body, would have issued a permit if it could not conclude that significant effects were unlikely, in which case it would be required to undertake an appropriate assessment.
>
> 1980 Given the conclusion reached by the competent authority in the permit as to the likelihood of the development having no significant effect upon protected habitats or species, it is concluded that the proposal would not give rise to harm to acknowledged nature conservation interests."

21. The Secretary of State's decision-letter referred to this passage and adopted its reasoning:

> "The Secretary of State agrees with the Inspector's analysis at IR 1960-80, with regard to the effect of the proposal upon the nature conservation interests. He is satisfied that, in respect of assessing the impact of the appeal proposal on the Special Areas of Conservation in the vicinity of the site, the Environment Agency is the competent authority (IR1975). Given the conclusions reached by the competent authority in the permit as to the likelihood of the development having no significant effect upon the protected habitats or species, the Secretary of State agrees with the Inspector's conclusion that

> the proposal would not give rise to harm to acknowledged nature conservation interests (IR1980).” (para 19)

The judgment below

22. Having set out the factual background and the relevant provisions, the judge summarised the Forum’s case (para 19-20):

> “It is the claimant's case that the planning inspectorate, on behalf of the Secretary of State, indicated that the inspector would consider as part of his remit whether an appropriate assessment was needed and, if so, would give his views on what that assessment should require. This, it is said, remained the position throughout the inquiry so that those who now come under the aegis of the claimant had a legitimate expectation that that would be done. It was not. Rather, it will be seen that the inspector simply accepted the views of the EA which indicated that it would grant a permit because it considered that there could not be any adverse effects so that an appropriate assessment was not required. That view had been challenged and evidence presented to contradict it. But the inspector, relying on Regulation 65 (2), decided that the EA should be regarded as the competent authority which should, more appropriately, assess any implications of the project. Thus he did not make any findings on the evidence presented to challenge the EA's view.”

23. The Forum had not thought it necessary to challenge the legality of the Environment Agency’s approach, because they understood that the Secretary of State would act as competent authority, and as such undertake the role of considering relevant impacts. It was only when the inspector’s report was published that they became aware that he was “disavowing his role as competent authority” and had not evaluated the criticisms made of the Agency’s approach.

24. Having reviewed the pre-inquiry exchanges and the relevant parts of the inspector’s report, the judge concluded, in broad agreement with Mr Wolfe’s submissions:

> “43... The inspector did not at any time suggest that the parties might not need to deal with the weight to be attached to the Environment Agency's views since he might decide that the Environment Agency was the appropriate competent authority within Regulation 65 (2).
>
> 44 Thus, whilst I think the claimant goes too far in suggesting that the inspector had repeatedly and throughout the inquiry process stated that the Secretary of State would take on the role of competent authority for the purposes of

the Habitats Regulations, he never suggested that the Secretary of State was not or might not be the material competent authority. Nor did he indicate that he might not consider and decide upon the contentions that the Environment Agency's view that no adverse effects were possible was wrong.

...

47. That the objectors were led to believe that the inspector would deal with the issue whether an appropriate assessment was required there can, in my view, be no doubt. That was on the basis that the Secretary of State was the competent authority and he it was who was the appropriate competent authority to deal with the issue. The objectors were never disabused of that belief by anything said by the inspector in the course of the inquiry process.

48. Whether the claim is correctly focused on the expectation that the Secretary of State was the relevant competent authority may be open to question. But it seems to me that the real point is that the expectation was that the inspector would consider and reach a view on the need for an appropriate assessment. In that, the Secretary of State would clearly be the relevant competent authority since the Environment Agency, the only other competent authority, had reached a decision which was said to be flawed. It was thus inevitable that if the inspector was to deal with the issue it had to be on the basis that the Secretary of State would be the relevant competent authority.

49. The Environment Agency's decision was under challenge, and since the expectation was that the inspector would deal with it - he had heard the evidence that was put before him to challenge the Environment Agency's view - the claimant did not see any need to seek judicial review to challenge it. Since the inspector was able to deal with both fact and law, judicial review was, in any event, a less effective remedy and the additional costs and possible delays involved in such a claim were undesirable and, it was believed by the claimant, unnecessary.

50. Thus I have no doubt that the expectation which I have identified was created. Furthermore, if there was a failure to comply with this expectation, the claimant has been unfairly treated since there has been no decision reached on its challenge to the Environment Agency's conclusion that no appropriate assessment is needed."

25. He went on to consider how the inspector had arrived at his conclusion, in the paragraphs set out above (1970-80). He criticised the inspector's statement (para 1974) that "the control of emissions to air in this case is not a matter for the planning system", saying:

> "57. There can be no doubt that the effect of the emissions on the SACs is a matter for the planning system... Indeed, in the context of PPS/10, paragraph 26, there is a policy L6 in a material plan which states that development harmful to an SAC should not be permitted. Regulation 68 (1), as I have already indicated, makes clear that the assessment provisions apply in relation to the grant of planning permission on an application under Part III of the 1990 Act. Thus the inspector was, in my view, wrong to state that air quality was, in relation to substances emitted from the chimney, wholly a matter for the EA. Since the contention was that the emissions were bound to have an effect so that an appropriate assessment was required, it was a matter for the planning process. Thus the conclusion of the inspector in paragraph 1975 that he was, as he put it, accordingly satisfied that the Environment Agency through the environmental permitting system was the competent authority is wrong....
>
> 59. Whilst, of course, it was inconceivable that the EA would have issued a permit if it did not conclude as it did, that wholly misses the point being made by the objectors, namely that the Environment Agency got it wrong. There was evidence put before the inspector that the EA had got it wrong. But he did not, as a result of his approach, deal with or reach any decision on the evidence which had been produced to challenge the EA's view. No doubt, the EA issued the permit because it considered that no appropriate assessment was needed but there was material before the inspector which raised the question whether that was correct. The inspector found it unnecessary to form a view on this because he thought it was not a matter for the planning process.
>
> 60. In my judgment, he was wrong in that view."

26. He rejected the contention that regulation 65(2) had been put in issue at the inquiry by SITA; that was in the context of a "factual attack", with a view to persuading the inspector that the conclusion reached by the Agency was correct (para 70):

> 71. Thus I do not accept the submission that the claimant should have challenged the Environment Agency's decision by judicial review and its failure to do so was its own fault, so that no prejudice resulted from the inspector's decision whether or not he was in any way wrong. It seems to me, as I

> have indicated, that the objectors were entitled to expect that the inspector would deal with the issue. There is nothing in the final submissions to which I have referred which ought to have put them on real inquiry that they might find the inspector not dealing with the issue. In context, the submissions were based on the contention that there was sufficient material before him to enable him and entitle him, indeed, not only entitle him but require him to accept the view of the Environment Agency as correct."

27. Finally, he rejected the submission by SITA that any legitimate expectation should be overridden by public interest considerations. He referred to the discussion of this issue by Laws LJ in *Nadarajah v Secretary of State* [2005] EWCA Civ 1363, where he explained it as a question of "proportionality":

> "... whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case..." (para 69)

28. He noted the inspector's comments on the potential cost of rejection to the public in financial terms (in excess of £200m) and in terms of loss of the ability to dispose of waste in a sustainable manner. However, these considerations did not justify refusal of relief:

> "... the Habitats Directive and the Regulations are the law and must be obeyed.... it not suggested before me that the case put forward by the objectors can be disregarded as having no weight. There is an arguable issue. That being so, it would be a breach of the Habitats Regulations to fail properly to consider whether an appropriate assessment was needed...." (para 79)

He suggested that a sensible way ahead would be for the Secretary of State to carry out an appropriate assessment as speedily as possible based on the evidence already produced.

The arguments in this court

29. Mr Wolfe interprets the judge's conclusions as based on two grounds: breach of legitimate expectation, and misdirection in law as to what was a planning matter. He accepts that the second ground went beyond his own submissions to the judge. Although he supports both grounds, he puts the main weight on the first argument, which is expressed in his skeleton:

> "CWF argued that it had a legitimate expectation that the Inspector (and thus then the Secretary of State) would deal with the issue of whether an appropriate assessment was required, including thus (when SITA argued that reliance should be placed on the Environment Agency's conclusion) grappling with the correctness of the Environment Agency's approach.
>
> However, the Secretary of State simply concluded (without grappling with the challenge to the Environment Agency's conclusion) that, pursuant to regulation 65(2), it was not necessary for him to further consider the matter."

The challenge with which the Secretary of State had failed to "grapple" was the challenge to the Agency's use of the 1% rule (again quoting his skeleton):

> "[The Forum] and others (most particularly Cornwall Council as planning authority) challenged… the legality of the application (in the circumstances) of the "1% rule". As Collins J said [79] "it is not suggested before me that the case put forward by the objectors [on the "1% rule"] can be disregarded as having no weight. That is an arguable issue. Nothing has changed in that regard."

30. The appellants submit that the judge was wrong on both grounds. First, there was no representation in language "clear, unambiguous and devoid of relevant qualification" such as would be necessary to found a legitimate expectation (*R(Bancoult) v Foreign Secretary (No 2)* [2009] 1AC 453 para 60 per Lord Hoffmann). In any event the representations relied on did not address the issue of allocation of responsibility under regulation 65(2). Secondly, there was no misdirection. The inspector was not saying that the emissions were irrelevant to the planning decision, but was simply following the well-established principle, approved by this court in *Gateshead MBC v Secretary of State* (1971) 71 P&CR 350 (citing the then current policy guidance, which is reflected in similar guidance today) that

> "It is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies… Nor should planning authorities substitute their own judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over those matters."

The Secretary of State followed the same approach.

31. SITA submit further that, even if any representation gave rise to a legitimate expectation as suggested, a departure is justified in the present case, having regard to the public importance of the project and the serious costs of delay.

32. It is significant that neither in his skeleton nor in his oral submissions did Mr Wolfe condescend to detailed presentation of the grounds for challenging the 1% rule. Although it is said to be a challenge to the "legality" of the rule he does not in these proceedings ask the court to rule on that legal question. He rests his case on the alleged unfairness resulting from the Secretary of State's failure to consider the legality of the 1% rule, and the assertion that the point is arguable. In other words, the challenge is essentially procedural not substantive.

Discussion

33. Although the Forum's case had been founded on legitimate expectation, the judgment looked at the matter more broadly, drawing together what seem to me five distinct but interconnected points:

i) The Forum had a legitimate expectation, derived from the pre-inquiry representations and the course of events at the inquiry, that the Inspector and the Secretary of State would themselves address the issue of significance, and if necessary appropriate assessment, under regulation 61. This they failed to do.

ii) Because of that legitimate expectation, the Secretary of State could not rely on regulation 65(2) to justify leaving the decision on those matters to the Environment Agency.

iii) Further, the inspector misdirected himself that emissions from the stack were not a planning matter. This led him wrongly to think that it was unnecessary for him or the Secretary of State to make their own assessment of the effect of the emissions.

iv) In view of the criticisms made by the Forum and others of the Agency's use of the 1% rule, it was necessary for the Inspector and the Secretary of State to address that issue, which they (unlike the court) could do as a matter of both law and fact.

v) Because they reasonably expected the Secretary of State to deal with that issue, the Forum were unfairly deprived of the opportunity to challenge the Environmental Permit within the time allowed for judicial review.

34. I can dispose of the third point shortly. I agree with the appellants that this stems from a misunderstanding of the inspector's language. It would be most surprising if an experienced inspector had made such an elementary legal error. As I read the passage in question, the inspector was making a point, not about emissions in general, but about the position in this case, reflecting the fact that (as explained in his preceding paragraph) by the end of the inquiry the only remaining issue for the SAC related to

emissions from the stack. He observed correctly that the *control* of such emissions *in this case* was a matter for the Environment Agency. Although the overall planning judgement was one for the Secretary of State, he was entitled to be guided on this issue by the agreed position of the two specialist agencies. That was entirely consistent with the familiar approach approved in cases such as *Gateshead*. Mr Wolfe was right not to put this point at the forefront of his case.

35. The first two points together encompass Mr Wolfe's main submission. On the first step in the argument, I agree with the judge. The clear expectation of all at the beginning of the inquiry was that the inspector, and on his advice the Secretary of State, would deal with the issue whether an appropriate assessment was required (under regulation 61), as part of the process of arriving at a planning decision on the merits of the proposal as a whole.

36. However, that is only the beginning. There are in my view three reasons why the legitimate expectation, based on the representations made before or during the inquiry, cannot lead to the conclusion which Mr Wolfe urges upon us. In the first place, as a technical matter, the relevant "competent authority" was the Secretary of State, not the Planning Inspectorate or the Inspector. They had no authority to commit the Secretary of State to an election under regulation 65(2), or to the form of his decision. Their task was limited to that of holding the inquiry and providing a report to the Secretary of State. It was of course important that there should be consistency between the approach adopted at the inquiry and the basis of his ultimate decision. But that was a question of procedural regularity, not legitimate expectation.

37. Secondly, and more importantly, the representations reflect the circumstances as they were at the time they were made. At that stage the question of appropriate assessment was thought to depend on a range of factors not confined to emissions from the stack. It is understandable that it was assumed by all that the decision-maker under the Directive would be the Secretary of State. The issue of an election under regulation 65(2) was not addressed because it did not arise. In my view, nothing said then can be treated as a binding commitment as to the position under the regulation if circumstances changed, as they did, so that the only relevant issues were ones within the competence of the Environment Agency.

38. Thirdly, in the context of the planning appeal the debate about responsibility under the Directive is in itself of no practical significance. Whether or not the Secretary of State remained the decision-maker for the purposes of the Habitats Directive, he could not avoid responsibility for the planning decision, one aspect of which, as he recognised, was whether there would be "harm to acknowledged nature conservation interests". On the facts of this case the two issues were inextricably linked. By the same token, in so far as the possibility of harm to those interests arose from stack emissions, he was entitled – in either capacity – to be guided by the expertise of the relevant specialist agencies, the Environment Agency and Natural England. It would be only if their guidance was shown to be flawed in some material way that his own decision, relying on that guidance, would become open to challenge for the same reason.

39. Thus, as the judge implicitly recognised (his para 48), the legitimate expectation argument on its own took the claimants nowhere. Points (iv) and (v) were essential. On the arguments presented at the inquiry, it had to be said, the Secretary of State could not simply rely on the Agency's guidance without further investigation. An arguable issue had been raised that the guidance was based on material error of law or principle. By ignoring it, the Secretary of State had deprived the claimants of their right to a reasoned decision on a significant issue in the case, and at the same time had unfairly deprived of them of the chance to raise it by way of judicial review of the permit itself.

40. It is at this stage of the argument that I respectfully part company with Collins J. The Secretary of State did decide the issue, by implicitly accepting the reasoning of the Agency, which included reliance on the rule. Any defect in their use of the 1% rule affected the Secretary of State's decision as much as that of the Agency. If there was an issue as to the legality of that approach, the time to raise it was in these proceedings. It is not enough simply to assert that the point is arguable. The judge referred to possible issues of both law and fact. However, Mr Wolfe's case as I understand it rests on an assertion of legal, rather than factual, error in the Agency's approach. Even if there were an independent factual challenge, it would not be a reason for delaying resolution of the legal issue by the court. If (which I doubt) the Forum could not have obtained an extension of time for judicial review of the permit itself, there was nothing to stop them including the same issues as part of their challenge to the legality of the planning decision. In short, the Forum has not been unfairly deprived of anything.

41. In summary, if one cuts through the legal and procedural arguments, the only substantive criticism of the Secretary of State's decision is in relation to his reliance, through the Agency, on the 1% rule as a test of "significance" under the Directive. The evidence before the inquiry was that the rule had been used in published guidance by the Agency, with the agreement of Natural England, for a number of years without legal challenge. The County Council, which initially challenged the use of the rule, does not maintain that challenge. Instead they point to the severe economic and practical consequences of any further delay in confirming the permission. The Forum has chosen not to challenge its legality either by way of judicial review of the Permit, or as part of the present proceedings. We are asked instead to send the issue back to the Secretary of State so that he may address it, purely on the basis that it has not been shown to be unarguable, and without any persuasive reason to think that ultimate decision will be any different. In my view, the Forum has failed to show any valid grounds to justify that course.

Conclusion

42. For these reasons I would allow the appeal and confirm the validity of the Secretary of State's decision.

Moore-Bick LJ :

Judgment Approved by the court for handing down.

43. I agree.

Arden LJ :

44. I also agree.