CO/6088/2011

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 13 October 2011

B e f o r e:

MR JUSTICE COLLINS

THE QUEEN ON THE APPLICATION OF CORNWALL WASTE FORUM, ST DENNIS BRANCH

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

First Defendant

SITA CORNWALL LTD

Second Defendant

ENVIRONMENT AGENCY

Third Defendant

CORNWALL COUNCIL

Fourth Defendant

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(Official Shorthand Writers to the Court)

Mr David Wolfe (instructed by Leigh Day) appeared on behalf of the Claimant, **Mr Rajendra Desai** appeared for latter part of judgment on 13 October 2011
Mr Hereward Phillpot (instructed by Treasury Solicitor) appeared on behalf of the First Defendant
Mr Mark Westmoreland Smith (instructed by Bond Pearce) appeared on behalf of the Second Defendant
The Third and Fourth Defendants were not represented, did not attend

J U D G M E N T
(As Approved by the Court)

145. MR JUSTICE COLLINS: The claimant in this case applies under Section 288 of the Town & Country Planning Act 1990 to quash a grant of planning permission made by the first defendant, the Secretary of State, to the second defendant, SITA Cornwall Ltd, on 11 May 2011. The claimant is an unincorporated association comprising three groups who were, pursuant to Rule 6 (6) of the Procedure Rules, parties to the public inquiry which led to the inspector recommending the grant of planning permission and the Secretary of State accepting his recommendation. Thus it is accepted that the claimant is entitled to make this application.

145. The material part of Section 288 reads:

> "(1) If any person —
>
> .....
>
> (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds —
>
> (i) that the action is not within the powers of this Act .....
>
> .....
>
> he may make an application to the High Court under this section.
>
> .....
>
> (5) On any application under this section the High Court —
>
> .....
>
> (b) if satisfied that the order or action in question is not within the powers of this Act ..... may quash that order or action."

145. It is plain therefore that there is no compulsion on the court to quash even if the court decides that the action in question was not within the powers of the Act. An action will not be within the powers of the Act if there has been an error of law and that will be judged on the standard principles of judicial review.

145. The planning permission in question was for the construction of what is called an energy-from-waste plant, perhaps more generally known as an incinerator on land at St Dennis in Cornwall. It is a major and important development. There is no doubt, as the inspector found, that there are many benefits arising from this form of waste disposal, particularly, as it happens, in Cornwall where landfill sites are near exhaustion. There are, as will be apparent, other advantages upon which Mr Westmoreland-Smith, for the second defendant, relies in submitting that even if I were persuaded that there was an error of law I should not grant the relief claimed because to do so would be disproportionate.

145. Cornwall County Council, as it then was, as the waste planning authority, refused permission for the development on 31 March 2009. There were a number of grounds

for such refusal but the only one which is material for the purposes of this case is the effect of the development on nature conservation interests. The site is close to two Special Areas of Conservation (SACs) which have been designated pursuant to the EU Habitats Directive 92/443/EEC. The provisions of this Directive are transposed into domestic law by virtue of the Habitats and Species Regulations 2010, SI/2010 No 490. These Regulations revoked the Conservation (Natural Habitats etc) Regulations 1994 which were in force until 1 April 2010. Thus the 1994 Regulations were referred to in the inquiry which commenced sittings on 16 March 2010 but there is no difference in the relevant provisions and so it is convenient to refer to the 2010 Regulations throughout.

145. The site itself extends to some 14.6 hectares on the edge of an extensive area of existing and former china clay workings to the north and north-west of the town of St Austell. The two SACs are, first, The Breney Common and Goss and Tregoss Moors. This is designated for three habitats which fall within Annex I of the Directive, namely North Atlantic wet heaths, European dry heaths and transition mires and quaking bogs. Annex I lists habitat types of community interest whose conservation requires the designation of an SAC. Annex II lists animal and plant species of community interest whose conservation requires again the designation of an SAC. The Marsh Fritillary is one such which occurs in The Breney Common site.

145. The second site is the St Austell Clay Pits SAC. This contains an Annex II species, the Western Rustwort which is a rare liverwort; its scientific name is marsupella profunda. It was the presence of this rare plant which led to the designation and so any adverse effect upon it would damage the SAC. It is, it is said, particularly vulnerable to changes in air quality. It is also a plant in need of strict protection falling within Annex IV of the Directive.

145. I do not need to go into further detail for the purposes of this judgment.

145. While the planning authority or, on appeal, the Secretary of State is concerned to decide whether planning permission should be granted for a development such as this application concerns, if permission is granted a permit is required to make use of the facilities. The authority which decides on the grant of a permit is the Environment Agency (EA). The permit, if granted, will usually contain conditions which have to be met to ensure that any adverse effects from the facility are avoided.

145. I should now set out as far as necessary the relevant provisions of the Habitats Regulations. I am not going to refer specifically to the Directive since it is clear that the Regulations transpose the relevant provisions of the Directive properly. The Regulations refer to the Appropriate Authority which, for our purposes, is the Secretary of State and the Competent Authority which is defined in Regulation 7. That provides —

> "(1) For the purposes of these Regulations, 'competent authority' includes —
>
> (a) any Minister of the Crown ..... government department, statutory undertaker, public body of any description or person holding a public office;

..... "

Thus it is plain that the EA and of course the Secretary of State - and indeed, so far as material, the County Council - were and are "a competent authority". By Regulation 8, a European site is defined to mean, among other things, "a Special Area of Conservation".

145. One turns to Part 6 of the Regulations which deals with assessment of plans and projects. By Regulation 61, which is headed Assessment of Implication for European Sites and European Off-shore Marine Sites, with which we are not concerned, it is provided at (1):

> "(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."

That is the obligation which is at the heart of this claim.

145. There is a two-stage approach. First, consideration - and this is referred to as a screening provision - 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 affect on the site.

145. Going back to the Regulations, Regulation 65 is important because it is particularly relied on by the defendants. It deals with a situation where more than one competent authority is involved. That is the position here because the Secretary of State is the competent authority in relation to the planning permission and the EA is the competent authority in relation to the grant of a permit.

145. So far as material, Regulation 65, under the heading "Co-ordination where more than one competent authority is involved", reads:

> "(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.

(3) The appropriate authority may issue guidance to competent authorities for the purposes of regulations 61 to 64 as to the circumstances in which a competent authority may or should adopt the reasoning or conclusions of another competent authority as to whether a plan or project —

(a) is likely to have a significant effect on a European site ..... ; or

(b) will adversely affect the integrity of a European site ..... "

145. There is no formal guidance under Regulation 65 (3). The closest we get to any guidance is contained in PPS/10 referred to by the inspector (paragraphs 26 and 27 under the heading "Responsibilities") which provide:

> "26 In considering planning applications for waste management facilities, waste planning authorities should concern themselves with implementing the planning strategy in the development plan and not with the control of processes which are a matter for the pollution control authorities.
>
> 27 The planning and pollution control regimes are separate but complementary. Pollution control is concerned with preventing pollution through the use of measures to prohibit or limit the release of substances to the environment to the lowest practicable level. It also ensures that ambient air and water quality meet standards that guard against impacts to the environment and human health. The planning system controls the development and use of land in the public interest and should focus on whether development is an acceptable use of the land, and the impacts of those uses on the development and use of land. Waste planning authorities should work on the assumption that the relevant pollution control regime will be properly applied and enforced."

145. It is obvious that it is incumbent upon the authority responsible for the planning decision to consider whether the facility, if constructed, would inevitably be likely to have an adverse effect on an SAC because if that is the situation then it is plain that permission should not be granted. Equally, as it seems to me, it has an obligation to consider whether without controls the facility would be likely to have such a significant effect because, again, it may be in a given case that conditions under the planning regime would be appropriate in order to ensure, so far as possible, that no damage was done. It would then of course be for the EA to consider what steps needed to be taken in the light of the material that was put before the competent authority, in this case the Secretary of State, to ensure that the emissions were kept at the lowest possible extent so as to avoid any damage being caused.

145. There is an obvious overlap, and it is not possible in my view to say in any given case that the planning considerations should defer, as it were, to control by the authority concerned with the grant of a permit. It has its own obligation.

145. That that is the case would seem to be confirmed to an extent by Regulation 68 (which is in Chapter 2 of Part VI under the heading "Planning") because this provides by paragraph (1):

"(1) The assessment provisions apply in relation to —

(a) granting planning permission on an application under Part 3 of the Town & Country Planning Act 1990 ..... "

This was of course such an application. Paragraph (2) provides:

"(2) Where the assessment provisions apply, the competent authority may, if they consider that any adverse effects of the plan or project on the integrity of a European site ..... would be avoided if the planning permission were subject to conditions or limitations, grant planning permission or, as the case may be, take action which results in planning permission being granted or deemed to be granted subject to those conditions or limitations."

Therefore it is plain that it is envisaged that there is a possibility in a case such as this that the planning permission, if granted, should be subject to conditions to avoid any damage that might otherwise occur.

145. Each constituent of the claimant who appeared at the inquiry was concerned that if permission were granted there would be significant effects on the SACs and so an appropriate assessment was needed. 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.

145. In the claim form the claimant contends that its members appearing at the inquiry -

" ..... had not thought it necessary to challenge the legality of the EA's approach because repeatedly and through the planning inquiry process the inspector had stated that the Secretary of State would take the role of competent authority, among other things, undertake for himself in the light of the material presented to the inquiry the role of considering the relevant impacts of the proposed incinerator on the SACs against the requirements of the Regulations and Directive."

In paragraph 12 it states:

"It was thus only when the inspector's report was published along with the Secretary of State's decision that objectors realised that the Secretary of State was, contrary to what had been promised, disavowing now his role as competent authority in that way. Nor had he even evaluated the criticisms made of the approach taken by the EA."

145. In his skeleton argument, Mr Wolfe has averred that the legitimate expectation relied on was that the Secretary of State would act as the competent authority.

145. The claimant relies on what was stated before the inquiry and the fact that nothing was said during the inquiry to gainsay it. In addition, the inspector's indication of what he required to be dealt with in final submissions was entirely consistent with those statements. I must therefore set out what was said to support the claim that a legitimate expectation was created but was wrongly not met.

145. I would only comment at this stage that the assertion that the inspector had repeatedly and throughout the planning inquiry process stated that the Secretary of State would take the role of competent authority is not borne out by the evidence. It goes too far. The reality is that the inspector at no time indicated anything contrary to the view that was formed as a result of what was said in the preliminary correspondence and, it is said, confirmed by the matters that the inspector wanted dealt with in the course of submissions.

145. The inquiry was commenced on 16 March 2010. It sat for a total of thirty-six days. It finished its main hearings at the end of May.

145. As will be seen, the EA produced in August a draft permit in which it concluded that there was no need for an appropriate assessment since no adverse effect on the SACs could occur. This led to the need for the inspector to receive further submissions to deal with the draft permit which the inspector had not hitherto seen. In December 2010 the EA issued the final permit, and that led to a further opportunity to be given to deal with any differences between the draft and the final. So far as this claim is concerned, there are no material differences which are relevant.

145. On 2 November 2009 Mr Toms, representing one of the objecting bodies, sent an e.mail to the Planning Inspectorate stating that in his view there should be an appropriate assessment before the inquiry was held because such an assessment was needed and it would be a waste of money to go through the inquiry and discover that no final decision could be made without such assessment. Mr Toms' e.mail referred to Regulation 48 of the 1994 Habitats Regulations which now is Regulation 61 of the 2010 Regulations.

145. A response came from Mr Bolton, who is in the Environment and Special Casework Division of the Planning Inspectorate. That response states that the view was that the inspector should hear all the evidence in order to be able to make a recommendation and the evidence before the inspector would contribute to the judgment as to whether there was possibility of any significant effect and, indeed, whether an appropriate assessment should be made. The way it was put was as follows:

> "The purpose of the public inquiry is so that the inspector can hear oral evidence, both for and against the proposed development, in order for him to make a recommendation to the Secretary of State who will then make a final decision on the proposal. The inspector, on behalf of the Secretary of State, cannot however carry out an appropriate assessment prior to the inquiry. Evidence of discussion at the inquiry may contribute to the judgment on likely significant effect. Also he must be satisfied that he has all the information before him to enable him to undertake the appropriate assessment if required. This may include evidence presented

at the inquiry."

145. Of course, technically it would not be for the inspector to undertake the appropriate assessment. The most that he could do was to make recommendations to the Secretary of State because the inspector is not the competent authority in this context. The Secretary of State is the competent authority. Obviously if the inspector heard all the material evidence and felt that he was in a position to indicate what should result from the appropriate assessment he would be able to do so. Thus the Secretary of State would be in a position to make the necessary assessment.

145. So far as the EA is concerned, at that stage it was of the view that it was not appropriate for it to be the competent authority. So much was made clear in an e.mail of 20 November 2009 in which it said that it agreed that it was not appropriate for the EA to be the lead competent authority for the appropriate assessment.

145. The Environment Agency however was considering, in connection with its obligation to decide whether a permit should be granted, whether an appropriate assessment was necessary. This led in January 2010 to a decision that it was minded to grant a permit. Unfortunately, it seems that it did not tell the Inspectorate or, at least, did not disclose to the Inspectorate the full material upon which it relied in order to reach that conclusion. It is plain that some information was given because there is reference to the decision of the EA upon which the inspector required comments. But this was thought to be merely a preliminary decision and one which had no finality.

145. It did however - it would seem - give the information to Natural England because there is an e.mail from Natural England, which obviously has a role in considering these matters, of 12 January 2010. This reads, so far as material:

> "Many thanks for forwarding a copy of the latest assessment of likely significant effect [for the proposed development]. We note in section 14 that following ..... the consultation, the operator has undertaken further modelling which supports the Environment Agency's initial conclusion that modelled emissions from CERC [the element in question] do not have the potential for an in-combination effect as the emissions are less than one per cent."

It asks:

> "Can you confirm the EA is confident that modelling work provided by the applicants is robust? We need to be clear that there is a high level of competence, that the one per cent threshold will not be breached. If there is any uncertainty then we would recommend that an in-combination test be applied."

145. There is then the point made that there was a possibility that the one per cent threshold could be exceeded if the emissions from the installation and traffic servicing the site were taken together. It concludes:

> "The Planning Inspectorate is now the competent authority for undertaking any in-combination test and appropriate assessment now with the planning application will be considered by a public inquiry. Given that air quality emissions, possibly including those that are the subject of

> the EA permit application, may be part of any further Regulation 48 [now 61] considerations to be made by the Planning Inspectorate, it would seem sensible to wait until the outcome of the public inquiry before finally confirming the Appendix 11.
>
> Though following your response to the point raised above, I will be happy to confirm whether any initial conclusions consistent with the EA or Natural England guidance."

145. The one per cent threshold stems from a guidance which has, I gather, been in effect since 2000. It has not, it seems, hitherto been challenged. It was challenged by the objectors who produced evidence that where there was already a significant increase the one per cent approach was not appropriate. The defendants contend that the attack is thus an allegation that there was an error of law in relying on the one per cent approach. But it is not law alone since the objectors contended that particularly in the case of the Western Rustwort its vulnerability to emissions affecting air quality meant that the existence of an adverse effect could not be excluded, and so an appropriate assessment was required.

145. Cornwall Council had obtained what was described as a shadow assessment from an expert firm in the field which concluded that in relation to both SACs adverse effects could not be excluded. It is however important to note that in the e.mail to which I referred Natural England was also concerned that the emissions from the chimney might not stand alone and possible additional traffic emissions might exceed the one per cent margin.

145. Mrs Larke, acting on behalf of the relevant objectors wrote to the inspector in January 2010, requesting his view on the Secretary of State as competent authority. In his reply on 4 February 2010, the inspector, so far as material, said this:

> "2 The decision as to whether an appropriate assessment under the Habitats Regulations is required is a matter for the decision maker. An appropriate assessment is required where the decision maker considers that the proposal is likely to have a significant effect upon a site of special protection area. These are sites of importance for bio-diversity that are identified through international conventions and European directives."

145. That perhaps is not entirely accurate. The approach should be that if it is not possible to rule out any adverse effect then appropriate assessment should be made to determine whether there is likely to be any significant impact. The trigger for the appropriate assessment is not a decision that the proposal is likely to have a significant impact, merely that it might. One of the purposes of the appropriate assessment is to see whether in fact it would have such an impact.

145. Going back to the response (paragraph 3):

> "3 Whilst the effect of the appeal proposal on nearby SACs could not form one of the reasons for refusal, the inspector understands that Cornwall Council would be seen to argue that an appropriate assessment is required. The inspector anticipates that the appellant will also wish to address him on this matter."

[The appellant is the second defendant in this claim].

> "4 The fact that the requirement for an appropriate assessment is being raised by the council does not preclude other parties from also raising this matter. The inspector expects that the views of the parties in respect of appropriate assessment will be supported by evidence.
>
> 5 The inspector anticipates that arguments as to appropriate assessment will be made as part of the case being put forward by parties alongside other issues such as landscape impact etc. Although an inquiry programme has not yet been prepared, the inspector does not anticipate at this stage there being a separate and discrete section on appropriate assessment or on any other topic, rather the case of each party will be presented in turn.
>
> 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."

145. In November 2009 a letter had been sent by an objector to the Prime Minister. On 20 February 2010 the local Member of Parliament had written to the Secretary of State in connection with the public inquiry making the point that the council's recommendation was that an appropriate assessment should be carried out. His concern was that in carrying out the appropriate assessment after the public inquiry it would mean that any information garnered from it could not be used to inform the decision made at the inquiry, and that it would surely be a waste of public money to have an inquiry that could then be undermined by the results of an appropriate assessment. That was largely the point that had been made by Mr Toms.

145. On 15 March, the day before the inquiry opened, there was a response from the Chief Executive of the Planning Inspectorate which stated, again so far as material:

> "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."

I make the same comment on that as I made in relation to the earlier matter. It is not for the inspector to make the appropriate assessment but obviously he can make the necessary recommendations, and the Secretary of State can apply them if he thinks it right to do so.

145. The letter goes on:

> "When considering this matter the inspector will judge whether the effect of the proposed development could be overcome with, for example, conditions or a Section 106 agreement or whether there are grounds

sufficient enough to justify recommending dismissing the appeal and not granting permission. This assessment cannot be carried out until the inspector has considered all the submitted evidence, including that heard at the inquiry. That evidence would come from the parties involved in the inquiry, Natural England, the Environment Agency and other statutory bodies which would have been consulted by the Local Planning Authority at the application stage. They would have been notified of the appeal and would have therefore the opportunity to comment on the proposed development and its effect. Other parties would also have had the opportunity to make their views known. That evidence can then be considered by the inspector."

145. Clearly what was envisaged and what all parties must have appreciated was the position was that the inspector would consider and give his views on not only whether an appropriate assessment was needed but, if possible, what that appropriate assessment should decide. It is apparent from all this that all parties and the inspector himself considered that he would have to hear evidence and decide whether an appropriate assessment was needed.

145. In July 2010, after the evidence had been concluded, the inspector notified the parties of matters which he specifically wished to see addressed in closing submissions. The one material for our purposes is "the weight to be given to the views of the Environment Agency and Natural England in making an appropriate assessment under the Habitats Regulations". He indicated that the identification of these specific matters did not preclude other matters from being raised, far from it, but they were the matters upon which the inspector wanted particular assistance. Thus it is clear from that that the views of the Environment Agency and Natural England were known. I do not think I have had any specific indication of the precise extent of what was known of those views at that stage. However the draft permit was not produced until August.

145. The inspector then gave the parties the opportunity to comment upon it specifically. That draft did contain the workings and the indications of precisely how the Environment Agency had reached the conclusion that it reached. 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).

145. 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.

145. On 11 December 2010 the Environment Agency issued the final permit. Thus any challenge to it by way of judicial review, which would be the means of challenging it apart from what went on in the inquiry, would need to be made by mid-March 2011 because there is a three-month time limit subject to the power of the court in certain circumstances to extend time.

145. The inspector's report and the Secretary of State's grant of permission was not made public until May 2011. Thus the opportunity to challenge by any means other than through the inquiry was, it is said, lost. It might have been possible in the circumstances to persuade a judge to extend time but that would have been an additional hurdle and clearly there would have been argument against the extension of time, on the ground there was prejudice within the meaning of Section 31 (6) of the Superior Courts Act 1981. Accordingly, it is said the claimant has been prejudiced by the error in failing to meet the legitimate expectation on which it relies.

145. 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.

145. 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.

145. 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.

145. 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.

145. I use the words "if there was a failure" because the defendant submits that the inspector was entitled on the evidence to regard the Environment Agency as the appropriate competent authority within Regulation 65 (2).

145. It is necessary therefore to see how the inspector reached his conclusion on this issue since his views were expressly accepted by the Secretary of State in granting planning permission. The inspector deals with the effect on nature conservation interests in paragraphs 1960 to 1980 of his report. It is, as perhaps is obvious from the paragraph numbers, a very lengthy and detailed report. The second defendant (the appellant before the inspector) had in February 2009 submitted a report to Cornwall County Council, which was then considering the grant of planning permission, which concluded that there were no possible adverse effects and so no need for an appropriate assessment in relation to Breney Common. The council's shadow assessment reached a

different conclusion in relation to both SACs.

145. In paragraphs 1970 and 1971, the inspector stated:

> "1970 The council maintained at the inquiry that on appeal the Secretary of State became the competent authority for the purposes of the Habitats Regulations. However I note that Regulation 65 (2) of the Habitats Regulations provides that where there is more than one competent authority, nothing in the Habitats Regulations requires a competent authority to assess any implications of a plan or project which would more appropriately assessed by another competent authority. 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."

145. Pausing there, I am not sure that I entirely accept that approach since it would seem to be undesirable that an overall view of the impacts of the project should be undertaken by two different authorities. As it seems to me, that that would indeed be a duplication of effort and a recipe for possible inconsistent results.

145. Going back to the inspector's report, at paragraph 1971 he said:

> "1971 Paragraph 26 of PPS/10 makes the point that planning authorities should not duplicate controls that are operated by the Pollution Control authorities. Paragraph 27 of PPS/10 draws a distinction between the different roles performed by the planning system and the pollution control regime. It indicates that the pollution control regime is concerned with preventing pollution through the use of controls to limit the release of substances to the environment. Contrast the planning system controls and the development and use of land in the public interest."

It goes on to say that planning authorities should have confidence that the relevant pollution control regime will be properly applied and enforced.

145. At paragraph 1972 he made the point that the council witness upon whom (to avoid duplication of evidence and no doubt costs) the objectors relied conceded that the only possible candidates for an adverse effect came from emissions from the chimney. In paragraphs 1973 and 1974 the inspector 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 envrionmental 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."

145. 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.

145. The inspector's conclusions on this point reached in paragraphs 1978 to 1980 read as follows:

"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."

145. 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.

145. In my judgment, he was wrong in that view.

145. In addition, it is said he was wrong not to have dealt with the issue since all parties had been led to believe that he would, and he had not at any stage disabused any of the parties of that expectation.

145. It is said on behalf of the defendants that the expectation was not one which was given by the Secretary of State; that matters not. It is sufficient that the inspector created the expectation because it is the fairness of the inspector's decision-making process which is in issue. If there was such an expectation which was not met, then the objectors were not treated fairly.

145. Mr Phillpot submits that the inspector was entitled to conclude that the EA was, within Regulation 65 (2), the appropriate competent authority rather than the Secretary of State and the Secretary of State was equally entitled to accept that conclusion.

145. The second defendant in its final submissions had raised the Regulation 65 (2) point which only became a reality because of the narrowing of the possible effects to those on air quality from emissions from the chimney. I have been taken to the material parts of those submissions which are set out in some detail in the inspector's report. Following an attack on the evidence relied on by the County Council and by the objectors which, it is said, amounts to nothing of substance, this is said so far as is relevant in paragraph 65. The point that is being made is -

> "that the vast majority of the emissions will be generated by CERC itself, particularly via the stack. This is manifestly the territory of the EA, not the waste planning authority."

145. It goes on:

> "Moreover the Conservation of Habitats and Species Regulations 2010 provide that where there is more than one competent authority nothing in the Habitats Regulations requires the competent authority to assess any implications of a plan or project which would be more appropriately assessed by another competent authority. PPS/10 reflects this by providing that the controls under the planning and the pollution control regimes should complement rather than duplicate each other and that waste planning authorities should work effectively with pollution control authorities to ensure that best use is made of expertise and information, and that decisions on planning applications and pollution control permits are delivered expeditiously."

145. The submissions stated that PPS/23 repeated the point. Both documents required the waste planning authority to assume that the Environment Agency had properly applied the pollution control regime. The council seemed perfectly well aware of this point when it advised its members on the planning application. It sought to abandon the

point now because the EA "are not held in high regard". I would comment that that was a point that was put in cross-examination on behalf of the council. It perhaps was not one of their best points.

145. The conclusion which resulted from this is set out in paragraph 81 of the submissions. It is said:

> "We therefore submit that it could be objectively concluded that the CERC is not likely to give rise to significant effects on the SAC. The council's objections are entirely misconceived. In the end the objection comes to nothing. The great irony is the fact that there seems to be little dispute that there is sufficient information before the inquiry for the Secretary of State to carry out an appropriate assessment in the event that contrary to the Environment Agency and Natural England position and our submissions the Secretary of State decides that an appropriate assessment is required."

145. Indeed, in examination-in-chief the relevant witness said he would struggle to think what to what more could be done. Another said that every possible avenue had been explored.

145. The point was made that the inquiry had all the necessary information, and it followed that even if the Secretary of State did not agree with the Environment Agency and the second defendant there was nothing to stop him carrying out an appropriate assessment. There was universal expectation amongst the statutory advisers that any appropriate assessment would not conclude that the scheme affected the integrity of either of the SACs.

145. Thus although the possibility of Regulation 65 (2) was raised it was in the context of a factual attack and an indication that the evidence before the inspector should persuade him that the conclusion reached by the EA was correct. It may be that the EA would be considered as the appropriate competent authority within Regulation 65 (2), and that would be on the basis that the inspector had accepted that there was no substance in the challenge to the Environment Agency's view put forward on behalf of the objectors.

145. 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.

145. Mr Phillpot also submitted that it was inherently wrong to expect the inspector or the Secretary of State, who did not have the necessary expertise, to form a judgment on the EA's views since the EA did have that expertise. That contention I also reject.

145. Any judicial or quasi-judicial decision maker has to form judgments on matters in

dispute even if those matters require expert consideration. He will rely upon the evidence of experts put before him by the parties who contend either way and will have to reach a decision on that basis. The same applies to the Secretary of State. He will not, of course, decide the issue without referring to expert evidence and that evidence can be put before him. So the view that it is wrong for the Secretary of State to decide without having the necessary expertise himself against the EA is one which I do not find in the least persuasive.

145. Mr Phillpot suggested that the claimant's case must be that the Secretary of State or the inspector or both had already pre-determined the application of Regulation 65 (2). I fail to understand the basis of that suggestion. It was only once the air quality from the chimney was the only possible effect to be considered that the inspector was led to conclude that the EA rather than the Secretary of State must be the appropriate competent authority. For reasons I have already given, I have already decided that the inspector's approach was wrong. The claimant has never suggested, nor does its case depend upon suggesting, that there was any pre-determination.

145. Mr Westmoreland-Smith submitted that there was a overriding public interest justifying a departure from the fulfillment of the representation. There were, as the inspector decided, many advantages in the development and, if delayed or not permitted, enormous sums of money would have been and would be wasted.

145. In Nadarajah v Secretary of State for the Home Department **[2005] EWCA Civ 1363, Lord Justice Laws considered the correct approach where the court must decide whether the overriding of a legitimate expectation was justified.**

145. In the end this depended on whether it was in all the circumstances proportionate. At paragraph 69 of his judgment in that case this is said. He considers whether there is a statutory duty which may dictate the frustration of a substantive expectation. That is not the position here. He goes on:

> "69 ..... Otherwise the question in either case will be 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. Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure. They are included in Mr Underwood's list of factors, all of which will be material, where they arise, to the assessment of proportionality. On the other hand where the government decision-maker is concerned to raise wide-ranging or 'macro-political' issues of policy, the expectation's enforcement in the courts will encounter a steeper climb. All these considerations, whatever their direction, are pointers not rules. The balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact. It is no surprise that, as I ventured to suggest in Begbie, 'the first and third categories explained in the Coughlan case ..... are not hermetically sealed'.

These cases have to be judged in the round."

145. Reliance is particularly placed upon the inspector's observations in paragraph 2123 of his report where he says:

> "The costs to the county's taxpayers of the CERC's proposal being rejected and a long delay in bringing in new facilities would thus be well in excess of £200,000,000. This would hit taxpayers and the council hard at a time of straitened financial circumstances affecting both individuals and local authorities. Financial implications of rejecting the CERC proposal is a matter that should be according substantial weight along with the other consequences of failing to meet targets, that of not diverting waste from landfill and not disposing of waste in a more sustainable manner."

145. The problem, as I see it, that faces me is that the Habitats Directive and the Regulations are the law and must be obeyed. Although the second defendant submitted at the inquiry that the attack on the EA's conclusion was entirely without substance, 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. In those circumstances, as it seems to me, I cannot properly exercise the discretion which undoubtedly exists not to grant relief notwithstanding that I am satisfied that there was an error of law. In those circumstances although I recognise the adverse effects of any delay or of the need to find an alternative site if it turns out that this is wrong, nonetheless, in the light of the Habitats Directive and the requirements of the Directive and the Regulations, it is not in my view appropriate for me to fail to grant relief in the circumstances.

145. It may be that the sensible way ahead in order to save time and money would be for the Secretary of State to carry out an appropriate assessment as speedily as possible having regard to all the evidence that has been produced by the claimant and indeed by others. If the result of that exercise was to agree with the EA, planning permission would then no doubt be granted. If there was the likelihood of any significant adverse effect, consideration would have to be given to whether conditions could avoid such an effect. If that was not possible, the law requires that the development cannot take place, subject to the possibility, which has not been explored, of overriding the prohibition in special circumstances.

145. Accordingly, I quash the decision to grant planning permission.

145. (To Mr Phillpot) You cannot resist costs, can you?

145. MR PHILLPOT: No. I am assuming that there is an application for costs against my side.

145. MR JUSTICE COLLINS: (To Mr Desai) You are applying?

145. MR DESAI: Yes.

145. MR JUSTICE COLLINS: The usual?

145. MR PHILLPOT: So far as the principle is concerned, there is no issue.

145. MR JUSTICE COLLINS: Detailed assessment, if not agreed.

145. MR PHILLPOT: Indeed, because there is a conditional fee arrangement and we do not have all the material before us to do that. In the absence of that material we could not carry out a summary assessment.

145. MR JUSTICE COLLINS: It would be inappropriate, I think, in a case such as this.

145. There are two other matters which I can take in whatever order your Lordship pleases. The first is as to permission to appeal. The second is as to various minor points in the judgment. Shall I deal with those first?

145. MR JUSTICE COLLINS: Yes. I can correct things on the transcript.

145. MR PHILLPOT: Your Lordship picked up the point about Environment Agency rather than "Authority". I have a couple of other points. In discussing the Regulations, you identified as a two-stage approach. The first stage you described as "scoping", I think it should be "screening". "Scoping" is to decide the nature of the exercise rather than whether there should be such an exercise.

145. MR JUSTICE COLLINS: Yes.

145. MR PHILLPOT: The next point is in relation to the effect of a conclusion under appropriate assessment that planning permission would have to be refused, which is a point you made in discussing the Regulations and then right at the conclusion of your judgment, Regulation 62 would then come into play.

145. MR JUSTICE COLLINS: So perhaps one would say subject to 62 (4).

145. MR PHILLPOT: Indeed.

145. MR JUSTICE COLLINS: Subject to possibility of over-riding - - - - -

145. MR PHILLPOT: Whether it arises here is not a matter we need concern ourselves with.

145. MR JUSTICE COLLINS: I take your point. There is possibly a fall-back in 62 (4).

145. MR PHILLPOT: Indeed. I will check if there is one other.

145. MR DESAI: There is a small point. There were a couple of references to "Cornwall Council" instead of "Cornwall County Council". It is a small point.

145. MR JUSTICE COLLINS: Does it exist any more - Cornwall County Council?

145. MR WESTMORELAND SMITH: It is Cornwall Council.

145. MR DESAI: I apologise, it is the other way around.

145. MR JUSTICE COLLINS: I do not think it is terribly material.

145. MR PHILLPOT: I therefore turn to my other matter which is permission to appeal. I have two points to make: first of all, to seek permission but, secondly, to deal with the question of timing of documents in any further application.

145. Dealing with the first point, I make my application for permission to appeal both on the basis that there is a real prospect of success and also that there is another compelling reason why it ought to be allowed. The points can be expressed shortly because you have heard my detailed argument. If I have not persuaded you, I am not now going to persuade you. In essence, there is an important issue which lies at the heart of this. That is the degree to which one competent authority is entitled to rely on the assessment made by another competent authority having regard to Regulation 65 (2) which, you will have seen through the guidance, is a matter that in the absence of further clarification might give rise to real procedural uncertainty and difficulty in further cases because it creates the question to what extent does the Secretary of State have to go through an exercise already undertaken by the Environment Agency, potentially vice versa.

145. I say that there is not only a real prospect they the Court of Appeal might be persuaded differently to your Lordship - - - - -

145. MR JUSTICE COLLINS: There is always that possibility.

145. MR PHILLPOT: There is always that possibility but there is a real prospect. But, secondly, in any event it is important that on such an important matter as this which has great significance in terms of public decision making on the matter - - - - -

145. MR JUSTICE COLLINS: I take that point.

145. MR PHILLPOT: Not only that, this is an area of decision making - not just the Habitats Directive - that the relationship between the permitting process for plants of this sort and the planning process is only going to become of increasing significance as more replacement energy plants are created.

145. MR JUSTICE COLLINS: Yes. It was in the paper yesterday, was it, there was some concern about an incinerator in some town.

145. MR PHILLPOT: The backdrop, as you will be familiar, is - - - - -

145. MR JUSTICE COLLINS: I know - landfill.

145. MR PHILLPOT: Not just that but the requirement for new generating capacity in the country which is set out in national policy statements, and developers are being encouraged to come forward. It is an issue which is going to - - - - -

145. MR JUSTICE COLLINS: Wind and nuclear and incinerators.

145. MR PHILLPOT: Indeed. The policy is encouraging of all sorts of generating capacity. Therefore the issue has real practical significance.

145. MR JUSTICE COLLINS: I can see it is of importance. Of course the figures which I referred to in terms of costs are also - - - - -

145. MR PHILLPOT: The public importance of this matter going up before the Court of Appeal is a compelling reason why we ought to be allowed to have permission. Unless I can assist you further on that first point?

145. MR JUSTICE COLLINS: No.

145. MR PHILLPOT: If I can deal with the second matter which is as to timing. You have given extempore judgment.

145. MR JUSTICE COLLINS: Not completely extempore, but yes.

145. MR PHILLPOT: You will recall from here on in I will have to hand over to other counsel because I have other commitments which means that anyone who is seeking to draft grounds of appeal and so on will be taking the matter up on the basis of extempore judgment and, in any event, on a matter as important as this it is very helpful - - - - -

145. MR JUSTICE COLLINS: What is the time scale if I were to grant leave?

145. MR PHILLPOT: It is 21 days to put in appellant's notice.

145. MR JUSTICE COLLINS: Twenty-one days is enough to let someone take over.

145. MR PHILLPOT: I was going to ask for time to run from production of transcript and for the production of transcript to be expedited, so there would be a transcript for whoever is taking over. (Pause)

145. MR JUSTICE COLLINS: I am told that a transcript could be ready by Wednesday. I will have to check it, but certainly before the end of next week you should have the completed transcript.

145. MR PHILLPOT: If the 21 days could run from the production of the transcript that would be extremely helpful.

145. MR JUSTICE COLLINS: You are the ones particularly who want speed.

145. MR PHILLPOT: I have discussed this with my friend in advance. As it seems to us, the only party who might potentially be prejudiced by that small additional delay is the second defendant. I understand from my friend, they are content to deal with it in this way.

145. MR WESTMORELAND SMITH: That is correct.

145. MR JUSTICE COLLINS: On that second issue I cannot see that there is any conceivable reason to object. What about leave to appeal?

145. MR DESAI: I am in a slightly unfortunate position in that I am standing in.

145. MR JUSTICE COLLINS: I obviously do not think I was wrong in deciding as I did if I did have any doubts. But I see the force of the submission that there is a matter of considerable importance arising. I have little doubt that were they to apply for leave to appeal they would probably get it. I think in those circumstances I am minded to grant leave to appeal. That does not mean of course that I think there is any merit in the

appeal, but I have to have regard to the importance of the issue generally. So unless you have any strong reasons to object, I think I will grant leave to appeal.

145. MR DESAI: I simply query if this is the right case. If this issue arises elsewhere perhaps a particularly fact-specific case.

145. MR JUSTICE COLLINS: (To solicitor) You obviously have the details. Do you have anything to say, if you forgive me going behind?

145. SOLICITOR FOR CLAIMANT: In my view your conclusions are quite clear, that the point that is being made is not what actually happened in this case. I think that in a way this is how you end up with bad law in the Court of Appeal because you are clear on the facts that this is a case where there was not that. You never said that they could not defer to the Environment Agency. You just say the process and the way they went about it was not correct. Therefore in my submission it would not be the right case for that issue to be considered.

145. MR JUSTICE COLLINS: I take that point. But that is not the only basis upon which they are suggesting there ought to be appeal. It is because of the importance of the issue generally. Whether it was correct for the inspector in the circumstances to take the view that he did not need to go behind the EA that is of fairly general importance I think. It may arise in other cases because if they adopt this approach - - I mean, first of all, the effect of that if they are right would be the need for lots of judicial reviews or it may be which I think is undesirable.

145. The point I am trying to make is that it seems to me, trying to detach myself a bit and pretend I was considering this as a Lord Justice on consideration of leave to appeal, I think I would be probably likely to grant leave to appeal. There is a need for speed. If I grant leave it does not mean in any way that I am indicating that I think there is any merit or likelihood of success in the appeal. It is simply avoiding unnecessary costs and an unnecessary stage.

145. I think I am persuaded that this is a proper case for me to grant leave to appeal.

145. MR PHILLPOT: I am grateful.

145. MR JUSTICE COLLINS: We have to fill in this form saying reasons for the leave to appeal. I will say "see transcript".