

Recent developments in environmental and agricultural law

UKAEL Conference, September 2011: 'EU LAW AND THE LAND'

Gwion Lewis

General issues

EIA: Meaning of “semi-natural areas”

- ***R(Wye Valley Action Group) v Hereford Council*** [2011] EWCA Civ 20
- Whether the EIA directive extends to polytunnels
- Schedule 2, para 1(a): “projects for the use of cultivated land or semi-natural areas for intensive agricultural purposes”
- Question of what is “semi-natural” primarily for the LPA – not for court to substitute its own judgment
- Designations attaching to land surrounding site not relevant

EIA: Screening opinion

- ***R(Bateman) v South Cambridgeshire DC*** [2011] EWCA Civ 157
- Need for sufficiently clear reasons in support of negative screening decision
- Domestic application of ***R(Mellor) v Secretary of State*** (C-75/08) [2010] P.T.S.R. 880
- No alternative but to quash permission

- ***Save Britain's Heritage v Secretary of State*** [2011] EWCA Civ 334 (25.3.11)
- Demolition of buildings and other structures can constitute “project” for EIA purposes
- Domestic application of ***Commission v Ireland*** (Case C-50/09)
- Paragraph 2(1)(a)-(d) of the Town and Country Planning (Demolition – Description of Buildings) Direction 1995 unlawful

- ***Cala Homes (No. 1)*** [2010] EWHC 2866 (Admin): if necessary, Sales J would also have quashed revocation of RSs on SEA grounds since revocation of part of development plan a “modification”
- ***Cala Homes (No. 2)*** – no SEA required for Sec of State’s letter
- ***Save Historic Newmarket Ltd v Forest Heath District Council*** [2011] EWHC 606 (25.3.11)
- Housing policies in Forest Heath Core Strategy quashed for breaching Art 5, SEA Directive
- ‘Environmental report’ failed to explain what reasonable alternatives had been considered and why rejected – iterative plan process not justify a “paper chase”

Habitats: Plans and Projects

- ***R(Akester) v DEFRA*** [2010] Env LR 33
- Introduction of new, larger ferries to Isle of Wight
- Amounted to a “project” and appropriate assessment required – purposive approach – ***Waddenzee*** (C-127/02) [2005] Env. L.R. 14 applied
- Defendant port authority itself was the “competent authority” under the Reg 3(4) obligation

Species disturbance: *Morge*

- ***Morge v Hampshire CC*** [2011] 1 W.L.R. 268 (SC)
- What meant by “deliberate disturbance” under Art. 12(1)(b) of the Habitats Directive? Lord Brown -
 - (i) disturbance of *species* not *habitats*
 - (ii) disturbance of *species* not *specimens of species*
 - (iii) disturbance does not mean only a detrimental impact which affects conservation status at a population level
 - (iv) although no reference to “significant” disturbance, still need to assess whether degree of impact sufficient to constitute “disturbance” – guidance says “*reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned....*”
 - (iv) activity during breeding, rearing, hibernation and migration more likely to constitute “disturbance”

Morge and reg. 9(5)

- Reg. 9(5) Conservation of Habitats & Species Regs 2010
 - “(5) Without prejudice to the preceding provisions, a competent authority, in exercising any of their functions, must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.”
- Lord Brown in **Morge** - not for LPA to police compliance with Habitats Directive, division of functions (see reg 9(5) 2010 Regs) between LPAs and Natural England
 - “I cannot see why a planning permission ... should not ordinarily be granted save only in cases where the planning committee conclude that the proposed development would both (a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers. ... it seems to me wrong in principle, when Natural England have the primary responsibility for ensuring compliance with the Directive, also to place a substantial burden on the planning authority in effect to police the fulfilment of Natural England’s own duty.”
- Displaces **R. (Woolley) v Cheshire East BC** [2010] Env. L.R. 5

Discretionary refusal of relief

- ***R(Hulme) v SSCLG*** [2010] EWHC 2386
- Frances Patterson QC *obiter dicta* – would have exercised discretion not to quash decision for breach of Habitats Directive
- Limits comments of Lord Hoffmann re discretion to quash in ***Berkeley v SS for the Environment*** [2001] 2 AC 63

State liability

- ***Cooper v HM AG*** [2010] EWCA Civ 464
- First UK case on state liability for breach of EU law by a court
- Failure to require EIA of White City development
- Breach not “sufficiently serious”

Environmental Liability Directive

- ***Raffinere Mediterranee*** Case C-378/008
- First case on Environmental Liability Directive
- Pollution from petrochemical plants. Polluters made equally liable without assessing their direct responsibility
- ECJ: presumptions acceptable provided 'plausible evidence' existed. No need to identify precisely the origins of each pollutant.

Practice and Procedure

Standing for statutory challenges

- S. 288 TCPA 1990 “persons aggrieved”
- ***William Ashton v SSCLG*** [2010] J.P.L. 1645
- Local resident who did not appear and object at inquiry
- Court of Appeal, *per* Pill LJ -8 key principles
 - (i) wide access to court is required;
 - (ii) participation in planning process normally required
 - (iii) failure to participate not always a bar
 - (iv) nature of substantive interest & prejudice relevant
 - (v) assess interest objectively
 - (vi) deliberate acquisition of an interest may not suffice
 - (vii) participation may be necessary to assess interest
 - (viii) avoid delay and efficiency are relevant to balancing

Time Limits & Promptness in JR (1)

- CPR 54.5 – JR should be brought within three months and in any event “promptly”
- JRs often not “prompt” e.g. ***Finn-Kelcey*** [2009] Env LR 4
- ***Burkett*** [2002] 1 WLR 1593 – Lord Steyn at [53] and Lord Hope at [59]-[60]
- ECJ and Aarhus Compliance Committee cases question validity of promptness requirement
- ***Uniplex (UK) Ltd v NHS Business Services Authority*** C-406/08 [2010] 2 CMLR 47 (EU procurement) – need for certainty; discretion to dismiss within 3 months contrary to certainty

Time Limits & Promptness in JR (2) *Uniplex*

- Reg 47(7)(b) Public Contracts Regulations 2006: identical time limit
- Directive 98/66 requires effective review of procurement decisions
- ECJ: promptness criterion not certain and harms effectiveness of the procurement regime
- General principles of EU law suggest wider application
- ***Sita UK Limited v Greater Manchester WDA*** [2011] EWCA Civ 156
- ***R(Waste Recycling Group Ltd) v Cumbria CC*** [2011] EWHC 288 (Admin) refusal to extend time for arguable breach of EIA Regulations

Time Limits & Promptness (3) *Port of Tyne*

- **ACCC/C/2008/33 adopted 24.9.10; made final 8.2.11**
- Art 9 Aarhus Convention –right to review of environmental decisions. Art 9(4) procedure must be fair and equitable.
- Aarhus Compliance Committee [138]-[140]
- 3 month time limit not “as such” problematic but considerable discretion re ‘promptness’
- Need clear minimum time limit in interests of fairness and legal certainty
- Time limits should start to run from the date on which a claimant knew, or ought to have known of the act, or omission, at stake.

Costs issues

PCOs, Aarhus, *Garner & Edwards*

- ***R(Garner) v Elmbridge BC*** [2011] 1 Costs L.R. 48
- C not local resident, but had long-standing association with Hampton Court
- ***Corner House*** criteria modified in 2 respects applying Art 10a EIA Directive incorporating Aarhus:
 - ***(i)*** abolishes requirement that issue be of general public importance;
 - ***(ii)*** whether procedure prohibitively expensive cannot be judged purely subjectively

Coedbach Action Group (1)

- ***R (Coedbach Action Group) v SS for Climate Change and Energy*** [2010] EWHC 2312
- C limited Co with 26 members opposed to 2 biomass plants in Wales. Challenge was to a biomass plant in Avonmouth.
- C did not have standing therefore Art 10a did not apply
- On ordinary ***Corner House*** principles PCO was refused

Coedbach (2)

- £70,000 not prohibitively expensive for a Ltd Co & 26 members could always chip in £3,000 each
- PCOs were not necessary if C was a limited Co which could simply dissolve itself to avoid costs liability
- Was C an “NGO promoting environmental protection” and thus automatically given standing by Art 10a of the EIA Directive?

Edwards again

- ***R(Edwards) v Environment Agency*** [2011] 1 W.L.R. 79
- Supreme Court criticised costs determination at zero by its own Costs Officers - costs decision in principle were only for review by SC itself
- Inclined to consider that Aarhus “prohibitively expensive” requirement should be determined objectively (***Garner*** considered) but issue unclear and reference to ECJ made for preliminary ruling

Aarhus Convention (1)

- ***Cultra Residents' Association complaint ACCC/C/2008/27***
- Made final 8.2.11
- £39,454 adverse costs order in JR re expansion of Belfast City Airport was prohibitively expensive and recommendation that UK *“review its system for allocating costs in applications for judicial review within the scope of the Convention, and undertake practical and legislative measures to ensure that the allocations of costs in such cases is fair and not prohibitively expensive”*
- ***Morgan complaint (ACCC/C/2008/23)***
- £5,130 not prohibitively expensive

Aarhus Convention (2)

- ***Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*** [C-240/09]
- ECJ decision 8 March 2011
- Ministry for the Environment in Slovakia had refused request by environmental association to be party to proceedings relating to derogations from Habitats Directive
- Association claimed breach of Art. 9(3) of Aarhus
- ECJ: Art 9(3) does not have direct effect, but national court to interpret national law “to the fullest extent possible” so as to achieve objectives of Art. 9(3)
- Implications?

Agricultural law

- 2 recent cases relating to CAP subsidy payments
- ***Oosterhof v Scottish Ministers***: failure to report the death of an animal was a “rectifiable”, not “permanent” breach
- ***Peter Strawson Ltd v Secretary of State for Environment, Food & Rural Affairs***: “obvious” error made in an application under the Single Payment Scheme does not have to be “obvious” on the face of the application itself: each case on its own facts

glewis@landmarkchambers.co.uk

Gwion Lewis