Claim No: QB-2022-001241 ("Shell Haven Proceedings")

Claim No: QB-2022-001259 ("Shell Centre Tower Proceedings")

Claim No: QB-2022-001420 ("Shell Petrol Stations Proceedings")

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

BETWEEN

SHELL U.K. LIMITED

Claimant: (QB-2022-001241)

SHELL INTERNATIONAL PETROLEUM COMPANY LIMITED

Claimant (QB-2022-001259)

SHELL U.K. OIL PRODUCTS LIMITED

Claimant (QB-2022-001420)

- and –

PERSONS UNKNOWN

[more fully described in the Relevant Claim Form]

Defendants

SECOND AUTHORITIES BUNDLE ("AB2")

Rule 46.24. - Scope and interpretation

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Rule 46.24. - Scope and interpretation

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Volume 1

Section A - Civil Procedure Rules 1998

Part 46 - Costs—Special Cases

Costs—Special Cases

IX - Costs Limits in Aarhus Convention Claims

Related Practice Directions

Rule 46_24

46.24.— Scope and interpretation [1]

46. 24 **(1)** This section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) In this Section—

(a) *"Aarhus Convention claim"* means a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 ("the Aarhus Convention");

(b) references to a member or members of the public are to be construed in accordance with the Aarhus Convention.

(3) This Section does not apply to appeals other than appeals brought under section 289(1) of the Town and Country Planning Act 1990 or section 65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 , which are for the purposes of this Section to be treated as reviews under statute.

(Rule 52.19A makes provision in relation to costs of an appeal.)

(The Aarhus Convention is available on the UNECE website at https://www.unece.org/env/pp/welcome.html.)

Editorial Introduction

46. 24. 1 This section was previously Section VII of Part 45. It was re-enacted, without amendment to the wording, as Section IX of Part 46 by the Civil Procedure (Amendment No.2) Rules 2023 with effect from 1 October 2023.

Effect of Section

46. 24. 2 The reason for the introduction of costs limits in Aarhus Convention claims was the existence of infraction proceedings which had reached the stage of a reasoned opinion issued by the European Commission on 18 March 2010 which argued that the UK had failed to transpose fully and to apply correctively Directive 2003/35/EC, the Public Participation Directive. The purpose of the rules in this Section of Part 46 is to ensure that such proceedings do not engender costs which are prohibitive. Where a claimant is ordered to pay the costs the maximum amount payable is £5,000 where the claimant is claiming only as an individual and not as or on behalf of a business or other legal person, or in all other cases £10,000. Where a defendant is ordered to pay costs the amount payable is a maximum of £35,000: r.46.26. These amounts may be varied in the circumstances set out in r.46.27.

The Court of Justice of the European Union found that the costs regime in the UK did not properly implement the requirements in the Aarhus Convention that access to environmental justice must not be prohibitively expensive: *European Commission v United Kingdom (C-530/11) EU:C:2014:67*. However notwithstanding subsequent amendments to the rules the Court of Appeal expressed the view that the protection afforded by this section of the rules was still not sufficient to comply with the obligations of the Convention because it was confined to applications for judicial review: *Secretary of State for Communities and Local Government v Venn [2014] EWCA Civ 1539*. The rules were therefore amended further, with effect from 28 February 2017, by extending the scope of the section to include statutory reviews within the scope of art.9(1) or 9(2) and by making provision for the variation of the costs limits and amended again, with effect from 1 October 2019, to include statutory reviews within the scope of art.9(3).

Aarhus Convention claims

46. 24. 3 The jurisdiction to make an order under this section is limited to claims for judicial review and review under statute: r.46.24(2)(a). There is no power to make an order in a private nuisance claim even if it raised issues to which the Convention applied: *Austin v Miller Argent (South Wales) Ltd [2014] EWCA Civ 1012*. A defendant to a claim for private nuisance by noise could not rely on the Convention to limit its liability for costs: *Coventry v Lawrence [2014] UKSC 46*. Where a ground which is within the scope of the Convention is included in a claim in good faith, it is not appropriate to distinguish between the costs attributable to that ground and those attributable to other grounds which are not within the scope of the Convention. Provided that part of the claim falls within the definition in r.46.24(2)(a) the cap will apply to the whole claim: *R. (Lewis) v Welsh Ministers [2022] EWHC 450 (Admin)*.

Related Practice Directions

Practice Direction 46—Costs Special Cases

Senior Costs Judge Practice Note: Approval of Costs Settlements, Assessments under CPR 46.4(2) and Deductions from Damages: Children and Protected Parties

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1 Introduced by the Civil Procedure (Amendment No.2) Rules 2023 (SI 2023/572).

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Rule 46.25. - Opting out, and other cases where rules 46.26 to 46.28 do not apply to a claimant

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Rule 46.25. - Opting out, and other cases where rules 46.26 to 46.28 do not apply to a claimant

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Volume 1

Section A - Civil Procedure Rules 1998

Part 46 - Costs—Special Cases

Costs—Special Cases

IX - Costs Limits in Aarhus Convention Claims

Related Practice Directions

Rule 46_25

46.25.— Opting out, and other cases where rules 46.26 to 46.28 do not apply to a claimant [1]

46. 25

(1) Subject to paragraph (2), rules 46.26 to 46.28 apply where a claimant who is a member of the public has—

(a) stated in the claim form that the claim is an Aarhus Convention claim; and

(b) filed and served with the claim form a schedule of the claimant's financial resources, which is verified by a statement of truth and provides details of—

(i) the claimant's significant assets, liabilities, income and expenditure; and

(ii) in relation to any financial support which any person has provided or is likely to provide to the claimant, the aggregate amount which has been provided and which is likely to be provided.

(2) Subject to paragraph (3), rules 46.26 to 46.28 do not apply where the claimant has stated in the claim form that although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

(3) If there is more than one claimant, rules 46.26 to 46.28 do not apply in relation to the costs payable by or to any claimant who has not acted as set out in paragraph (1), or who has acted as set out in paragraph (2), or who is not a member of the public.

Related Practice Directions

Practice Direction 46—Costs Special Cases

Senior Costs Judge Practice Note: Approval of Costs Settlements, Assessments under CPR 46.4(2) and Deductions from Damages: Children and Protected Parties

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1 Introduced by the Civil Procedure (Amendment No.2) Rules 2023 (SI 2023/572).

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Rule 46.26. - Limit on costs recoverable from a party in an Aarhus Convention claim

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Rule 46.26. - Limit on costs recoverable from a party in an Aarhus Convention claim

White Book 2024 | Commentary last updated August 2, 2023

Volume 1

Section A - Civil Procedure Rules 1998

Part 46 - Costs—Special Cases

Costs—Special Cases

IX - Costs Limits in Aarhus Convention Claims

Related Practice Directions

Rule 46_26

46.26.— Limit on costs recoverable from a party in an Aarhus Convention claim [1]

46. 26 **(1)** Subject to rules 46.25 and 46.28 , a claimant or defendant in an Aarhus Convention claim may not be ordered to pay costs exceeding the amounts in paragraph (2) or (3) or as varied in accordance with rule 46.27 .

(2) For a claimant the amount is—

(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;

(b) £10,000 in all other cases.

(3) For a defendant the amount is £35,000.

(4) In an Aarhus Convention claim with multiple claimants or multiple defendants, the amounts in paragraphs (2) and (3) (subject to any direction of the court under rule 46.27) apply in relation to each such claimant or defendant individually and may not be exceeded, irrespective of the number of receiving parties.

The nature of the claimant

46. 26. 1 A claimant will not lose the protection of the rules because it is a public authority. It was not appropriate to refer to the Convention to place a gloss on the ordinary and natural meaning of "claimant" in PD 46: *R. (HS2 Action Alliance Ltd) v Secretary of State for Transport [2015] EWCA Civ 203*.

A claimant pursuing a claim with the benefit of crowdfunding was still claiming only as an individual and not on behalf of others: *R. (Lewis) v Welsh Ministers [2022] EWHC 450 (Admin)*.

Interested parties

46. 26. 2 The rule applies to an interested party as if it is a defendant: *R. (Kent) v Teesside Magistrates Court [2020] EWHC 304 (Admin)*.

The limits and the assessment of costs

46. 26. 3 The figures in r.46.26(2) include VAT: *R. (Friends of the Earth Ltd) v Secretary of State for Transport [2021] EWCA Civ 13*.

The limits to the amount of costs recoverable do not have a bearing on the approach to the assessment of those costs. On a standard basis assessment the court will allow only those costs which are reasonable and proportionate. Once those costs have been assessed the cap is applied only if the assessed costs would otherwise exceed it: *Campaign to Protect Rural England - Kent Branch v Secretary of State for Communities and Local Government [2019] EWCA Civ 1230*.

Related Practice Directions

Practice Direction 46—Costs Special Cases

Senior Costs Judge Practice Note: Approval of Costs Settlements, Assessments under CPR 46.4(2) and Deductions from Damages: Children and Protected Parties

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1 Introduced by the Civil Procedure (Amendment No.2) Rules 2023 (SI 2023/572).

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Rule 46.27. - Varying the limit on costs recoverable from a party in an Aarhus Convention claim

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Rule 46.27. - Varying the limit on costs recoverable from a party in an Aarhus Convention claim

White Book 2024 | Commentary last updated August 2, 2023

Related Practice Directions

Rule 46_27

46.27.— Varying the limit on costs recoverable from a party in an Aarhus Convention claim [1]

46. 27

(1) The court may vary the amounts in rule 46.26 or may remove altogether the limits on the maximum costs liability of any party in an Aarhus Convention claim.

(2) The court may vary such an amount or remove such a limit only on an application made in accordance with paragraphs (5) to (7) ("an application to vary") and if satisfied that—

(a) to do so would not make the costs of the proceedings prohibitively expensive for the claimant; and

(b) in the case of a variation which would reduce a claimant's maximum costs liability or increase that of a defendant, without the variation the costs of the proceedings would be prohibitively expensive for the claimant.

(3) Proceedings are to be considered prohibitively expensive for the purpose of this rule if their likely costs (including any court fees which are payable by the claimant) either—

(a) exceed the financial resources of the claimant; or

(b) are objectively unreasonable having regard to—

(i) the situation of the parties;

(ii) whether the claimant has a reasonable prospect of success;

(iii) the importance of what is at stake for the claimant;

(iv) the importance of what is at stake for the environment;

(v) the complexity of the relevant law and procedure; and

(vi) whether the claim is frivolous.

(4) When the court considers the financial resources of the claimant for the purposes of this rule, it must have regard to any financial support which any person has provided or is likely to provide to the claimant.

(5) Subject to paragraph (6), an application to vary must—

(a) if made by the claimant, be made in the claim form and provide the claimant's reasons why, if the variation were not made, the costs of the proceedings would be prohibitively expensive for the claimant;

(b) if made by the defendant, be made in the acknowledgment of service and provide the defendant's reasons why, if the variation were made, the costs of the proceedings would not be prohibitively expensive for the claimant; and

(c) be determined by the court at the earliest opportunity.

(6) An application to vary may be made at a later stage if there has been a significant change in circumstances (including evidence that the schedule of the claimant's financial resources contained false or misleading information) which means that the proceedings would now—

(a) be prohibitively expensive for the claimant if the variation were not made; or

(b) not be prohibitively expensive for the claimant if the variation were made.

(7) An application under paragraph (6) must—

(a) if made by the claimant—

(i) be accompanied by a revised schedule of the claimant's financial resources or confirmation that the claimant's financial resources have not changed; and

(ii) provide reasons why the proceedings would now be prohibitively expensive for the claimant if the variation were not made; and

(b) if made by the defendant, provide reasons why the proceedings would now not be prohibitively expensive for the claimant if the variation were made.

(Rule 39.2(3)(c) makes provision for a hearing (or any part of it) to be in private if it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality.)

Hearing to vary a cost-capping order

46. 27. 1 An interested party may apply to vary the cap: *R. (Bertoncini) v Hammersmith & Fulham LBC [2020] 6 WLUK 174*.

Cost capping variation hearings are to be heard in private: see para.39.2.2.

Related Practice Directions

Practice Direction 46—Costs Special Cases
Senior Costs Judge Practice Note: Approval of Costs Settlements, Assessments under CPR 46.4(2) and Deductions from Damages: Children and Protected Parties
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1 Introduced by the Civil Procedure (Amendment No.2) Rules 2023 (SI 2023/572).

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Rule 46.28. - Challenging whether the claim is an Aarhus Convention claim

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Rule 46.28. - Challenging whether the claim is an Aarhus Convention claim

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Section A - Civil Procedure Rules 1998

Part 46 - Costs—Special Cases

Costs—Special Cases

IX - Costs Limits in Aarhus Convention Claims

Related Practice Directions

Rule 46_28

46.28.— Challenging whether the claim is an Aarhus Convention claim [1]

46. 28

(1) Where a claimant has complied with rule 46.25(1) , and subject to rule 46.25(2) and (3), rule 46.26 applies unless—

(a) the defendant has in the acknowledgment of service—

(i) denied that the claim is an Aarhus Convention claim; and

(ii) set out the defendant's grounds for such denial; and

(b) the court has determined that the claim is not an Aarhus Convention claim.

(2) Where the defendant denies that the claim is an Aarhus Convention claim, the court must determine that issue at the earliest opportunity.

(3) In any proceedings to determine whether the claim is an Aarhus Convention claim—

(a) if the court holds that the claim is not an Aarhus Convention claim, it shall, except for good reason, make no order for costs in relation to those proceedings;

(b) if the court holds that the claim is an Aarhus Convention claim, it shall, except for good reason, order the defendant to pay the claimant's costs of those proceedings to be assessed on the standard basis, and that order may be enforced even if this would increase the costs payable by the defendant beyond the amount stated in rule 46.26(3) or any variation of that amount.

Related Practice Directions

Practice Direction 46—Costs Special Cases
Senior Costs Judge Practice Note: Approval of Costs Settlements, Assessments under CPR 46.4(2) and Deductions from Damages: Children and Protected Parties
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1 Introduced by the Civil Procedure (Amendment No.2) Rules 2023 (SI 2023/572).

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*976 Regina v Lyons and Others

Positive/Neutral Judicial Consideration

Court
House of Lords

Judgment Date
14 November 2002

Report Citation
[2002] UKHL 447; [2002] 3 W.L.R. 1562
[2003] 1 A.C. 976

ICLR

House of Lords

Lord Bingham of Cornhill , Lord Hoffmann , Lord Hutton , Lord Hobhouse of Woodborough and Lord Millett

2002 Oct 14, 15, 16; Nov 14

Crime—Court of Appeal (Criminal Division)—Reference by Criminal Cases Review Commission—Reliance on judgment of European Court of Human Rights—Defendants convicted after trial where prosecution lawfully adducing evidence of answers given by defendants under compulsion—Convictions upheld on appeal—Subsequent ruling by Court of Human Rights that admission of answers contrary to Convention right to fair trial—Referral back to Court of Appeal—Whether obligation to apply ruling when reviewing safety of conviction— Companies Act 1985 (c 6), s. 434(5) — Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), art 6(1)

In 1990 the defendants, L, P, R and S, stood trial on various charges alleging dishonest conduct in connection with an illegal share support operation designed to assist G plc's bid to buy another company, the offer including an exchange of G plc's shares for those of the other company. At the trial the prosecution sought, pursuant to section 434(5) of the Companies Act 1985 [1] , to lead evidence of statements made by the defendants under compulsion of law in answer to questions put to them by Department of Trade and Industry inspectors investigating the affairs of G plc. The defendants asked the judge to use his discretion to exclude the evidence under section 78 of the Police and Criminal Evidence Act 1984 as having such an adverse effect on the fairness of the proceedings that he ought not to admit it, but the judge ruled that, since Parliament had provided that such statements were to be admissible notwithstanding that they had been obtained by statutory compulsion, it would not be a lawful exercise of his discretion under section 78 to exclude them solely on the ground that they had been obtained by compulsion. The defendants were convicted and in 1991, the Court of Appeal dismissed P, R and S's appeals against conviction, save for quashing S's conviction on one count. In 1994 the European Commission of Human Rights ruled, on S's application, that the use at the trial of the statements made to the inspectors under their compulsory powers had infringed S's right not to incriminate himself and so had violated his right to a fair trial guaranteed by article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms [2] and referred the case to the European Court of Human Rights. In 1995, on a reference back to the Court of Appeal by the Secretary of State for the Home Department pursuant to section 17(1)(a) of the Criminal Appeal Act 1968 the Court of Appeal, in upholding all the convictions save for one count in respect of L, held, inter alia, that under domestic law the admission in evidence of answers which Parliament had said could be admitted could not be regarded as unfair per se so as to require their exclusion under section 78. In 1996 the European Court of Human Rights ruled that the admission of the statements had infringed S's right to a fair hearing in accordance with article 6 and in 2000 made a similar ruling in respect of L, P and R. Following the 1996 decision the Attorney General issued a guidance note the effect of which prevented prosecutors from tendering compulsorily obtained *977 statements under section 434(5) , and thereafter section 434(5A)(5B) was inserted into the 1985 Act so as to make such statements inadmissible in any criminal proceedings taking place after April 2000 other than for making false statements on oath. Subsequent to, and by reason of,

the decisions of the Court of Human Rights and the coming into force of the main provisions of the Human Rights Act 1998 , the Criminal Cases Review Commission referred the cases back to the Court of Appeal for a second time. The Court of Appeal, having first applied House of Lords authority to preclude any reliance in an appeal taking place after the coming into force of the 1998 Act on any of the provisions of that Act, held that it was not open to the court to quash the convictions when the stigmatised procedures had been expressly permitted by Parliament.

On appeal by the defendants—

Held, dismissing the appeal, that the Convention was an international treaty and as such did not confer rights on individuals enforceable in domestic law; that although there was a presumption in favour of interpreting English law in a way which did not place the United Kingdom in breach of the obligations of the Crown under the Convention, where there was an express and applicable provision of domestic statutory law it was the duty of the courts to apply it even if that would involve the Crown in a breach of an international treaty; that an appellate court, when judging the safety of a conviction in the exercise of its jurisdiction under section 2(1) of the 1968 Act would apply contemporary standards of fairness but by reference to the law applicable at the date of the trial; that in considering the fairness of the defendants' trial it was necessary to apply section 434(5) of the 1985 Act as then applicable, which clearly allowed the admission of statements made under compulsion, the subsequent qualification set out in section 434(5A)(5B) having been made without retrospective effect, and section 434(5) therefore prevailed over any obligations arising under the Convention or from a ruling of the Court of Human Rights; and that, accordingly, there were no grounds for holding the defendants' trial to have been unsafe (post, paras 13-14, 16-18, 20, 23-24, 27-29, 39-40, 47, 59, 62-63, 67, 69, 78, 79, 81, 83, 96, 98, 100, 104-105, 109).

Decision of the Court of Appeal (Criminal Division) [2001] EWCA Crim 2860; [2002] 2 Cr App R 210 affirmed .

The following cases are referred to in their Lordships' opinions:

Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL(E)
Belilos v Switzerland (1988) 10 EHRR 466
Brown v Stott [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
Brozicek v Italy (1989) 12 EHRR 371
Dallal v Bank Mellat [1986] QB 441; [1986] 2 WLR 745; [1986] 1 All ER 239
Findlay v United Kingdom (1997) 24 EHRR 221
Hauschildt v Denmark (1989) 12 EHRR 266
Henderson v Henderson (1843) 3 Hare 100
IJL, GMR and AKP v United Kingdom (2000) 9 BHRC 222
London United Investments plc, In re [1992] Ch 578; [1992] 2 WLR 850; [1992] 2 All ER 842, CA
Papamichalopoulos v Greece (1995) 21 EHRR 439
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827; [1980] 2 WLR 283; [1980] 1 All ER 556, HL(E)
R v Bentley, decd [2001] 1 Cr App R 307, CA
R v Director of Serious Fraud Office, Ex p Smith [1993] AC 1; [1992] 3 WLR 66; [1992] 3 All ER 456; 95 Cr App R 191, HL(E)
R v Erdheim [1896] 2 QB 260
R v Faryab (unreported) 22 February 1999, CA
R v Kansal (No 2) [2001] UKHL 62; [2002] 2 AC 69; [2001] 3 WLR 1562; [2002] 1 All ER 257; [2002] 1 Cr App R 478, HL(E) ****978***
R v Lambert [2001] UKHL 37; [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 3 All ER 577; [2001] 2 Cr App R 511, HL(E)
R v McIlkenny [1992] 2 All ER 417; 93 Cr App R 287, CA
R v Mullen [2000] QB 520 ; *[1999] 3 WLR 777; [1999] 2 Cr App R 143, CA*
R v R [1992] 1 AC 599; [1991] 3 WLR 767; [1991] 4 All ER 481; 94 Cr App R 216, HL(E)
R v Saunders (Ernest) [1996] 1 Cr App R 463, CA
R v Scott (1856) Dears &; B 47
R v Seelig [1992] 1 WLR 148; [1991] 4 All ER 429; 94 Cr App R 17, CA

R v Staines [1997] 2 Cr App R 426, CA
R v Togher [2001] 3 All ER 463; [2001] 1 Cr App R 457, CA
Rayner (J H) (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418; [1989] 3 WLR 969; [1989] 3 All ER 523, HL(E)
Saunders v United Kingdom (1996) 23 EHRR 313
Z v United Kingdom (2001) 34 EHRR 97

The following additional cases were cited in argument:

Barberà, Messegué and Jabardo v Spain 13 June 1994, Publications of the European Court of Human Rights, Series A no 285-C
Bönisch v Austria (1985) 9 EHRR 191
Congo, Democratic Republic of v Belgium (Case concerning arrest warrant of 11 April 2000) (unreported) 14 February 2002, ICJ
De Cubber v Belgium (1987) 13 EHRR 422
De Wilde, Ooms and Versyp v Belgium (No 2) (1972) 1 EHRR 438
Eckle v Germany (1983) 13 EHRR 556
Germany v United States of America (LaGrand case) (unreported) 27 June 2001, ICJ
Higgs v Minister of National Security [2000] 2 AC 228; [2000] 2 WLR 1368, PC
Pelladoah v The Netherlands (1994) 19 EHRR 81
Piersack v Belgium (1984) 7 EHRR 251
R v Thomas [2002] EWCA Crim 941; [2003] 1 Cr App R 168, CA
Saidi v France (1993) 17 EHRR 251
Schmautzer v Austria (1995) 21 EHRR 511
Scozzari and Giunta v Italy (2000) 35 EHRR 243
Staines v United Kingdom Reports of Judgments and Decisions 2000-V, p 505
Thomas v Baptiste [2000] 2 AC 1; [1999] 3 WLR 249, PC
United Mexican States v Metalclad Corpn (2001) 119 Int LR 646

APPEAL from the Court of Appeal (Criminal Division)

This was an appeal, by leave of the House of Lords (Lord Bingham of Cornhill, Lord Scott of Foscote and Lord Rodger of Earlsferry), by the defendants, Isidore Jack Lyons, Anthony Keith Parnes, Gerald Maurice Ronson and Ernest Walter Saunders, from the order of the Court of Appeal (Criminal Division) (Rose LJ, Tomlinson J and Sir Humphrey Potts), on a reference by the Criminal Cases Review Commission under section 9 of the Criminal Appeal Act 1995 , dismissing appeals against the defendants' convictions in the Central Criminal Court, sitting at Southwark, on 27 and 28 August 1990, (1) in the case of Lyons, one count of conspiracy to contravene section 151(2)(3) of the Companies Act 1985 , one count of false accounting contrary to section 17(1)(a) of the Theft Act 1968 , two counts of false accounting contrary to section 17(1)(b) of the 1968 Act and one count of theft; (2) in the case of Parnes, one count of false accounting contrary to section 17(1)(a), two counts of false accounting contrary to section 17(1)(b) of the 1968 Act and three counts of theft; (3) in the case of Ronson, one ***979** count of conspiracy to contravene section 13(1)(a)(i) of the Prevention of Fraud (Investments) Act 1958 , two counts of false accounting contrary to section 17(1)(a) and one count of theft; and (4) in the case of Saunders, one count of conspiracy to contravene section 13(1)(a)(i) of the 1958 Act, eight counts of false accounting contrary to section 17(1)(b) and two counts of theft.

The Court of Appeal (Criminal Division), having dismissed the appeals against conviction, certified that a point of law of general public importance was involved in their decision, namely:

> "Where the Court of Appeal (Criminal Division) is called upon to determine the safety of a criminal conviction following a finding by the European Court of Human Rights that the use made at trial before 2 October 2000 of evidence obtained under powers of statutory compulsion in section 434 of the Companies Act 1985 rendered the appellant's trial unfair and in breach of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ; (a) is the Crown entitled to rely after 2 October 2000 upon the evidence the use of which was held to have rendered the trial unfair in order to support the safety of the conviction; and (b) is the court entitled to hold the conviction safe in reliance on such evidence; notwithstanding the United Kingdom's obligation under article 46 of the European Convention to abide by the judgment of the European Court, and the principle of judicial

comity governing the recognition and enforcement of a judgment of an international tribunal which is final and binding as between the parties to the appeal?"

The facts are stated in the opinion of Lord Bingham of Cornhill.

Ben Emmerson QC, Murray Hunt, James Crawford, Julian Knowles and *Alexander Cameron* for the defendants. Where a case has been referred back to the Court of Appeal to determine the safety of a conviction in the light of a finding by the European Court of Human Rights of a serious violation of the right to a fair trial because of the use made of certain evidence, the Crown is not entitled to rely on that evidence in support of the conviction and the Court of Appeal itself is not entitled to uphold the conviction in reliance on that evidence. It was established before the European Court that the use of answers obtained under compulsion pursuant to section 434(5) of the Companies Act 1985 was a violation of the defendants' rights under article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms: see *Saunders v United Kingdom(1996) 23 EHRR 313* and *IJL, GMR and AKP v United Kingdom (2000) 9 BHRC 222* .

The United Kingdom has an obligation, under both the general rules of international law and the specific rules of the Convention, to provide reparation for that violation by restoring the state of affairs to that which existed before the unlawful act was committed: see article 35 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, annexed to UN General Assembly Resolution 56/83 adopted on 12 December 2001; articles 41 and 46 of the Convention; *Papamichalopoulous v Greece (1995) 21 EHRR 439* ; *Scozzari and Giunta v Italy (2000) 35 EHRR 243* ; *Piersack v Belgium (1984) 7 EHRR 251* ; *De Cubber v Belgium (1987) 13 EHRR 422* ; *Barberà, Messegué and Jabardo v Spain13 June 1994, Publications of the European Court of Human Rights, Series A no 285-C* and *Bönisch v Austria (1985) 9 EHRR 191* . All victims of violations of the Convention should be entitled, as far as possible, to an effective restitutio in integrum: see the Committee of Ministers "Recommendation No R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights", 19 January 2000. The United Kingdom has an appropriate procedure for the re-examination of cases following a violation in the shape of the procedure under the Criminal Appeal Act 1995 and the Criminal Cases Review Commission. On that re-examination the national court must, in order to maintain the effectiveness of the Convention system for protecting fundamental rights, respect the res judicata of Strasbourg judgments.

The obligations which arise as a result of the United Kingdom being found to have committed an international wrongful act bite directly on its courts because they are part of the state for the purposes of the United Kingdom's compliance with its obligations, both to individuals and to the international community. The Court of Appeal must therefore have regard to the relevant principles of international law and to specific treaty obligations when interpreting statutes and, in particular, when exercising a judicial discretion The traditional dualist approach to the domestic legal status of international law as set out in *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418* is no longer applicable to international human rights norms.

Even were it permissible to invoke the sovereignty of Parliament as a reason for not performing the obligations entailed by article 46, the courts cannot rely on a repealed statutory provision as a justification for not complying with the state's obligation to make reparation to which there is no subsisting parliamentary bar. Parliament, far from affirming the principle contained in the relevant statutory provision, responded to the decision of the Strabourg court by expressly repealing that provision. [Reference was made to *R v Faryab (unreported) 22 February 1999* .] The sovereignty of Parliament cannot be invoked to justify deferring to a replealed law when the current will of Parliament is known. In any event, a statutory provision that is permissive rather than mandatory cannot be said to override all other sources of obligation.

The Court of Appeal erred in adopting the reasoning in *R v Staines [1997] 2 Cr App R 426* that if the power to exclude evidence of the compelled answers on the grounds of unfairness under section 78 of the Police and Criminal Evidence Act 1984 were to be exercised in one case, it had to be exercised in all other cases and so would amount to a repeal of a statutory provision. Whether or not there is unfairness depends on a fact-specific analysis of the particular case. [Reference was made to *Staines v United Kingdom* Reports of Judgments and Decisions 2000-V, p 505.]

It is also a breach of the principle of judicial comity for the Crown to seek to uphold the convictions by reliance on evidence which the Court of Human Rights has already said was used at trial in breach of article 6(1) : see *Dallal v Bank Mellat [1986] QB 441* . The reasoning in the *Bank Mellat* case was not limited to litigation between two individuals.

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Crawford , following, referred to *De Wilde, Ooms and Versyp v Belgium (No 2) (1972) 1 EHRR 438* ; *Democratic Republic of Congo v Belgium (Case concerning arrest warrant of 11 April 2000) (unreported) 14 February 2002* ; *Germany v United States of America (LaGrand case) (unreported) 27 June 2001* ; *Eckle v Germany (1983) 13 EHRR 556* ; *Hauschildt v Denmark (1989) 12 EHRR 266* ; *Saidi v France (1993) 17 EHRR 251* ; *United Mexican States v Metalclad Corpn (2001) 119 Int LR 646* and *R v Thomas [2003] 1 Cr App R 168* .

Lord Goldsmith QC, A-G, James Eadie and *Daniel Bethlehem* for the Crown. The convictions of the defendants were lawful as a matter of domestic law at the date that they were entered, notwithstanding the article 6 violation. That was because Parliament had expressly permitted the use of such answers in section 434(5) of the 1985 Act . The will of Parliament can be as clearly expressed in a permissive provision as in a mandatory provision. The convictions remained lawful under domestic law up to the bringing into force of the Human Rights Act 1998: see *R v Staines [1997] 2 Cr App R 426* .

The 1998 Act does not provide a route by which the convictions may be challenged as it is not retrospective: see *R v Lambert [2002] 2 AC 545* and *R v Kansal (No 2) [2002] 2 AC 69* . Even if it is retrospective, section 6(2) of the 1998 Act preserves the principle of parliamentary sovereignty: see *R v Kansal (No 2) [2002] 2 AC 69, 112-114* , paras 83-88. It is not the expressed will of Parliament that a conviction in 1990 should be judged by a set of rules not then in place. Parliament enacted that from a specified date section 434(5) answers could not be put in evidence: it left convictions before that date unchanged.

The existence of a judgment of the European Court of Human Rights declaring the fact of a breach of article 6 does not create a special situation permitting a challenge to the safety of a pre-2 October 2000 conviction in circumstances in which the breach itself would not open up such a challenge. Before that date Convention rights, subject to limited exceptions, existed only on the international, not the national, plane. *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418* remains good law. [Reference was also made to *Higgs v Minister of National Security [2000] 2 AC 228, 241* .] They were derived from an unincorporated treaty. They became directly enforceable domestically only through, and subject to the limits imposed by, the 1998 Act. Article 46 of the Convention confers no domestically enforceable right on the defendants. There is no basis in principle why an individual who is unable to rely on the fact of a substantive article 6 violation because the 1998 Act does not permit retrospective reliance should, in the event of the violation being the subject of a declaration by the Strasborg court, be able to rely on the procedural obligation set out in article 46.

There has been no violation of article 46 in any event. The international obligation imposed on the state under article 46(1) is to abide by the final judgments of the Strasborg court. That court's powers in article 41 are limited to a declaration of the violation, a financial award and an award of costs. The court has no power to quash a conviction: see *Belilos v Switzerland (1988) 10 EHRR 466* ; *Hauschildt v Denmark 12 EHRR 266* ; *Schmautzer v Austria (1995) 21 EHRR 511* and *Findlay v United Kingdom (1997) 24 EHRR 221* . The court cannot order the re-opening of proceedings: see *Pelladoah v The Netherlands (1994) 19 EHRR 81* . The Committee of Ministers, in supervising the execution of the final judgment, can have no greater powers than the court the execution of whose judgment it is supervising. The United Kingdom, having done all that the Strasbourg judgments required it to do, namely, to pay the sum ordered to be paid, has therefore complied with article 46. The United Kingdom, however, has gone further and amended the law to ensure that future violations do not occur.

Dallal v Bank Mellat [1986] QB 441 was concerned only with private international law. The constitutional issues relating to the Convention and its application in a field which Parliament has already entered were not addressed in that case.

The principle of legality cannot assist the defendants. It does not entitle the court to adopt an interpretation of a statutory provision solely in order to achieve compatibility with Convention rights.

Emmerson QC , in reply, referred to *Thomas v Baptiste [2000] 2 AC 1, 23* .

Their Lordships took time for consideration.

14 November. LORD BINGHAM OF CORNHILL

1. My Lords, the four appellants appeal against the refusal of the Court of Appeal (Criminal Division) in 2001 to quash convictions recorded against them in 1990: *[2002] 2 Cr App R 210* . They contend that their convictions should be quashed because the prosecution case against them at trial depended in significant part on answers given by them to inspectors armed with statutory power to compel answers. The admission of evidence of these answers at trial has since been held by the European Court of Human Rights, in the case of all the appellants, to infringe their right not to incriminate themselves and so to violate

their right to a fair trial guaranteed by article 6 of the European Convention on Human Rights ("the Convention"). The essential question before the House is whether, in view of these rulings by the European Court, the appellants' convictions should now be quashed.

The factual background

2. In 1986 Guinness plc made an offer to buy the shares of the Distillers Co plc. The offer included an exchange of Guinness shares for Distillers shares. The higher the value of the Guinness shares, the more valuable the offer and thus the more attractive to Distillers shareholders. It was suspected that the four appellants, in different capacities and in different ways, had acted to inflate the price of Guinness shares in the market in order to promote acceptance of its offer. Inspectors were appointed to investigate the affairs of Guinness under Part XIV of the Companies Act 1985. By virtue of section 434 of that Act it became the duty of the appellants as officers or agents of Guinness to attend before the inspectors when required to do so and to give the inspectors all the assistance they were reasonably able to give. Failure to comply was punishable as contempt of court (section 436). Section 434(5) of the Act provided: "An answer given by a person to a question put to him in exercise of powers conferred by this section ... may be used in evidence against him." As Lord Hoffmann points out (see paragraphs 22 and 33 below), provisions and rules having this effect have a ***983*** long ancestry. The appellants answered questions put to them by the inspectors.

3. An indictment containing some 24 counts was preferred charging the appellants variously with offences of conspiracy, false accounting, theft and other offences. At the appellants' trial, which lasted for some six months during 1990, the prosecution relied in support of its case against the appellants on transcripts of the evidence they had given to the inspectors. On 27 and 28 August 1990 the jury convicted each of the appellants on four or more of the counts in the indictment.

4. Before the trial there had been two hearings to rule on the admissibility of evidence. At the first, held in November 1989, Mr Parnes sought to exclude the transcripts relating to him on the grounds provided in sections 76 and 78 of the Police and Criminal Evidence Act 1984. Henry J ruled that the transcripts were admissible, for reasons summarised by the European Court in *Saunders v United Kingdom (1996) 23 EHRR 313, 319* , in paragraph 28 of its judgment. At the second hearing, in January 1990, Mr Saunders sought to exclude evidence of answers given by him at the last two of his nine interviews with the inspectors. In reliance on sections 76 and 78 of the 1984 Act, he contended that this evidence should be excluded because of his state of health at the time of those interviews and because they took place after he had been charged. The judge ruled, in the exercise of his discretion under section 78, that the evidence of these last two interviews should be excluded on the second (but not the first) of the grounds relied on. Mr Lyons and Mr Ronson did not apply to exclude evidence of their answers. At the trial, Mr Saunders, alone of the appellants, gave evidence. Mr Ronson relied on what he had said and written to the inspectors.

5. All four appellants appealed against conviction, although Mr Lyons abandoned his appeal on grounds of ill-health in December 1990. The Court of Appeal gave judgment on 16 May 1991 and dismissed the appeals, save that Mr Saunders' conviction on one count was quashed and (on appeals against sentence) certain sentences and costs orders imposed and made by the judge were reduced. At pp 27-28 of the transcript of its judgment of 16 May the Court of Appeal said:

> "At the end of counsel's submissions it was made clear to the court that counsel for Mr Parnes and for Mr Saunders might wish to address further arguments to the court as to the admissibility of statements made by these appellants in the course of their interviews with the DTI inspectors. It is now accepted, however, that the question of admissibility has been determined, as far as this court is concerned, by the decision given on 9 May 1991 by another division of this court presided over by Watkins LJ in *R v Seelig [1992] 1 WLR 148* ."

Mr Seelig was a defendant charged with offences, also arising out of the Guinness takeover of Distillers, whose trial had been scheduled to follow that of the appellants. In the reported case, evidence of answers compulsorily given to inspectors was held to be properly admissible: see *[1992] 1 WLR 148, 154-155* .

6. Mr Saunders made application to the Commission complaining that the use at his trial of statements made by him to the inspectors acting under their compulsory powers had deprived him of a fair hearing in violation of *984 article 6(1) of the Convention . On 10 May 1994 the Commission found, by a large majority, that there had been such a violation.

7. The appellants' case was referred back to the Court of Appeal by the Home Secretary under section 17(1)(a) of the Criminal Appeal Act 1968 and a further hearing took place over eight days in 1995. The judgment of the court, delivered on 27 November 1995, is reported at *[1996] 1 Cr App R 463* . The "first broad ground of appeal" (p 473) related to the questioning of the appellants by the inspectors, the lack of protection against self-incrimination and the use of the transcripts at the trial. It was accepted for the appellants that in Part XIV of the 1985 Act Parliament had overridden privilege against self-incrimination, and that answers so obtained might be admitted as evidence in criminal proceedings, but it was submitted that the judge should have exercised his discretion to exclude the evidence under section 78 of the 1984 Act because "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it": p 475. The Court of Appeal first considered arguments based on the 1985 Act and then turned to the Convention, of which Lord Taylor of Gosforth CJ, delivering the judgment of the court, said, at pp 477-478:

> "Mr Caplan submits that in applying section 78, the trial judge should also have had regard to article 6 of the European Convention on Human Rights and having done so should have excluded the interviews. Article 6 does not specifically refer to the principle against self-incrimination, but relying on *Funke v France (1993) 16 EHRR 297* Mr Caplan submitted that the article carries the implication that a person should not be required to incriminate himself. However that may be, English courts can have recourse to the European Convention on Human Rights and decisions thereon by the European Court of Justice only when the law of England is ambiguous or unclear. Saunders has taken his case to Europe on this issue and the European Commission on Human Rights has referred it to the European Court in Strasbourg. Should Saunders succeed there, our Treaty obligations will require consideration to be given to the effect of the decision here. But our duty at present is to apply our domestic law which is unambiguous. Parliament has made its intentions quite clear in section 434(5) . It cannot be right for a judge to exercise his discretion to exclude evidence of interviews simply on the ground that Parliament ought not to have countenanced the possibility of self-incrimination. Nor could he properly do so for the general purpose of bringing section 434(5) into line with section 2(8) of the 1987 Act, a step which Parliament has advisedly declined to take. In the course of argument, we invited counsel for the appellants to say whether they contended that on either of these grounds judges should, as a general rule, exclude under section 78 interviews by DTI inspectors. Although their arguments logically pointed to that conclusion, all counsel shied away from it when the question was posed. In our view, the admission in evidence of answers which Parliament has said may be admitted cannot be regarded as unfair per se under section 78 simply because of inherent features of the statutory regime under which they were obtained. However, in considering whether the particular application of the statutory regime in a given case created any unfairness, a judge can, in our *985 view, as part of the background setting, have in mind that under that regime there is an obligation to answer the inspectors' questions on pain of sanctions. In that sense we respectfully agree with Lord Browne-Wilkinson that the judge can take those features of the regime into account. We consider later whether there was any unfairness deriving from the circumstances of the interviews in the present case."

Mr Lyons's conviction on one count was quashed, but otherwise the appeals were dismissed. Shortly after this decision Mr Lyons, Mr Ronson and Mr Parnes made complaints to the Commission to the same effect as that already made, successfully, by Mr Saunders.

8. The judgment of the European Court upholding Mr Saunders's complaint by a majority was delivered on 17 December 1996: *Saunders v United Kingdom (1996) 23 EHRR 313* . In response to this decision the Attorney General issued guidance to prosecutors, referring to section 434(5) of the 1985 Act and other statutory provisions to similar effect and indicating that, save in certain situations not relevant for present purposes, prosecutors should not normally use in evidence as part of the prosecution case or in cross-examination answers obtained under compulsory powers. Statutory effect was given to this guidance by section 59 of and Schedule 3 to the Youth Justice and Criminal Evidence Act 1999 .

9. On 19 September 2000 the European Court unanimously upheld the complaints of Mr Lyons, Mr Ronson and Mr Parnes (applications nos 29522/95, 30056/96 and 30574/96) on essentially the same grounds as in Mr Saunders's case. This decision prompted Mr Lyons, Mr Parnes and Mr Ronson to make application to the Criminal Cases Review Commission ("CCRC") which on 20 December 2000 referred Mr Lyons's case to the Court of Appeal. This decision in turn prompted Mr Saunders to make application to the CCRC, which on 28 February 2001 referred to the Court of Appeal the cases of Mr Parnes, Mr Ronson and Mr Saunders also. All four cases were then, by virtue of section 9(2) of the Criminal Appeal Act 1995 , to be treated as appeals under section 1 of the Criminal Appeal Act 1968.

10. On 21 December 2001, the Court of Appeal again dismissed the appellants' appeals in the judgment now under appeal: *[2002] 2 Cr App R 210* . In the judgment of the court delivered by Rose LJ, the crux of the court's reasoning is to be found in paragraphs 53-57. The court's conclusions, crudely summarised, were these: (1) the obligation of the United Kingdom under article 46 of the Convention to abide by judgments of the European Court does not confer any right on these appellants; (2) it is doubtful whether article 46 requires the reopening of convictions, the court having made a declaration of violation, made an award of costs and declined to make an award of damages; (3) since the case against each of the appellants was supported by evidence other than the compelled answers, restitutio in integrum could be achieved only by quashing the appellants' convictions and ordering a retrial, but given the lapse of time since the convictions the case is not one in which the court would in any event exercise its discretion to order a retrial; (4) even if failure to reopen the appellants' convictions might give rise to a violation of article 46 by the United Kingdom, the domestic statutory law of the United Kingdom precludes reliance on such violation in the circumstances since "the will of ***986*** Parliament as expressed in section 434 trumps any international obligation"; (5) the appellants' compelled answers could not have been excluded by the trial judge in exercise of his discretion under section 78 on grounds of unfairness arising from use of the compelled answers alone, since Parliament had expressly permitted such use; (6) the decision of Hobhouse J in *Dallal v Bank Mellat [1986] QB 441* gives the appellants no assistance, since that case did not concern a conflict between the decision of an international tribunal and a domestic statutory provision. While the Court of Appeal indicated, as noted in (3), that there was evidence to support the prosecution case against each of the appellants independently of the compelled answers, it also held (in para 47 of the judgment, a conclusion on which the appellants rely strongly) that the court would not hold the convictions to be safe if the compelled answers were to be treated as excluded.

11. The Court of Appeal refused leave to appeal to the House but certified the following question as one of general public importance:

> "Where the Court of Appeal (Criminal Division) is called upon to determine the safety of a criminal conviction following a finding by the European Court of Human Rights that the use made at trial before 2 October 2000 of evidence obtained under powers of statutory compulsion in section 434 of the Companies Act 1985 rendered the appellant's trial unfair and in breach of article 6 of the European Convention for the Protection of Human Rights and Fundamental Fredoms ; (a) is the Crown entitled to rely after 2 October 2000 upon the evidence, the use of which was held to have rendered the trial unfair, in order to support the safety of the conviction; and (b) is the court entitled to hold the conviction safe in reliance on such evidence; notwithstanding the United Kingdom's obligation under article 46 of the European Convention to abide by the judgment of the European Court, and the principle of judicial comity governing the recognition and enforcement of a judgment of an international tribunal which is final and binding as between the parties to the appeal?"

The argument for the appellants

12. In his skilful and powerful argument for the appellants Mr Emmerson roundly accepted, as in the light of *R v Lambert [2002] 2 AC 545* and *R v Kansal (No 2) [2002] 2 AC 69* he was bound to accept, that a defendant convicted before 2 October 2000 (when the main provisions of the Human Rights Act 1998 came into force) cannot rely on breaches of "the Convention rights" referred to in section 1(1) of that Act in an appeal heard after that date. He also made plain that his argument did not at all rely on the incorporation of the Convention into the domestic law of the United Kingdom by the 1998 Act. Had the Convention never been incorporated his argument would have been the same, since it depended on the duty of the United Kingdom, binding

in international law, to comply with treaties (such as the Convention) which it had made and on the general duty of the courts, as a public organ of the state, to act so far as possible in a manner consistent with the international obligations of the United Kingdom. The main steps of the argument, in brief and inadequate summary, were these: (1) by ratifying the Convention the United Kingdom *987 undertook to give effective protection (subject to the terms of the Convention) to certain specified rights, among them the right to a fair trial expressed in article 6; (2) the obligations set out in the Convention are binding in international law on member states including the United Kingdom; (3) among the obligations binding on the United Kingdom are those expressed in articles 41 and 46, which provide:

> " *Article 41—Just satisfaction*
>
> "If the court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the court shall, if necessary, afford just satisfaction to the injured party."
>
> " *Article 46—Binding force and execution of judgments*
>
> (1) The High Contracting Parties undertake to abide by the final judgment of the court in any case to which they are parties.
>
> (2) The final judgment of the court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

(4) where a violation has occurred it is the duty of the member state concerned to make reparation to the fullest extent possible under national law; (5) where a conviction results (or may result) from breach of the Convention right to a fair trial, and the conviction cannot be upheld irrespective of that breach, full reparation can be afforded only if the conviction is quashed; (6) national courts should, so far as they are free to do so, seek to act in a manner consistent with the obligations of the state binding in international law; (7) while deference to the sovereignty of Parliament may preclude a United Kingdom court from giving effect to an obligation binding on the state in international law, it does not do so in present circumstances because (a) section 434(5) was expressed in permissive, not mandatory, terms, and (b) that section has now been substantially qualified so as to prevent prosecutors adducing evidence of compelled answers save in certain exceptional situations which did not obtain here; (8) Considerations of judicial comity should lead the English court to give full effect to the judgment of the European Court. Mr Emmerson also suggested that, since the United Kingdom is party to the Convention, the conduct of the Crown in seeking to uphold the convictions is an abuse of the process of the court.

The issues

13. I am attracted by the broad thrust of Mr Emmerson's submissions numbered (1) to (6). It is true, as the Attorney General insisted, that rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts. But although international and national law differ in their content and their fields of application they should be seen as complementary and not as alien or antagonistic systems. Even before the Human Rights Act 1998 the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law. I would further accept, as Mr Emmerson strongly contended, with reference to a number of sources, that the efficacy *988 of the Convention depends on the loyal observance by member states of the obligations they have undertaken and on the readiness of all exercising authority (whether legislative, executive or judicial) within member states to seek to act consistently with the convention so far as they are free to do so.

14. Mr Emmerson however accepted, as submission (7) in my summary makes clear, that a Convention duty, even if found to exist, cannot override an express and applicable provision of domestic statutory law. Whether the Court of Appeal was (and the House is) subject to such a constraint is in my view the central issue in this case.

15. The jurisdiction of the Court of Appeal in criminal matters is wholly statutory. Section 2(1) of the Criminal Appeal Act 1968 (as substituted by section 2(1) of the Criminal Appeal Act 1995) provides: "Subject to the provisions of this Act, the Court of Appeal—(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case." Thus the Court of Appeal must decide whether it thinks a conviction unsafe: if so, it is subject to a mandatory duty to allow the appeal; if not, it is subject to a mandatory duty to dismiss it. The decision on safety must be taken with reference to the conviction (or convictions) actually recorded against the appellant. That directs attention to the trial leading to the conviction, the evidence adduced, the judge's rulings and directions, any irregularity which may have occurred, and so on. But a court called upon to decide whether a conviction is safe will make its decision at the time of the hearing before it and in the light of any fresh evidence or new argument which is then received or addressed. The old procedure under section 17(1)(a) of the 1968 Act required, and the current procedure under section 9 of the 1995 Act continues to require, that the Court of Appeal should exercise its own judgment on the question of safety, unfettered by the failure of a previous appeal or appeals, which there will almost always have been.

16. When judging the safety of old convictions the Court of Appeal has applied contemporary standards of fairness but has accepted that the case was governed by the law applicable at the date of trial. Thus, for example, in *R v Bentley, decd [2001] 1 Cr App R 307* the court found the summing up to have been unfair but had to apply the doctrine of constructive malice because that was not abolished until the enactment of section 1(1) of the Homicide Act 1957 . In the present case, if the question of fairness were at large and the trial judge had been unconstrained by any statutory or common law rule, it would have been open to the Court of Appeal to pay heed and give appropriate weight to the European Court's judgment that the conduct of the appellants' trial was rendered unfair by the admission of the compelled evidence even if the Court of Appeal had previously held the admission of such evidence to be fair. But, as Mr Emmerson fairly recognised, the situation may be different if the trial judge was obliged by law to act as he did.

17. It is plain from the terms of section 434(5) , quoted in paragraph 2 above, that a prosecutor was not required to put in evidence the answers given by defendants to inspectors exercising compulsory powers. If the answers did not advance the case of the prosecution or the defence, the prosecutor did not have to adduce that evidence, which might distract and could not assist the jury. But while the prosecutor had discretion not to adduce the evidence, he also had a statutory discretion to use it against the ***989** defendant if he chose. His discretion to adduce that evidence was subject to the judge's overriding discretion to exclude it under section 78 of the 1984 Act . If it appeared to the court that, having regard to all the circumstances, including the circumstances in which the evidence had been obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it, the evidence could be excluded. Thus Henry J, for sound reasons, excluded evidence of Mr Saunders's last two interviews. There was however no taint of oppression or unfairness affecting the remainder of the compelled evidence other than the fact that it had been compelled and that it was to be used in evidence against the appellants. But these procedures had been expressly sanctioned by Parliament. Had the judge excluded the evidence on these grounds alone he would have acted unlawfully because inconsistently with the enacted will of Parliament. The judge's duty was (and is) not only to "do right to all manner of people" but also, importantly, to do so "after the laws and usages of this realm". I consider that the law was accurately stated by the Court of Appeal in *R v Staines [1997] 2 Cr App R 426, 440-444* , where the facts were different from those here but the issue (as understood by the court) was very much the same. The Court of Appeal's unreported decision in *R v Faryab (unreported) 22 February 1999* , where reliance had been placed on compelled evidence after the date of the Attorney General's direction that such evidence should not be adduced, is explicable on its facts but lays down no principle.

18. Mr Emmerson sought to overcome the obvious problem posed by section 434(5) by pointing out that the will of Parliament has changed, as evidenced by the 1999 qualification of the section. This argument cannot avail the appellants for two reasons. First, as already pointed out, the Court of Appeal is bound, whenever an appeal takes place, to accept the substantive law as it stood at the time of the trial. It cannot proceed on the assumption that the substantive law binding on the trial court was otherwise than as it was. Secondly, although section 434(5) was very significantly qualified in 1999, in response to the judgment of the European Court, such qualification was not given retrospective effect. Nothing in the language of the 1999 enactment suggests such an intention. Nor, as the House has twice held, did Parliament intend criminal appellate courts hearing appeals after 2 October 2000 to take notice of breaches of Convention rights occurring before that date: *R v Lambert [2002] 2 AC 545* ; *R v Kansal (No 2) [2002] 2 AC 69* . Thus section 434(5) as it stood at the date of the appellants' trial must be regarded as the applicable expression of Parliament's intention, subject to no derogation or qualification.

19. This conclusion is fatal to the success of the appeals, as the Court of Appeal rightly held. In the circumstances, I think it neither necessary nor desirable, despite the wealth of interesting material to which we were referred, to consider what full reparation or just satisfaction might require in a case such as the present in which (if the compelled evidence were excluded)

the existing convictions could not be upheld as safe, in which there is material (irrespective of the compelled evidence) to support a case against the appellants, but in which the Court of Appeal has indicated (no doubt rightly, in view of the lapse of time, the serving or partial serving of prison sentences and the age and health of some of the appellants) that the interests of justice would not appear to require a retrial even if the appeals were ***990*** allowed (see section 7(1) of the Criminal Appeal Act 1968). These are no doubt questions which the European Court or the Committee of Ministers, or both, may be called upon to address and I forbear to comment. I would however comment briefly on two of Mr Emmerson's submissions. First, I do not think that *Dallal v Bank Mellat [1986] QB 441* assists the appellants, since in that case Hobhouse J was free to apply familiar common law principles unconstrained by any statutory enactment. Secondly, I find nothing abusive in the prosecution's resistance to these appeals. It is true that the ratification of the Convention by the United Kingdom was an act of the executive. But the important aim underlying the establishment of the Crown Prosecution Service by the Prosecution of Offences Act 1985 was to emphasise its role as a public service independent of the executive, and although the Director of Public Prosecutions discharges his functions under the superintendence of the Attorney General (see section 3) both are required in this context to act as independent ministers of justice. The Court of Appeal may not allow an appeal against conviction unless it thinks the conviction to be unsafe, and in deciding whether it is safe or unsafe the court is entitled to the professional assistance of an independent prosecuting authority.

20. The references in the certified question to reliance by the Crown and the court on the compelled evidence do not seem to me entirely apt, but the thrust of the question is clear and I would answer it in the affirmative. I would accordingly dismiss the appeals.

LORD HOFFMANN

21. My Lords, the question in this appeal is whether the appellants had a fair trial. Strictly speaking, it is whether their convictions are unsafe. That is the word used by section 2(1)(a) of the Criminal Appeal Act 1968 (as substituted by section 2(1) of the Criminal Appeal Act 1995) to state the only ground upon which the Court of Appeal is permitted and required to allow an appeal against a conviction on indictment. But unsafe does not mean only that the accused might not have committed the offence. It can also mean that whether he did so or not, he was not convicted according to law. As Rose LJ said in *R v Mullen [2000] QB 520, 540* : "for a conviction to be safe, it must be lawful." And what the law requires, among other things, is that the accused should have had a fair trial.

22. The appellants say that their trial was not fair because the prosecution was allowed to lead evidence of statements which they had made in answer to questions put by inspectors appointed by the Secretary of State under section 432 of the Companies Act 1985 to investigate the affairs of Guinness plc. They had been obliged by law to answer those questions. Section 436 provides that if a person refuses to answer, a court may punish him as if he had been guilty of contempt. There is no express exception for answers which tend to incriminate and in *In re London United Investments plc [1992] Ch 578* , the Court of Appeal decided, by analogy with decisions on powers of investigation in personal and corporate insolvency proceedings which went back more than a century, that no such exception was to be implied. The appellants do not challenge this decision. They accept it as showing that they had no alternative but to answer. So the appellants say that it was a denial of a fair trial for their answers to be given in evidence. It ***991*** infringed the principle that they should not be required to incriminate themselves.

23. The difficulty for the appellants is that section 434(5) says in express terms that a person's answer to the inspectors "may be used in evidence against him". At the trial, they tried to get round this problem by asking the judge to exclude their statements under section 78 of the Police and Criminal Evidence Act 1984 . This gives the judge a discretion to exclude admissible evidence. He may do so if it appears to him having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that he ought not to admit it. But the judge (Henry J) said that if Parliament had said in express terms that the statements were to be admissible notwithstanding that they had been obtained by statutory compulsion, it would not be a lawful exercise of the discretion for him to exclude them solely on the ground that they had been obtained by statutory compulsion. The Court of Appeal agreed *[1996] 1 Cr App R 463, 473-478* both when the case was first referred to them in 1995 and in the reference giving rise to this appeal. This reasoning has not been challenged in your Lordships' House.

24. What is said to make a difference is that the European Court of Human Rights ("ECHR") has ruled on two occasions, once in relation to the appellant Saunders (*Saunders v United Kingdom (1996) 23 EHRR 313*) and then again in relation to the other three appellants (*IJL, GMR and AKP v United Kingdom 19 September 2000, Publications of the European Court of Human Rights, Series A no 285-C*) that the admission of the statements infringed the right to a "fair and public hearing" in accordance

with article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). After the first of these decisions, the Attorney General issued guidelines telling prosecutors to stop tendering such statements in evidence. Afterwards, Parliament amended section 434 of the 1985 Act . By paragraph 5 of Schedule 3 to the Youth Justice and Criminal Evidence Act 1999, it inserted two new subsections, (5A) and (5B), which provide that the answers are not to be admissible in any criminal proceedings other than for making false statements on oath. It is clear from the language of these amendments, however, that they are not retrospective. They apply only to trials taking place after they came into force on 14 April 2000.

25. The Human Rights Act 1998 also came into force in 2000. At one stage it was thought that it might also have some retrospective effect upon the question of whether the appellants had a fair trial. But in two recent decisions the House has held that it was not retrospective: *R v Lambert [2002] 2 AC 545* and *R v Kansal (No 2) [2002] 2 AC 69* . I shall have something to say in due course about the 1998 Act but Mr Emmerson, who appeared for the appellants, did not rely upon it. He said that his arguments about the effect of the two judgments of the ECHR would be exactly the same even if the 1998 Act had never been passed.

26. What, then, is the effect of the ECHR rulings upon the question of whether the appellants' convictions are safe? The Convention is an international treaty made between member states of the Council of Europe, by which the High Contracting Parties undertake to "secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this ***992** Convention". Article 19 sets up the ECHR "to ensure the observance of the engagements undertaken by the High Contracting Parties". It has jurisdiction under article 32 to decide "all matters concerning the interpretation and application of the Convention". And by article 46 the high contracting parties undertake "to abide by the final judgment of the court in any case to which they are parties."

27. In other words, the Convention is an international treaty and the ECHR is an international court with jurisdiction under international law to interpret and apply it. But the question of whether the appellants' convictions were unsafe is a matter of English law. And it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418* (the *International Tin Council* case). Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so. Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation. As Lord Goff of Chieveley said in *Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 283* : "I conceive it to be my duty, when I am free to do so, to intepret the law in accordance with the obligations of the Crown under [the Convention]."

28. But for present purposes the important words are "when I am free to do so". The sovereign legislator in the United Kingdom is Parliament. If Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not.

29. At the time of the trial, therefore, section 434(5) of the 1985 Act required the court to admit the statements, whether or not this would be considered by the ECHR to be an infringement of article 6 . Does it make any difference that today, when the appeal is being decided, the ECHR has given its rulings and section 434(5) has been amended? Can one say that according to current notions, the appellants did not have a fair trial?

30. I do not think that one can. In *Brown v Stott [2003] 1 AC 681, 693* Lord Bingham of Cornhill said: "What a fair trial requires cannot ... be the subject of a single, unvarying rule or collection of rules. It is proper to take account of the facts and circumstances of particular cases." I respectfully agree. But that does not mean that the court is at large, assessing the fairness of the trial in each case by reference to some overarching abstract notion of fairness. A fair trial requires compliance with a collection of rules and principles. Some of the rules are highly specific; for example, the rule that at least ten jurors must agree with the verdict. Some are expressed at a more abstract level; for example, the rule that a judge should exclude evidence which would prejudice the fairness of the trial or the rule that the accused is entitled to a fair summing up. The application of these principles is very case-specific. But whether the criteria of fairness involve compliance with ***993** rules or principles, they are all legal rules and principles, derived from English statute and common law.

31. In deciding, therefore, whether the accused had a fair trial in 1990, the question is whether the trial complied with those rules and principles of English law which constitute the criteria of fairness. And in English law (as, I would imagine, in every other

system of law) there is no absolute "right to silence" or privilege against self-incrimination. Instead there is what Lord Mustill in *R v Director of Serious Fraud Office, Ex p Smith [1993] AC 1, 30* described as "a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute".

32. In the present case, the common law privilege had been expressly encroached upon by section 434(5) . For the same reasons as Lord Taylor of Gosforth CJ, on the first referral, said that the statements could not be excluded under section 78 of the 1984 Act on the ground that their admission would adversely affect the fairness of the trial, so it cannot be said on appeal that a trial in which those statements were admitted was unfair.

33. If the encroachment had been by a judge-made rule of common law or a judicial implication in a statute which did not expressly address the question, it would in theory have been open to the court to say that the previous common law rule or judicial interpretation had been wrong and that the law should rather be understood in a sense which conformed to the judgment of the ECHR. For example, in the present case, even if there had been no section 434(5), the chances are that before the *Saunders* case the courts would have construed the statute as impliedly making the answers admissible. That was the view of the Court for Crown Cases Reserved in relation to the investigatory powers conferred by the Bankrupt Law Consolidation Act 1849 (12 & 13 Vict c 106) (see *R v Scott (1856) Dears & B 47*) and this decision has been followed in many cases concerned with individual or corporate insolvency: see, for example, *R v Erdheim [1896] 2 QB 260* . If the question had remained a matter of judicial decision, it would have been open to the court after the Saunders case to say that the decision in *Scott's* case was wrong and that the powerful dissenting judgment of Coleridge J should be preferred to Lord Campbell CJ's judgment on behalf of himself Alderson B, Willes J and Bramwell B. In that case, the appellants would have had the benefit of the declaratory theory of judicial decision-making by which the new interpretation would be treated as stating what the law had always been.

34. I do not say that the courts would necessarily have done so, particularly in the light of Parliament's 1999 decision to change the law without retrospective effect. Lord Bingham of Cornhill has referred to *R v Bentley, decd [2001] 1 Cr App R 307* , in which the appeal was heard nearly half a century after the trial. He says that while the Court of Appeal was able and indeed obliged to apply the current common law principles about the fairness of the summing up, it had to apply the doctrine of constructive malice because it was not abolished until the Homicide Act 1957. I am sure that is right, but it should be observed that constructive malice was a common law doctrine and it was theoretically open to the court (at least, at an appropriate level in the judicial hierarchy) to say that it was and always had been a mistake, just as the House of Lords in *R v R[1992] 1 AC 599* overturned, with retrospective effect, the ancient marital immunity ***994*** from conviction for rape. But where Parliament has prospectively amended the law, it would be an unusual case in which the courts re-examined the previous law in order to declare that it had always been different.

35. In this case, however, there is not even the theoretical possibility of the courts making a retrospective change in the law. There is no way in which section 434(5) can be reinterpreted to make it possible for the statements to have been excluded. The language does not allow it.

36. So far, I think that Mr Emmerson was inclined to accept the arguments for the Crown on the position in English domestic law. He also accepted that the Convention, as such, formed no part of English law. But he submitted that an English court should give effect to the judgments of the ECHR in relation to these particular appellants. The United Kingdom was bound by article 46 to abide by the judgment. Customary international law, which did form part of the English common law, required a state responsible for an internationally wrongful act to make restitution by restoring the status quo ante. (See Chapter II of Part Two of the draft articles on *Responsibility of States for internationally wrongful acts* , annexed to Resolution 56/83 adopted by the General Assembly on 12 December 2001.) Restitution would in this case require that the appellants' convictions be set aside and their criminal records expunged.

37. Mr Emmerson went on to say, more specifically, that it was the view of the Committee of Ministers of the Council of Europe, who were by article 46(2) of the Convention entrusted with supervising the execution of judgments of the ECHR, that compliance by a member state required that the injured party be restored to his previous position. He referred to Recommendation No R (2000) 2 of the Committee, adopted on 19 January 2000, which recited that:

> "the practice of the Committee of Ministers in supervising the execution of the court's judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving restitutio in integrum"

and went on to encourage the contracting parties to:

> "examine their legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the court has found a violation of the Convention, especially where: (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the court leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of."

38. How do these principles impact upon the decision of a court in an English criminal appeal? Mr Emmerson argued that the court was for two reasons obliged to provide the appellants with restitution. The first was that it was an organ of the state and therefore could not act contrary to the ***995** United Kingdom's obligation to give effect to the judgments. The second was that judicial comity required it to give effect to the decision of a competent tribunal in proceedings between the same parties, even if that tribunal derived its jurisdiction from an international treaty. Alternatively, Mr Emmerson said that the Crown, which was the organ of state entrusted with the treaty-making power and which had entered into the Convention on behalf of the United Kingdom, would be acting contrary to its obligations by supporting a conviction obtained at a trial which the ECHR had held to be unfair.

39. My Lords, I cannot but admire the resourcefulness with which Mr Emmerson has painstakingly built this elaborate forensic structure. But I think that its foundations rest upon sand. In the end it comes to nothing more than an attempt to give direct domestic effect to an international treaty, contrary to the principle in the *International Tin Council case [1990] 2 AC 418* . The obligation to make restitution may, as Mr Emmerson says, be a developing or even established feature of customary international law. But it is in the present case ancillary to a treaty obligation. It is infringement of the treaty obligation to secure Convention rights to everyone within the jurisdiction that is said to give rise to the obligation to make restitution. Mr Emmerson himself described it as a secondary obligation in the sense used by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, 848-849* . But if there is no enforceable primary obligation, how can its breach give rise to an enforceable secondary obligation?

40. The argument that the courts are an organ of state and therefore obliged to give effect to the state's international obligations is in my opinion a fallacy. If the proposition were true, it would completely undermine the principle that the courts apply domestic law and not international treaties. There would be no reason to confine it to secondary obligations arising from breaches of the treaty. The truth of the matter is that, in the present context, to describe the courts as an organ of the state is significant only in international law. International law does not normally take account of the internal distribution of powers within a state. It is the duty of the state to comply with international law, whatever may be the organs which have the power to do so. And likewise, a treaty may be infringed by the actions of the Crown, Parliament or the courts. From the point of view of international law, it ordinarily does not matter. In domestic law, however, the position is very different. The domestic constitution is based upon the separation of powers. In domestic law, the courts are obliged to give effect to the law as enacted by Parliament. This obligation is entirely unaffected by international law.

41. It should be observed, however, that despite the normal principle of international law which takes no account of the domestic distribution of powers, article 41 of the Convention , dealing with just satisfaction, contains what appears to be an exception. It says that "if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the court shall, if necessary, afford just satisfaction to the injured party". This suggests that if the internal law does not permit full restitution (e g by quashing a conviction) the court may have to accept this position and devise some other way of affording just satisfaction.

But I refrain from speculating upon how the ECHR or the Committee of Ministers may interpret these *996 provisions because they involve the interpretation and application of the Convention and this is not a matter within your Lordships' jurisdiction.

42. The argument that the Crown is in breach of obligation by supporting the conviction in my view fares no better. It is true that the decision to tender the statements in evidence was a matter for the prosecution. It did not have to do so and, as I have mentioned, the Attorney General issued guidelines to prosecutors after the first ECHR decision telling them to stop. It has been decided by the Court of Appeal that a conviction obtained after tendering evidence in breach of those guidelines was unsafe: see *R v Faryab (unreported) 22 February 1999* . I reserve my position on the correctness of that decision. But there can be no doubt that the prosecution acted entirely lawfully when it tendered the evidence in 1990. When it comes to the appeal, the view of the Crown about the safety of the conviction is helpful but not determinative. It is for the Court to be satisfied that the conviction is unsafe.

43. In any case, if treaties form no part of domestic law, I do not see why an infringement of the treaty by the Crown should have more domestic significance than its infringement by Parliament or the courts. The fact that the Crown has the treaty-making power seems to me for this purpose irrelevant.

44. The argument based on judicial comity derives from the decision of Hobhouse J in *Dallal v Bank Mellat [1986] QB 441* . In that case Mr Dallal had submitted the question of whether he was owed US$400,000 by the Bank Mellat to the decision of the Iran-United States Claims Tribunal, a body set up under an international treaty. The tribunal dismissed his claim on the merits. He then commenced proceedings in England for the same sum. Hobhouse J struck out his claim as an abuse of process under the principle in *Henderson v Henderson (1843) 3 Hare 100* . Comity required that the jurisdiction of the Tribunal be recognised notwithstanding that it was set up under an international treaty. But in that case the issue sought to be relitigated was the very issue which the parties had submitted to the Tribunal, namely whether, as a matter of private law, the bank owed money to Mr Dallal. In the present case, the issue submitted to the ECHR was whether, as a matter of international law, the appellants' trial was in breach of article 6. The issue now before the House is whether, as a matter of domestic law, their convictions were unsafe.

45. Finally I return to the Human Rights Act 1998. As I have mentioned, the Act was not relied upon because it has been held not to be retrospective. But even if it had been retrospective, I do not think that it would have made any difference. The obligation under section 3(1) to interpret legislation in a way compatible with Convention rights "so far as it is possible to do so" would not have been engaged because it is simply not possible to interpret section 434(5) so as to allow the statements to be excluded. Possibly a declaration might have been made (notwithstanding the present tense in which the power is expressed in section 4(2)), that section 434(5), as it then stood, was incompatible with Convention rights.

46. Whether such a declaration would have been made is hard to say. It might have been thought that as Parliament had already deliberately decided to amend the law without retrospective effect, there was little point in revisiting the question. If this difficulty had been resolved in the appellants' favour, the next question would have been whether the court considered that *997 it ought to follow the ECHR interpretation of article 6. Given that Parliament had accepted the ECHR interpretation when it passed the 1999 Act, it seems to me very likely that the courts would also have done so. If Parliament considered that the law should be changed to comply with an international obligation, it would be strange for the courts to say that it had been unnecessary. Parliament and the courts should speak with one voice on such issues. What the position would have been if Parliament had not intervened and given guidance to the courts is more speculative. It is obviously highly desirable that there should be no divergence between domestic and ECHR jurisprudence but section 2(1) says only that the courts must "take into account" the decisions of the ECHR. If, for example, an English court considers that the ECHR has misunderstood or been misinformed about some aspect of English law, it may wish to give a judgment which invites the ECHR to reconsider the question: compare *Z v United Kingdom (2001) 34 EHRR 97* . There is room for dialogue on such matters. In the present case, the difficulties caused by the reasoning of the ECHR have already been commented upon by my noble and learned friends Lord Steyn and Lord Hope of Craighead in *Brown v Stott [2003] 1 AC 681, 711, 720-721* respectively. Some degree of misunderstanding is also evident in the concurring judgment of Judge Walsh when he said *23 EHRR 313, 346* :

> "The present statutory provisions which have given rise to the instant case are a post-Convention constitutional departure from common law in England but also from the principles disclosed in the various statutes referred to."

In fact express statutory provisions of the same kind go back at least to section 17 of the Bankruptcy Act 1883 (46 & 47 Vict c 52) and judicial interpretations of other provisions as having the same effect go back even further. On the other hand, there are other provisions which allow the questions to be asked but exclude the answers and there are others which leave the matter to the discretion of the judge. They all form part of a carefully modulated attempt by English law to strike a balance between the protection of the individual and the need of society to deal adequately with white-collar crime.

47. For present purposes, however, it is sufficient to say that there are no grounds for holding the convictions to be unsafe and I would therefore dismiss the appeals.

LORD HUTTON

48. My Lords, these appeals raise the important issue whether the Court of Appeal, in deciding an appeal against a conviction, are bound to give effect to a judgment of the European Court of Human Rights ("the European Court") in favour of the appellant, when the issue arising in the appeal relates to the admission of evidence, and at the trial that issue was governed by a United Kingdom statute.

49. The appellants were convicted at the Central Criminal Court in 1990 of offences which alleged dishonest conduct during Guinness plc's takeover bid for the Distillers Co plc. Two successive appeals by the appellants against their convictions were heard by the Court of Appeal in 1991 and 1995 (the second appeal being pursuant to a reference back to the Court of ***998** Appeal by the Secretary of State) and the appeals were dismissed (save in respect of one count against Mr Saunders in the 1991 appeal and one count against Mr Lyons in the 1995 appeal).

50. At the trial of the appellants the Crown relied on answers which they were compelled to give pursuant to section 434 of the Companies Act 1985 to inspectors appointed by the Secretary of State under section 432(2) and section 442 of the 1985 Act to investigate the affairs of Guinness plc. The appellants were unable to contend that in exercise of his discretion under section 78(1) of the Police and Criminal Evidence Act 1984 to exclude evidence unfairly obtained, the trial judge should exclude the answers on the ground that the appellants had been compelled to incriminate themselves. It was not possible for the appellants to advance this argument because section 434(5) expressly provides that the answers given to questions put by inspectors are admissible in evidence:

> "An answer given by a person to a question put to him in exercise of powers conferred by this section (whether as it has effect in relation to an investigation under any of sections 431 to 433, or as applied by any other section in this Part) may be used in evidence against him."

51. The reason why Parliament provided that the answers which the appellants were compelled to give were admissible in evidence was explained by Lord Taylor of Gosforth CJ in the judgment of the Court of Appeal which dismissed the appellants' second appeal, *R v Saunders [1996] 1 Cr App R 463, 474* :

> "Mr Caplan referred to the long established common law principle that no person should be required to incriminate himself. However, there is no doubt that Parliament can override that principle. It has done so for example in the fields of insolvency and company fraud. The rationale is said to be that the unravelling of complex and devious transactions in those fields is particularly difficult and those who enjoy the immunities and privileges afforded by the bankruptcy laws and the Companies Acts must accept the need for a regime of stringent scrutiny especially where fraud is suspected."

52. After the dismissal of the second appeal the appellant, Mr Saunders, brought an application to the European Court in which he complained that the use at his trial of the answers which he was compelled to give to the inspectors deprived him of a fair hearing in violation of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). This complaint was upheld by the European Court *(1996) 25 EHRR 313, 340* , which held that there had been a violation of article 6(1) and stated, at paragraph 74 of its judgment delivered on 17 December 1996:

> "[The court] does not accept the government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. Like the Commission, it considers that the general requirements of fairness contained in article 6, including the right not to incriminate oneself, apply to criminal ***999** proceedings in respect of all types of criminal offences without distinction, from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings."

53. The other appellants subsequently brought a similar application to the European Court, and in a judgment delivered on 19 September 2000 the court again held for the reasons given by it in Mr Saunders's case that their rights under article 6(1) had been violated.

54. On the application of the appellants the Criminal Cases Review Commission, subsequent to the judgment of the European Court in September 2000, referred the appellants' cases back to the Court of Appeal, and on 21 December 2001, the Court of Appeal again dismissed the appellants' appeals by the judgment now under appeal *[2002] 2 Cr App R 210* .

55. Mr Emmerson, in his skilful argument on behalf of the appellants, advanced two main propositions to the House which I summarise as follows. The first proposition was that the United Kingdom had entered into the Convention, an international treaty, and had agreed in article 1 to secure to everyone within its jurisdiction the rights and freedoms (including the right to a fair trial) defined in section 1 of the Convention . Article 41 (originally article 50) of the Convention provides:

> "If the court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the court shall, if necessary, afford just satisfaction to the injured party."

Article 46 (originally articles 53 and 54) provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the court in any case to which they are parties.
>
> "2. The final judgment of the court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

Therefore the United Kingdom, including the courts of the United Kingdom, was obliged to abide by the judgments of the European Court that the rights of the appellants to a fair trial had been violated. Accordingly the Court of Appeal in hearing the appellants' third appeal after the European Court had given its judgments, should have held that the answers given to the inspectors' questions were inadmissible in evidence on the ground of unfairness and should have quashed the convictions, the court having observed in paragraph 47 of their judgment that:

> "if we concluded that the compelled answers should not have been admitted in evidence, or if we concluded that we were bound to give effect to the Strasbourg court's decision that the trial was unfair by examining anew the safety of the convictions, we would not uphold the convictions on the basis that they are safe in any event."

56. Mr Emmerson's second main proposition was that a ruling by the Court of Appeal in December 2001 quashing the convictions would not have been contrary to the will of Parliament as expressed in section 434(5) ***1000*** because Parliament had accepted and given effect to the judgments of the European Court by enacting section 59 of, and Schedule 3 to, the Youth Justice and Criminal Evidence Act 1999 (coming into operation on 14 April 2000) which amended section 434 by providing in respect of offences (including those with which the appellants were charged):

> "4. The Companies Act 1985 is amended as follows.
>
> "5. In section 434 (production of documents and evidence to inspectors conducting investigations into companies), after subsection (5) (use of answers given to inspectors) insert—'(5A) However, in criminal proceedings in which that person is charged with an offence to which this subsection applies —(a) no evidence relating to the answer may be adduced, and (b) no question relating to it may be asked, by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.' "

Mr Emmerson therefore challenged the correctness of the statement by Rose LJ in paragraph 54 of the judgment of the Court of Appeal that: "the will of Parliament as expressed in section 434 trumps any international obligation."

57. I consider that it is desirable to consider, first, Mr Emmerson's second main proposition, because if it is incorrect and if Rose LJ was right to state that the will of Parliament as expressed in section 434 trumps any international obligation, the appeals must fail irrespective of whether, assuming that the matter was not concluded in favour of the Crown by section 434(5), there was validity in Mr Emmerson's first main proposition.

58. Leaving aside any question as to the primacy of European Community law which does not arise in this case, Parliament is the supreme law-making body for the United Kingdom and a statute enacted by Parliament which cannot be read under section 3(1) of the Human Rights Act 1998 in a way which is compatible with the Convention prevails over any provision of the Convention or any judgment of the European Court whether the statute was passed before or after the coming into operation on 2 October 2000 of the 1998 Act which incorporated most of the provisions of the European Convention into United Kingdom law. The sovereignty of Parliament and the supremacy of an Act of Parliament over the Convention is recognised and confirmed by section 4(6) of the 1998 Act which provides that a declaration by a court that a provision of a statute is incompatible with a Convention right does not affect the validity, continuing operation or enforcement of that statutory provision.

59. Therefore, on first consideration, it appears that the Court of Appeal were clearly right in deciding that they must give effect to what Parliament had provided in section 434(5) , which had not been amended at the time of the trial, and that they should hold that the admission of the answers was not unfair, notwithstanding that such a ruling was contrary to the judgments of the European Court. As Lord Bingham of Cornhill CJ stated in *R v Staines [1997] 2 Cr App R 426, 442* in rejecting an argument similar to that advanced by the present appellants as to the unfairness of admitting answers given to inspectors exercising coercive powers of interrogation:

> "If the court were to rule here that this evidence should be excluded, it would be obliged to exclude such evidence in all such cases. That would ***1001*** amount to a repeal, or a substantial repeal, of an English statutory provision which remains in force in deference to a ruling [by the European Court in *Saunders v United Kingdom*] which does not have direct effect and which, as a matter of strict law, is irrelevant."

Lord Bingham further stated, at p 443:

> "the section here expressly authorises the use of evidence so obtained and that, as we see it, amounts to a statutory presumption that what might otherwise be regarded as unfair is, for this purpose and in this context, to be treated as fair, at any rate in the absence of special features which would make the admission of the evidence unfair."

60. However, as I have stated in paragraph 56 above, Mr Emmerson submitted that a ruling by the Court of Appeal that the answers were admitted in evidence unfairly would not have been in breach of the will of Parliament. Section 2(1) of the Criminal Appeal Act 1968 provides: "Subject to the provisions of this Act, the Court of Appeal—(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case." Mr Emmerson emphasised that section 2(1) provides that it is the duty of the Court of Appeal to allow an appeal if they think that "the conviction *is* unsafe". Therefore he submitted that the question for the Court of Appeal was not, was the conviction unsafe at the time the jury returned their verdict, but was it unsafe at the time when the Court of Appeal considered the appeals and gave their decision. He further submitted that at the time when the Court of Appeal considered the appeals Parliament, by enacting section 59 of, and Schedule 3 to, the 1999 Act, had made it clear that it considered that the judgments of the European Court in the appellants' applications should be complied with in the United Kingdom and that it accepted that it was unfair to admit in evidence against them answers to questions put to persons pursuant to inspectors' powers under section 434 . Therefore, rather than complying with the will of Parliament, the Court of Appeal in dismissing the appeals had acted contrary to the will of Parliament in holding that the convictions, which were substantially based on the answers admitted in evidence, were safe.

61. Recognising that the decisions of the House in *R v Lambert [2002] 2 AC 545* and *R v Kansal (No 2) [2002] 2 AC 69* established that a person who had been convicted at a trial which took place before the Human Rights Act 1998 came into operation on 2 October 2000 could not rely on the rights given by sections 6 and 7 of that Act in an appeal against conviction heard by the Court of Appeal after that date, Mr Emmerson made it clear that in advancing his submissions he was not seeking to rely on the provisions of the 1998 Act.

62. I am unable to accept Mr Emmerson's submission that the Court of Appeal would have been acting in accordance with the will of Parliament if they had quashed the convictions of the appellants. In my opinion the Court of Appeal were right to hold that it was the intention of Parliament that the admission in evidence at the appellants' trial of the answers which they had given was not to be regarded as unfair. The will or intention of Parliament is to be found in the words which Parliament has used. Parliament provided in section 434(5) that an answer given by a person to inspectors might be used in evidence against him. Subsection (5A) was appended to section 434 by ***1002*** the 1999 Act and that Act did not come into operation until 14 April 2000. A statute has only a prospective effect unless the contrary intention clearly appears, and therefore the intention of

Parliament in respect of the use in evidence at a trial taking place before 14 April 2000 of answers given to inspectors was that the answers should not be excluded on the grounds of unfairness. Accordingly I am in full agreement with the passage in paragraph 54 of the judgment of the Court of Appeal where Rose LJ states:

> "However, and determinatively, even if the failure to reopen the appellants' convictions might give rise to violation of article 46, domestic law precludes reliance on any such violation in the circumstances of this case. The fact of violation could not have led to the exclusion of the answers at the trial, applying the approach available under domestic law at the time, because this would have amounted to partial repeal of legislation enacted by Parliament which authorised the use of the evidence (see *R v Staines [1997] 2 Cr App R 426, 442c, approved* by Lord Hope of Craighead in *R v Kansal (No 2)[2002] 2 AC 69, 113* , para 86, to which we return later) ... Put another way, the will of Parliament as expressed in section 434 trumps any international obligation."

63. Moreover as Parliament did not intend that the provisions of the Human Rights Act 1998 would have a retrospective effect on the validity of a conviction which took place before 2 October 2000 it is improbable that Parliament intended that the change in the law coming into operation on 14 April 2000 effected by the 1999 Act would have a retrospective effect on the validity of a conviction which took place before that date.

64. A further submission advanced on behalf of the appellants was based on the guidelines issued by the Attorney General in February 1998 which were designed to take into account the decision of the European Court in the application brought by Mr Saunders against the United Kingdom. Paragraph 1 of the guidelines stated:

> "The purpose of this note is to provide guidance for prosecuting authorities in England and Wales and in Northern Ireland about the approach to be adopted towards evidence available to prosecutors in the form of answers obtained by the exercise of compulsory powers such as those available under section 434 of the Companies Act 1985 . It takes account of the judgment of the European Court of Human Rights in *Saunders v United Kingdom (1996) 23 EHRR 313* ."

Paragraph 3 stated:

> "In all cases the prosecution should not normally (i e subject to the discretionary exceptions mentioned in paragraph 4) use in evidence as part of its case or in cross-examination answers obtained under compulsory powers."

65. Mr Emmerson relied on the judgment of the Court of Appeal (Criminal Division) in *R v Faryab (unreported) 22 February 1999* . In that case a trial took place in March 1998 after the Attorney General had issued his guidelines, but at the time of the trial the existence of the guidelines was not known to counsel for the prosecution or the defence or to the judge. At the trial the prosecution put in evidence and placed strong reliance on answers to questions which the defendant had been compelled to give in the ***1003** course of an interview conducted pursuant to the Insolvency Act 1986 . The defendant appealed against his conviction on the ground that, having regard to paragraph 3 of the guidelines, his answers should not have been admitted in evidence against him. The appeal was allowed and Gray J stated:

> "[Crown counsel] has candidly, and in our judgment inevitably, conceded that, if the existence of those guidelines had been known to those involved in the trial, then the evidence of the answers given by the appellant in his interview would probably not have been adduced. It follows from that concession and from our conclusion as to the non-availability of exception (i) in paragraph 4 of the guidelines that the jury was in the present case provided with evidence which had at least the potential to give rise to unfairness to the appellant."

Gray J further stated that the appellant's contention was valid:

> "that in the light of the decision of [the European Court in] *Saunders* and the ensuing guidelines, the appellant's answers in his compulsory interview should not have been admitted in evidence."

66. Mr Emmerson submitted that in this case the Court of Appeal should have followed the same course as that taken by the Court of Appeal in *R v Faryab* and should have held that the answers of the appellants should not have been admitted in evidence. In the alternative he submitted that the Court of Appeal should have stopped the Crown from relying on the answers in seeking to uphold the convictions. I am unable to accept either of these submissions. As I have stated in an earlier part of this opinion, section 434(5) makes it clear that the admission in evidence of the appellants' answers at the trial was not unfair either at the time of the trial or when considered at the time of the hearing of the appeals in December 2001. The issuing of guidelines by the Attorney General cannot make unfair what Parliament has stated to be fair and, moreover, the guidelines had not been issued at the time of the appellants' trial in 1990. I consider that the decision of the Court of Appeal in *R v Faryab* was largely influenced by the consideration that the Crown accepted that if prosecution counsel had known at the time of the trial of the Attorney General's guidelines, the answers of the appellant would probably not have been adduced in evidence. If the decision goes beyond that I would wish to reserve my opinion as to its correctness. I also reject the submission that the Court of Appeal in this case should have stopped the Crown from relying on the answers or should have required the Crown to acknowledge that the use of the answers in evidence at the trial was unfair. Under section 2(1)(a) of the Criminal Appeal Act 1968 , the Court are only empowered to allow an appeal if *they* think that the conviction is unsafe, and it is for the Court of Appeal to decide this, not the prosecution: see per Lloyd LJ in *R v McIlkenny [1992] 2 All ER 417, 428* . If the court do not think that the verdict is unsafe, section 2(1)(b) requires them to dismiss the appeal.

67. Therefore I am of opinion that the appeals must fail on the ground that the intention of Parliament stated in section 434(5) prevails over whatever obligations may arise from the Convention and the judgments of the European Court.

68. It is therefore unnecessary to express a concluded opinion on Mr Emmerson's first main proposition that, if the Court of Appeal were not ***1004*** compelled by section 434(5) to hold otherwise, they were obliged to follow the judgments of the European Court in the cases of Mr Saunders and the other appellants and to hold that the admission of their answers violated their rights to a fair trial.

69. On this issue the House had the benefit of interesting submissions from Mr Emmerson and the Attorney General on the effect of international treaties on domestic law. This House has stated that international treaties do not create rights enforceable in domestic law: see *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, 476-477, 483c, 500c-d* . But the present case relates to the fairness of the appellants' trial and is not one where the appellants claim to enforce a right which is given to them only by the Convention and is not recognised by English domestic law. As Lord Woolf CJ stated in *R v Togher [2001] 3 All ER 463, 472* , para 33: "The requirement of fairness in the criminal process has always been a common law tenet of the greatest importance." Therefore in a case such as the present one concerned with the issue of fairness, I consider that the principle stated in *Rayner's* case does not mean that an English court should not regard a judgment of the European Court on that issue as providing clear guidance and should not consider it right to follow the judgment unless (as I would hold in

the present case) it is required by statute to reach a different conclusion. As Lord Goff of Chieveley stated in *Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 283g* : "I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the European Convention on Human Rights]."

70. In his submissions Mr Emmerson laid stress on the point that these appellants were not merely relying on a principle established by a judgment of the European Court, they were relying on the fact that judgments had been pronounced by the European Court in their favour in cases in which they were the applicants. Accordingly, he submitted that the United Kingdom (including its courts) came under an express obligation under articles 41 and 46 of the Convention to give effect to the judgments by quashing the convictions.

71. There are many judgments of the European Court which recognise in relation to article 41 that, notwithstanding a decision by the court that there has been a breach of the Convention, the national law of the respondent state may not permit the quashing of a conviction which is valid under national law and that the court has no power to quash it: see *Belilos v Switzerland (1988) 10 EHRR 466, 491* , para 76, *Hauschildt v Denmark (1989) 12 EHRR 266, 281* , para 54, *Brozicek v Italy (1989) 12 EHRR 371* , *Findlay v United Kingdom (1997) 24 EHRR 221, 247* , para 88. In *Papamichalopoulos v Greece (1995) 21 EHRR 439, 451* , the European Court stated, in paragraph 34:

> "The contracting states that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the contracting states under the Convention to secure the rights and freedoms guaranteed (article 1). If the nature of the breach allows of restitutio in integrum, it is for the respondent state to effect it, ***1005** the court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow—or allows only partial—reparation to be made for the consequences of the breach, article 50 empowers the court to afford the injured party such satisfaction as appears to it to be appropriate."

72. Mr Emmerson submitted that if article 41 did not impose an obligation on the United Kingdom to quash the appellants' convictions, that obligation arose under article 46 and Mr Emmerson cited a number of resolutions of the Council of Ministers which stress the importance of member states giving effect to the judgments of the European Court.

73. In his application to the European Court Mr Saunders claimed damages for pecuniary loss in excess of £3½m. Referring to this claim the court stated in paragraph 83 of its judgment: "At the hearing before the court, however, the applicant accepted that 'true compensation' would be a finding in his favour by the court and the resulting vindication of his good name." The court dismissed the claim for pecuniary loss and stated at paragraph 86 of its judgment:

> "The court observes that the finding of a breach in the present case concerned the criminal proceedings against the applicant and not the proceedings before the inspectors about which no complaint was made. Moreover, it cannot speculate as to the question whether the outcome of the trial would have been any different had use not been made of the transcripts by the prosecution and, like the Commission, underlines that the finding of a breach of the Convention is not to be taken to carry any implication as regards that question. It therefore considers that no causal connection has been established between the losses claimed by the applicant and the court's finding of a violation."

Mr Saunders also claimed non-pecuniary damages of £1m to compensate him for the denial of his right to a fair trial and the resulting anxiety, anguish and imprisonment. The court dismissed this claim and stated at paragraph 89 of its judgment: "The court considers that, in the circumstances of the case, the finding of a violation constitutes sufficient just satisfaction in respect

of any non-pecuniary damage sustained." Mr Saunders also claimed a sum for costs and expenses, and the court awarded him £75,000 in respect of this claim.

74. In the applications brought by the other appellants the European Court declined to award them pecuniary and non-pecuniary damages for the same reasons as those given in the case of Mr Saunders and the court reserved the issue of the appellants' claims for costs and expenses.

75. In the course of his submissions the Attorney General observed that the United Kingdom had paid to Mr Saunders the costs and expenses awarded to him by the European Court and he further submitted that in pursuance of its international obligations under the Convention the United Kingdom had sought to comply with the two judgments of the European Court by amending its domestic law by the enactment of section 59 of, and Schedule 3 to, the 1999 Act which provided that answers given under compulsion should not (save in certain limited exceptions) be used in evidence against the person giving the answers.
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76. The Attorney General recognised that at some future time the appellants' cases may be considered by the Council of Ministers under article 46, and therefore I think that it would not be appropriate for this House to express an opinion on the effect of article 46 in these cases.

77. I would add that in my opinion the appellants cannot advance an argument based on the requirements of international comity in reliance on the judgment of Hobhouse J in *Dallal v Bank Mellat [1986] QB 441* because the issue in that case was not affected by an Act of Parliament.

78. For the reasons which I have stated I would dismiss these appeals and would answer the certified question in the affirmative.

LORD HOBHOUSE OF WOODBOROUGH

79. My Lords, I am in entire agreement with the opinion of my noble and learned friend Lord Hoffmann.

80. The jurisdiction of the Criminal Division of the Court of Appeal is to allow appeals against conviction only when they consider that the conviction is unsafe. In deciding whether the conviction is unsafe, the court is under an obligation to consider whether the trial was conducted in accordance with the law and whether it was unfair. If inadmissible evidence was admitted and the admission of such evidence made the conviction unsafe, the appeal should be allowed. But, if the evidence is admissible, the evidence should be allowed to go before the jury unless its admission would create a significant unfairness in the proceedings such that the judge should exercise his discretion under section 78 of the Police and Criminal Evidence Act 1984 to exclude it or, if confession evidence, unless it should be excluded under section 76 .

81. The decision of the European Court of Human Rights is that the provision in section 434 of the Companies Act 1985 which makes a person's answers given to the inspectors admissible in evidence against him contravenes article 6 of the Convention . This created a conflict between the Convention and the United Kingdom statute. The obligation of a court of the United Kingdom is to apply the law of the United Kingdom. The Convention has now, substantially but not completely, been made part of the law of the United Kingdom. But the incorporation has not been retrospective and has preserved parliamentary supremacy. Therefore the position in English law remains as stated by the Court of Appeal in *R v Staines [1997] 2 Cr App R 426, 442-443* .

82. Specifically in relation to the admission of the evidence in question, the fairness of the trials of the present appellants and the safety of their convictions was carefully considered by the Court of Appeal both in 1995, *[1996] 1 Cr App R 463, 478 and 484* , and again last year in the decision under appeal *[2002] 2 Cr App R 210* . On each occasion the court, having recognised that the trial judge was (as were the Court of Appeal) bound by section 434, and, having carefully considered all the circumstances as required by section 78, concluded that there had been no actual unfairness in the appellants' trials and no lack of safety in the relevant convictions.

83. I accordingly agree that the appeals should be dismissed.

LORD MILLETT

84. My Lords, on 27 August 1990 following a six month trial before a judge and jury at the Central Criminal Court the four appellants were *1007 convicted of serious criminal offences involving dishonesty. The offences were committed during 1986 in the course of an illegal share support operation undertaken to assist Guinness plc in acquiring Distillers Co plc. Save as to one count against Mr Saunders, in respect of which his conviction was quashed, appeals against conviction by three of the appellants were dismissed by the Court of Appeal in 1991. The case in respect of all four appellants was later referred back to the Court of Appeal by the Secretary of State. Save as to one count against Mr Lyons (who had not taken part in the earlier appeal) in respect of which his conviction was quashed the appeals were again dismissed in 1995.

85. The convictions were obtained in part by the use by the prosecution of transcripts of the answers given by the appellants to inspectors appointed under the Companies Act 1985 to investigate the affairs of Guinness plc. Failure on the part of any person to attend before the inspectors when required to do so and to give them all the assistance that he is reasonably able to give is punishable as a contempt of court: see sections 434 and 436 of the Companies Act.

86. Section 434(5) of the Companies Act 1985 as it then stood provided: "An answer given by a person to a question put to him in exercise of powers conferred by this section ... may be used in evidence against him." Section 78(1) of the Police and Criminal Evidence Act 1984 provided:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

87. The two sections were not inconsistent. Section 78 gave the court a general power to exclude admissible evidence where its admission was considered to be unfair to the accused. Section 434(5) dealt with a particular situation where the admission of such evidence might be so considered. It made the answers given by the appellants to the inspectors admissible in evidence against them despite the fact that they had been obtained under compulsion and were or might be self-incriminatory. It precluded any challenge to the admission of such evidence on this ground. To this extent, but to this extent only, it limited the powers of the court under section 78 to exclude admissible evidence. Where there was some additional ground which rendered the admission of such evidence unfair to the accused, it could be excluded under section 78. Thus transcripts of answers given by Mr Saunders to the inspectors at interviews held after he had been charged were excluded by the trial judge. Where the sole ground of objection was that the evidence had been obtained under compulsion in the course of an investigation under the Companies Act 1985, however, the court was obliged to give effect to section 434(5): the prosecution was entitled to adduce the evidence if it chose and the court was bound to admit it.

88. In 1996 the European Court of Human Rights ("ECHR") held that the use made at the trial of the transcripts of Mr Saunders's answers to the inspectors infringed the rule against self-incrimination and thereby constituted a violation of his rights under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms *1008 ("the Convention"). When considering what remedy to award the court stated that it could not speculate whether the outcome of the trial would have been any different had use not been made of the transcripts by the prosecution. Accordingly, no causal connection had been established between the violation and the pecuniary damage which Mr Saunders claimed. It also ruled that in the circumstances of the case the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage which he had sustained.

89. In 2000 the ECHR held on the same ground that there had been a similar violation of the rights of the other three appellants. It made the same observations as to its inability to speculate as to the outcome of a hypothetical trial and as to the sufficiency of the finding of a violation as just satisfaction in respect of any non-pecuniary damage that it had made in the case of Mr Saunders.

90. Under article 46 of the Convention it is incumbent upon the United Kingdom to abide by judgments of the ECHR. This requires the United Kingdom to take measures to prevent recurrence of any violations of the Convention which the ECHR has identified and to make reparation to the victims if it is proper to do so. Full reparation involves restitutio in integrum, which has been variously explained either as restoring the complainant to the position he was in immediately before the violation occurred; or as restoring him to the position he would have been in if the violation had not occurred. Article 41 of the Convention enables

the ECHR to award just satisfaction in a case where the internal law of the state concerned allows only partial reparation to be made. This recognises that the state's internal law may preclude it from making full reparation, and that its obligation to abide by the judgment of the ECHR does not require it to change its internal law retrospectively to enable it to do so.

91. Following the judgment of the ECHR in *Saunders v United Kingdom 23 EHRR 313* , the United Kingdom took immediate measures to procure cessation of the infringements and prevent recurrence. The Attorney General, who as a Law Officer of the Crown is answerable to Parliament for the exercise of discretionary powers in relation to the conduct of criminal prosecutions in the United Kingdom, issued non-statutory guidance to prosecutors directing that in future they should not make use of evidence obtained under compulsory powers in the course of criminal proceedings in the absence of special circumstances which would justify them in doing so. Statutory effect was given to these directions by section 59 of and Schedule 3 to the Youth Justice and Criminal Evidence Act 1999 . This made amendments to a number of existing statutory provisions which had formerly enabled evidence obtained by compulsory powers to be used in evidence. It left section 434(5) of the Companies Act 1985 standing without amendment, but added a new subsection (5A) which severely limited the circumstances in which the evidence could be adduced by the prosecution in future.

92. The question which then arose was whether the appellants' convictions ought to be quashed in view of the fact that they had been obtained in part by the admission of evidence in violation of article 6 of the Convention . Following the judgment of the ECHR on 19 September 2000 and the coming into force of the Human Rights Act 1998 on 2 October 2000 the appellants' cases were again referred to the Court of Appeal. Serious criminal trials in England are tried by jury, and the Court of Appeal could ***1009*** not retry the case itself and determine guilt or innocence on the transcripts of the evidence given at trial. Its powers are limited to quashing the conviction and, if appropriate, reopening the proceedings by ordering a retrial before a fresh jury. Thus the court was being called on to consider the question which the Convention leaves to the national courts, that is to say the extent if any to which, in conformity with our domestic law, it could award non-monetary reparation or restitutio in integrum to the appellants.

93. The court examined the evidence against each of the appellants. It concluded that the impugned evidence constituted a significant part of the evidence against them, and that it was impossible to say that the jury would still have convicted in the absence of such evidence. On the other hand there was a substantial body of other evidence against each of the appellants, and it was impossible to say that the jury would necessarily have acquitted without the impugned evidence. The court was thus in the same position as the ECHR; it could not speculate on what the outcome of the trial would have been in the absence of the impugned evidence.

94. The court also concluded, at an early stage of the hearing, that it would not be appropriate to order a retrial. A second jury trial more than ten years after the original trial and more than 14 years after the events with which the trial would be concerned was out of the question, particularly in the light of the appellants' age and state of health. Restitutio in integrum was impossible. It was not practicable to restore the appellants to the position they were in before the violations occurred, when they were accused persons facing serious criminal charges. Nor could they be put in the position they would have been in had the violations not taken place, since this could not be known without a retrial.

95. Under section 2(1) of the Criminal Appeal Act 1968 the Court of Appeal is obliged to quash a conviction if it thinks that "the conviction is unsafe"; but otherwise it must allow the conviction to stand. The question is not whether the accused is guilty, but whether the conviction is open to possible doubt. The question whether there should be a retrial is treated as distinct from the prior question whether the conviction is unsafe. If the conviction is unsafe the court is obliged to quash it, even though it is no longer possible to order a retrial so that the guilt or innocence of the accused may never be determined.

96. The question for the court under section 2(1) of the Criminal Appeal Act 1968 is whether the convictions "are unsafe", not "were unsafe"; but this question has to be determined by reference to what happened at the trial. This was not a case where new evidence had become available since the trial. In such a case it is open to the court to find that, in the light of the new evidence, a conviction which appeared to be safe at the time is now shown to be unsafe. Nor was it a case where the convictions were challenged on the ground that the conduct of the trial was not consistent with general notions of fairness, which change over time. In such a case, it is open to the court to find that a trial which would have been considered to be fair by the more robust standards of a past age was conducted in a manner which is simply not acceptable today.

97. No complaint is made in the present case of the general fairness of the appellants' original trial or the relevance and import of the impugned evidence. The trial was conducted fairly and in accordance with the substantive rules of evidence and procedure which were current at the time. ***1010*** The sole ground on which the convictions are said to be unsafe is that they were obtained

by the use of cogent and relevant evidence the admission of which was expressly authorised by Parliament but which infringed article 6 of the Convention.

98. Section 434(5) of the Companies Act 1985 as it stood at the time of the trial was clearly inconsistent with article 6 . It precluded any challenge to the admission of the evidence in question in the absence of special circumstances justifying its exclusion under section 78 . Article 6 by contrast precluded the admission of such evidence in the absence of special circumstances justifying its admission. That is why Parliament amended section 434 by adding subsection (5A). But the amendment was not retrospective. Moreover, the new subsection was directed to the conduct of the trial, not to the hearing of an appeal against conviction. It was evidently the will of Parliament that the new arrangements should apply to future trials only, and that past convictions obtained under the former law should not be disturbed.

99. By the time the appeal came before the Court of Appeal the Human Rights Act 1998 was in force. Section 6(1) of the 1998 Act makes it unlawful for a public authority (which includes both the prosecution and the court itself) to act in a way which is incompatible with a Convention right. But this House has twice held that the 1998 Act is not retrospective, and the appellants rightly did not invoke it. Indeed, they went so far as to submit that your Lordships should deal with their appeals as if it had not been passed. That is not the correct approach. The present case is a transitional one. It raises the question whether a conviction obtained by evidence which infringed article 6 of the Convention but at a time before the 1998 Act was in force can be treated as unsafe if an appeal is heard after it has been brought into force. The fact that the 1998 Act is not retrospective is not without significance. As in the case of the amendments to the Companies Act 1985, it demonstrates Parliament's continuing intention to leave past convictions undisturbed.

100. As a matter of our own domestic law, therefore, the Court of Appeal could not properly regard the convictions as unsafe by reason only of the admission of evidence which was expressly made admissible by statute in force at the time of the trial and in the face of Parliament's clear intention, twice expressed, to leave such convictions undisturbed.

101. The appellants sought to avoid this conclusion by relying, not on the breaches of article 6 alone, but on the fact that they have been established by judgments of the ECHR. Article 46 , they say, imposes a duty on the United Kingdom and its courts to abide by judgments of the ECHR; this requires them not only to acknowledge any breach of the Convention which has been established by any such judgment, as they have done, but to make the fullest reparation to the victims which is available under national law, which they have not. Moreover, national courts should, if free to do so, refrain from acting in a manner which would put the United Kingdom in breach of its international obligations.

102. This argument involves the following propositions: (i) that the United Kingdom's international obligation to abide by a judgment of the ECHR is binding on our domestic courts and directly enforceable in those courts by individuals; (ii) that the Court of Appeal was at liberty under our domestic law to quash the convictions; and (iii) that its failure to do so put ***1011** the United Kingdom in breach of its international obligation to abide by the judgments of the ECHR.

103. The argument draws an untenable distinction between those cases where the breach of the Convention right has been established by a judgment of the ECHR and those cases where it has not, even though the United Kingdom is bound by the Convention and not merely by the judgment. But in any case I am unable to accept any of the propositions which it involves.

104. In the first place, the obligation placed upon the United Kingdom by article 46 of the Convention to abide by a judgment of the ECHR is an international obligation of the United Kingdom. It has not been incorporated into our domestic law so as to be directly enforceable by individuals. An illuminating contrast may be drawn with section 2(1) of the Civil Jurisdiction and Judgments Act 1982 , which provides that the Brussels Convention "shall have the force of law in the United Kingdom." As my noble and learned friend Lord Hoffmann observed during argument, if the primary obligation of the United Kingdom contained in article 6 of the Convention does not form part of our domestic law enforceable directly by individuals (otherwise than through the mechanism of the Human Rights Act 1998), how can the secondary obligation to abide by judgments of the ECHR do so?

105. In the second place, the identification of the judicial and other organs of the state with the state itself is a principle of international law. But it has no place in the domestic jurisprudence of the state. The legal relationships of the different branches of government depend on its internal constitutional arrangements. In the case of the United Kingdom, the governing principles are the separation of powers, the supremacy of Parliament, and the independence of the judiciary. Accordingly, while a judgment of the ECHR is binding on the United Kingdom, it is not directly binding as a matter of our domestic law on the courts. It is for this reason that section 2 of the Human Rights Act 1998 provides only that in determining a question which has arisen in connection with a Convention right the court must "take into account" the jurisprudence of the ECHR. By contrast section

3(1) of the Civil Jurisdiction and Judgments Act 1982 requires any question as to the meaning or effect of any provision of the Brussels Convention to "be determined in accordance with ... any relevant decision" of the European Court of Justice.

106. In the third place, the Convention itself distinguishes between breach and remedies for breach, and deals with the role of the national courts in providing a remedy. The international obligation of the state to provide reparation is not unqualified. It is incumbent on the state to do so but only so far as its internal law permits. When it comes to reparation, therefore, the state's internal law has primacy; it governs the extent of the reparation which the state is obliged to make. It is noticeable that in those cases where the ECHR has made a further monetary award there has been no suggestion that the state has been in breach of its article 46 obligation. It follows that the principle that our domestic courts will not act in a manner which would put the United Kingdom in breach of its international obligations is not engaged.

107. The appellants also sought to rely on the decision in *Dallal v Bank Mellat [1986] QB 441* and the principle of judicial comity to argue that our national courts should not merely "take account" of decisions of the ECHR ***1012*** as the Human Rights Act 1998 prescribes but apply them, at least where the same complainants are involved. Although they eschewed reference to the doctrine of res judicata, they laid considerable stress on the facts that the ECHR is a court of competent jurisdiction and that the parties are essentially the same. Their difficulty, as its seems to me, is twofold. First, even if the doctrine of res judicata were applicable, the present case is one where the court would be constrained by statute to disapply it. Secondly, an essential element for the application of the doctrine is absent: the issues were not the same. The issue before the ECHR was whether the admission of the impugned evidence infringed article 6 of the Convention. It held that it did, and its ruling has not been disputed. The issue in the present appeals is whether the internal law of the United Kingdom permits the convictions to be quashed. For the reasons which I have given, I consider that the Court of Appeal was correct to hold that it does not.

108. I am also unable to accept the appellants' submission, essentially forensic, that the prosecution is acting incompatibly with the Convention by relying on the impugned evidence to support the convictions. It has acknowledged throughout that the admission of the evidence in question infringed the appellants' Convention rights. It does not "rely" in any meaningful sense on the impugned evidence to uphold the convictions. It merely contends, as it is entitled under the Convention to do, that our internal law does not permit the convictions to be quashed by reason only of the admission of the evidence in question.

109. For these reasons, as well as those given by my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann, whose speeches I have had the advantage of reading in draft, I would dismiss the appeals.

Appeals dismissed.

Representation

Solicitors: Mishcon de Reya for Stephenson Harwood and for D J Freeman ; Mishcon de Reya for Peters & Peters ; Mishcon de Reya ; Serious Fraud Office .

C T B

Footnotes

1 Companies Act 1985, s. 434(5)(5A): see post, paras 50, 56.
2 Convention for the Protection of Human Rights and Fundamental Freedoms, art 6(1): "In the determination of ... any criminal charge ... everyone is entitled to a fair and public hearing ..."

MORGAN v HINTON ORGANICS (WESSEX) LTD

COURT OF APPEAL (CIVIL DIVISION)

Laws, Carnwath and Maurice Kay L.JJ.: March 2, 2009

[2009] EWCA Civ 107; [2009] Env. L.R. 30

LT Admissibility; Costs orders; Discretion; Environment; Expert witnesses; Injunctions; Interim injunctions; Interim orders; Odours; Protective costs orders; Treaty interpretation

H1 *Nuisance—composting site—odour nuisance—expert evidence—bias—costs—interim costs order—ability to pursue case—access to justice—Aarhus Convention—whether interim costs order prevented pursuit of claim at trial*

H2 The appellants (M) lived in a rural hamlet in close proximity to the defendant's (HO) composting site. M had a history of complaining about odours from HO's site. The regulatory agencies had taken some steps to enforce licence conditions in order to improve the situation but this did not resolve the odour problems. Subsequently, M commenced proceedings in private nuisance with a view to obtaining an injunction and damages. At the first hearing, an interim injunction was granted pending trial with the interim costs reserved until the full trial. In a second hearing, however, the trial judge discharged the injunction and ordered M to pay HO's costs. M appealed against the Costs order on the ground that it contravened the principle in the Aarhus Convention that costs in environmental proceedings should not be prohibitively expensive. On the first day of the substantive trial, M objected to the evidence of HO's odour expert on the grounds of apparent bias. The judge ruled that the evidence was inadmissible and ordered HO to pay M's costs thrown away. HO appealed against that order (the expert witness appeal) and it was heard with M's adjourned application to appeal against the interim costs order (the interim costs appeal).

H3 In relation to the interim costs appeal, M had been left with a potential costs bill of £25,000, but had legal insurance only to £50,000 so that their ability to pursue their claim to trial was alleged to be at risk. M argued that the appropriate award would have been to reserve costs to the trial judge. In relation to the expert witness appeal, HO argued that the trial judge had applied the wrong test when ruling on the inadmissibility of H's expert evidence.

H4 **Held,** in allowing both appeals:

H5 (1) In relation to the interim costs appeal, the principle that costs in environmental proceedings should not be prohibitively expensive as found in the Aarhus Convention was, at most, a matter to which a court might have regard in exercising its discretion. There was no legal principle which would enable

the court to treat a pure treaty obligation, as converted into a rule of law directly binding on the English court. It was, however, unnecessary to consider the application of the Aarhus Convention in detail because M had not raised the point before the judge and M should have provided submissions and the factual basis to enable the court to decide whether the order was prohibitive. In fact, subsequent events showed that M had not been deterred from proceeding to trial.

H6 (2) The merits of the interim costs application had been so closely tied up with the merits of the case overall that the judge should have considered the desirability of leaving issues of costs to the trial judge. The correct order would have been to reserve H's costs of the interim application to the trial judge.

H7 (3) In relation to the expert witness appeal, the material available to the trial judge did not support any finding of institutional bias. Furthermore, there was no significant breach of an obligation to inform the court of a potential conflict of interest. To rule the evidence as inadmissible once the trial was underway was wrong. That question should be determined in the course of case management and the judge would have to weigh the alternative choices open if the expert's evidence was excluded.

H8 **Legislation referred to:**

Environmental Protection Act 1990 s.82
Civil Procedure Act 1997
Human Rights Act 1998
UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) arts 2; 3(8), 9(3)(4)
Directive 2003/35 (Public Participation in Environmental Decision Making) arts 2; 3(7); 4(4)

H9 **Cases referred to:**

Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment [2004] UKPC 6; [2004] Env. L.R. 16
Bolton MDC v Secretary of State for the Environment (Costs) [1995] 1 W.L.R. 1176; [1995] 3 P.L.R. 37 HL
Commission v France (C-239/03) [2004] E.C.R. I-9325
Commission v Ireland (Case C-427/07)
Environment Agency v Biffa Waste Services Ltd [2006] EWHC 3495 (Admin); [2007] Env. L.R. 16
Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (Costs) (No.2) [2002] EWCA Civ 932; [2003] Q.B. 381
Goodson v HM Coroner for Bedfordshire and Luton [2004] EWHC 2931 (Admin); [2006] 1 W.L.R. 432
Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No.3) [2001] 1 W.L.R. 2337 Ch. D.
McDonald v Horn [1995] I.C.R. 685 CA (Civ Div)
National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikerian Reefer) (No. 1) [1993] 2 Lloyd's Rep. 68 QBD

R. (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp [2008] EWCA Civ 1209; [2009] Env. L.R. 18
R. (on the application of Bullmore) v West Hertfordshire Hospitals NHS Trust [2007] EWHC 1350 (Admin)
R. (on the application of Burkett) v Hammersmith and Fulham LBC (Costs) [2004] EWCA Civ 1342; [2005] J.P.L. 525
R. (on the application of Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749; [2008] A.C.D. 68
R. (on the application of Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600
R. (on the application of England) v Tower Hamlets LBC (Permission to Appeal) [2006] EWCA Civ 1742
Sweetman v An Bord Pleanala and the Attorney General [2007] IEHC 153
Toth v Jarman [2006] EWCA Civ 1028; [2006] C.P. Rep. 44
Wilkinson v Kitzinger [2006] EWHC 835 (Fam); [2006] 2 F.L.R. 397
Whitehouse v Jordan [1981] 1 W.L.R. 246 HL

H10 *Mr D. Hart Q.C.* and *Mr Jeremy Hyam*, instructed by Richard Buxton appeared on behalf of the appellants.
Mr S. Tromans and *Mr R. Wald*, instructed by Bond Pearce appeared on behalf of the respondent.
Mr D. Wolfe instructed by CAJE appeared on behalf of the Intervener.

JUDGMENT

CARNWATH L.J.: This is the judgment of the court to which all members have contributed.

Introduction

1 The claimants are two residents of Publow, a rural hamlet not far from Bristol. The defendants, Hinton Organics (Wessex) Ltd, operate a composting site, about 300 and 500 metres (respectively) from the claimants' homes. In 1999 planning permission was granted by the Bath and North East Somerset Council (the council), and in January 2001 a waste management licence by the Environment Agency (the agency). The claimants have complained frequently of smells from the site. Some enforcement action has been taken by the authorities based on conditions in the licence, but this has not resolved the problem to the satisfaction of the claimants. In July 2006 they began their own proceedings in private nuisance for an injunction and damages.

2 On November 9, 2007, H.H. Judge Seymour Q.C. granted an interim injunction pending trial, and reserved the costs of the interim application to the trial judge. There was no appeal. However, on December 21, 2007, following representations by the council and the agency, he discharged the interim injunction, and ordered the claimants to pay their costs and those of the defendant. The clai-

mants sought permission to appeal against the costs order, on the grounds that it contravened the principle of ''the Aarhus Convention'' that costs in environmental proceedings should not be ''prohibitively expensive''. The application was refused by Pill L.J. on the papers, but renewed before Carnwath L.J. on April 10, 2008, by which time the trial was less than a month away. He adjourned the application for 28 days and stayed the costs order.

3 The trial began on April 7, 2008 before H.H. Judge Bursell Q.C. On the first day the claimants objected to the evidence of the defendant's odour expert, Mr Branchflower, on the grounds of apparent bias. On the following day, the judge ruled that this evidence was inadmissible. He adjourned the proceedings, and ordered the defendant to pay the claimants' costs thrown away.

4 On July 28, 2008, Carnwath L.J. gave the defendant permission to appeal against that order and later directed that that appeal be heard at the same time as the claimants' adjourned application for permission to appeal against the interim costs order, with the hearing to follow directly if permission were granted. In the event, we granted permission without opposition from Mr Tromans for the defendant. The council and the agency are not directly concerned in the appeals, since an agreement has been made protecting their interests. We have also had helpful written submissions, given by permission of the court, by Mr Wolfe on behalf of the Coalition for Access to Justice for the Environment (CAJE), which comprises several leading UK Non-Governmental Organisations concerned with the environment. DEFRA declined Carnwath L.J.'s invitation to offer comments on the relevance of the Aarhus Convention, but their general position has been made known by a different route (see below).

5 Accordingly there are before us two appeals raising distinct issues:

i) The claimants' appeal against Judge Seymour's interim costs order of December 21, 2007 (the interim costs issue);
ii) The defendant's appeal against Judge Bursell's order of April 8, 2008, relating to the evidence of their odour expert (the expert witness issue).

(1) The Interim Costs Issue

The proceedings before the judge

6 Before turning to the arguments, it is necessary to say something about the form of the interim order, and the sequence of events leading to its discharge. The order as made on November 7, 2007 prohibited the defendant from ''causing odours'' in the vicinity of the claimants' properties,

> ''. . .at levels that are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside the boundary, as perceived by an authorised officer of [either the Agency or the Council]''.

7 This formulation, including in particular the reference to the perception of an officer of the agency, followed the wording of one of the conditions in the waste management licence for the Hinton site, granted in 2001. The validity of a condition in this form had been upheld by the Divisional Court in *Environment*

Agency v Biffa Waste Services Ltd [2006] EWHC 3495 (Admin). In that case, the Divisional Court rejected the argument that the reference to the perception of an authorised officer rendered the condition invalid, as breaching the principle of certainty required for a criminal offence, and usurping the adjudicative function of the court. It was held that, while the evidence of an authorised officer was a necessary ingredient of the offence, the condition did not limit the jurisdiction of the court to decide on all the evidence whether the odours offended the standards set by the condition.

8 As appears from a subsequent letter from the court (see below), it seems that the judge himself had raised the need for some objective criteria to support the order, and that his attention had been drawn to the terms of the licence condition as a possible precedent. In his judgment he described this form of order as being ''substantially in the terms of paragraph 5.2.2 of the licence'' while making it specific to the properties of the claimants, and adding an authorised officer of the council (in addition to that of the agency) as a potential monitor.

9 On the merits of the application the judge was satisfied that there was a ''serious issue to be tried'' as to whether odours from the defendant's premises were interfering with the claimants' enjoyment of their properties, and that damages would not be an adequate remedy. It was accepted by Mr Wald, for the defendants, that an injunction in the form now proposed would not damage the defendants' business. The judge decided that the balance of convenience favoured the grant of the injunction. He noted Mr Wald's submission that it would add nothing of substance to the agency's existing powers, but he concluded that it would have benefits in that it would ''focus attention'' on the these particular properties, and add to the remedies otherwise available ''the formidable powers of the court in relation to contempt of court''.

10 The defendants themselves did not appeal against the order. However, having been notified of the order, the agency and the council wrote to the court expressing concerns about their role as monitors of the order. In a response written on behalf of the judge, the court explained the background to the adoption of this form of order, and continued:

> ''The Judge made plain that, if an order was made in those terms, it was at the risk of the claimants as to whether either [the Agency] or [the Council] was prepared to co-operate. The judge did not envisage that either body would take any steps in relation to the monitoring of 'odours' other than such as they, respectively, considered appropriate in the usual exercise of their respective functions. . .''

11 This did not satisfy the two authorities. They wrote to the parties reiterating their concern about the potential for conflict between their statutory functions, and their position as ''*de facto* arbiters'' of breaches of the injunction. They invited the parties to agree to amend the order by deleting the reference to them, and suggested that an alternative might be to substitute a reference to an agreed independent expert. The claimants accepted this proposal in principle and wrote to the defendants inviting them to propose names of three possible experts. The defendants replied that they did not see how such an appointment

would ''work in practice or assist the parties generally''. They considered that the only ''sensible and effective'' way to resolve the issues was to proceed to trial as soon as possible.

12 Accordingly, in default of agreement between the parties to their proposed amendment, the authorities requested the judge to relist the case, so that they could apply to exclude the reference to their officers. At the hearing on December 21, 2007, having heard argument from the authorities, the defendants, and the claimants, the judge discharged the injunction.

13 In his judgment he commented critically on letters sent by both the claimants and the defendants to the authorities, which he thought had overstated the degree of active involvement required of the authorities by his order. However, he accepted the argument on behalf of the authority that the form of order was wrong in principle,

> ''. . .it is inappropriate in principle to constitute an individual, who has other statutory functions to perform, the person to determine whether or not an order of the court has been infringed''.

He remained of the view that the injunction would be unworkable without some objective means of assessment. He thought it right therefore to reconsider ''on a balance of convenience basis'' whether it had been appropriate to make any form of order. He noted the suggestion that there might be substituted a reference to an independent expert, but commented:

> ''That in my view would be appropriate if, but only if, there was an agreement between the claimants and the defendant as to the identity of such a person. That is not the position. . .''

14 Having decided to discharge the injunction, he heard applications for costs by both the authorities and the defendants. Mr Hyam, for the claimant, submitted that the costs should be reserved to the trial judge, as had been done on the previous occasion. He did not at that stage base any argument on the Aarhus Convention. The judge allowed both applications. The authorities were ''entirely innocent parties'' whose attendance had been made necessary by the claimants' refusal to agree to a variation. Their costs were summarily assessed at £5,130 plus VAT. As to the defendant's costs, he held that their attendance on that day had been justified because ''there was a suggestion of an alternative form of order, which would have still made the defendant subject to an injunction''. He thought that they should also have the costs of the previous hearing, because that was the order he would have made if (with the benefit of the authorities' submissions) he had refused the injunction on that occasion. The order in their favour was subject to detailed assessment if not agreed.

The appeal

15 The claimants sought permission to appeal against the judge's orders in respect of costs. They noted that the costs awarded to the authorities (£5,132) and those claimed by the defendant (£19,190.25) resulted in a potential liability of almost £25,000, in circumstances where the court had found that there was a serious

issue to be tried and that some form of injunctive relief was appropriate. Although the claimants had legal expenses insurance limited to £50,000, the costs award put at risk the prospect of their being able to pursue their claim to trial. The appropriate award would have been to reserve costs to the trial judge, as had been done on the first occasion. In the result the order was ''unfair and prohibitively expensive and therefore contrary to Article 9(4) of the Aarhus Convention 1998''.

16 As already noted, Carnwath L.J. directed that the application be adjourned on notice with the appeal to follow if permission were granted. He said:

> ''I am satisfied that the case raises an issue of some general importance relating to the relevance of the Aarhus Convention in the exercise of the Judge's discretion as to costs. This is given added significance by the recent publication of the report of the working party under Sullivan J on 'Ensuring access to environmental justice in England and Wales' (in which this case is mentioned in paragraph 73).''

He added that the claimants faced a ''serious hurdle'' having failed to raise this issue before the judge.

17 Mr Hart has proposed three issues as arising under this part of the appeal:

i) Was the application for an injunction against the defendant within the scope of art.9(4) of the Aarhus Convention?
ii) If yes, what is the nature of the Aarhus obligation on the court when exercising its discretion on costs (regardless of whether or not the convention is raised by one of the parties)?
iii) In the light of (a) and (b) above, was it outside the court's proper discretion to order the claimant to pay the costs of the defendant and the authorities?

18 Before returning to these issues, it is necessary to give a brief account of the Aarhus Convention and its aftermath, and of related judicial activity in this country.

The Aarhus Convention

19 The ''UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters'', usually referred to as ''the Aarhus Convention'' (after the town in Denmark where it was agreed), was signed by the first parties (including the United Kingdom) in 1998, and came into force in October 2001. It was ratified by the United Kingdom in February 2005, at the same time as its ratification by the European Community.

20 The main provisions of the convention relied on as relevant to the present appeal are:

> Article 3(8): ''Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the

powers of national courts to award reasonable costs in judicial proceedings.''

Article 9(3): ''In addition and without prejudice to the review procedures referred to in paragraph 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.''

Article 9(4): ''In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide *adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.'' (emphasis added)

21 Reference must also be made to the definitions in art.2:

''4. 'The public' means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

5. 'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.''

22 For the purposes of domestic law, the convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts, but may be taken into account in resolving ambiguities in legislation intended to give it effect (see Halsbury's Laws Vol 44(1) Statutes para.1439)). Ratification by the European Community itself gives the European Commission the right to ensure that Member States comply with the Aarhus obligations in areas within Community competence (see *Commission v France* (C-239/03) [2004] E.C.R. I-9325 at [25]–[31]). Furthermore provisions of the convention have been reproduced in two EC Environmental Directives, dealing respectively with Environmental Assessment and Integrated Pollution Control (neither applicable in the present case).

23 There was a proposal for a more general European Directive on access to justice in environmental matters (COM(2003) 624), but it has not progressed beyond the draft stage. It would in any event have been confined to administrative or judicial review proceedings. This exclusion of private law proceedings was explained in the supporting text (p.12) on grounds of ''subsidiarity'':

> ''Setting out provisions in relation to private persons would impinge upon the very core of member states systems since it means that a community law might address an issue as close to member states' competence as the possibility for private persons to challenge in courts acts by private persons.''

European enforcement

24 In December 2005, WWF-UK (later to become one of the constituent bodies of CAJE) lodged a formal complaint with the European Commission regarding the UK's failure to comply with the convention so far as applied by the Directives. This led in October 2007 to a notice by the Commission to the UK Government relating to alleged failure to comply with its obligations under art.3(7) and 4(4) of Directive 2003/35. In April 2008, in a letter to CAJE the Commission expressed their particular concern at,

> ''the failure by the United Kingdom to provide details showing that review procedures provided for under Articles 3(7) and 4(4) of the Directive are 'fair, equitable, timely and *not prohibitively expensive*'''. (their emphasis added)

They had also asked for clarification on the availability of injunctive relief in environmental cases. Following a meeting with Ministry of Justice officials it had been agreed to await the publication of the then imminent Sullivan report, and the comments on it of the United Kingdom authorities, before deciding what further steps needed to be taken.

25 Parallel with these exchanges there had been correspondence with the Aarhus Secretariat at UNECE in Geneva. In April 2008 the government had published a ''UK Aarhus Convention Implementation Report''. On the issue of costs, the report (pp.27–9) explained the discretion available to the judge in UK court proceedings, and also referred to the different routes available in the UK system to seek redress in environmental matters. In the same month, in response to earlier representations by the claimants' solicitors and comments by CAJE, UNECE put a number of questions to the Department (DEFRA). The following reply in October 2008 helpfully indicates DEFRA's position on the relevance of the convention to a case such as the present:

> *''Question 1 – To which procedures and remedies in this kind of case do the provisions of article 9, paragraphs 3 and 4, of the Convention apply?*
>
> The rights and obligations created by international treaties have no effect in UK domestic law unless legislation is in force to give effect to them, i.e. they have been 'incorporated'. The provisions of the Aarhus Convention cannot therefore be said to apply directly in English law to any particular procedure or remedy. There is, however, in English law a presumption that legislation is to be construed so as to avoid a conflict with international law, which operates where legislation which is intended to bring the treaty into effect is ambiguous. The presumption must be that Parliament would not have intended to act in breach of international obligations.

> In the kind of case in question, i.e. a claim by one private party against another in nuisance, the rules which govern civil court procedure in England and Wales (the Civil Procedure Rules 1998 or 'CPR'), as laid down in secondary legislation under powers in the Civil Procedure Act 1997, are therefore, insofar as they are ambiguous/discretionary rather than clearly prescriptive, to be construed so as to be consistent with article 9(3) and (4) of the Convention.
>
> The procedure to challenge acts or omissions by public authorities for contravention of provisions of national law relating to the environment is also prescribed in the CPR and the same therefore applies.''

26 Finally, we were referred to Commission proceedings in the European Court of Justice against Ireland (*Commission v Ireland* (C-427/07)), in which similar complaints were made against that government, including one in respect of litigation costs in the context of planning law. The opinion of Advocate General Kokott was delivered on January 15, 2009. Pending a decision of the court, paras 89–96 provide valuable guidance as to the scope and effect of the rule against ''prohibitively expensive'' procedures. Her comments have to be understood in the context that it had been agreed that at this stage of the proceedings the question was whether Ireland had failed altogether to implement the requirements of the Directive, leaving issues as to the *quality* of implementation for subsequent consideration.

27 The Advocate-General rejected the argument that the rule was not concerned with orders against an unsuccessful party to pay the other side's costs. The second sentence of art.3(8) was not intended to have that effect, but simply to make clear that the award of costs was not to be regarded as a ''penalty, persecution or harassment''. In her view, the ban on prohibitively expensive procedures ''extends to all legal costs incurred by the parties involved''. She continued:

> ''95. The Commission founds its objection that there is insufficient protection against prohibitive costs in particular on the basis that the costs of successful parties can be very high in Ireland, stating that costs of hundreds of thousands of euro are possible.
>
> 96. In this regard, Ireland's submissions that rules providing for legal aid—the Attorney General's Scheme—exist and that, furthermore, potential applicants can make use of the Ombudsman procedure which is free of charge are hardly compelling. The Attorney General's Scheme is, according to its wording, inapplicable to the procedures covered by the directive. It cannot therefore be acknowledged to be an implementing measure. The Ombudsman may offer an unbureaucratic alternative to court proceedings but, according to Ireland's own submissions, he can only make recommendations and cannot make binding decisions.
>
> 97. As the Commission acknowledges and Ireland emphasises, Irish courts can though, in the exercise of their discretion, refrain from awarding costs against the unsuccessful party and even order the successful party to pay his costs. Therefore, a possibility of limiting the risk of prohibitive costs exists.

98. This possibility of limiting the risk of costs is, in my view, sufficient to prove that implementing measures exist. The Commission's action is therefore unfounded in relation to this point too.

99. I wish to make the supplementary observation that the Commission's wider objection that Irish law does not oblige Irish courts to comply with the requirements of the directive when exercising their discretion as to costs is correct. In accordance with settled case-law, a discretion which may be exercised in accordance with a directive is not sufficient to implement provisions of a directive since such a practice can be changed at any time. However, this objection already concerns the quality of the implementing measure and is therefore inadmissible.''

Public interest cases in domestic law

28 In England and Wales the principles governing the award of costs are found in CPR Pt 44. The court has a general discretion, but this is subject to certain well established rules, including the ordinary rule that the unsuccessful party pays the costs of the successful party (CPR r.44.3). Recent years have seen a greater willingness of the courts to depart from ordinary costs principles in cases raising issues of general public interest, in environmental cases as in other areas of the law. A recent example an environmental case (albeit in the Privy Council) was the *Bacongo* case of (*Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6) where, as we were told, no order for costs was made against the Association, in spite of losing the appeal, because of the public interest of the case.

29 The same trend has been reflected also in greater willingness to make ''Protective Costs Orders'', by which the risk of an adverse costs order can be limited in advance. The principles governing such orders in relation to public interest cases were restated by this court in *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. Certain aspects of those principles have proved controversial, particularly the requirement that the claimant should have no private interest in the outcome of the case (on which we shall comment further below).

30 There have been some specific references in judgments to the Aarhus principles. For example, in *R. (on the application of Burkett) v Hammersmith and Fulham LBC* [2004] EWCA Civ 1342 at [74]–[80], Brooke L.J. referred to the Aarhus Convention, and to concerns expressed in a recent study as to whether the current costs regime is compatible with the convention. In the light of the costs figures revealed by that case, he thought that there were serious questions ''of ever living up to the Aarhus ideals within our present legal system''. He called for a broader study of the issues.

31 In 2006 there was published a report of an informal working group of representatives of different interests, (including private practitioners, NGO lawyers and private sector lawyers in a personal capacity) sponsored by Liberty and the Civil Liberties Trust, and chaired by Maurice Kay L.J. (*Litigating the Public Interest*—Report of the Working Group on Facilitating Public Interest Litigation

July 2006). Its recommendations were directed principally to the principles for the granting of protective costs orders in public interest cases generally.

32 The 2008 Sullivan report, to which Carnwath L.J. referred in granting permission in the present case, was a report of another informal working group representing a range of interested groups, this time under Sullivan J. (*Ensuring Access to Environmental Justice in England and Wales*—Report of the Working Group on Access to Environmental Justice May 2008). The report expressed views on the application of the Aarhus principles, in the context of domestic procedures relevant to environmental proceedings, including protective costs orders. The present case was mentioned, without further discussion, as apparently the first which has reached this court raising issues under the convention in relation to a costs order in private law proceedings. The following points from the report are possibly relevant in the present context:

i) That the ''not prohibitively expensive'' obligation arising under the convention extends to the full costs of the proceedings, not merely the court fees involved (in this respect differing from the Irish High Court in *Sweetman v An Bord Pleanala and the Attorney General* [2007] IEHC 153);
ii) That the requirement for procedures not to be prohibitively expensive applies to all proceedings, including applications for injunctive relief, and not merely the overall application for final relief in the proceedings;
iii) That costs, actual or risked, should be regarded as ''prohibitively expensive'' if they would reasonably prevent an ''ordinary'' member of the public (that is, ''one who is neither very rich nor very poor, and would not be entitled to legal aid'') from embarking on the challenge falling within the terms of Aarhus (para.20);
iv) That there should be no general departure from the present ''loser pays'' principle, provided that the loser's potential liability does not make litigation prohibitively expensive in the way described above (para.38).

33 Since the grant of permission in this case, there have been two further judgments of this court dealing with the issue of protective costs orders in public interest cases: *R. (on the application of Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749; *R. (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209. In both, reference was made to the Kay and Sullivan reports, and to their comments on the Aarhus Convention. The latter, as an environmental case, is more directly relevant to the scope of the convention. However, the Master of the Rolls (in the judgment of the court) agreed with Waller L.J. in *Compton* that there should be,

> ''. . .no difference in principle between the approach to PCOs in cases which raise environmental issues and the approach in cases which raise other serious issues and *vice versa*'' ([17]).

He also indicated that the principles stated in *Corner House* were to be regarded as binding on the court, and were to be applied ''as explained by Waller LJ and

Smith LJ'' ([19]). We take the last words to be a reference to the comments of Waller and Smith L.JJ. respectively that the *Corner House* guidelines were ''not. . . to be read as statutory provisions, nor to be read in an over-restrictive way'' (*Compton* at [23]); and were ''not part of the statute and. . . should not be read as if they were'' ([74]). These comments reflect the familiar principle that:

> ''As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule.'' (per Lord Lloyd of Berwick, *Bolton MDC v Secretary of State for the Environment* [1995] 1 W.L.R. 1176 at 1178; cited in *Corner House* at [27]).

34 In November 2008 (in a press release issued by the Judicial Communications Office) it was announced that the Master of the Rolls had requested Jackson L.J. to conduct a ''fundamental review'' into the costs of civil litigation. The objectives, as stated in the terms of reference are:

> ''To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.''

The report is due to be presented in December 2009.

Protective Costs Orders and Private Interests

35 The possibility of a Protective Costs Order in relation to the present appeal was not raised until the actual hearing before us, by which time it was redundant. The costs had by then been incurred and their incidence will be determined in the light of our judgment on the appeals. It is unnecessary therefore to explore the issues which would arise on such an application, including the circumstances (if any) in which such an order could properly be made in a private nuisance action such as this (cf *Corner House* at [45], citing *McDonald v Horn* [1995] I.C.R. 685).

36 However, the authorities to which we have been referred reveal considerable uncertainty in relation to what we have already identified as a controversial element in the *Corner House* guidelines, that is the requirement (1)(iii), that ''the applicant should have no private interest in the case''. Although the court must be cautious in offering guidance on matters not directly in issue, we think that, pending further clarification by the Rules Committee, it would be helpful for us to give our view as to where the law now stands.

37 The private interest requirement was strictly applied by this court, when (unanimously) refusing a PCO in *Goodson v HM Coroner for Bedfordshire and Luton* [2005] EWCA 1172). The applicant was seeking judicial review of the Coroner's decision not to conduct a full inquiry into the circumstances of her father's death in hospital. It was held that her personal interest, albeit not a financial one, was sufficient to rule out a PCO. It had been argued that it should be sufficient if the ''public interest in having the case decided transcends. . . or wholly outweighs the interest of the particular litigant''. ([26]). The court disagreed, noting that such alternative formulations had been considered in

Corner House itself, but nonetheless the guideline had been expressed ''in unqualified terms'' ([27] per Moore-Bick L.J.).

38 At first sight that judgment appears to represent a clear ruling on the issue at this level. However, it is necessary also to take account of how the issue has been addressed subsequently:

i) In *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam), the President (without specific reference to *Goodson*) commented on the difficulty of applying the private interest test in a case where the applicant ''whether in private or public law proceedings'' is pursuing a personal remedy, ''albeit his or her purpose is essentially representative of a number of persons with a similar interest''. He thought that in such cases the extent and nature of the private interest should be treated as ''a flexible element in the court's consideration of whether it is fair and just to make the order'' ([54]).

ii) In July 2006 the Kay report was published. The authors (paras 77–85) discussed the difficulties they perceived in a strict application of the private interest test, particularly in cases under the Human Rights Act, in which it is a requirement that an applicant be ''personally or directly affected'' by the alleged violation. They recommended that the private interest if any should be regarded as a matter to be taken into account; ''the weight to be attached to it should be a matter for the judge considering the application''.

iii) In *R. (on the application of England) v Tower Hamlets LBC* [2006] EWCA Civ 1742, the question of a PCO did not arise for decision, as permission to appeal was refused. However, Carnwath L.J. (with the agreement of Neuberger L.J.) noted the recent publication of the Kay Report, and its ''valuable discussion'' of the issues arising from *Corner House*. The court expressed doubts as to the ''appropriateness or workability'' of the private interest criterion, and suggested that different considerations might in any event apply where the interest of the applicant, as in the instant case, was ''not a private law interest but simply one he shares with other members of his group in the protection of the environment'', and suggested that the Aarhus Convention might be relevant in this respect. The court expressed the hope that the Civil Procedure Rules Committee would take the opportunity in the near future to review the questions in the light of the Kay Report.

iv) In *R. (on the application of Bullmore) v West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin), Lloyd Jones J., when refusing a PCO on other grounds, commented specifically on the ''private interest'' requirement, which he said had been ''diluted in the later case law'', citing *Wilkinson v Kitzinger*, and *England* (but not *Goodson*). He thought that a private interest should not be a disqualifying factor but ''its weight or importance in the overall context'' should be treated as ''a flexible element'' in the judge's consideration.

v) In May 2008, the Sullivan Report was published. The authors criticised the strict private interest requirement, as applied to environmental cases. They thought it inconsistent with the Aarhus principles which contain no corresponding limitation. They supported the approach recommended by the Kay Report (paras 41–55).

vi) *Compton*, decided in this court in July 2008, was not directly concerned with the private interest requirement. However, in discussing the definition of a ''public interest case''. Waller L.J. quoted without criticism from the comments of the Kay and Sullivan Reports. Having referred (in the passage quoted above) to the need to avoid an ''over-restrictive'' approach to the *Corner House* guidelines, he also found ''support for a non-rigorous approach'' in the passage noted above from the decision of Lloyd Jones J. in *Bullmore*.

vii) In November 2008 came the judgment of this court in *Buglife*. Again it was not directly concerned with the private interest requirement. However, before generally endorsing Waller L.J.'s approach to the *Corner House* guidelines (as already noted), the Master of the Rolls specifically referred to his approval of ''the flexible approach of Lloyd Jones J in *Bullmore*'' ([17]).

39 On a strict view, it could be said, *Goodson* remains binding authority in this court as to the application of the private interest requirement. It has not been expressly overruled in this court. However, it is impossible in our view to ignore the criticisms of this narrow approach referred to above, and their implicit endorsement by this court in the last two cases. Although they were directly concerned with other aspects of the *Corner House* guidelines, the ''flexible'' approach which they approved seems to us intended to be of general application. Their specific adoption of Lloyd Jones J.'s treatment of the private interest element makes it impossible in our view to regard that element of the guidelines as an exception to their general approach.

40 The hope that the Rules Committee might be able to address these issues in the near future has not been realised. In the meantime, in our view, the ''flexible'' basis proposed by Waller L.J., and approved in *Buglife* should be applied to all aspects of the *Corner House* guidelines.

The Convention in private nuisance proceedings

41 Returning to the present case, we heard arguments about the scope of the convention, its place in domestic law, and its relevance to private nuisance proceedings.

42 Mr Tromans sought to draw a distinction between actions to vindicate general public rights to a clean environment from actions for private nuisance designed to protect private property rights, the latter being outside the scope of the convention altogether. However, a literal reading of the provisions does not appear to support that restriction. The ''public'' as defined may be a single natural person, and the proceedings may be in respect of acts or omissions of ''private persons''. We doubt in any event whether it is helpful in practice to draw such a clear dis-

tinction. In the present case, the claimants' action is no doubt primarily directed to the protection of their own private rights, but the nuisance if it exists affects the whole locality. The public aspect is underlined by the interest of the agency and the council.

43 He had an alternative argument that, whatever the intended scope of the convention itself, in the context of Community law it should be regarded as more strictly confined. Although the Community has built Aarhus rights into Directives on public law matters of environmental assessment and pollution control, it has not ventured into the field of private law claims for environmental harm. He relies on the form of the EU Proposal, and its supporting commentary, to which we have already referred.

44 These arguments raise potentially important and difficult issues which may need to be decided at the European level. For the present we are content to proceed on the basis that the convention is capable of applying to private nuisance proceedings such as in this case. However, in the absence of a Directive specifically relating to this type of action, there is no directly applicable rule of Community law. The United Kingdom may be vulnerable to action by the Commission to enforce the Community's own obligations as a party to the treaty. However, from the point of view of a domestic judge, it seems to us (as the DEFRA statement suggests) that the principles of the convention are at the most something to be taken into account in resolving ambiguities or exercising discretions (along with other discretionary factors including fairness to the defendant).

45 Mr Tromans also relies on the need to see the requirements of the convention in the context of the full range of proceedings permitted by domestic law. The convention gives a right to access to justice, but no right to any particular form of legal remedy. As Mr Tromans points out, there are other procedural routes which might have been chosen by the claimants. He mentions four:

i) Seeking judicial review of failure by the agency or the council to enforce the relevant site licence conditions or serve a statutory nuisance abatement notice.
ii) Making a complaint to the Parliamentary Ombudsman or Local Government Ombudsman in respect of such failure.
iii) Initiating a private prosecution for alleged breach of the relevant waste management licence conditions.
iv) Making a complaint of statutory nuisance under the summary procedure provided by s.82 of the Environmental Protection Act 1990.

Thus, he says, even if it were found that the private nuisance claim entailed ''prohibitive cost'', there would be no breach of the convention unless it were established that the other possible routes were also defective in that or some other way.

46 We accept that the particular remedy sought in a particular case needs to be seen in the wider context of available remedies generally. However, the argument brings with it other questions. Reference to the Ombudsman raises the same issue of legal enforceability mentioned by the Advocate-General in respect of the Irish

Ombudsman. The other remedies would need to be considered individually in terms not only of cost but of legal efficacy. The very diversity of jurisdictions leads to another question which has been the subject of lively debate but no resolution: that is the possible need for a separate environmental court or tribunal to further the Aarhus ideals by ensuring that remedies in the environmental field are both coherent and accessible (a ''one-stop shop'', as Lord Woolf and others have proposed: see Carnwath, ''Environmental Litigation – a way through the Maze?'' (1999) JEL 3 13).

Drawing the threads together

47 It may be helpful at this point to draw together some of the threads of the discussion, without attempting definitive conclusions:

i) The requirement of the convention that costs should not be ''prohibitively expensive'' should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders.

ii) Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in the light of the Advocate-General's opinion in the Irish cases, the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.

iii) With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary ''loser pays'' rule and the principles governing the court's discretion to depart from it. The principles of the convention are at most a matter to which the court may have regard in exercising its discretion.

iv) This court has not encouraged the development of separate principles for ''environmental'' cases (whether defined by reference to the convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The *Corner House* statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied ''flexibly''. Further development or refinement is a matter for legislation or the Rules Committee.

v) The Jackson review provides an opportunity for considering the Aarhus principles in the context of the system for costs as a whole. Modifications of the present rules in the light of that report are likely to be matters for Parliament or the Civil Procedure Rules Committee. Even if we were otherwise attracted by Mr Wolfe's invitation (on behalf of CAJE) to provide guidelines on the operation of the Aarhus Convention, this would not be the right time to do so.

vi) Apart from the issues of costs, the convention requires remedies to be ''adequate and effective'' and ''fair, equitable, timely''. The variety and lack of coherence of jurisdictional routes currently available to

potential litigants may arguably be seen as additional obstacles in the way of achieving these objectives.

The present case

48 We turn now to consider the facts of the present appeal.

49 It is unnecessary, in our view, to consider the application of the convention in further detail, because there is in our view an insuperable objection to the claimant's case in this respect. That is that the point was not mentioned before the judge. This is admitted by Mr Hart. His answer is that the requirement to comply with the convention is ''an obligation on the Court'', which should have been considered by the judge of his own motion; or alternatively, it is a requirement on this court in reviewing the judge's decision in order to avoid contravention of the convention.

50 We are unable to accept that argument. Mr Hart could not point to any legal principle which would enable us to treat a pure treaty obligation, even one adopted by the European Community, as converted into a rule of law directly binding on the English court. As we have said, it is at most a matter potentially relevant to the exercise of the judge's discretion. If the claimants wished him to take it into account, they needed not only to make the submission, but also to provide the factual basis to enable him to judge whether the effect of his order would indeed be ''prohibitive''. The defendant would also no doubt have wished to give evidence of its own position.

51 Not surprisingly, since the point was not raised, we have no finding as to practical effect of the order. All we have is assertion as to the potential risk. But, as Mr Tromans points out, subsequent events have shown that the claimants were not in fact deterred from proceeding to trial. Indeed, had it not been for their objection to part of the defendant's evidence, the trial would by now have been completed, and the significance of the interim costs order could have been judged in the context of the incidence of costs as a whole.

52 This does not dispose of the appeal, since Mr Hart submits that the judge's order was flawed, even on conventional principles. This has caused us some difficulty. On the one hand, the court is very reluctant to interfere with the judge's discretion on costs, particularly if to do so results in satellite litigation at the interlocutory stage. Furthermore, it is often difficult to consider the merits of a costs order, other than in the context of the merits of the substantive order to which it is linked. In this case there is no appeal against the judge's decision to discharge the interim injunction, and so its merits are not in issue. For those reasons, we might have been reluctant to grant permission to appeal from the interim costs order, viewed in isolation from the other appeal, and apart from the issues of general principle which we have discussed. However, the appeal is now before us and we must consider it on its merits.

53 For reasons we have explained, the order in favour of the two authorities has not been the subject of argument, but in any event we would find it hard to see any objection to it. There being no appeal from the judge's decision that they were wrongly included in the order, they were entitled to their costs on ordinary prin-

ciples. Since they would be no longer involved as parties to the case, it was obviously appropriate to deal with them then and there.

54 The position of the defendants was rather different. This was an interim skirmish in a much longer battle, in which the overall merits could only be determined at trial. The claimants had won the argument on November 9, 2007, and that decision had not been challenged by the defendants. The judge's reason for awarding the defendants their costs of the December 21, 2007 was that they needed to be there to meet the possibility of an injunction in a modified form. That we read as a reference to the suggestion of replacing the authorised officer of the authorities by an independent expert.

55 The judge did not dismiss that alternative because of any objection in principle, but simply because no agreed expert had been identified. That may have been a sufficient reason for abandoning the search for an alternative mechanism (as to which we express no view, having heard no argument). But as a basis for determining the incidence of costs, it called in our view for some investigation as to why that mechanism had not proved possible. As the correspondence shows, the claimants had been willing to agree to that suggestion, and had invited names from the defendants. They however had rejected it out of hand as unworkable.

56 In those circumstances, it was wrong in our view for the judge to award costs in favour of the defendants, simply because that is what he would have done if he had rejected the application in the first place. That ignored what had happened since, seen against the background of his own finding that the balance of convenience lay in favour of some form of interim protection, damages not being an adequate remedy. In a case of this kind, where the merits of the interim application were so closely tied up with the merits of the case overall, he should in our view have considered the desirability of leaving issues of costs between the principal parties to be sorted out when the final result was known.

57 In fairness to the judge, so far as appears from the transcript, this aspect of the argument may not have been pressed by counsel before him, and we note that the exchanges to which we have referred were headed ''without prejudice''. However, Mr Tromans has not objected to Mr Hart's reference to them nor to the argument based on them. In those circumstances, we think we are entitled unusually to revisit the exercise of his discretion on this issue. We would hold that the correct order would have been to reserve the defendant's costs of the interim application (including the costs of the hearings on November 9 and December 21, 2007) to the trial judge.

58 On this issue, therefore, we will allow the appeal and substitute an order that the costs of the defendant be reserved to the trial judge.

(2) The expert witness issue

Background

59 We turn to the appeal against the order of H.H. Judge Bursell Q.C. dated April 8, 2008 by which he ruled that the expert evidence of Mr Philip Branchflower was inadmissible because Mr Branchflower lacked the independence required of an

expert witness. It is important to keep in mind how this issue arose. By their claim form issued on July 21, 2006 the claimants alleged that the defendant had caused and was causing nuisances by way of air pollution, odour pollution and noise. On December 13, 2006 Master Rose made a number of directions including:

> ''4 (a) There be permission to each party to rely on the expert evidence of one witness in each of the fields of (i) odours (ii) noise (iii) bioaerosol emissions.''

60 By the time of the trial the claimants had reduced the basis of their claim to odour pollution alone. At trial, the expert witness for the claimants was to be Mr Peter Danks and for the defendant Mr Branchflower. At no point prior to the trial did the claimants raise any issue as to the admissibility of the evidence of Mr Branchflower. In his opening note dated April 1, 2008, Mr Hyam, on behalf of the claimants referred to Mr Branchflower's conclusion as being ''simply unsustainable on the underlying evidence''. He also said:

> ''The claimants doubt much reliance can be placed on Mr Branchflower as an independent expert for the reason that SLR Consulting were appointed by the Council to advise on waste planning matters as early as 29 August 2006, 'one urgent matter being three planning applications of the defendant'.''

61 It was clear from that that Mr Hyam intended to cross-examine Mr Branchflower about his independence in view of the fact that SLR Consulting (of which Mr Branchflower was at the time an employee) had advised the council on waste planning matters including matters concerning the defendant. The person at SLR who had an involvement with the council was Mr Chris Herbert. In September 2007 the defendant's solicitors approached Mr Matthew Stolling of SLR with a view to SLR being retained by the defendant. When Mr Stolling carried out an internal check he ascertained that Mr Herbert had previously worked as a minerals and waste planning specialist for the council until 2005 when he moved to SLR. Whilst at SLR he had continued to provide the council with planning advice. It seems that Mr Herbert was more concerned with planning matters than with the enforcement of waste control. Although he had made observations about odour emissions he had not provided the council or anyone else with expert odour advice. Mr Stolling concluded that, in view of their different areas of specialism and the fact that the council is not a party to the present proceedings, no conflict of interest arose or would be likely to arise.

62 The trial began on April 7, 2008. On the first morning there was some discussion about the fact that Mr Branchflower had not signed the appropriate declaration required of an expert witness in one of his reports but he had in relation to two others. The trial proceeded. When Mr Wald was cross-examining Mr Morgan, a point came when he started to put to Mr Morgan material from Mr Branchflower's report. A short way into this passage, Mr Hyam objected to the material being put to Mr Morgan ''on the grounds that it is not properly independent''. The immediate response of the judge was to say:

> ''Now one moment. Are you saying Mr Branchflower's evidence is not admissible? Well if so you should have made that application some time ago.''

63 Mr Hyam then made it clear that he was challenging the admissibility of Mr Branchflower's report, at which point he made a formal application to exclude it. In the course of his application he explained to the judge his concern about the position of Mr Herbert.

64 In his detailed judgment on this issue the judge set out a passage from the judgment of Evans-Lombe J. in *Liverpool Roman Catholic Archdiocesan Trustees v Goldberg (No.3)* [2001] 1 W.L.R. 2337, at [12]–[13]. Having considered a passage in the speech of Lord Wilberforce in *Whitehouse v Jordan* [1981] 1 WLR 246, at 256–7, and the well known summary of the role of an expert witness articulated by Cresswell J. in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikerian Reefer)* [1993] 2 Lloyds Rep. 68 at 81, Evans-Lombe J. said:

> ''However, in my judgment where it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted, however unbiased the conclusion of the expert might probably be.''

65 There can be no doubt that in the present case the judge applied that ''reasonable observer'' test. At a later passage in his judgment (at [38]), he said:

> ''The real question in this case is whether an independent observer of this case, properly understanding the legal principles involved, might feel that the relationship within SLR is capable of affecting the views of Mr Branchflower so as to make them unduly favourable to the defendant. I put it in that way because of the quotation from the *Liverpool Roman Catholic Archdiocesan Trustees* case.''

66 In the following paragraph he referred to his conclusion that:

> ''An independent observer, against the background of factors I have endeavoured to outline, might reasonably feel that Mr Branchflower was not sufficiently independent to give an unbiased and independent opinion to this court. I have to say that in reaching that conclusion I have found it a difficult exercise.''

The issues on the appeal

67 The first submission made by Mr Wald on this appeal is that the judge applied the wrong test. He relies on *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (Costs) (No.2)* [2003] Q.B. 381 [2002] EWCA Civ 932 in which, giving the judgment of the court, Lord Phillips of Worth Matravers M.R. said of the above passage from the judgment of Evans-Lombe J. (at [70]):

> ''This passage seems to us to be applying to an expert witness the same test of apparent bias that would be applicable to the Tribunal. We do not believe that this approach is correct. It would inevitably exclude an employee from giving expert evidence on behalf of an employer. Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence.''

Factortame (No.2) was not drawn to the attention of the judge in the present case.

68 In our judgement the submission that the judge applied the wrong test is irresistible. Indeed, Mr Hart has offered no more than token resistance. His submission is that the reasoning which led to the judge being satisfied on the *Liverpool* test was of such a nature and quality that he would or at least might have come to the same conclusion if he had been properly cognisant of *Factortame (No.2)*.

69 We cannot accept Mr Hart's submission. We say this for three main reasons. First, to the extent that the judge seems to have found a kind of institutional bias, we do not consider that the material supported such a finding. It was not a case of a relationship between Mr Branchflower and the defendant. Such relationship as existed was between SLR, through Mr Herbert, and the council, a non-party. Secondly, we do not consider that, in this case, there was a significant breach of the obligation to inform the court of a potential conflict of interest. Whilst *Factortame (No.2)* itself is authority for the proposition that where an expert has an interest of one kind or another in the outcome of the case this fact should be made known to the court as soon as possible (at [70]), it seems to us that, in the present case, conscientious consideration was given by Mr Stolling to the possibility of a conflict of interest but he came to the reasonable conclusion that no such issue arose.

70 We appreciate that, in the last resort, ''it is for the Court and not the parties to decide whether a conflict of interest is material or not'' (see *Toth v Jarman* [2006] EWCA Civ 1028 at [112], per Sir Mark Potter P.), but we do not regard this as a marginal case. The claimants' advisers had known for many months of the facts and matters upon which they came to rely when seeking to exclude the evidence of Mr Branchflower. However, they took no point about the admissibility of his evidence until the trial was well underway. It seems to us that the defendant was entitled to assume from the silence and from the manner in which Mr Branchflower's position was criticised in the opening note that the issue about his evidence was as to weight rather than admissibility.

71 Thirdly, in *Factortame (No.2)*, the court went on to state (at [70]):

> ''The question of whether the proposed expert should be permitted to give evidence should . . . be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.''

In our judgement, this is a matter of considerable importance in the present case. Even if all the judge's concerns about the position of Mr Branchflower had been well-founded—and, as we have said, we do not think that they were—it seems to us that to rule the evidence inadmissible once the trial was well underway was simply wrong. The ruling gave rise to an inevitable application for an adjournment to which the judge predictably acceded.

72 In the context of the overriding objective and proportionality, the ruling achieved the worst of all worlds. Costs were thrown away. Some 10 months have passed waiting for this appeal. The trial remains further from finality than it was in April last year. If the judge had identified the claimants' concern about Mr Branchflower as going to weight rather than to admissibility, as he should have done, Mr Branchflower would have been cross-examined about the claimants' concerns and, in due course, the judge could have formed his own conclusion, one way or another. That is what should have happened. The approach taken by the judge was, in the circumstances of this case, altogether too precious.

73 For all these reasons the defendant's appeal on this issue also succeeds, and the judge's order on admissibility must be set aside.

Conclusion

74 Both appeals are accordingly allowed. For the interim costs order there will be substituted an order reserving the costs of the defendant to the trial judge. The decision on admissibility will be set aside. We understand that Judge Bursell has now retired. Accordingly, it will be necessary for the trial to recommence before a different judge.

*2328 Venn v Secretary of State for Communities and Local Government and others

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
27 November 2014

Report Citation
[2014] EWCA Civ 1539
[2015] 1 W.L.R. 2328

ICLR

Court of Appeal

Sullivan , Gloster , Vos LJJ

2014 Nov 17; 27

Costs—Order for costs—Protective costs order—Claimant's statutory application to quash on environmental impact grounds decision of Secretary of State's inspector to grant planning permission—Judge making protective costs order—Application not " Aarhus Convention claim" since not claim for judicial review—Whether application nevertheless falling within Aarhus Convention —Whether combination of statute and planning policies "provisions of ... national law relating to the environment" for purposes of Convention—Whether discretion to make protective costs order in case falling within Convention but not " Aarhus Convention claim"—Whether protective costs order rightly made— Town and Country Planning Act 1990 (c 8), s 288 — CPR r 45.41 — Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art 9(3)

Law reform—Whether necessary—Protective costs orders— CPR not providing power to make protective costs order in all cases where Convention so requiring—Whether legislation required to secure compliance with Convention

The Secretary of State's planning inspector allowed the second defendant's appeal against the decision of the local planning authority to refuse him planning permission to build a single-storey courtyard dwelling in the garden of his house. The claimant applied to the High Court under section 288 of the Town and Country Planning Act 1990 [1] , questioning the validity of, and seeking an order to quash, the inspector's decision, on the basis that he had failed to have regard to emerging local plan policy which restricted residential development on garden land. In those proceedings she applied for a protective costs order limiting her liability to pay the defendants' costs. The judge, although holding that the claimant was not entitled to costs protection under CPR r 45.41 [2] because the section 288 application, not being a claim for judicial review, was not an " Aarhus Convention claim" within that rule, nevertheless exercised the court's discretion to make a protective costs order because the proceedings challenged an alleged contravention of provisions of the United Kingdom's "national law relating to the environment", within article 9(3) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [3] , and the order was necessary in order to give effect to the United Kingdom's obligation under article 9(3) to ensure *2329 that members of the public had access to judicial procedures to challenge such environmental contraventions.

On the Secretary of State's appeal—

Held , (1) that the United Kingdom's combination of statute and national and local policy, the statutes requiring the policies to be prepared, taken into account and in some instances followed, was properly characterised as "provisions of … national law relating to the environment" within article 9(3) of the Aarhus Convention , even though such policies were not in themselves provisions of national law and the relevant statutory provisions did not directly relate to the environment; and that, accordingly, the claimant's section 288 application did seek to challenge acts or omissions of public authorities which contravened provisions of the United Kingdom's "national law relating to the environment" and so fell within article 9(3) (post, paras 17–18, 36, 37).

But (2), allowing the appeal, that, since the exclusion of statutory appeals and applications from CPR r 45.41 was not an oversight but had been a deliberate expression of a legislative intent, it would not be appropriate to exercise a judicial discretion so as to side-step that exclusion; that it would be doubly inappropriate to exercise the discretion for the purpose of giving effect under domestic law to the requirements of the Aarhus Convention which, while it was an integral part of the legal order of the European Union, was not directly effective and had not been incorporated into the domestic law of the United Kingdom; and that, accordingly, the judge had erred in exercising her discretion so as to make a protective costs order (post, paras 33–34, 36, 37).

R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600, CA applied .

Per curiam . The costs protection regime introduced by CPR r 45.41 is not compliant with the Aarhus Convention in so far as it is confined to claims for judicial review and excludes statutory appeals and applications. A costs regime for environmental cases falling within the Aarhus Convention under which costs protection depends, not on the nature of the environmental decision or the legal principles upon which it may be challenged, but on the identity of the decision-taker, is systemically flawed in terms of compliance with the Convention. If the flaw is to be remedied action by the legislature is necessary (post, paras 34, 35, 36, 37).

Decision of *Lang J [2013] EWHC 3546 (Admin); [2014] JPL 447* reversed.

The following cases are referred to in the judgment of Sullivan LJ:

Austin v Miller Argent (South Wales) Ltd [2011] EWCA Civ 928; [2011] Env LR 650, CA
European Commission v United Kingdom of Great Britain and Northern Ireland (supported by Kingdom of Denmark intervening) (Case C-530/11) EU:C:2014:67; [2014] QB 988; [2014] 3 WLR 853, ECJ
Lesoochranárske zoskupenie VLK v Ministerstvo ivotného prostredia Slovenskej republiky (Case C-240/09) EU:C:2011:125; [2012] QB 606; [2012] 3 WLR 278; [2012] PTSR 822; [2012] All ER (EC) 1, ECJ
Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107; [2009] Env LR 629, CA
R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL(E)
R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corpn [2008] EWCA Civ 1209; [2009] Env LR 315, CA
R (Compton) v Wiltshire Primary Care Trust (Practice Note) [2008] EWCA Civ 749; [2009] 1 WLR 1436; [2009] PTSR 753; [2009] 1 All ER 978, CA
R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192; [2005] 1 WLR 2600; [2005] 4 All ER 1, CA

R (Garner) v Elmbridge Borough Council (WWF-UK intervening) [2010] EWCA Civ 1006; [2012] PTSR 250; [2011] 3 All ER 418, CA
R (SAVE Britain's Heritage) v Sheffield City Council [2013] EWHC 2456 (Admin) ***2330**

The following additional cases were cited in argument:

Dullingham Parish Council v East Cambridgeshire District Council [2010] EWHC 1307 (Admin)
Eaton v Natural England [2012] EWHC 2401 (Admin); [2013] Env LR 173
Walton v Scottish Ministers [2012] UKSC 44; [2013] PTSR 51, SC(Sc)

APPEAL from Lang J

By a CPR Pt 8 claim form issued on 5 June 2013 the claimant, Sarah Louise Venn, applied under section 288 of the Town and Country Planning Act 1990 to quash the decision of the first defendant, the Secretary of State for Communities and Local Government, contained in a notice dated 25 April 2013 issued by his appointed planning inspector, Nicholas Taylor, to allow the appeal of the second defendant, Robert Dos Santos, against the refusal by the third defendant, Lewisham London Borough Council, of the second defendant's application for planning permission to erect a single-storey two-bedroom home at 47 Dundalk Road, London SE4. The claimant applied for a protective costs order on the ground that her application under section 288 was an " Aarhus Convention claim" within CPR r 45.41 . By an amended order sealed on 21 November 2013 Lang J [2014] JPL 447 ordered that the claimant's liability to pay costs to the defendants was not to exceed the sum of £3,500, inclusive of VAT.

By an appellant's notice dated 6 December 2013 and pursuant to permission granted by the Court of Appeal (Lewison LJ) on 18 February 2014 the Secretary of State appealed on the ground, inter alia, that the judge had erred in finding that the claimant's section 288 challenge fell within the scope of article 9(3) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters .

The facts are stated in the judgment of Sullivan LJ.

James Eadie QC and *Andrew Deakin* (instructed by *Treasury Solicitor*) for the Secretary of State.

Richard Drabble QC and *Christopher Jacobs* (instructed by *Richard Buxton Environmental & Public Law*) for the claimant.

The second and third defendants did not appear and were not represented.

The court took time for consideration.

27 November 2014. The following judgments were handed down.

SULLIVAN LJ

Introduction

1. This is the Secretary of State's appeal against the amended order dated 21 November 2013 of Lang J [2014] JPL 447 granting the claimant a protective costs order ("PCO") limiting her liability to pay the defendants' costs to £3,500 (inclusive of VAT) in respect of her application under section 288 of the Town and Country Planning Act 1990 to quash a decision dated 25 April 2013 of an inspector appointed by the Secretary of State (the first defendant below), allowing the second defendant's appeal under section 78 of the 1990 Act against the refusal of the third defendant to grant ***2331** planning permission for a single storey courtyard dwelling on the side garden area of 47 Dundalk Road, Lewisham, London, SE4 2JJ. The second and third defendants did not appear before Lang J, and they have played no part in this appeal.

Facts

2. The factual background is set out in Lang J's judgment [2014] JPL 447. In summary, the claimant lives next door to number 47, at 49a Dundalk Road. In Ground 1 of her challenge under section 288 the claimant contended that the inspector had failed to have regard to emerging local plan policy in the form of the third defendant's Development Management Local Plan Policy No 32, which provides that the development of back gardens for separate dwellings in perimeter form residential typologies

identified in the Lewisham Character Study will not be granted planning permission. The claimant contended that this policy was supported by para 53 of the National Planning Policy Framework ("NPPF"), by policy 3.5 in the London Plan, and by the Mayor of London's supplementary planning guidance on housing.

3. In paras 17–20 of her judgment Lang J referred to evidence from the Royal Horticultural Society ("RHS"), the London Wildlife Trust, and the Campaign for the Protection of Rural England, all of whom expressed concern about the adverse effects of what was described by the RHS as "garden grabbing", and to a 2010 briefing from the Town and Country Planning Association which was to the same effect.

The issues

4. Before the judge, the claimant contended that: (1) her application under section 288 was an " Aarhus Convention claim" within CPR r 45.41 , and that she was entitled to costs protection under that rule; alternatively (2) the court should exercise its inherent jurisdiction to make a PCO on the basis that this was an environmental challenge falling within article 9(3) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("Aarhus").

5. The Secretary of State contended that: (1) the claimant's application under section 288 of the 1990 Act did not fall within article 9(3) of Aarhus; (2) even if the claimant's application fell within article 9(3) of Aarhus it was not an " Aarhus Convention claim" for the purposes of CPR r 45.41 because it was a statutory application to quash and not an application for judicial review; (3) while the court had a discretion to make a PCO, that discretion had to be exercised in accordance with the principles set out in *R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600* (" Corner House ") which could be modified only in so far as it was necessary to secure compliance with directly enforceable EU environmental Directives, which were not in issue in the present case: see *R (Garner) v Elmbridge Borough Council [2012] PTSR 250* (" Garner ").

6. The judge concluded [2014] JPL 447 that: (1) the claimant's section 288 application was an environmental challenge falling within article 9(3) of Aarhus (para 24); (2) it was not an " Aarhus Convention claim" for the purposes of CPR r 45.41 because costs protection under that rule was confined to claims for judicial review, and the claimant's section 288 application was a statutory application to quash, albeit that it ***2332*** would be determined on the basis of the legal principles that are applicable to judicial review claims (para 32); (3) she should exercise the court's discretion to make a PCO because "the Corner House criteria should be relaxed to give effect to the requirements of the Aarhus Convention ": para 36.

7. The claimant does not challenge the judge's conclusion that CPR r 45.41 applies only to claims for judicial review, and does not apply to statutory appeals or applications, such as her application under section 288 of the 1990 Act. I have no doubt that this concession on the part of the claimant is correct. The wording of CPR r 45.41 is clear, and it is plain that the omission of statutory appeals and applications from costs protection under CPR r 45.41 was deliberate: see para 30 of the judgment.

8. The issues in this appeal are therefore: (1) whether the claimant's section 288 application falls within article 9(3) of Aarhus; and (2) if it does, what are the principles (if any) on which the court should exercise its discretion to grant a PCO in an Aarhus Convention case in which directly enforceable EU environmental Directives are not engaged?

9. I will deal with these two issues in turn. For convenience, the full text of article 9 is set out in the Annex to this judgment.

Issue (1): Article 9(3)

10. I can deal with this issue briefly because Mr James Eadie QC on behalf of the Secretary of State did not take issue with Lang J's conclusion (see para 11 of the judgment) that the description of "environmental information" in article 2(3) of Aarhus was an indication of the intended ambit of the term "environmental" in the Convention, and that the *Implementation Guide* to Aarhus was of assistance in reaching that conclusion. The *Implementation Guide* , 2nd ed, (2013) says, at p 40, that: "The clear intention of the drafters, … was to craft a definition [of environmental information] that would be as broad in scope as possible, a fact that should be taken into account in its interpretation."

11. In his skeleton argument the Secretary of State accepted that "environmental information" is given a broad definition in article 2(3) , and further accepted that since administrative matters likely to affect "the state of the land" are classed as "environmental" under Aarhus the definition of "environmental" in the Convention is arguably broad enough to catch most,

if not all, planning matters. The judge's conclusion that environmental matters are given a broad meaning in Aarhus (see para 15 of the judgment) is supported by the decision of the *Court of Justice of the European Union ("CJEU") in Lesoochranárske zoskupenie VLK v Ministerstvo ivotného prostredia Slovenskej republiky (Case C-240/09) [2012] QB 606* ("the Brown Bear case").

12. In the Brown Bear case, the CJEU concluded that the provisions of the Convention, at para 30: "now form an integral part of the legal order of the European Union." While the provisions of article 9(3) are not directly enforceable (para 45), The CJEU said, at para 46: "it must be observed that those provisions, although drafted in broad terms are intended to ensure effective environmental protection." The CJEU said, at paras 49–50:

> "49. Therefore, if the effective protection of European Union environmental law is not to be undermined, it is inconceivable that ***2333** article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by European Union law.
>
> "50. It follows that, in so far as concerns a species protected by European Union law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by European Union environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in article 9(3) of the Aarhus Convention ."

13. The Secretary of State rightly rejected the distinction that was drawn at the permission stage in *R (SAVE Britain's Heritage) v Sheffield City Council [2013] EWHC 2456 (Admin)* between the reference to "decision, act or omission" in article 9(2), and article 9(3) which refers only to "acts or omissions", not "decisions". As the Secretary of State's skeleton argument points out, there is persuasive authority in the *Implementation Guide* , 2nd ed (2013), p 209; in decisions of the Aarhus Compliance Committee (see ACCC/C/2005/11 (concerning compliance by Belgium) at para 34 and ACCC/C/2008/33 (concerning compliance by the United Kingdom) at paras 123–127); and in para 100 of Advocate General Sharpston's opinion in the Brown Bear case [2012] QB 606 to the effect that the term "acts or omissions" is sufficiently broad in this context to encompass administrative decisions.

14. The sole basis on which Mr Eadie submitted that the judge had erred in concluding that the claimant's section 288 application fell within article 9(3) of Aarhus was that the claimant was not challenging an act or omission by a public authority which contravened a provision of *national law relating to the environment* . Recommended Policy 32 in the third defendant's development management local plan was emerging policy at the date of the inspector's decision, to which weight was to be given in accordance with para 216 of the NPPF. Recommended Policy 32 was not a provision of *national law* , and the complaint was not that it had been contravened, but that there had been a failure to take it into account as a material consideration in accordance with section 70(2) of the 1990 Act. In so far as the claimant was alleging a contravention of *national law* , it was a contravention of section 70(2) , which could not be characterised as a *law relating to the environment* . It was submitted that a distinction should be drawn between section 70(2) and other enactments which were "specifically environmental laws", such as sections 80 and 82 of the Environmental Protection Act 1990 , section 55(2) of the Clean Air Act 1993 , and section 2(4) of the Noise Act 1996 .

15. The Secretary of State's submission is ingenious, and it might have had some force if article 9(3) was a domestic UK enactment, and was not a provision governing the obligations of the parties to an international Convention, each of whom has agreed to give effect to article 9 "within the framework of its national legislation". National legislation may address the issue of environmental protection in different ways. The UK has a sophisticated town and country planning system, and Parliament has chosen to implement much of the UK's environmental protection through that system. One obvious example is the environmental impact assessment process, which is tied to the grant of planning permission. Another example is the requirement that local development plan documents must ***2334** include policies that are designed to ensure that development in each local plan area contributes to the mitigation of, and adaptation to, climate change: see section 19(1A) of the Planning and Compulsory Purchase Act 2004 .

16. As a consequence, it is a characteristic of the UK's approach to environmental protection that much (if not most) of the detail is contained, not in statutory regulations, but in policies, both national policies adopted by the government (the NPPF), and local policies adopted by local planning authorities in their development plan documents. When preparing their local development plan documents local planning authorities must have regard to national policies; including the NPPF: see section 19(2)(a) of the 2004 Act. Decision-makers are then required by section 70(2) to have regard to such policies; and if the policies are contained in the development plan they must be followed unless material considerations indicate otherwise: see section 38(6) of the 2004 Act and para 22 of Lang J's judgment [2014] JPL 447.

17. Given that this is the way in which the UK has chosen to implement a great deal of environmental protection "within the framework of its national legislation", it would deprive article 9(3) of much of its effect if a distinction was drawn between the *policies* , both national and local, which do relate to the environment, and the *law* which does not directly relate to the environment, but which requires those policies which do relate to the environment to be prepared, and then to be taken into account, and in certain cases to be followed unless material considerations indicate otherwise. It would not be consistent with the underlying purpose of Aarhus to adopt an interpretation of article 9(3) which would, at least in the UK, deprive it of much of its effect: see the Brown Bear case [2012] QB 606, paras 49–50: para 12 above. In the Aarhus context the UK's combination of statute and policy, with the former requiring that the latter be prepared, taken into account and in some instances followed, is properly characterised as "national law relating to the environment".

18. For these reasons, I endorse the judge's conclusion that the claimant's section 288 application falls within article 9(3) of Aarhus.

Issue (2): PCOs in Aarhus Convention cases where no EU Directive applies

19. It is common ground that: (a) the court has power to grant costs protection in Aarhus cases falling outside CPR r 45.41 ; and (b) the discretion is not untrammelled, but must be exercised in accordance with the CPR and "established principles": see *Corner House [2005] 1 WLR 2600* , para 8. The issue is whether those "established principles" are still, after the coming into effect of CPR r 45.41 on 1 April 2013, the governing principles which are set out in para 74 of Corner House , as modified by *Garner [2012] PTSR 250* but only in so far as it is necessary to do so in order to comply with directly effective EU environmental Directives (which do not apply in the present case).

20. There is no dispute that those were the "established principles" prior to the coming into effect of CPR r 45.41 . In R (Buglife: The Invertebrates Conservation Trust) v Thurrock Thames Gateway Development Corpn [2009] Env LR 315 , para 19 (" Buglife ") the court agreed with the conclusion of the *Court of Appeal in R (Compton) v Wiltshire Primary Care Trust (Practice Note) [2009] PTSR 753* (" Compton "), that the principles stated in Corner House ***2335*** were binding on this court. The court also said [2009] Env LR 315, paras 17–18 that the opinion expressed by Waller LJ in Compton "that there should be no difference in principle between the approach to PCOs in cases which raise environmental issues and the approach in cases which raise other serious issues and vice versa" was a statement of general application.

21. This approach was followed in Morgan v Hinton Organics (Wessex) Ltd [2009] Env LR 629 (" Morgan "). Responding to a submission that a different approach should be adopted in cases which fell within Aarhus, Carnwath LJ said, at para 44:

> "These arguments raise potentially important and difficult issues which may need to be decided at the European level. For the present we are content to proceed on the basis that the Convention is capable of applying to private nuisance proceedings such as in this case. However, in the absence of a Directive specifically relating to this type of action, there is no directly applicable rule of Community law. The UK may be vulnerable to action by the Commission to enforce the Community's own obligations as a party to the Treaty. However, from the point of view of a domestic judge, it seems to us (as the DEFRA statement suggests) that the principles of the Convention are at the most something to be taken into account in resolving ambiguities or exercising discretions (along with other discretionary factors including fairness to the defendant)."

22. Carnwath LJ drew the threads together in para 47 of his judgment. The following points are of particular relevance for the purpose of this appeal:

> "(ii) Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in the light of the Advocate General's opinion in the Irish cases, the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.
>
> "(iii) With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary 'loser pays' rule and the principles governing the court's discretion to depart from it. The principles of the Convention are at most a matter to which the court may have regard in exercising its discretion.
>
> "(iv) This court has not encouraged the development of separate principles for 'environmental' cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of protective costs orders apply alike to environmental and other public interest cases. The Corner House statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied 'flexibly'. Further development or refinement is a matter for legislation or the Rule Committee."

23. The problem identified in para 47(ii) of Morgan arose in *Garner [2012] PTSR 250* . In paras 32–33 of my judgment in that case, I said:

> "32. It is unnecessary to rehearse the authorities which deal with the application of Corner House principles. The threads are drawn together ***2336** in Morgan's case … Although the principles must be applied flexibly, they are settled so far as this court is concerned. However, this court has not had to consider whether those principles do comply with the requirements of article 10(a) in a case where the Directive applies. It is common ground that the Directive has a direct effect in our domestic law. In such a case, the Court of Appeal recognised in Morgan's case, (para 47(ii)) that some more specific modification of our domestic costs rules may be required.
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> "33. There is no dispute that the decision to grant planning permission in the present case is a decision to which the Directive applies. The [defendant] required that an EIA should accompany the planning application. It seems to me, therefore, that we must modify the Corner House conditions in so far as it is necessary to secure compliance with the Directive, but only in so far as it is necessary to secure such compliance."

24. Judgment in Garner case was given on 29 July 2010 . There have been a number of developments since that date, including the decision dated 24 August 2011 of the Aarhus Compliance Committee (concerning compliance by the United Kingdom), Datasheet ACCC/C/2008/33 (UK), that the UK's regime for costs in Aarhus environmental cases was not compliant with Aarhus; the publication of the Government's Consultation Paper CP16/11 *Costs Protection for Litigants in Environmental Judicial Review Claims* on 19 October 2011; the Government's Response to Consultation (CP(R) 16/11) on 28 August 2012; the coming into effect of CPR r 45.41 on 1 April 2013; and the decision on *13 February 2014 of the CJEU in European Commission v United Kingdom of Great Britain and Northern Ireland (supported by Kingdom of Denmark intervening) (Case C-530/11)*

[2014] QB 988 (" Commission v UK "), that the UK had failed to fulfil its obligations under the EIA and SEA Directives to ensure that judicial proceedings were not prohibitively expensive.

25. Against this background, the issue between the parties is a very narrow one. Both rely on the fact that CPR r 45.41 has come into effect. Mr Eadie submitted that the previously settled principles in Corner House (and Garner , where relevant) had been amended by CPR r 45.41 in respect of Aarhus judicial review claims, but there was a deliberate legislative decision (the CPR being secondary legislation made under powers contained in the Civil Procedure Act 1997 , see para 25 of Morgan) that the previously settled principles should not be amended in respect of statutory appeals and applications. He submitted that it was not a proper exercise of a judicial discretion to side-step a limitation that has been deliberately enacted in the CPR in order to give effect to an international Convention which has not been directly incorporated into our domestic law: see Morgan [2009] Env LR 629 , para 22.

26. In support of his submission Mr Eadie referred to a post- CPR r 45.41 decision, Austin v Miller Argent (South Wales) Ltd [2011] Env LR 650 , (" Austin ") in which the appellant had sought a PCO in her claim in private nuisance against the respondent. The court accepted that private nuisance actions were, in principle, capable of constituting procedures which fall within the scope of article 9(3) (para 21), but rejected the appellant's submission that the EIA Directive was applicable: para 35. Applying *R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696* , Elias and Pitchford LJJ in para 37 of their judgment rejected the claimant's ***2337** submission that the court was obliged to exercise its discretion to grant a PCO where the failure to do so would involve a breach of Aarhus. At para 39, the court said:

> "In our view, therefore, the article 9(4) obligation is no more than a factor to take into account when deciding whether to grant a PCO. It reinforces the need for the courts to be alive to the wider public interest in safeguarding environmental standards when considering whether or not to grant a PCO."

27. Mr Eadie accepted that there was one respect in which the principles in *Corner House [2005] 1 WLR 2600* had been modified: the fact that a claimant has a private interest in the outcome of a challenge to an environmental decision falling within Aarhus does not, of itself, bar the claimant from obtaining a PCO: see Austin [2011] Env LR 650 , paras 40–44. If the existence of a private interest in the outcome of an application were a bar it would often be impossible in practice to obtain a PCO in a section 288 case because of the need for the applicant to be a "person aggrieved" by the decision under challenge. However, the existence of a personal interest is a relevant factor in the exercise of the court's discretion to grant a PCO (ibid). In Austin the court considered that the "strong element of private interest in the claim" was one of the factors which pointed against the grant of a PCO; see para 47. Subject to this exception, Mr Eadie submitted that the court could exercise its discretion to make a PCO in a statutory appeal or application falling within article 9(3) of Aarhus (where no EU environmental Directive was applicable) only if it was satisfied that the remaining Corner House principles (i), (ii), (iv) and (v) were met. The judge did not conclude (i) that the issues raised in this case were of general public importance, nor did she conclude (ii) that the public interest required that those issues should be resolved.

28. On behalf of the claimant, Mr Richard Drabble QC submitted that the coming into effect of CPR r 45.41 on 1 April 2013 had removed the underlying premise on which the principles in Corner House had been applied to environmental cases by this court in Buglife , Morgan and Garner : that there should be no difference in principle between the approach to PCOs in environmental cases and the approach to PCOs in other public interest cases: see Buglife [2009] Env LR 315 , paras 17–18 and Morgan [2009] Env LR 629 , para 47(iv). The CPR now drew a distinction between Aarhus cases and other public interest cases. This distinction was not considered by the court in Austin [2011] Env LR 650 , which was distinguishable in any event because it was a private nuisance claim and not a statutory application in which judicial review principles would be applied.

29. Mr Drabble submitted that if the Secretary of State was correct the court now had to exercise its discretion in circumstances where the availability of costs protection for a claimant making a challenge falling within article 9(3) of Aarhus to an environmental decision depended, not on the nature of the environmental decision, but simply on the identity of the decision-taker. If the decision to grant planning permission in the present case had been taken by the local planning authority, a challenge to that decision by the claimant on identical legal grounds would have been by way of judicial review, and her claim would then have fallen within CPR r 45.41 .

*2338

30. More generally, if a planning application were decided by a local planning authority a legal challenge to that permission falling within Aarhus would have costs protection under CPR r 45.41 , whereas if the same application were called in by the Secretary of State for his determination, there would be no costs protection for a claimant wishing to challenge the Secretary of State's decision on identical legal grounds, since a challenge to the latter could be made only by way of a statutory application under section 288 : see section 284 of the 1990 Act. Mr Drabble submitted that an inevitable consequence of the Secretary of State's argument that the court's discretion had to be exercised in accordance with Corner House principles in cases where an EU environmental Directive was not applicable was that the UK would continue to be in breach of Aarhus, a situation which CPR r 45.41 was intended to remedy.

31. Mr Drabble further submitted that none of the reasons given in the Government's formal response to the consultation *Costs Protection for Litigants in Environmental Judicial Review Claims* for excluding statutory appeals and applications from costs protection under CPR r 45.41 (see para 30 of the judgment) was applicable in the present case. While there was no permission filter for section 288 applications, the judge had concluded that this claimant's application was arguable (see para 40 of the judgment); the application was made by a private individual, not a developer; and it was a public law case against the Secretary of State and not a private law case against another party with limited financial resources. He accepted that some applications for PCOs in claims falling within article 9(3) of Aarhus might raise wider policy issues which it would be inappropriate to resolve by the exercise of a judicial discretion, but he submitted that no such issue arose in the present case. The nature of the environmental challenge within article 9(3) of Aarhus in this statutory application was identical to a challenge by way of an application for judicial review. In such a case the principles in Corner House , in particular principles (i) and (ii) (see para 27 above), were no longer applicable.

Conclusions

32. I have not found this an easy case to resolve. The arguments are finely balanced. Mr Eadie fairly conceded that if, as I have concluded (see para 18 above), the claimant's section 288 application does fall within article 9(3) of Aarhus, there will on the judge's findings (which are not challenged) as to the claimant's means, be a breach of Aarhus if the discretion is not exercised so as to grant her a PCO. He also accepted that whether costs protection was available under CPR r 45.41 for environmental challenges falling within article 9(3) would, in many cases, depend solely on the identify of the decision-taker. He recognised that there was no principled basis for that distinction if the object of the costs protection regime was to secure compliance with the UK's obligations under Aarhus.

33. Notwithstanding these implications of the Secretary of State's case, I have been persuaded that his appeal must be allowed. The coming into effect of CPR r 45.41 is the sole basis on which the claimant submits that "the goal posts have moved" (my expression) to such an extent that this court is no longer bound to apply Corner House principles to applications for PCOs in environmental cases falling within article 9(3) . Once it is *2339 accepted that the exclusion of statutory appeals and applications from CPR r 45.41 was not an oversight, but was a deliberate expression of a legislative intent, it necessarily follows that it would not be appropriate to exercise a judicial discretion so as to side-step the limitation (to applications for judicial review) that has been deliberately imposed by secondary legislation. It would be doubly inappropriate to exercise the discretion for the purpose of giving effect under domestic law to the requirements of an international Convention which, while it is an integral part of the legal order of the EU, is not directly effective (see the Brown Bear case [2012] QB 606), and which has not been incorporated into UK domestic law: see Morgan [2009] Env LR 629 .

34. For these reasons I would allow the appeal. I do so with reluctance. In the light of my conclusion on article 9(3) , and the decisions of the Aarhus Compliance Committee and the *CJEU in Commission v UK [2014] QB 988 referred* to in para 24 above, it is now clear that the costs protection regime introduced by CPR r 45.41 is not Aarhus-compliant in so far as it is confined to applications for judicial review, and excludes statutory appeals and applications. A costs regime for environmental cases falling within Aarhus under which costs protection depends not on the nature of the environmental decision or the legal principles on which it may be challenged, but on the identity of the decision-taker, is systemically flawed in terms of Aarhus compliance.

35. This court is not able to remedy that flaw by the exercise of a judicial discretion. If the flaw is to be remedied action by the legislature is necessary. We were told that the Government is reviewing the current costs regime in environmental cases, and that as part of that review the Government will consider whether the current costs regime for Aarhus claims should make provision for statutory review proceedings dealing with environmental matters: see the speech of Lord Faulks in the House of Lords Committee stage of the Criminal Justice and Courts Bill: Hansard (HL Debates), 30 July 2014, col 1655. That review

will be able to take our conclusions in this appeal, including our conclusion as to the scope of article 9(3) , into account in the formulation of a costs regime that is Aarhus-compliant.

GLOSTER LJ

36. I agree.

VOS LJ

37. I also agree.

Appeal allowed.

Ken Mydeen, Barrister

Annex

Article 9

Access to justice

1. Each party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a ***2340** party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5 , shall be deemed sufficient for the purpose of sub-paragraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of sub-paragraph (b) above. The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively

expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article each party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

***2341**

Footnotes

1 Town and Country Planning Act 1990, s 288(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, or (ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the High Court under this section."

2 CPR r 45.41 : "(1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims. (2) In this Section, ' Aarhus Convention claim' means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."

3 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art 9 : see post, Annex.

Supreme Court

Regina (Finch) *v* Surrey County Council

[2024] UKSC 20

2023 June 21, 22;
2024 June 20

Lord Sales, Lord Leggatt, Lady Rose, Lord Richards JJSC, Lord Kitchin

Planning — Development — Environmental assessment — Local planning authority granting planning permission to expand drilling site for production of hydrocarbons — Whether adequate environmental impact assessment carried out — Whether planning authority required to consider inevitable "downstream" environmental effects from use of end products by consumers in addition to effects of operation of drilling site — Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571), regs 3, 4(2) — Parliament and Council Directive 2011/92/EU, arts 3(1), 5(1) (as amended by Parliament and Council Directive 2014/52/EU)

The developer applied to the local planning authority for planning permission for a project to extract oil for commercial purposes at a site in Surrey. In carrying out its environmental impact assessment as required by regulations 3 and 4 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017[1], which had been enacted to give effect in English law, in part, to Parliament and Council Directive 2011/92/EU, as amended by Directive 2014/52/EU[2], the planning authority accepted as adequate, and relied upon, an environmental statement prepared by the developer which assessed the greenhouse gas that would be produced by the operation of the development itself but did not attempt to assess the greenhouse gas that would be emitted "downstream" when the crude oil produced from the site was used by consumers, typically as a fuel for motor vehicles, after being refined elsewhere. The planning authority granted the permission sought, whereupon the claimant sought judicial review of the decision on the ground, inter alia, that such downstream emissions were "indirect significant effects of a project on … climate" within the meaning of regulation 4(2) of the Regulations and article 3(1) of the amended Directive and so ought to have been identified and assessed. Dismissing the claim, the judge held that such emissions could not in law, by reference to the terms of the amended Directive, be regarded as effects of the activity of extracting the crude oil because of the need for the intermediate refining process to take place before the oil could be used. The Court of Appeal, by a majority, dismissed an appeal by the claimant, albeit on the alternative ground that it was a matter for the evaluative assessment of the local planning authority, subject only to the scrutiny of the court on public law grounds, as to whether there was a sufficient causal connection between the extraction of the oil and its eventual combustion, on which different planning authorities could reasonably take opposite views, and that the defendant

[1] Town and Country Planning (Environmental Impact Assessment) Regulations 2017, reg 3: see post, para 29.
Reg 4(2): "The [environmental impact assessment] must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors ... climate ..."

[2] Parliament and Council Directive 2011/92/EU (as amended), art 3(1): see post, para 221.
Art 5(1): see post, para 224.

A local planning authority had been entitled to use the existence of the intervening stages before the generation of the downstream emissions as good reason for excluding those emissions from its consideration of the indirect significant effects of the proposed development on climate.

On the claimant's further appeal—

Held, allowing the appeal (Lord Sales and Lord Richards JJSC dissenting), that the object of an environmental impact assessment was to ensure that the environmental B impact of a project was exposed to public debate and considered in the decision-making process; that where an environmental impact assessment was required in respect of a planning application to build or develop an oil well, where it was inevitable that the oil would be sent to refineries for conversion to combustible fuel resulting in "downstream" greenhouse gas emissions, those emissions were properly to be regarded as "indirect significant effects of a project on … climate" within the meaning of article 3(1) of Parliament and Council Directive 2011/92/EU, as C amended by Directive 2014/52/EU (and hence also within regulation 4(2) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017), and so were to be taken into account in the environmental impact assessment; that, in particular, (i) not only did the Directive not impose any geographical limit on the scope of the environmental effects of a project which had to be identified and assessed but it was in the very nature of "indirect" effects that they might occur away D from their source, (ii) the fact that the combustion emissions would emanate from activities beyond the well site boundary which were not themselves part of the project was neither a valid reason to exclude them, nor did it break the causal connection between the extraction of the oil and its use, (iii) the process of refining the oil was one which it was always expected and intended that the oil would undergo, and (iv) it was possible to make a reasonable estimate of the quantity of downstream greenhouse gas emissions which would thereby be released; and that, accordingly, E the local planning authority, by confining its assessment of greenhouse gas emissions to those directly released from within the well site boundary, had not complied with the legal requirement to assess both the direct and indirect effects of the proposed development and its decision to grant planning permission could not stand (post, paras 3, 7, 79, 83, 85, 93, 102, 118, 123, 126, 174).

Per curiam. The approach of the majority of the Court of Appeal would mean that any local planning authority conducting an environmental impact assessment F for a project to drill for oil could, subject only to the requirement of public law rationality, lawfully reach its own decision as to whether the downstream greenhouse gas emissions following on from that project were, or were not, "indirect significant effects of the project". If the idea is that it is for each decision-maker to decide for itself what factors to treat as relevant, this is not a reasonable interpretation of the Directive. It would be a recipe for unpredictable, inconsistent and arbitrary decision-making (post, paras 59–60, 132–133, 207, 321, 323).

G Decision of the Court of Appeal [2022] EWCA Civ 187; [2022] PTSR 958 reversed.

The following cases are referred to in the judgments:

Aannemersbedrijf PK Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland (Case C-72/95) EU:C:1996:404; [1997] All ER (EC) 134; [1996] ECR I-5403, ECJ H

Abraham v Wallonia (Case C-2/07) EU:C:2008:133; [2008] Env LR 32; [2008] ECR I-1197, ECJ

An Taisce – The National Trust for Ireland v An Bord Pleanála (Edenderry Power Ltd, Notice Party) [2015] IEHC 633

An Taisce – The National Trust for Ireland v An Bord Pleanála (Kilkenny Cheese Ltd, Notice Party) [2022] IESC 8; [2022] 2 IR 173

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Berkeley v Secretary of State for the Environment [2001] 2 AC 603; [2000] 3 WLR 420; [2000] 3 All ER 897, HL(E)
Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321; [2012] Env LR 22, CA
Brown v Stott [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
Brussels Hoofdstedelijk Gewest v Vlaams Gewest (Case C-275/09) EU:C:2011:154; [2011] PTSR D37; [2011] Env LR 26; [2011] ECR I-1753, ECJ
Ecologistas en Acción-CODA v Ayuntamiento de Madrid (Case C-142/07) EU:C:2008:445; [2009] PTSR 458, ECJ
Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22; [1998] 2 WLR 350; [1998] 1 All ER 481, HL(E)
Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1; [2021] AC 649; [2021] 2 WLR 123; [2021] 3 All ER 1077; [2021] 2 All ER (Comm) 779, SC(E)
Gloucester Resources Ltd v Minister for Planning [2019] NSWLEC 7; 234 LGERA 257
Gray v Minister for Planning [2006] NSWLEC 720; 152 LGERA 258
Greenpeace Ltd v Advocate General [2021] CSIH 53; 2021 SLT 1303, Ct of Sess
Greenpeace Nordic v The State of Norway (represented by Ministry of Petroleum and Energy) (Case No 23-099330TVI-TOSL/05), 18 January 2024, Oslo District Ct
Nature and Youth Norway v The State of Norway (represented by Ministry of Petroleum and Energy) HR-2020-2472-P (Case No 20-051052SIV-HRET), 22 December 2020, Sup Ct of Norway
Ó Grianna v An Bord Pleanála [2014] IEHC 632
R v Monopolies and Mergers Commission, Ex p South Yorkshire Transport Ltd [1993] 1 WLR 23; [1993] 1 All ER 289, HL(E)
R v North Yorkshire County Council, Ex p Brown [2000] 1 AC 397; [1999] 2 WLR 452; [1999] 1 All ER 969, HL(E)
R (Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin); [2004] Env LR 29
R (Champion) v North Norfolk District Council [2015] UKSC 52; [2015] 1 WLR 3710; [2015] 4 All ER 169; [2015] LGR 593, SC(E)
R (Frack Free Balcombe Residents Association) v West Sussex County Council [2014] EWHC 4108 (Admin)
R (Friends of the Earth Ltd) v Secretary of State for Transport [2020] UKSC 52; [2021] PTSR 190; [2021] 2 All ER 967, SC(E)
R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649; [2019] 1 All ER 638, DC
R (Lebus) v South Cambridgeshire District Council [2002] EWHC 2009 (Admin); [2003] Env LR 17
R (Squire) v Shropshire Council [2019] EWCA Civ 888; [2019] Env LR 36, CA
R (Stephenson) v Secretary of State for Housing, Communities and Local Government [2019] EWHC 519 (Admin); [2019] PTSR 2209
Vereniging Milieudefensie v Royal Dutch Shell plc (Case No C/09/571932) NL:RBDHA:2021:5337; (unreported) 26 May 2021, Hague District Ct
WildEarth Guardians v Zinke (2019) 368 F Supp 3d 41, US District Ct of Columbia
World Wildlife Fund (WWF) v Autonome Provinz Bozen (Case C-435/97) EU:C:1999:418; [1999] ECR I-5613, ECJ

The following additional cases were cited in argument:

Commission of the European Communities v Kingdom of Spain (Case C-227/01) EU:C:2004:528; [2005] Env LR 20; [2004] ECR I-8253, ECJ

Marktgemeinde Straßwalchen v Bundesminister für Wirtschaft, Familie und Jugend (Case C-531/13); EU:C:2015:79; [2015] PTSR 1060; [2015] CMLR 47, ECJ

Minister for the Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190; 134 LGERA 272

R (Friends of the Earth Ltd) v North Yorkshire County Council [2016] EWHC 3303 (Admin); [2017] Env LR 22

R (Goesa Ltd) v Eastleigh Borough Council [2022] EWHC 1221 (Admin); [2022] PTSR 1473

R (Wright) v Forest of Dean District Council [2019] UKSC 53; [2019] 1 WLR 6562; [2020] 2 All ER 1, SC(E)

APPEAL from the Court of Appeal

On 8 November 2019 the claimant, Sarah Finch, issued judicial review proceedings in the Planning Division of the Administrative Court in respect of the decision of the defendant local planning authority, Surrey County Council, on 27 September 2019 to grant planning permission to the first interested party, Horse Hill Developments Ltd ("the developer"), for the retention of two existing oil wells for the commercial production of hydrocarbons on a site at Horse Hill, Hookwood, Horley, Surrey and for the expansion of the site by drilling four new wells. On 3 January 2020 Lang J refused permission on the papers. On 15 July 2020, on a renewed application, Lewison LJ granted the claimant permission to proceed with the claim. On 20 October 2020 Holgate J joined the Secretary of State for Housing, Communities and Local Government (subsequently the Secretary of State for Levelling Up, Housing and Communities) as the second interested party. On 21 December 2020 Holgate J [2020] EWHC 3566 (Admin); [2021] PTSR 1160 dismissed the claim.

On 17 February 2022 the Court of Appeal (Lewison LJ and Sir Keith Lindblom SPT, Moylan LJ dissenting) [2022] EWCA Civ 187; [2022] PTSR 958 dismissed an appeal by the claimant.

Pursuant to leave granted by the Supreme Court (Lord Reed PSC, Lord Sales, Lord Stephens JJSC) on 9 August 2022 the claimant appealed. Pursuant to permission granted by the Supreme Court (Lord Reed PSC, Lord Kitchin and Lord Sales JJSC) on 11 April 2023 Friends of the Earth, Greenpeace UK, the Office for Environmental Protection (a non-departmental public body established under section 22 of the Environment Act 2021, sponsored by the Department for Environment, Food and Rural Affairs) and West Cumbria Mining Ltd intervened by way of written submissions.

The issue for the court, as stated in the parties' agreed statement of facts and issues, was whether under Parliament and Council Directive 2011/92/EU, as amended by Directive 2014/52/EU, and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, it was unlawful for a local planning authority not to require the environmental impact assessment for a project for crude oil extraction for commercial purposes to include an assessment of the impact of greenhouse gas emissions resulting from the eventual use of the refined products of that oil as fuel.

The facts are stated in the judgments, post paras 31–38, 183–200.

Marc Willers KC, *Estelle Dehon KC* and *Ruchi Parekh* (instructed by *Leigh Day*) for the claimant.

Harriet Townsend and *Alex Williams* (instructed by *Legal and Democratic Services, Surrey County Council, Kingston upon Thames*) for the local planning authority.

David Elvin KC and *Matthew Fraser* (instructed by *Hill Dickinson LLP, Manchester*) for the developer.

Richard Moules KC and *Nick Grant* (instructed by *Treasury Solicitor*) for the Secretary of State.

Paul Brown KC and *Nina Pindham* (instructed by *Richard Buxton Solicitors, Cambridge*) for Friends of the Earth Ltd, intervening, by written submissions only.

Ruth Crawford KC, *Richard Harwood KC* and *David Welsh* (instructed by *Harper Macleod LLP, Edinburgh*) for Greenpeace UK, intervening, by written submissions only.

Stephen Tromans KC and *Ruth Keating* (instructed by *Head of Litigation and Casework*) for the Office for Environmental Protection, intervening, by written submissions only.

Gregory Jones KC and *Alexander Greaves* (instructed by *Ward Hadaway, Newcastle upon Tyne*) for West Cumbria Mining Ltd, intervening, by written submissions only.

The court took time for consideration.

20 June 2024. The following judgments were delivered.

LORD LEGGATT JSC (with whom **LADY ROSE JSC** and **LORD KITCHIN** agreed)

1. Introduction

1 Anyone interested in the future of our planet is aware by now of the impact on its climate of burning fossil fuels—chiefly oil, coal and gas. When fossil fuels are burnt, they release carbon dioxide and other "greenhouse gases"—so called because they act like a greenhouse in the earth's atmosphere, trapping the sun's heat and causing global surface temperatures to rise. According to the United Nations Environment Programme ("UNEP") Production Gap Report 2023, p 3, close to 90% of global carbon dioxide emissions stem from burning fossil fuels.

2 The whole purpose of extracting fossil fuels is to make hydrocarbons available for combustion. It can therefore be said with virtual certainty that, once oil has been extracted from the ground, the carbon contained within it will sooner or later be released into the atmosphere as carbon dioxide and so will contribute to global warming. This is true even if only the net increase in greenhouse gas emissions is considered. Leaving oil in the ground in one place does not result in a corresponding increase in production elsewhere: see UNEP's 2019 Production Gap Report, p 50, which reported, based on studies using elasticities of supply and demand from the economics literature, that each barrel of oil left undeveloped in one region will lead to 0.2 to 0.6 barrels not consumed globally over the longer term.

3 Before a developer is allowed to proceed with a project which is likely to have significant effects on the environment, legislation in the United Kingdom and many other countries requires an environmental impact assessment ("EIA") to be carried out. The object of an EIA is to ensure

A that the environmental impact of a project is exposed to public debate and considered in the decision-making process. The legislation does not prevent the competent authority from giving development consent for projects which will cause significant harm to the environment. But it aims to ensure that, if such consent is given, it is given with full knowledge of the environmental cost.

B **4** This appeal raises a question about whether the greenhouse gas ("GHG") emissions which will occur when oil extracted from an oil well, after being refined, is burnt as fuel must be included in the EIA required before development consent may be given for the extraction of the oil. The answer to this question depends on whether, for the purpose of the applicable legislation, the effect on climate measured by the GHG emissions that will occur upon combustion of the oil is an effect of the project on climate.

C **5** The competent authority, Surrey County Council, initially considered that the EIA for a project to extract oil for commercial purposes at a well site in Surrey should include an assessment of the combustion emissions from the oil to be produced. The council advised the developer that its environmental statement describing the likely significant effects of the project on the environment should assess the effect of the project on climate and "should consider, in particular, the global warming potential of the oil and gas that would be produced by the proposed well site." But later the council changed its mind. It accepted as sufficient an environmental statement which assessed only direct releases of greenhouse gases at the project site over the lifetime of the project and contained no assessment of the impact on climate of the combustion of the oil. In consequence, no information about the combustion emissions was made available to the public or considered by the council before it granted development consent for the project.

D

E

6 The issue which this court must now decide is whether it was lawful for the council to restrict the scope of the EIA in this way. In defence of the council's decision to do so, two alternative arguments are made. First, it is said that as a matter of law the combustion emissions could not be regarded as environmental effects of the project within the meaning of the legislation. So the council was right to omit them from the EIA. Alternatively, it is said that whether the combustion emissions were effects of the project was a matter of evaluative judgment for the council. Hence the council's decision not to assess the combustion emissions can be challenged only on the limited grounds on which a court can review an exercise of discretion by a public authority. Here, it is argued, there is no proper ground for such a challenge.

F

G **7** I am not persuaded by either argument. It is agreed that the project under consideration involves the extraction of oil for commercial purposes for a period estimated at 20 years in quantities sufficient to make an EIA mandatory. It is also agreed that it is not merely likely, but inevitable, that the oil extracted will be sent to refineries and that the refined oil will eventually undergo combustion, which will produce GHG emissions. It is not disputed that these emissions, which can easily be quantified, will have a significant impact on climate. The only issue is whether the combustion emissions are effects of the project at all. It seems to me plain that they are.

H

8 Before explaining my reasons for so concluding, I must identify the applicable legislative provisions and say a little more about the factual and procedural background to this appeal.

2. The legislation

9 The legislation which the council had to apply was contained in the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571). I will refer to these as "the 2017 Regulations". The 2017 Regulations are one of a number of UK statutory instruments designed to implement Parliament and Council Directive 2011/92/EU, as amended by Directive 2014/52/EU. I will refer to Directive 2011/92/EU, as amended, as "the EIA Directive" and to Directive 2014/52/EU as "the 2014 Directive".

10 We are concerned with the law as it stood in September 2019 when the council's decision to grant development consent for the project was taken. This was before the United Kingdom left the European Union. It is not suggested that the analysis of this case is affected by any changes made to English law as a result of Brexit.

11 The 2017 Regulations are to be interpreted in line with the EIA Directive which they were intended to implement. In these circumstances it is appropriate to focus directly on the provisions of the EIA Directive: see eg *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190, para 136.

The EIA Directive

12 The principle underpinning the EIA Directive, as stated in recital (7), is that:

> "Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out."

"Development consent" is defined in article 1 as "the decision of the competent authority or authorities which entitles the developer to proceed with the project". The term "project" is widely defined and specifically includes "the extraction of mineral resources".

13 The general obligation imposed by the EIA Directive is set out in article 2(1):

> "Member states shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in article 4."

14 Certain projects—such as oil refineries, power stations and waste disposal installations among others—are regarded as inherently likely to have significant effects on the environment and therefore automatically require development consent and an EIA: see article 4(1). These projects are listed in Annex I. The list includes, at item 14:

> "Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500,000 cubic metres/day in the case of gas."

A It is agreed that the project here falls within this description. Development consent for the project and an EIA were therefore required.

15 As defined in article 1(2)(g) of the EIA Directive, "environmental impact assessment" is a process consisting of: (i) the preparation of an EIA report by the developer; (ii) the carrying out of consultations, including public consultation; (iii) the examination by the competent authority of the
B information received; (iv) a reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of its examination; and (v) the integration of this reasoned conclusion into any decisions taken by the competent authority.

16 Article 3(1) requires the EIA to "identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project" on various factors, which
C include "climate". article 5(1) specifies information which the developer must provide in an EIA report where an EIA is required. This information includes "a description of the likely significant effects of the project on the environment" and any additional information specified in Annex IV relevant to the particular project or type of project in question: see article 5(1)(b) and (f). The information specified in Annex IV includes, at paragraph
D 5, a "description of the likely significant effects of the project on the environment resulting from, inter alia": "(f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) …"

17 Annex IV, paragraph 5, further stipulates:

> "The description of the likely significant effects on the factors
E specified in article 3(1) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project."

Public participation

F **18** One of the objects of the EIA Directive is to provide for public participation in environmental decision-making.

19 The European Union and the United Kingdom are both parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, known as "the Aarhus Convention", which was adopted in 1998 and ratified by the EU and
G the UK in 2005. As its full name indicates, this international agreement is designed to secure three rights in relation to environmental matters: a right of access to information, a right of public participation in decision-making, and a right of access to justice. The Aarhus Convention was itself partly based on Council Directive 85/337/EEC of 27 June 1985, which introduced the EIA procedure within the European Economic Community (as it was then called). That Directive was amended after the Aarhus Convention came into force
H by Directive 2003/35/EC to implement obligations arising under the Aarhus Convention and was later codified in the EIA Directive. Recital (18) to the EIA Directive refers to the Aarhus Convention and recital (19) records that:

> "Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in

> environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and wellbeing."

20 Obligations arising under the Aarhus Convention have been built into articles 6, 8 and 9 of the EIA Directive. Thus, article 6 imposes obligations on member states to inform the public early in the decision-making procedure of various matters, which include details of the arrangements made for public participation in the process; to make available to the public concerned the information gathered where an EIA is required; and to give the public concerned early and effective opportunities to express comments and opinions before the decision on the request for development consent is taken. The "public concerned" is defined in article 1(2)(e) as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures" required by the EIA Directive and specifically includes NGOs promoting environmental protection. Article 8 of the EIA Directive requires the results of such public consultation to be "duly taken into account" in the decision-making procedure; and article 9(1) provides that the public must be promptly informed of the decision taken and of "the main reasons and considerations on which the decision is based, including information about the public participation process".

21 The rationale underpinning these public participation requirements is expressed in recital (16) to the EIA Directive:

> "Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken."

Two important ideas are included within this rationale. First, public participation is necessary to increase the democratic legitimacy of decisions which affect the environment. Second, the public participation requirements serve an important educational function, contributing to public awareness of environmental issues. Guaranteeing rights of public participation in decision-making and promoting education of the public in environmental matters does not guarantee that greater priority will be given to protecting the environment. But the assumption is that it is likely to have that result, or at least that it is a prerequisite. You can only care about what you know about.

The 2014 amendments

22 As well as the provisions implementing the Aarhus Convention, it is relevant to note amendments to the EIA Directive made by the 2014 Directive. These included the incorporation in Annex IV of climate and GHG emissions as specific factors which must be addressed in the description of the likely significant effects of the project on the environment (see para 16 above).

23 The rationale for these amendments is explained in recitals (7) and (13) to the 2014 Directive. Recital (7) stated:

A

> "Over the last decade, environmental issues, such as … climate change … have become more important in policy making. They should therefore also constitute important elements in assessment and decision-making processes."

Recital (13) stated:

B

> "Climate change will continue to cause damage to the environment and compromise economic development. In this regard, it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change."

24 Further background to the amendments appears from a proposal to amend the EIA Directive sent by the European Commission to the Council on C 26 October 2012, accompanied by an impact assessment, and from *Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment* published by the Commission in 2013 ("the 2013 Guidance") in anticipation of the relevant amendments being made. These documents explain that, although the EIA Directive had previously included "climate" as a factor specified in article 3(1), experience had shown that climate change D issues were not being adequately identified and assessed. One of the aims of the 2014 Directive was to change this, including by the incorporation of an explicit requirement to consider GHG emissions. The aim of the 2013 Guidance was to help member states improve the way in which climate change (and biodiversity) issues were integrated into the EIA process.

E *The 2017 Regulations*

25 The EIA Directive has been transposed into English law through a series of statutory instruments applicable to different types of project for which, under the EIA Directive, development consent and an EIA are required. There are separate statutory regimes for—to give just a few examples—projects related to forestry, harbour works, marine F works, pipeline works, offshore petroleum works and nuclear reactor decommissioning works.

26 The regulations applicable to projects for offshore petroleum production in an amount exceeding 500 tonnes per day (and therefore falling within item 14 of Annex I to the EIA Directive) are the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 (SI 1999/360). Under those regulations, the authority responsible for G deciding whether to grant development consent and for carrying out an EIA when required is the Secretary of State.

27 In the case of projects for onshore petroleum production (and many other types of project), the United Kingdom has chosen to implement the EIA Directive through the town and country planning regime, by way of the 2017 Regulations. The responsibility for deciding whether to grant development H consent and for carrying out an EIA when required is conferred by the 2017 Regulations on the "relevant planning authority" which is, broadly speaking, the body responsible for determining an application for planning permission for the development. Where the development involves the extraction of oil or other minerals, this is the county council for the area in which it is proposed that the extraction will take place.

28 I pause to note that the EIA Directive did not oblige the UK to adopt this approach. Article 2(2) of the EIA Directive states that the EIA "may be integrated into the existing procedures for development consent to projects in the member states" or into "other procedures or into procedures to be established to comply with the aims of [the] Directive". There is nothing in the EIA Directive which prevented the UK, if it thought necessary or fit, from establishing a national regime for decisions whether to give development consent for projects for onshore oil production—just as the UK has done in relation to projects for offshore oil production. I will return to this point when addressing a suggestion that, because the public authority responsible for granting development consent here is a county council, the EIA process cannot require an assessment of the combustion emissions, as such effects on climate are properly considered at a national level. A short answer is that this looks at the matter the wrong way round. If (which I do not accept) a county council cannot carry out EIAs for projects for onshore petroleum production that are adequate to comply with the aims of the EIA Directive, then a different procedure should be established—if necessary, at a national level—that will achieve such compliance.

29 Regulation 3 of the 2017 Regulations enacts the basic rule that:

> "The relevant planning authority, the Secretary of State or an inspector must not grant planning permission or subsequent consent for EIA development, unless an EIA has been carried out in respect of that development."

The definition of "EIA development" includes (subject to exemptions not relevant in this case) development of a description mentioned in Schedule 1 to the 2017 Regulations, which reproduces Annex I to the EIA Directive. It therefore encompasses the project for the extraction of oil which is the subject of this case.

30 The 2017 Regulations contain provisions which mirror the provisions of the EIA Directive referred to at paras 14–17 above. The EIA report which under article 5(1) of the EIA Directive the developer must prepare is referred to in the 2017 Regulations as an "environmental statement".

3. Factual background

The project

31 The relevant "EIA development" in this case is a project to expand oil production from a well site at Horse Hill near Horley in Surrey. The developer, a company called Horse Hill Developments Ltd, applied to Surrey County Council, as the relevant mineral planning authority, for planning permission to retain and extend the existing well site (comprising two wells) and drill four new wells, and to extract hydrocarbons from the six wells for commercial production. The plan was to carry out the project over 25 years in six phases, starting with construction works to modify the well site, drill the new wells and install facilities for exporting crude oil from the site, and ending with decommissioning and site restoration. The relevant phase is phase 4, which encompasses the extraction of oil from the wells over 20 years. It is estimated that over this period the total quantity of oil produced could be of the order of 3.3 million tonnes.

The scope of the environmental statement

32 The 2017 Regulations (in regulation 15, which implements article 5(2) of the EIA Directive) allow the developer, before making an application for planning permission for EIA development, to ask the relevant planning authority for a "scoping opinion" on the information to be provided in the environmental statement. There is nothing which prevents the planning authority from deciding to grant planning permission if the environmental statement does not conform to the scoping opinion. But there is an expectation that, where there is a scoping opinion, the environmental statement will be based on it. This is explicit in regulation 18(4), giving effect to article 5(1), which states that, where a scoping opinion has been issued, the environmental statement "must … be based" on that opinion.

33 In this case the developer requested, and the council issued, a scoping opinion. The scoping opinion said (in para 3.13) that "the indirect effects associated with the production and sale of fossil fuels which would likely be used in the generation of heat or power, consequently giving rise to carbon emissions, cannot be dismissed as insignificant". This led (in para 3.14) to the following recommendation:

> "Given the nature of the proposed development, which is concerned with the production of fossil fuels, the use of which will result in the introduction of additional greenhouse gases into the atmosphere, it is recommended that the submitted EIA include an assessment of the effect of the scheme on the climate. *That assessment should consider, in particular, the global warming potential of the oil and gas that would be produced by the proposed well site*." (Emphasis added.)

34 The developer did not comply with this recommendation. The environmental statement submitted by the developer contained no information about the global warming potential of the oil that would be produced by the proposed well site. The section dealing with "Greenhouse Gas Emissions and The Climate" stated that:

> "The scope of the assessment is confined to the direct releases of greenhouse gases from within the well site boundary resulting from the site's construction, production, decommissioning and subsequent restoration over the lifetime of the proposed development."

35 The decision to restrict the scope of the assessment in this way was explained (in paras 121 and 122 of the environmental statement) on these grounds:

> "121. … The essential character of the proposed development is the extraction and production of hydrocarbons and does not extend to their subsequent use by facilities and process beyond the planning application boundary and outwith the control of the site operators.
>
> "122. The assessment methodology pays regard to national planning policy and guidance that establishes that decision-makers should 'focus on whether the development is an acceptable use of land, rather than on control of processes or emissions where these are subject to approval under pollution control regimes'. These non-planning regimes regulate hydrocarbon development and other downstream

> industrial processes and decision-makers can assume that these regimes will operate effectively to avoid or mitigate the scope for material environmental harm."

36 As I read these paragraphs (in agreement with Moylan LJ at para 116 of the Court of Appeal judgment), the developer was giving two, or possibly three, reasons for confining the scope of the assessment to "the direct releases of greenhouse gases from within the well site boundary" contrary to the council's scoping opinion. The first reason (or pair of reasons) was that it was unnecessary to assess GHG emissions resulting from the subsequent processing and use of the hydrocarbons beyond the well site boundary because such processes and use (a) were not part of the proposed development and (b) were "outwith the control of the site operators". The other reason given (in para 122) was that the planning authority should not concern itself with GHG emissions that will occur "downstream" when the oil produced from the wells is processed and used because such processes are regulated by other, non-planning regimes, and the planning authority can assume that these regimes will operate effectively to avoid or mitigate the scope for material environmental harm.

The council's decision

37 The council accepted the developer's explanation for not preparing an environmental statement which complied with the scoping opinion. The environmental statement was reviewed by a council officer, Dr Jessica Salder. Her review noted (at para 5.15) that the assessment of the impact of the proposed development on GHG emissions and climate change was limited to "the direct greenhouse gas emissions" of the development and operation of the proposed well site and that "[t]he potential contribution of the hydrocarbons that would be produced over the lifetime of the well site is not covered". The review also noted that the reasons for excluding those emissions were set out in paras 121 and 122 of the environmental statement (quoted above) and said that the council accepted the justification given there for excluding consideration of the global warming potential of the produced hydrocarbons from the scope of the EIA process.

38 At a meeting on 11 September 2019, the council's planning and regulatory committee decided that planning permission should be granted for the project. The committee had sight of an officer's report which included consideration of the effect of the development on climate. But because of the council's acceptance of the approach taken in the developer's environmental statement, this report ignored the combustion emissions. This limitation in the scope of the EIA was recognised, even if only obliquely, in the conclusion (at para 97 of the report) that:

> "the proposed development would not give rise to significant impacts on the climate as a consequence of the emissions of greenhouse gases *directly* attributable to the implementation and operation of the scheme." (Emphasis added.)

The report said nothing about impacts on the climate as a consequence of GHG emissions *indirectly* attributable to the operation of the well site, as no assessment had been made of those indirect effects of the project.

4. Classifying GHG emissions

39 It is convenient at this stage to introduce some terminology which, although not used in the EIA Directive and 2017 Regulations, has become widely used in reporting GHG emissions and was used in the judgments of the Court of Appeal. The terminology derives from the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard (the "GHG Protocol"). This is a document published by the Greenhouse Gas Protocol Initiative, an international initiative involving businesses, NGOs, governments and others. Its aim is to develop internationally accepted GHG accounting and reporting standards for business and to promote their broad adoption.

40 The GHG Protocol classifies GHG emissions using three categories, labelled "scope 1", "scope 2" and "scope 3". Scope 1 emissions are defined as direct GHG emissions that occur from sources that are owned or controlled by an entity. Scope 2 emissions are a special category of indirect emissions. This category consists of GHG emissions from the generation of purchased electricity consumed by an entity. Scope 2 emissions occur at the facility where the electricity is generated. Scope 3 encompasses all other indirect emissions. Scope 3 emissions are consequences of the activities of the entity but (like scope 2 emissions) occur from sources not owned or controlled by the entity. Some examples of scope 3 activities given in the GHG Protocol (at p 25) are extraction and production of purchased materials, transportation of sold products, and use of sold products and services.

41 In November 2021 the International Financial Reporting Standards ("IFRS") Foundation announced the formation of the International Sustainability Standards Board. The Board's aim is to develop international standards for the disclosure of information related to sustainability. Sustainability is defined very broadly and includes direct and indirect effects of the entity's business on the environment. So far two standards have been issued: IFRS S1 and IFRS S2. IFRS S1 establishes general requirements for disclosure of sustainability-related financial information. IFRS S2 is concerned with disclosure of climate-related information. Among other information, IFRS S2 requires entities to disclose their absolute gross GHG emissions during the reporting period, classified as scope 1, scope 2 and scope 3 GHG emissions. Scope 3 GHG emissions are themselves required to be classified in 15 categories derived from the GHG Protocol. These categories include "downstream transportation and distribution", "processing of sold products" and "use of sold products".

42 The UK Government is currently consulting on whether to endorse IFRS S2 for use in the UK and, in particular, whether to introduce reporting requirements for UK companies which include an obligation to report their scope 3 GHG emissions: see "Scope 3 Emissions in the UK Reporting Landscape: A Call for Evidence" (October 2023).

43 Using the taxonomy adopted in the GHG Protocol Standard and IFRS S2, the council's decision to confine the scope of the assessment of GHG emissions to "the direct releases of greenhouse gases from within the well site boundary" (see para 37 above) meant that only scope 1 GHG emissions were assessed. That is, only direct GHG emissions from sources within the control of the developer/site operator were included in the EIA. No indirect GHG emissions resulting from the project but occurring from sources outside the control of the developer/site operator were assessed. As it happens, there were

no relevant scope 2 GHG emissions. This is because the project was intended to generate its own electricity. There was therefore no plan to consume any purchased electricity generated at facilities elsewhere. So the GHG emissions from the generation of electricity used in the operation of the well site would all be scope 1 GHG emissions. The combustion emissions which are the centre of controversy here are scope 3 GHG emissions, as they are indirect GHG emissions not included in scope 2. Under IFRS S2 they fall within scope 3, category (11): emissions from the use of sold products.

5. These proceedings

The claim

44 The claimant, who lives near the site and represents an association called the Weald Action Group, has brought this claim for judicial review of the council's decision to grant planning permission for the project. Her primary ground of challenge (and the only one still relevant on this appeal) is that the council did not comply with the obligations imposed by the EIA Directive and the 2017 Regulations because, in carrying out the EIA required for the project, it failed to assess the combustion emissions that will result from the oil to be produced. There are three defendants to the claim, all of whom oppose it. They are the council, the developer and the Secretary of State for Levelling Up, Housing and Communities.

The High Court decision

45 In the High Court Holgate J dismissed the claim for reasons given in a characteristically clear and comprehensive judgment: [2021] PTSR 1160. The judge found, at para 69, that it is impossible to say where the oil produced would be refined or used, and whether this would be in the United Kingdom or abroad. But the judge also made this important finding, at para 100, which is an agreed fact on this appeal:

> "it is *inevitable* that oil produced from the site will be refined and, as an end product, will eventually undergo combustion, and that that combustion will produce GHG emissions." (Emphasis added.)

46 Even so, the judge concluded that assessment of the combustion emissions was, as a matter of law, incapable of falling within the scope of the EIA required by the 2017 Regulations: see para 126. Alternatively, if that was wrong and it was legally possible to take the view that the combustion emissions fell within the scope of the required EIA, the judge thought it impossible to say that the council's opinion that the combustion emissions were not indirect effects of the proposed development was irrational or otherwise unlawful: see paras 127, 132.

Decision of the Court of Appeal

47 The Court of Appeal, by a majority, affirmed the judge's decision, on the basis of his alternative reasoning: [2022] PTSR 958. The majority (Sir Keith Lindblom SPT and Lewison LJ) did not agree with the judge that, as a matter of law, the combustion emissions were incapable of being regarded as effects on climate requiring assessment in the EIA. In their view, whether the combustion emissions are indirect effects of the extraction of the oil which therefore had to be assessed depends on whether there was a "sufficient

causal connection" between the two, which they saw as a matter of fact and evaluative judgment for the council: see paras 43, 57, 60, 63, 141. The Senior President was satisfied that, in the circumstances of this case, the council had a reasonable and lawful basis for excluding the combustion emissions from the EIA: paras 60–66. Lewison LJ was more doubtful but ultimately concluded, "not without hesitation", that the reasons given by the council for its decision "just about pass muster": para 149.

48 Moylan LJ dissented. He agreed with the majority that whether the combustion emissions needed to be assessed was a matter to be determined by the council. But he considered that cogent reasons would be required to exclude those GHG emissions from assessment and that the reasons given by the council were legally flawed: paras 129–130.

This appeal

49 On this further appeal by the claimant, the parties' positions are as follows:

(i) The claimant contends that, on the proper interpretation of the legislation, the "effects of the project" on climate which the council needed to assess as part of the EIA included the combustion emissions.

(ii) Two of the defendants—the council and the Secretary of State—invite this court to endorse the analysis of the majority of the Court of Appeal (and alternative approach of the judge) that the council was entitled to decide, as a matter of evaluative judgment, that the combustion emissions were not "effects of the project" on climate.

(iii) The developer submits (as its primary position) that the judge was right to hold that the combustion emissions cannot as a matter of law be regarded as "effects of the project" on climate.

50 With the court's permission, four interveners have also made written submissions. I have found particularly helpful submissions made by the Office for Environmental Protection. This is a public body established under section 22 of the Environment Act 2021 and sponsored by the Department of the Environment, Food and Rural Affairs. Its principal objective is to contribute to environmental protection and the improvement of the natural environment.

51 Two of the interveners, Friends of the Earth Ltd and Greenpeace UK, support the claimant's case. Another, West Cumbria Mining Ltd, supports the approach of the majority of the Court of Appeal. The submissions made by the Office for Environmental Protection do not take sides between the parties but explain the reasons for its concern that the decisions of the lower courts, if upheld, "could have an adverse effect on sound environmental decision-making and hence on environmental protection and the improvement of the natural environment".

6. The issue

52 The overall issue in the appeal is whether, under the EIA Directive and the 2017 Regulations, it was lawful for the council not to include the combustion emissions in the EIA for the proposed project.

53 The council could not lawfully grant planning permission for the project unless an EIA had been carried out which complied with the obligation to "identify, describe and assess in an appropriate manner … the

direct and indirect significant effects" of the project on (among other factors) "climate": see regulation 4(2), reflecting article 3(1) of the EIA Directive. If the significant effects of the project on climate include the combustion emissions, the council was therefore obliged to assess them as part of the EIA and its failure to do so renders the decision to grant planning permission unlawful. On the other hand, if (as the judge held) the combustion emissions were incapable as a matter of law of being regarded as "effects of the project" on climate within the meaning of the legislation, then the council was right not to assess them and its decision to grant planning permission was lawful. Its decision was also lawful if (as the majority of the Court of Appeal held) the question whether the combustion emissions are "effects of the project" on climate within the meaning of the legislation was a matter of evaluative judgment for the council and the council's reasons for leaving the combustion emissions out of account were lawful.

7. The meaning and application of legislation

54 The approach taken by the Court of Appeal raises a question about the respective roles of the competent authority and the court when a dispute arises about whether the authority has correctly applied legislation to the facts of a particular case.

55 Interpreting the law, by establishing the meaning and legal effect of legislation, is the court's role. If a decision-making authority bases its decision on an interpretation of legislation which the court concludes was mistaken, then the authority makes an error of law and its decision is unlawful.

56 Interpreting a legislative provision requires the court to identify, from the language and purpose of the legislation, the criteria to be applied in deciding whether the facts of any individual case fall within its scope. These criteria may be so precise that, when applied to the facts of a given case, they rationally yield only one answer. But sometimes, as Lord Mustill pointed out in *R v Monopolies and Mergers Commission, Ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, 32, the criteria are sufficiently imprecise that there is room for different decision-makers, each acting rationally, to reach different answers. In such a case the court will not interfere with the decision taken unless it is "irrational" in the sense either that it is outside the range of reasonable decisions open to the decision-maker or that there is a demonstrable flaw in the reasoning which led to the decision. Examples of such a flaw would be that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error: see eg *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, para 98.

57 The question in *South Yorkshire Transport* was whether, for the purpose of particular competition legislation, an area of South Yorkshire in which a transport company was providing bus services constituted "a substantial part of the United Kingdom". The House of Lords held that, even after eliminating inappropriate senses of the term "substantial", the meaning was broad enough to call for an exercise of judgment and that the conclusion arrived at by the decision-maker was well within the "permissible field of judgment", p 33.

58 The term "substantial" is intrinsically vague because, in the absence of some further, more precise criterion, there will be cases in which the

question whether the term applies has no answer on which reasonable people who understand the meaning of the term could all be expected to agree. The same is true of the term "significant" which is used in article 3(1) and other provisions of the EIA Directive. Deciding whether an effect of a project on the environment is "significant" clearly requires a value judgment and carries the potential for cases to arise in which different decision-makers may legitimately reach different conclusions without it being possible to say that any of them has made an error in interpreting or applying the term.

59 The concept of "the effects of a project" on the environment is not—or at least not obviously—vague in this way. One might think that whether a particular environmental impact is or is not an effect of the project is a question which, in principle, admits of only one answer. In my view, in the great majority of cases that impression is indeed correct. I think it is true here. But it will be necessary to consider the contrary view taken by the Court of Appeal that whether something is an "effect of the project" is a matter of degree which requires the decision-making authority to evaluate whether there is a "sufficient causal connection" between the project and the putative effect. The concept of a "sufficient causal connection" is intrinsically vague. If no more precise criterion can be identified, it would leave a wide range of cases in which the question whether a particular environmental impact is or is not an "effect of the project" has no single right or wrong answer.

60 As an initial comment, this would be a very unsatisfactory state of affairs. It would mean that in cases of the present kind there would be no consistency, or means of ensuring consistency, between decisions made by different planning authorities when faced with similar issues, or even between decisions made by the same authority on different occasions in relation to similar projects. That would be all the more regrettable when issues relating to climate change and the extent to which disclosure of information about GHG emissions should be required are becoming more and more salient in policy-making and public debate. To treat inconsistent approaches to questions of whether and when direct or indirect GHG emissions should be included in EIAs as equally valid would be a form of arbitrary administration. The fact that the interpretation of the EIA Directive favoured by the Court of Appeal would have such an unreasonable result is itself a good reason to reject it.

8. Interpreting the EIA Directive

61 In interpreting the EIA Directive, certain core principles are not in dispute. To determine what is meant by the "direct and indirect … effects of a project", it is necessary to examine the language and in particular the purpose of the EIA Directive: *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, 401. The Court of Justice of the European Union ("CJEU") has repeatedly emphasised that the EIA Directive is wide in scope and its purpose very broad: see eg *Aannemersbedrijf PK Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1997] All ER (EC) 134; [1996] ECR I-5403, para 31; *World Wildlife Fund (WWF) v Autonome Provinz Bozen* (Case C-435/97) [1999] ECR I-5613, para 40; *Abraham v Wallonia* (Case C-2/07) [2008] Env LR 32; [2008] ECR I-1197, paras 32 and 42. Concisely stated, that purpose is to ensure that decisions whether to give development consent for projects which may affect the environment are made on the basis of full information: *R v North Yorkshire County Council,*

Ex p Brown [2000] 1 AC 397, 404; *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, 615.

62 It is also important to keep in mind that the legislation is essentially procedural in nature. It is not concerned with the substance of the decision whether to grant development consent but with how the decision is taken. Thus, as the House of Lords held in *Berkeley*, it is no answer to a challenge based on failure to carry out an EIA that complies with the EIA Directive to say that complying with the EIA Directive would not have affected the decision. It is essential to the validity of the decision that, before it is made, there has been a systematic and comprehensive assessment of the likely significant effects of the project on the environment in accordance with the EIA Directive. As well explained by one writer on the subject:

> "EIA is not a procedure for preventing actions with significant environmental impacts from being implemented, although in certain circumstances this could be the appropriate outcome of the process. Rather the intention is that actions are authorised in the full knowledge of their environmental consequences."

See Christopher Wood, *Environmental Impact Assessment: A Comparative Review*, 2nd ed (2002), p 3.

63 As noted earlier, public participation is also integral to the process of assessment. This was also emphasised in *Berkeley*, where Lord Hoffmann stated, at p 615:

> "The directly enforceable right of the citizen which is accorded by the [EIA] Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues."

64 With these principles in mind, I turn to the key question of what, on the proper interpretation of the EIA Directive, is meant by the "direct and indirect … effects of a project" on the factors specified in article 3(1)—and, in particular, on "climate"—which the EIA is required to identify, describe and assess.

9. What are "effects of a project"?

65 What are or are not "effects of a project" is, to state the obvious, a question of causation. An effect is the obverse of a cause.

Causation in fact

66 Whether one event or state of affairs (Y) is an effect of another event or state of affairs (X)—or, to say the same thing the other way round, whether X is a cause of Y—is in the first place a question of fact. To determine whether two events are causally connected, we apply scientific knowledge, understanding of human behaviour and other knowledge about the world. Such knowledge may of course increase as new research is undertaken and new discoveries are made. Understanding of climate change is a good illustration. Until quite recently it was uncertain and controversial whether global temperatures have been rising as a result of human activities. But there

A is now overwhelming scientific proof of this phenomenon demonstrating the past, present and likely future effects on climate of, among other human activities, burning fossil fuels to generate energy.

Causation in law

67 Establishing that, as a matter of fact, there is a causal relationship B between events X and Y, does not by itself answer the question whether, as a matter of law, X is to be regarded as a cause of Y (and Y as an effect of X). To answer that question, it is necessary to understand the purpose for which the question is being asked: see eg *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, 29–31.

68 Depending on the context, various tests of causation may be applied, C some more demanding than others. A test often used at least as a minimum requirement is whether X is a necessary condition for the occurrence of Y. This is known by lawyers as the "but for" test because one simple way of expressing it is to ask: would event Y have occurred but for the occurrence of event X? The "but for" test is generally seen as a weak test of causation because, in any given situation, many events (or states of affairs) will satisfy D the "but for" test which would not usually be regarded as causes of the event under consideration: see eg *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] AC 649, para 181.

69 The strongest possible test of causation, which is seldom satisfied when questions of causation arise in law, requires the occurrence of event X to be both a necessary and sufficient condition for the occurrence of Y. If X is a sufficient cause of Y, then every time X happens Y will always follow. This is E the kind of unbreakable connection that exists, for example, where laws of physics, such as Newton's laws of motion, operate.

70 An example of a test not as strong as this but much stronger than the "but for" test is the interpretation placed on pollution control legislation in the *Environment Agency* case mentioned earlier. The legislation made it an offence to cause polluting matter to enter controlled waters. Diesel oil F stored in a tank in the defendant's yard had overflowed into a river but only because an outlet tap without a lock had been turned on by a person unknown. The question was whether the defendant had caused the oil to enter the river. The House of Lords held that the criterion for identifying which intervening acts and events negative causal connection for this purpose was whether the intervening act or event was a matter of ordinary occurrence G or was something extraordinary. If, as on the facts of that case, the third party act which was the immediate cause of the pollution was a matter of ordinary occurrence, it should not be regarded as negativing the causal effect of the defendant's acts. The proper conclusion would therefore be that the defendant had caused the polluting matter to enter the river.

71 A similar test applies in insurance law where, unless the insurance policy otherwise provides, the insurer is liable only for losses "proximately" H caused by a peril insured against. As explained in *Financial Conduct Authority v Arch Insurance*, paras 164–168, the term "proximate" means "real or efficient" and whether the occurrence of an insured peril was the proximate (or efficient) cause of the loss involves making a judgment as to whether it made the loss inevitable—if not, which could seldom if ever be said, in all conceivable circumstances—then in the ordinary course of events.

For this purpose, human actions are not generally regarded as negativing causal connection, provided at least that those actions were not wholly unreasonable or erratic.

Predicting likely effects

72 Typically, when questions of causation arise in law the inquiry involves looking backwards to determine whether one past event caused another past event. In determining the required scope of an EIA, however, the inquiry is forward-looking. The question is: on the assumption that the project goes ahead, what possible future effects on the environment will constitute "effects of the project" which (if significant) must therefore be assessed? The EIA Directive answers that question by imposing the test of whether the effect is "likely". Thus, article 5(1)(b) requires the information provided by the developer to include "a description of the *likely* significant effects of the project on the environment" (emphasis added) and Annex IV further specifies what this obligation involves.

73 The term "likely" can bear more than one meaning. It can mean "more probable than not", or it may connote some other (lesser or greater) degree of probability. A guide provided by the Intergovernmental Panel on Climate Change, quoted with approval by the European Commission in its 2013 Guidance at p 40, equates the term "likely" with a probability of between 66% and 100%. Arguably, this is too strict a standard. But, as I will soon discuss, there is no need to express any view on this question to decide this case.

74 Whatever the precise meaning of the term, to determine that a potential effect is "likely" requires evidence on which to base such a determination. If evidence is lacking so that a possible future occurrence is a matter of speculation or conjecture, then a rational person would not feel able to judge that it is "likely". Such agnosticism is not the same as judging the event to be unlikely. It reflects a belief that there is too little knowledge on which to base a judgment.

75 The need for sufficient evidence on which to base an assessment is not spelt out as a requirement in the EIA Directive. But it can be deduced from the description and purpose of the EIA procedure. As set out in article 1(2)(g), stage (iv) of that procedure—which follows (i) the preparation of the environmental statement by the developer, (ii) the carrying out of consultations, and (iii) the examination by the competent authority of the information received—is:

> "[a] reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of [its] examination; …"

76 The initial, information gathering stages of the process, including the preparation of the environmental statement, are thus directed towards the ability to reach a reasoned conclusion on the significant effects of the project on the environment. This is confirmed in article 5(1), which provides that the environmental statement shall "include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment, taking into account current knowledge and methods of assessment." Similarly, article 5(3)(c) provides that, "where necessary, the competent authority shall seek from the

A developer supplementary information, in accordance with Annex IV, which is directly relevant to reaching [a] reasoned conclusion on the significant effects of the project on the environment."

77 Implicit in these provisions, and in the aims of the EIA Directive, is the criterion that material should be included in the environmental statement and taken into account in the procedure only if it is information on which a reasoned conclusion could properly be based. Conjecture and speculation B have no place in the EIA process. Thus, if there is insufficient evidence available to found a reasoned conclusion that a possible environmental effect is "likely", there is no requirement to identify, describe and try to assess this putative effect. This criterion must also govern, where a possible effect is regarded as "likely", the nature and extent of the assessment of the effect.

78 There is here an area of evaluative judgment involved in determining C the scope of an EIA. Judging whether a possible effect of a project is likely and capable of assessment may, depending on the circumstances, be a matter on which different decision-makers, each acting rationally, may take different views.

Causation in this case

D **79** In this case there is no uncertainty about the relevant facts. It is known with certainty that the extraction of oil at the proposed well site in Surrey —which is the activity giving rise to the requirement to carry out an EIA— would initiate a causal chain that would lead to the combustion of the oil and release of greenhouse gases into the atmosphere. It is not necessary to consider what is meant by "likely" because it is an agreed fact that, if the E project goes ahead, this chain of events and the resulting effects on climate are not merely likely but inevitable.

80 Expressed in terms of necessary and sufficient conditions, this is not simply a case in which the "but for" test is satisfied in that, but for the extraction of the oil, the oil would stay in the ground and so would not be burnt as fuel. On the agreed facts, the extraction of the oil is not just a necessary condition of burning it as fuel; it is also sufficient to bring F about that result because it is agreed that extracting the oil from the ground guarantees that it will be refined and burnt as fuel. As discussed above, a situation where X is both necessary and sufficient to bring about Y is the strongest possible form of causal connection—much stronger than is required as a test of causation for most legal purposes.

81 It is also common ground that general estimates of combustion G emissions can be made using methodology such as that described in guidance issued by the Institute of Environmental Management and Assessment. Estimating the combustion emissions which will occur if the project proceeds is not a difficult task. It could easily have been performed by the developer and has in fact been performed by Dr Jessica Salder, the council officer who reviewed the environmental statement, when she made a witness statement in these proceedings. All that is required is to identify from published sources H a suitable "conversion factor"—which is the estimated amount of carbon dioxide emitted upon combustion of each tonne of oil produced. The total estimated quantity of oil to be produced is then multiplied by this conversion factor to calculate the total combustion emissions. In her evidence Dr Salder used a conversion factor of 3.22 tonnes of carbon dioxide for each tonne of oil produced. Multiplying the total estimated output from the proposed

project of 3.3 million tonnes of oil (see para 31 above) by this factor gives an estimated total of 10.6 million tonnes of CO_2 emissions over the lifetime of the project.

82 It is instructive to compare the amount of these emissions with the "direct" GHG emissions at the well site over the lifetime of the project which were included in the environmental statement. The estimated amount of the "direct" GHG emissions was 140,958 tonnes of CO_2. As well as providing this figure, the developer calculated the proportion which this figure would represent of the total UK carbon budget. Based on this calculation, the environmental statement described the effects of the proposed development on climate as "negligible". Had the combustion emissions been included in the assessment, the figure for GHG emissions attributable to the project would have been nearly two orders of magnitude greater and could not have been dismissed as "negligible" in that way.

Direct and indirect effects

83 Article 3(1) of the EIA Directive requires the EIA to assess both the "direct and indirect" effects of a project on the specified environmental factors, one of which is climate. The express requirement to assess indirect as well as direct effects is clearly intended to emphasise the wide causal reach of the required assessment. This is further emphasised by the stipulation in Annex IV, paragraph 5, that the description of the likely significant effects on the factors specified in article 3(1) should cover both the direct effects and "any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project". It would be hard to devise broader wording than this.

84 From one point of view the distinction between "direct" and "indirect" effects does not matter, as both types of effect must be assessed in the EIA process. There is still, I think, some value in considering what these terms mean. No case law has been cited which has sought to define "direct" and "indirect" effects. A natural way to understand the distinction —and how it is commonly used in social sciences—is to define a direct effect of one event on another event as an effect which is not mediated by one or more variables. An indirect effect, by contrast, is one which depends on one or more variable intermediate factors that may alter the total effect observed: see eg J Pearl, "Direct and indirect effects" in *Proceedings of the American Statistical Association, Joint Statistical Meetings* (2005), pp 1572–1581.

85 On this definition combustion emissions are direct effects of the extraction of oil because they are almost entirely independent of any intermediate variables. To know that combustion emissions will occur and quantify them, there is no need to know anything about where the oil will go after it is extracted or what the oil will be used for or when or where it will be burnt. It is sufficient to know—as is known with virtual certainty—that the oil will be refined and ultimately used as fuel. There are no variables in the intervening events which will significantly alter the fact or amount of the combustion emissions or their impact on climate. So on this definition the combustion emissions are a direct effect of the activity of extracting the oil.

86 An alternative approach is to draw the distinction by reference to the immediate source of the impact. This approach gets some support from guidance issued by the European Commission. In May 1999 the European Commission published *Guidelines for the Assessment of Indirect*

and Cumulative Impacts as well as Impact Interactions. These Guidelines were said to be intended for use by EIA practitioners and developers and to be designed to apply to a wide range of projects and to assist in the EIA process throughout member states.

87 After observing that there are no agreed and accepted definitions, the Guidelines define "indirect impacts" as:

> "Impacts on the environment, which are not a direct result of the project, often produced away from or as a result of a complex pathway. Sometimes referred to as second or third level impacts, or secondary impacts."

This definition offers little assistance beyond spelling out that, as might be thought obvious, indirect effects can be and often are produced away from the site of the project.

88 Somewhat more useful are the definitions given in the 2013 Guidance referred to at para 24 above. This defines "direct effects" as:

> "Environmental effects directly caused by the preparation, construction or operation of a project in a particular location." (p 6)

"Indirect effects/impacts" are defined as:

> "Effects/impacts that occur away from the immediate location or timing of the proposed action, eg quarrying of aggregates elsewhere in the country as a result of a new road proposal, or as a consequence of the operation of the project (see also secondary effects)." (p 7)

The definition of "secondary effects", to which cross-reference is made, is:

> "Effects that occur as a consequence of a primary effect or as a result of a complex pathway." (p 8)

89 When applied to GHG emissions, these definitions distinguish between those which are "direct" and "indirect" effects in much the same way as the GHG Protocol and IFRS S2. As noted earlier, those standards define direct GHG emissions (labelled "scope 1") as GHG emissions that occur from sources that are owned or controlled by an entity. Indirect GHG emissions (ie scope 2 and 3) are defined as GHG emissions that are a consequence of the activities of an entity but occur at sources owned or controlled by another entity.

90 On these definitions the combustion emissions are indirect effects of the project, as they will occur, probably far away from the project site, at sources owned or controlled by entities other than the developer/site operator. They are like impacts from the quarrying of aggregates in the illustration given by the Commission in defining "indirect effects." If the quarrying of aggregates used in building a new road would be likely to generate significant GHG emissions, the Commission contemplates, correctly in my view, that these would be indirect effects of the project which, if significant, must therefore be assessed. I can see no reason why combustion emissions that will occur elsewhere as a consequence of the operation of a project to extract oil should be regarded differently.

91 The 2013 Guidance, at p 29, also provides a table of "examples of main climate change and biodiversity concerns to consider as part of EIA." Under the heading "climate change mitigation" the table lists: "direct

GHG emissions"; "indirect GHG emissions due to increased demand for energy"; and "indirect GHG emissions caused by any supporting activities or infrastructure that is directly linked to the implementation of the proposed project (eg transport …)". In the terminology of the GHG Protocol and IFRS S2, the first of these categories corresponds broadly to scope 1 GHG emissions, the second to scope 2 GHG emissions, and the third to certain types of scope 3 GHG emissions.

92 Doubtless the categories given as examples were chosen because they are likely to be relevant to many different types of project—unlike combustion emissions which arise as a consequence of projects for the extraction of fossil fuels. But there is no suggestion that the categories stated as examples are considered to be exhaustive of the circumstances in which GHG emissions can occur as indirect effects of a project. To the contrary, the 2013 Guidance states expressly that they are examples only, that the list "is not comprehensive", that "the issues and impacts relevant to a particular EIA should be defined by the specific context of each project", that "flexibility is therefore needed", and that the table provided "should be used only as a starting point for discussion". The examples given therefore cannot be read as somehow cutting down the definition of "indirect effects" given earlier in the 2013 Guidance. Applying that definition, the combustion emissions are "indirect effects" of the project in issue here.

Transboundary effects

93 It is worth emphasising that the EIA Directive does not impose any geographical limit on the scope of the environmental effects of a project which must be identified, described and assessed when an EIA is required. In principle, all likely significant effects of the project must be assessed, irrespective of where (or when) those effects will be generated or felt. There is no justification for limiting the scope of the assessment to effects which are expected to occur at or near the site of the project. The fact that an environmental impact will occur or have its immediate source at a location away from the project site is not a reason to exclude it from assessment. There is no principle that, if environmental harm is exported, it may be ignored.

94 That is no less true if the effect will be produced or felt outside the territorial jurisdiction of the state (here, the UK) whose national law requires the EIA to be carried out. If there were otherwise any doubt about this, it is removed by the express inclusion in Annex IV, paragraph 5, of "transboundary" effects in the description of the likely significant effects on the factors specified in article 3(1) which should be covered (see para 83 above).

95 The developer in the present case advanced an argument that the express requirement to assess "transboundary" effects actually tells in favour of a narrow interpretation of the scope of the effects on climate which are to be assessed. This paradoxical claim makes no more sense on analysis than it does at first sight. The argument is based on article 7 of the EIA Directive. Article 7 applies where a member state is aware that a project intended to be carried out in one member state is likely to have significant effects on the environment in another member state. In such a case the member state in whose territory the project is intended to be carried out must give the other member state an opportunity to participate in the environmental decision-making procedures. Article 7 also requires the member states concerned to

A enter into consultations regarding the potential transboundary effects of the project. The argument made is that it cannot sensibly have been intended that the article 7 procedure should have to be invoked in any case where a project is likely to give rise to "downstream" GHG emissions in another member state.

96 Plainly it would be impossibly burdensome if, for example, in relation to the present project it were necessary to give every member state of the B European Union an opportunity to participate in the environmental decision-making procedures on the footing that oil produced from the well site might find its way into that country and generate GHG emissions when used as fuel. But that is a false fear. There is no risk of such an obligation arising, for two reasons. First, there is no way of knowing where the oil produced from the well site will ultimately be used as fuel. There is therefore no foreign state C of which it can be said (on anything more than speculation) that the oil is likely to be consumed there. Second, and more fundamentally, it is wrong in any event to treat the impact on climate of GHG emissions as local to the places where the combustion occurs.

97 Climate change is a global problem precisely because there is no correlation between where GHGs are released and where climate change is felt. Wherever GHG emissions occur, they contribute to global warming. D This is also why the relevance of GHG emissions caused by a project does not depend on where the combustion takes place. If an activity is carried on which will inevitably result in significant GHG emissions, people who carry on the activity cannot be heard to say: "These emissions are not effects of our activity because they are occurring far away among people of whom we know nothing."

E **98** On a proper interpretation, the obligations set out in article 7 of the EIA Directive are not triggered by awareness that, as a consequence of a project intended to be carried out in one member state, GHG emissions are likely to occur in another member state. To avoid absurdity, the reference in article 7(1) to "effects on the environment in another member state" must be read as meaning effects on the environment which are specific to that F other member state rather than purely global effects that affect the whole world. Thus effects on climate of GHG emissions occurring in one state as a consequence of a project undertaken in another state do not fall within article 7.

99 This conclusion is reinforced by the 1991 UN Convention on Environmental Impact Assessment in a Transboundary Context (known as the "Espoo Convention"), to which—as recital (15) of the EIA Directive G confirms—article 7 is intended to give effect. Article 1(8) of the Espoo Convention defines a "transboundary impact" to mean "any impact, *not exclusively of a global nature*, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party" (emphasis added). The EIA Directive does not itself define a "transboundary impact" H or "transboundary effect", but it is reasonable to interpret these terms where they are used in the EIA Directive as having a similar meaning to their meaning in the Espoo Convention.

100 The fact that the combustion emissions from the oil produced are likely to occur outside the UK therefore does not give rise to any requirement to invoke the article 7 procedure. As the effects of GHG emissions on the

environment are exclusively of a global nature, they are not "transboundary effects" which engage obligations of consultation between the nation in which the oil is produced and the nation(s) in which its combustion occurs.

10. The council's approach

101 Coming now to the EIA carried out in this case, the legal error made as regards the scope of the assessment is apparent on the face of the relevant reports. The environmental statement explained that the developer had confined its assessment of GHG emissions to the "direct releases of greenhouse gases from within the well site boundary." Admittedly, therefore, the developer chose to provide information only about the direct effects of the project on climate and to exclude indirect effects, contrary to the express requirement in the EIA Directive and 2017 Regulations that indirect effects must be included. The council accepted and adopted this approach. As a result, the officer's report on which the council's decision to grant development consent was based advised that the proposed development would not give rise to significant effects on the climate by way of GHG emissions "directly attributable" to the operation of the scheme. GHG emissions indirectly caused by the project were not considered. Again, therefore, the scope of the assessment self-evidently did not comply with the legal requirement to assess both direct and indirect effects of the proposed development.

Effects "outwith the control" of the site operators

102 The flaws in the reasons given by the developer and accepted by the council for limiting the scope of the assessment in this way are also in my view plain. The fact that the combustion emissions would emanate from activities beyond the well site boundary which were not themselves part of the project was not a valid reason to exclude them. An impact is not precluded from being an effect of a project by the fact that its immediate source is another activity that occurs away from the project site. As already discussed, it is in the very nature of "indirect" effects that they may occur as a result of a complex pathway involving intermediate activities away from the place where the project is located.

103 The associated reason given that GHG emissions beyond the well site boundary are "outwith the control of the site operators" (see para 36 above) was equally flawed. The combustion emissions are manifestly not outwith the control of the site operators. They are entirely within their control. If no oil is extracted, no combustion emissions will occur. Conversely, any extraction of oil by the site operators will in due course result in GHG emissions upon its inevitable combustion. It is true that the time and place at which the combustion takes place are not within the control of the site operators. But the effect of the combustion emissions on climate does not depend on when or where the combustion takes place. Those factors are irrelevant to the size and significance of the environmental impact.

104 One potential benefit of the EIA process is that it may sometimes result in the identification of ways in which the design of the project can be modified without undue detriment to its aims so as to avoid or reduce what would otherwise have been a significant adverse environmental effect of the project. The EIA Directive contains provisions specifically aimed

A at this. Thus, article 5(1)(c) states that the information provided by the developer in the environmental statement must include "a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment"; see also Annex IV, paragraph 7. And where development consent is granted, the decision to grant it must incorporate "a description of any features of the project and/or measures envisaged to avoid, prevent or B reduce and, if possible, offset significant adverse effects on the environment": see article 8a(1)(b). Member states must ensure that any such features or measures are implemented by the developer: article 8a(4).

105 In the case of oil extraction, there are no measures within the control of the developer which, if the project proceeds, would avoid or reduce the combustion emissions and their impact on climate. But that is not a reason C to dispense with an EIA. Identifying mitigating measures, where they are available, may be a valuable result of the EIA process. But it is not its sole—or even its main—purpose. If there are no measures which could be taken to mitigate adverse environmental effects of a project, then this is itself something the decision-maker and the public need to know. The EIA process would not fulfil its essential purpose of ensuring that decisions likely to affect the environment are made on the basis of full information if the fact that D significant adverse effects are unavoidable were treated as a reason not to identify and assess them.

Other environmental regimes

106 The further reason given by the developer and accepted by the council for confining the assessment to direct GHG emissions from sources within E the well site boundary was that the council should not concern itself with emissions that will occur "downstream" when the oil produced from the wells is processed and used because such processes are regulated by other, non-planning regimes and the council "can assume that these regimes will operate effectively to avoid or mitigate the scope for material environmental harm" (see para 36 above).

F **107** Paragraph 122 of the developer's environmental statement, which made this argument, quoted from the National Planning Policy Framework (July 2018), paragraph 183, which stated:

> "The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate G pollution control regimes). Planning decisions should assume that these regimes will operate effectively. …"

Reference was also made in footnotes to paragraph 122 to the National Planning Practice Guidance, Minerals, para 012, which was in similar terms, and to *R (Frack Free Balcombe Residents Association) v West Sussex County Council* [2014] EWHC 4108 (Admin). This case was cited for the H proposition that a "local planning authority may consider that matters of regulatory control can be left to a statutory regulatory authority to consider."

108 It was a clear legal error to regard this aspect of planning policy as a justification for limiting the scope of an EIA. An assumption made for planning purposes that non-planning regimes will operate effectively to avoid or mitigate significant environmental effects does not remove the

obligation to identify and assess in the EIA the effects which the planning authority is assuming will be avoided or mitigated. This is clear from a line of authority referred to in the *Frack Free Balcombe Residents Association* case. In *R (Lebus) v South Cambridgeshire District Council* [2003] Env LR 17, paras 41–46, Sullivan J held that it is an error of law to reason that no environmental statement is needed because, although a project would otherwise have significant effects on the environment, mitigation measures will render them insignificant. What is required in such a case is an environmental statement setting out the likely significant effects and the measures which can be taken to mitigate them; see also *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710, paras 49–51. The same principle must apply in determining the scope of the assessment required where an environmental statement is carried out.

109 As pointed out in those cases, the requirement in the EIA Directive to describe "measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment" (see para 104 above) implies that the potentially significant environmental impacts of a development should be described together with the measures expected to avoid or reduce them. The public is thereby able to understand the assumption made and to comment on it.

110 In any case it does not appear that there are any separate pollution control or other non-planning regimes which could be relied on to avoid or reduce the combustion emissions which would be indirect effects of the project proposed here. No such regimes have been identified in these proceedings. Indeed, it follows from the agreed fact that it is inevitable that oil produced from the well site will be refined and will eventually undergo combustion, which will produce GHG emissions, that the combustion emissions are unavoidable if the project proceeds and no pollution control regime could be relied on to prevent or reduce them.

111 The reasons accepted by the council for excluding the combustion emissions from consideration and assessing only direct GHG emissions from within the well site boundary are therefore demonstrably flawed. Unless there is some other reason not given in the environmental statement or the council's review of it which required the EIA to exclude the combustion emissions, it follows that the council's decision was unlawful.

11. The judge's approach

112 Although the Court of Appeal did not think that there was any such reason, the judge did. I will therefore consider next the judge's view that assessment of the combustion emissions was, as a matter of law, incapable of falling within the scope of the EIA required by the legislation. As discussed earlier, to justify that conclusion, it would be necessary through interpretation of the EIA Directive and the 2017 Regulations to identify a criterion governing the scope of the EIA which, when applied, dictates—without any room for reasonable differences of opinion—that the combustion emissions are not likely effects of the project on climate.

113 What might that criterion be? The judge's reason for his conclusion was expressed in this passage (at para 126) of his judgment:

> "In my judgment the scope of that obligation [ie the obligation to assess the environmental effects of the project] does not include

A the environmental effects of consumers using (in locations which are unknown and unrelated to the development site) an end product which will be made in a separate facility from materials to be supplied from the development being assessed. I therefore conclude that, in the circumstances of this case, the assessment of GHG emissions from the future combustion of refined oil products said to emanate from the development site was, as a matter of law, incapable of falling within the B scope of the EIA required by the 2017 Regulations …"

114 This reasoning needs to be unpicked. One point made, although only parenthetically, is that the combustion emissions will occur in "locations which are unknown and unrelated to the development site." In so far as the judge relied on this fact, I have already pointed out its irrelevance. The effect C of the combustion emissions on climate does not depend on where they occur, and it is thus unnecessary to know where the emissions will occur to assess their environmental impact. There is therefore no justification for restricting the scope of the assessment to GHG emissions occurring at known locations at or related to the development site. To the contrary, such a restriction is inconsistent with the language and purpose of the EIA Directive and the 2017 Regulations.

D **115** I do not, however, perceive the judge's reference to the locations where the combustion emissions will occur as essential to his reasoning. I understand his central point to be that the source of the emissions will not be use of the oil in the state in which it is extracted from the ground but the use of "an end product which will be made in a separate facility from materials to be supplied from the development." Hence the fact that the oil E will undergo an intermediate process of being refined in a separate facility before it is burnt as fuel is seen as pivotal. This is what, in the judge's view, entails that the combustion emissions are incapable as a matter of law of being effects of the project within the meaning of the legislation.

116 This view also has the support of the Court of Session (Inner House) in *Greenpeace Ltd v Advocate General* 2021 SLT 1303, para 65, which in obiter dicta agreed with Holgate J's reasoning and conclusion that the effects F of the project do not include effects of "the consumption of any retailed product ultimately emerging as a result of a refinement of the raw material."

The relevance of refinement

117 This is also the position which the developer seeks to defend G on this appeal. Counsel for the developer submitted that the combustion emissions cannot be regarded as effects of the project because the crude oil produced from the well site could not itself be used as fuel. What results in the combustion of the oil, so it was argued, is the separate activity of manufacturing fuel products at a refinery. Crude oil refineries are projects which themselves require development consent and an EIA (at least if they are situated in the UK or the European Union). Mr David Elvin KC for the H developer expressly accepted that, in carrying out an EIA for a refinery, it would be necessary to assess the combustion emissions from the refined oil because they would be effects of the activity of refining the crude oil. But he submitted that these emissions cannot, in law, be regarded as effects of the activity of extracting the crude oil because of the need for this intermediate refining process to take place before the oil can be used.

118 I cannot accept that the existence of this intermediate process has the legal significance contended for by the developer and attributed to it by the judge. The process of refining crude oil does not alter the basic nature and intended use of the commodity. Given that the process of refining the oil is one which it is always expected and intended that the oil will undergo —and which it is agreed that the oil produced here will inevitably undergo —it is unreasonable to regard it as breaking the causal connection between the extraction of the oil and its use.

119 The judge was clearly concerned that, if it were to be accepted that combustion emissions are environmental effects of the extraction of the oil, then this would have "ramifications far beyond the legal merits of the present challenge as they relate to the production of crude oil" (para 4). The judge drew a comparison with the production of other minerals and raw materials for use in industrial processes. He observed that, for example, the production of metals, followed by their use to manufacture parts for motor vehicles and the assembly of such vehicles, will result in GHG emissions from the cars, vans and lorries when they are eventually purchased and driven (para 4). The judge also gave an example of a factory that manufactures components for use in the construction of aircraft. He observed that such manufacture will result in GHG emissions, not just from the industrial processes involved but ultimately from the fuel burnt when the aircraft are used for aviation (para 5). Holgate J was clearly worried that, if all the GHG emissions generated from these activities had to be assessed, the EIA process would be unduly onerous and unworkable.

120 In my view, this concern was misplaced. Recognising that combustion emissions are effects of producing crude oil does not open floodgates in the way the judge feared. There are sound reasons for distinguishing examples of the kind he gave, without resorting to the artificial notion that refining crude oil transforms it into something fundamentally different and so breaks the chain of causation between the extraction of the oil and its use.

121 Oil is a very different commodity from, say, iron or steel, which have many possible uses and can be incorporated into many different types of end product used for all sorts of different purposes. In the case of a facility to manufacture steel, it could reasonably be said that environmental effects of the use of products which the steel will be used to make are not effects of manufacturing the steel. That is because the manufacture of the steel is far from being sufficient to bring about those effects. Such effects will depend on innumerable decisions made "downstream" about how the steel is used and how products made from the steel are used. This indeterminacy regarding future use would also make it impossible to identify any such effects as "likely" or to make any meaningful assessment of them at the time of the decision whether to grant development consent for the construction and operation of the steel factory.

122 Similar considerations apply to Holgate J's examples of manufacturing components for use in the construction of motor vehicles or aircraft. Where a component is manufactured which forms a small part of a much larger object, such as a motor vehicle or aircraft, the view might reasonably be taken that the contribution of the component is not material enough to justify attributing the impact on the environment of the end product to the activity of manufacturing the component part. In any event, the number of motor vehicles or aircraft in which such parts will be

A incorporated and the use which will subsequently be made of them may be so conjectural that no realistic estimate could be made of GHG emissions arising from such use on which a reasoned conclusion could be based. I have discussed above that the EIA process does not require that attempts be made to measure or assess putative effects which are incapable of such assessment.

123 But that is not the position here. The oil produced from the well site will not be used in the creation of a different type of object, in the way B that a component part is incorporated—along with many other different and equally necessary components—in manufacturing a motor vehicle or aircraft. Refining the oil is simply a process that it inevitably undergoes on the pathway from extraction to combustion. Nor is there any element of conjecture or speculation about what will ultimately happen to the oil. It is agreed that it will inevitably be burnt as fuel. And a reasonable estimate can C readily be made of the quantity of GHGs which will be released when that happens.

124 It is also instructive to compare what the position would be if the fossil fuel extracted from the ground were, for example, coal. Coal need not undergo any intermediate process before it is burnt as fuel. So, on the developer's approach, the combustion emissions from the coal would be D effects that it would be necessary to assess in an EIA for a project to mine coal. I do not think it rational to distinguish between combustion emissions from different fossil fuels on this basis.

125 Nor can it affect the analysis that crude oil refineries are themselves among the projects referred to in article 4(1) and Annex I of the EIA Directive which automatically require an EIA before development consent may be granted. There is no reason to suppose that oil produced by the well site E in Surrey would be sent to a refinery for which an EIA would be required before the oil could be refined (or even that the refinery would necessarily have required an EIA pursuant to the EIA Directive when it was built). More importantly, there is no rule that the same effect on the environment cannot result from more than one activity or that, if particular effects have been or will be assessed in the context of one project, this dispenses with the need F to assess them as part of an EIA required for another project. It is in any event an objective of the EIA Directive, recorded in recital (2), that effects on the environment should be taken into account at the earliest possible stage in decision-making. That entails that, whatever other assessments might be required in which some of those GHG emissions are included, an assessment of the GHG emissions from the combustion of oil should be made before permission is given to extract the oil from the ground and the oil begins the G journey which will inevitably end with these emissions.

126 For these reasons, the fact that the crude oil produced from the well site would need to be refined before it is used as fuel is not a valid ground for excluding the combustion emissions from the scope of the EIA. Still less does the need to process the oil at a refinery justify the conclusion that the combustion emissions cannot as a matter of law count as effects of the H project.

The project "itself"

127 Can anything else provide a criterion which, when applied, leads to the conclusion that the combustion emissions are not, as a matter of law, effects of the project on climate and are therefore incapable of falling within

the scope of the EIA? At para 101 of his judgment Holgate J said that "the true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought". It is impossible to disagree with this statement as it merely repeats what the legislation says.

128 Holgate J also said, at para 110, that "indirect effects" of the proposed development cover "consequences which are less immediate, but they must, nevertheless, be effects which *the development itself* has on the environment" (emphasis in original). Outside the realms of Kantian metaphysics, there is no such thing as "the development itself" which enjoys some sort of separate noumenal existence. There are only the human activities which constitute the physical development (or "project", to use the terminology of the EIA Directive).

129 If referring to "the project itself" is intended to emphasise that it is necessary to distinguish between direct and indirect effects of the project, or between local and geographically distant effects, then that is untenable for the reasons I have already explained. The EIA must include all effects of the project, whether direct or indirect, immediate or remote. Further, the fact that something is an effect of the project does not mean that it cannot also be an effect of something else. It does not follow that because the combustion emissions are effects of some other activity, such as the refinement of the oil or its subsequent use as fuel by consumers, then they cannot also be effects of the project of extracting the oil. As Lord Hoffmann pointed out several times in the *Environment Agency* case [1999] 2 AC 22, the fact that an activity has caused an environmental impact (or other event) is not inconsistent with another activity having caused it as well.

130 In short, the assertion that "effects of the project" must be effects which "the project" or "*the project itself*" has on the environment does not take matters any further.

12. The Court of Appeal's approach

131 As already noted, the Court of Appeal did not think it possible to say that the combustion emissions are legally incapable of being an environmental effect requiring assessment under the legislation. All the same, Sir Keith Lindblom SPT attached significance to the intermediate steps which would have to occur before combustion could take place. He did not adopt the judge's view that the need to refine the oil before it could be used as fuel was a critical consideration. But he emphasised the fact that the oil extracted at the project site would pass through "several other distinct processes and activities, including, initially, its refinement, followed by the onward transportation and distribution of the refined products, and their eventual sale for use as fuel, which would only then, in various places at various times, produce emissions of greenhouse gases": see [2022] PTSR 958, para 65.

132 In the view of the Senior President, whether the combustion emissions were "indirect effects" of the project depended on an evaluative judgment as to whether, given these intermediate events, there was a "sufficient causal connection" between the extraction of the oil and its eventual combustion. This was a question to which he thought that different decision-makers, each acting reasonably and lawfully, could give opposite answers. Thus, the Senior President concluded, at para 66, that:

A "the environmental effects of [the combustion] emissions could reasonably be seen as far removed from the proposed development itself, and not causally linked to it, because of the series of intervening stages between the extraction of the crude oil and the ultimate generation of those emissions …"

B **133** The first difficulty with this approach is that it is unclear how the decision-making authority is supposed to judge whether the existence or nature of the intervening stages between the extraction of the oil and the ultimate generation of emissions is such as to render the connection between them insufficiently close. Is the number of intervening stages supposed in itself to be important? Does the nature of these stages matter and, if so, how? Is the geographical distance between the project site and the places where the
C GHG emissions will take place supposed to be a relevant consideration and, if so, why? What else, if anything, would be relevant in making a judgment that there was or was not a "sufficient causal connection"? Without any criteria to answer these questions, developers and decision-making authorities are left completely adrift. If the idea is that it is for each decision-maker to decide for itself what factors to treat as relevant, this is not a reasonable interpretation
D of the EIA Directive. As discussed earlier in this judgment, it would be a recipe for unpredictable, inconsistent and arbitrary decision-making.

134 There is another fundamental problem with this approach. It is not just that it is intolerably vague. Considering the questions that I have posed above shows that it rests on a false premise. The fact that there is a series of intervening stages between the extraction of the oil and the ultimate generation of emissions does not itself provide any rational basis for denying
E that the two are causally linked. If there is a clear and inexorable causal path from event X to event Y, then Y is an effect of X. The number of intermediate steps along the way, the nature of those steps and the fact that Y occurs far away from X does not alter or affect that conclusion.

135 The Senior President gave two reasons to justify the proposition that a decision-maker could reasonably decide that the GHG emissions generated
F when the oil produced is burnt are not even indirect effects of the proposed development, because of the intervening stages through which the oil must pass (see para 65 of the Court of Appeal judgment). Both reasons are, in my opinion, mistaken. The first was that "decisions yet to be made 'downstream' would determine how much of the oil would end up being combusted". If true, that might make it impossible to assess what the likely quantity of
G combustion emissions would be. But it is not true. It was an error to say that how much of the oil would end up being combusted would depend on decisions yet to be made "downstream". It is common ground that *all* of the oil would be combusted. This follows from the agreed fact that it is inevitable that the oil produced would be refined and would eventually undergo combustion. There is no difficulty, let alone impossibility, in these circumstances in assessing the likely quantity of the combustion emissions.

H **136** The Senior President added a suggestion that the emissions generated by combustion of the oil would depend on "whether the economic demand for it would rise or fall". That is also incorrect. Rise or fall in demand would doubtless affect the price for which the oil is sold and purchased. But it has not been suggested—and it would be inconsistent with the agreed facts to

suggest—that any such rise or fall in demand would result in any of the oil remaining unused.

137 The second reason given by the Senior President was that the claimant had not argued that any of the environmental impacts resulting from the intermediate process of refinement ought to have been included in the EIA for the project. He said, at para 65:

> "That is not part of the argument advanced … What is submitted, in effect, is that the county council could only reasonably conclude that environmental impacts several steps further away than refinement ought to have been assessed. That proposition is, in my view, untenable."

This reasoning is also invalid because it assumes that, just because something was not argued, it must be wrong, and that its invalidity can then be relied on to draw further inferences without the need to identify whether or why the argument not made could not have succeeded.

138 Given the agreed fact that all the oil produced would be refined, I see no reason why environmental impacts resulting from the process of refining the oil should not in principle fall within the scope of the EIA for the project of extracting the oil. There are, however, potential reasons why the view might reasonably be taken that it was not necessary to include an assessment of such impacts in the EIA. One would be that there was insufficient information available on which to make a reasonable assessment of the relevant impacts. Another potential reason would be that, so far as it was possible to judge, such impacts were not themselves likely to be significant. I express no view about whether such reasons would in fact have been tenable as the question has never been raised or explored. What matters is that it cannot properly be assumed that, because the claimant has not complained about the failure to assess effects of refining the oil, the council could reasonably exclude the effect on climate of ultimate use of the oil as fuel from the EIA.

139 In my view, there was no basis on which the council could reasonably decide that it was unnecessary to assess the combustion emissions. These further suggested possible reasons for that decision, like the reasons actually relied on by the council, are flawed.

13. Relationship between EIA and national policy

140 There is another line of argument that I must consider as it appears to have weighed with the judge and the defendants have sought to make something of it. This is, broadly stated, that local planning authorities are unsuited or incompetent to incorporate into decisions whether to grant planning permission for a mineral extraction project an assessment of the potential contribution of the project to climate change. To understand the basis for this argument it is necessary to look, in overview, at UK national policy as regards climate change and the extraction of oil and gas.

The Paris Agreement and the production gap

141 In adopting the Paris Agreement on 12 December 2015, most of the nations of the world have acknowledged that climate change represents "an urgent and potentially irreversible threat to human societies and the planet" (Preamble to the decision to adopt the agreement) and have agreed on the goal of "holding the increase in the global average

temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels": article 2(1)(a). It is left to each state party to decide what measures it will take towards achieving this goal by preparing, communicating and maintaining successive "nationally determined contributions" that it intends to achieve: see article 4(2).

142 To date, most state parties' planned contributions have focused on setting targets for reducing GHG emissions from the consumption of fossil fuels within their own territory and taking measures aimed at reducing such consumption—for example, by promoting the development and use of alternative sources of energy. Comparatively little has been promised or done to reduce fossil fuel production. UNEP has published a series of reports highlighting and quantifying the "production gap"—that is, the difference between countries' planned fossil fuel production and global production levels consistent with limiting global warming to 1.5°C or 2°C. In analysing governments' policies and plans, these reports use an accounting method which allocates carbon dioxide emissions from fossil fuel combustion to the location of extraction. UNEP has consistently found that, viewed overall, the world's governments plan to produce more than twice the amount of fossil fuels in 2030 than would be consistent with limiting global warming to 1.5°C: see eg UNEP Production Gap Report 2023, p 4. The reports also examine national policies, plans and projections in key countries (including the UK). The general picture is that many governments continue to support, finance, and expand fossil fuel production, even though such policies are irreconcilable with global climate commitments: see eg UNEP Production Gap Report 2023, p 11.

UK legislation

143 The principal UK legislation addressing climate change is the Climate Change Act 2008. This sets a target for the year 2050 for a reduction of GHG emissions from sources in the UK (section 1). The Act also provides for a national system of carbon budgeting. Section 4(1) places a duty on the Secretary of State to set a carbon budget for each succeeding period of five years and to ensure that the net amount of UK emissions during a budgetary period does not exceed this budget. Carbon budgets must be set with a view to meeting the target for 2050 (section 8(2)). Section 13 requires the Secretary of State to prepare proposals and policies for meeting the carbon budgets set under the Act. Each time a new carbon budget is set, the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods (section 14). There is also a duty to report to Parliament each year with a statement giving details of the amount of UK emissions for the year (section 16). Other provisions of the Act include the formation of a Committee on Climate Change which has duties to give advice to the Secretary of State and to report to Parliament on progress towards meeting the carbon budgets (sections 32 to 38).

144 In calculating "UK emissions" for the purpose of the Climate Change Act 2008 and measures taken under it, GHG emissions from fossil fuels extracted in the UK are not included unless the emissions occur in the UK.

145 Despite its impact on climate UK national policy remains geared towards encouraging domestic production of oil and gas. The Petroleum

Act 1998 establishes a system of licences to explore for and extract petroleum in the UK. The "principal objective" of the regime, as stated in section 9A, is that of "maximising the economic recovery of UK petroleum." Licences are granted by the Oil and Gas Authority (now named the North Sea Transition Authority), which conducts licensing rounds. A petroleum exploration and development licence grants exclusive rights within a defined area for a defined period in relation to hydrocarbon exploration, development and production. Such a licence confers exclusivity but does not give permission to carry out operations. For this, other consents are needed, including planning permission from the relevant mineral planning authority. As noted earlier, where a project falls within the scope of the EIA Directive and 2017 Regulations, planning permission cannot be granted unless an EIA has been carried out (see para 29 above).

National planning policy

146 The National Planning Policy Framework (in the version published in February 2019) at paragraph 205, stated that, "when determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy." (There was an exception in relation to the extraction of coal.) This was originally supplemented by paragraph 209(a), which stated that minerals planning authorities should "recognise the benefits of on-shore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put in place policies to facilitate their exploration and extraction." However, paragraph 209(a) was removed after the High Court held in *R (Stephenson) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 2209 that the decision to include it was unlawful because it was made without proper public consultation.

Arguments founded on national policy

147 Against this background, an argument is made that it would be inappropriate for a local planning authority, in deciding whether to grant planning permission for the extraction of oil at a particular site, to take into account the effects on climate of the GHG emissions that will result from the combustion of the oil. It is said that whether or to what extent measures should be taken aimed at reducing GHG emissions from oil extracted in the UK is a matter which can only sensibly and properly be addressed at a national level. It would not be appropriate for a local planning authority to take decisions on the basis of its own views on these issues.

148 It is further argued that the object of the EIA process is to obtain information that has a bearing on the decision whether to grant development consent (or attach conditions to such consent) for a project rather than simply to generate information for its own sake. It is said that this object would not be served by obtaining information about combustion emissions in relation to a project of the present kind, as there is nothing that the local planning authority could in practice do with this information. The burden of gathering and assessing such information would be disproportionate when it could not inform the decisions to be taken in any practical way.

149 This in turn is said to indicate that an interpretation of the EIA Directive under which GHG emissions from the combustion of extracted

A oil are capable of being regarded as "indirect effects of a project" cannot be correct. It cannot have been the intention that information about such GHG emissions should be taken into account in the EIA process, since such information could have no proper bearing on actions to be taken by local planning authorities.

150 I consider these arguments to be misguided. To begin with, I do not accept the premise that it would be wrong for a local planning authority, B in deciding whether to grant planning permission, to take into account the fact that the proposed use of the land is one that will contribute to global warming through fossil fuel extraction. Of course, the authority must have regard to national policy; and in so far as UK national policy requires great weight to be given to the benefits of petroleum extraction, in particular for the economy, that must be taken into account. But it does not follow that C the planning authority has to ignore adverse effects on climate of a proposed project or adopt an interpretation of what constitute such adverse effects which is contrary to reality. Just as *beneficial* indirect effects of a project on climate—for example, the "green" energy that would be generated by a project to develop a wind farm or solar farm—are clearly a relevant matter for the planning authority to consider, so corresponding *adverse* effects are D also a material planning consideration.

151 Quite apart from this, the arguments based on UK national policy have two flaws. First, it is wrong to interpret the meaning and scope of the EIA Directive by reference to UK policy and legislation (or that of any other country) for controlling GHG emissions and regulating petroleum production. Such matters are irrelevant to the proper interpretation of the EIA Directive. It is not simply that policies which member states (or non-E member states) choose to adopt are generally irrelevant in construing EU legislation, though that is true. It is also necessary to recall that the aim of the EIA is to establish general principles for assessing environmental effects. UK national policy is clearly relevant to the substantive decision whether to grant development consent. But it is irrelevant to the scope of EIA. For reasons discussed earlier, the fact (if and in so far as it is a fact) that a decision F to grant development consent for a particular project is dictated by national policy does not dispense with the obligation to conduct an EIA; nor does it justify limiting the scope of the EIA.

152 The second, related flaw is also fundamental. The argument made is a version of the claim that, if information about environmental impacts would make no difference to the decision whether to grant development consent (or on what conditions), it is not legally necessary to obtain and assess such G information in the EIA process. Such a contention was resoundingly rejected by the House of Lords in *Berkeley* [2001] 2 AC 603. It misunderstands the procedural nature of the EIA. The fact (if it be the fact) that information will have no influence on whether the project is permitted to proceed does not make it pointless to obtain and assess the information. It remains essential to ensure that a project which is likely to have significant adverse effects on H the environment is authorised with full knowledge of these consequences.

153 Looking at the matter more broadly, it needs to be recognised that the process of EIA takes place in a political context and that the information generated by an EIA will be considered within a political decision-making arena. It is therefore inevitable that economic, social and other policy factors will outweigh environmental factors in many instances. But this does not

avoid or reduce the need for comprehensive and high-quality information about the likely significant environmental effects of a project. If anything, it enhances the importance of such information. Nowhere is this more so than where issues arise relating to climate change.

154 It is foreseeable in today's world that, when development consent is sought for a project to produce oil, members of the public concerned will express comments and opinions about the impact of the project on climate change and the potential contribution to global warming of the oil produced. Indeed, as Lewison LJ observed (at para 148 of the judgment of the Court of Appeal) the officers' report recorded that such objections were made in this case. (Objections raised by two local parish councils were specifically mentioned in the report along with other public representations.) Lewison LJ thought that the fact that objections based on climate change were noted and considered by the council was a reason tending to show that the EIA was adequate because "it cannot be said that [the council] completely ignored the potential global warming effect of the proposed development": para 149. In my view, this fact shows the opposite. It confirms the inadequacy of the EIA. It is not good enough that the potential global warming effect of the proposed development was not "completely ignored". The effect should have been properly assessed so that public debate could take place on an informed basis. That is a key democratic function of the EIA process. It was not fulfilled here.

14. Case law

155 Although many decisions of domestic and foreign courts were cited in argument on this appeal, most were of limited assistance. There is no previous decision of a court in this country or of the CJEU on the question we have to decide. Given the rapidly increasing prominence of issues relating to climate change and GHG emissions, more litigation raising such issues can be expected. But the question raised on this appeal must be answered by examining the wording and purpose of the EIA Directive, as transposed into UK law by the 2017 Regulations. The main relevance of decided cases lies not in providing analogies with the facts of this case but in helping to illuminate the purpose of the EIA Directive and the proper approach to its interpretation. Where decided cases assist with this, I have referred to them above.

156 That said, four further cases, for different reasons, deserve mention.

Abraham v Wallonia

157 In *Abraham v Wallonia* (Case C-2/07) [2008] Env LR 32 the CJEU held that, in deciding whether a project to modify an airport required an EIA, it was necessary to take into account the effects on the environment of a projected increase in the activity of the airport and air traffic which would result from the proposed construction works. This decision confirms that the effects of a project which must be covered by an EIA are not limited to effects of construction works but include effects of the operational phase of the project—that is, of the activity which takes place after such works have been executed. In *Abraham* this was held to be so even though the project required an EIA because it fell within a category described in what is now Annex I, paragraph 7, of the EIA Directive as "construction" of airports.

158 The claimant has sought to derive more from *Abraham* than this by reference to para 43 of the judgment, which states:

> "It would be simplistic and contrary to [the approach required by the Directive] to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works."

This statement was repeated in *Ecologistas en Acción-CODA v Ayuntamiento de Madrid* (Case C-142/07) [2009] PTSR 458, para 39. The claimant submits that the reference to "the use and exploitation of the end product of those works" is applicable to the use as fuel of the oil that would be produced by the proposed well site.

159 However, this submission takes the statement out of context. It is clear from the context that the phrase "end product" in the passage quoted above was intended to refer to the facility or installation that results from construction works. In *Abraham* that was the reconfigured airport. The equivalent here is the functioning well site after modifications to the existing site, the drilling of new wells and the installation of facilities for exporting crude oil from the site. The "use and exploitation of the end product of those works" would consist in the production of oil from the expanded well site. The judgment in *Abraham* does not assist in determining the scope of the effects on the environment of, in that case, the increase in the activity of the airport or, in this case, the planned production of oil.

Squire

160 A second case relied on by the claimant is *R (Squire) v Shropshire Council* [2019] Env LR 36. This concerned a challenge to the grant of planning permission for a facility for the intensive rearing of chickens. A by-product of the planned activity would be the production of substantial quantities of poultry manure. This was to be spread as fertiliser on agricultural land in the local area, some of it owned by the poultry farmer/developer and some of it owned by others. The Court of Appeal held, at paras 62–69, that the EIA for the project was deficient and unlawful because it did not include a proper assessment of indirect environmental effects of the proposed development in the form of smell and dust that would emanate from the storage and spreading of the manure, including on third party land.

161 This case provides an illustration, if it be needed, that the "indirect effects of a project" on the environment can include emissions occurring "downstream" from the development from sources that are not owned or controlled by the site owner. In his judgment in Court of Appeal here, at para 65, the Senior President said that *Squire* can be distinguished on the ground that:

> "In that case the manure was a product of the development itself in its operation as a poultry enterprise: a waste product with a commercial value. The connection between the development and the impacts in question was clear as a matter of fact, and not dependent on a series of intermediate processes."

162 I do not consider this to be a valid distinction. In this case too the oil would be a product of the development itself in its operation as a mining

enterprise: a product with a commercial value. The connection between the development and the impacts in question is also clear as a matter of fact: it is common ground that the extraction of the oil will inevitably result in clear (and quantifiable) impacts on the environment upon its combustion. The only potential difference is in the existence of intermediate processes. It is unclear whether this is even a factual difference, as there may well be intermediate steps between the production of manure and its use as fertiliser. But assuming this to be a point of factual difference, I have already explained why, in my view, reliance on this as a material distinction is misplaced.

Kilkenny Cheese

163 Attention was also devoted in argument to the decision of the Irish Supreme Court in *An Taisce – The National Trust for Ireland v An Bord Pleanála (Kilkenny Cheese Ltd, Notice Party)* [2022] 2 IR 173 ("the Kilkenny Cheese case"). The central issue in that case was whether or to what extent there was an obligation to include in the EIA for a proposed cheese factory the environmental effects of producing the milk needed to supply the factory. The Irish national planning authority, An Bord Pleanála ("the Board"), in granting permission for the project, calculated the gross CO_2 emissions likely to arise in producing the 450 million litres of milk (some 4.5% of the national milk supply) expected to be required by the factory each year. But the Board found that the milk would come from existing sources and thus was going to be produced in any event. It followed that there would be no significant net increase in GHG emissions as a result of the construction and operation of the factory: see para 108 of the court's judgment.

164 Even so, the Supreme Court accepted that establishing a new factory which would take 4.5% of the national milk supply may have some wider economic effects by increasing the overall demand for milk. This increase in overall demand might in turn stimulate an increase in milk production, with implications for the size of the national herd and therefore GHG emissions: see paras 75–78. The key question was whether these implications for general milk production and GHG emissions were "indirect significant effects of a project" within the meaning of article 3(1) of the EIA Directive which the EIA for the project was therefore required to identify and assess: para 79. The court answered this question in the negative.

165 The court's judgment, given by Gerard Hogan J, was handed down after the judgment of Holgate J but before the judgment of the Court of Appeal in this case. Two possible interpretations of article 3(1) were considered. The first was to say that article 3(1) "should be read in an open-ended fashion": para 87. The second was to adopt the approach of Holgate J in this case and say that, to fall within article 3(1), indirect effects must be "'effects which the development itself has on the environment'": para 102. Hogan J rejected the "open-ended" interpretation because he considered that it would lead to the imposition of obligations in carrying out EIAs which were impossibly onerous and unworkable: paras 100, 103–105. He endorsed Holgate J's approach, subject to the caveat that "there may well … be special and unusual cases where the causal connection between certain off-site activities and the operation and construction of the project itself is demonstrably strong and unbreakable." In such cases the significant indirect environmental effects of these off-site activities would need to be assessed: para 102.

166 This caveat is material since, if applied here, it would lead to the opposite result from that which Holgate J reached. The causal connection between the operation of the well site and the use of the oil produced as fuel is, by any standard, "demonstrably strong and unbreakable", as there are no realistic circumstances in which extraction of the oil will not lead to its use as fuel. Neither will occur without the other. Cause and end-result are inextricably linked so that, on the approach of the Irish Supreme Court, the environmental effects of combustion of the oil would need to be assessed.

167 I would, however, for the reasons already given, reject Holgate J's approach altogether. Where I respectfully differ from the Irish Supreme Court is that I think it is a false dilemma to assume that the only alternative approach is one that is entirely open-ended. I have explained why the EIA Directive does not, as I interpret it, impose obligations which are impossibly onerous and unworkable. In particular, only effects which evidence shows are likely to occur and which are capable of meaningful assessment must be assessed. In an important passage of the judgment, at para 110, the Irish Supreme Court gave a compelling justification for its decision which implicitly adopted these criteria. After observing that any future increase in total milk production "is likely not to be entirely independent of the operation of the factory", Hogan J said:

> "Beyond this, however, proof of causality such [as] would satisfy the requirements of the EIA in respect of 'direct and or indirect significant environmental effects' remains entirely elusive, contingent and speculative. Its very elusiveness means that it is incapable of measurement or assessment and, hence, cannot be the sort of significant indirect environment effect which article 3(1) of the EIA Directive must be taken necessarily to contemplate."

168 In my view, this reasoning clearly articulates the relevant distinction between that case and the present case.

Greenpeace Nordic

169 Since the oral hearing of this appeal, a court in Norway has decided the same issue that we must decide. The Norwegian case is a sequel to proceedings brought to challenge the grant of licences by the Norwegian government for petroleum production. One issue in the earlier Norwegian proceedings was whether, before the relevant area of the South Barents Sea had been opened for petroleum exploration and production, an EIA should have been carried out which assessed the possible combustion emissions if production licences were awarded and development consent given for plans for the development and operation of particular fields. That earlier case reached the Supreme Court of Norway which, by a majority of 11 to 4, rejected the challenge: see *Nature and Youth Norway v The State of Norway (represented by the Ministry of Petroleum and Energy)* HR-2020-2472-P (Case No 20-051052SIV-HRET), 22 December 2020.

170 The majority judgment explained that, at the time of the decision to open the relevant area, it was highly uncertain whether petroleum would be found and, if found, whether in amounts sufficient to make extraction commercially viable. The majority also emphasised that a production licence did not give an unconditional right to extraction even if profitable discoveries should be made. Extraction would require development consent. Before this

was granted, an EIA would normally be required, which would need to assess GHG emissions: see paras 216–223. Relevantly for the subsequent proceedings, the majority judgment also pointed out that, when assessing GHG emissions as part of the climate impact of a measure or project, it is irrelevant where geographically the GHG emissions occur, as the environmental effect of GHG emissions is in principle the same irrespective of where on earth the emissions take place: see para 225.

171 The later case was brought after development consent had been granted for three projects. All three projects involved the extraction of petroleum in quantities which made an EIA mandatory before consent could be granted. The EIAs carried out did not assess the combustion emissions from the oil and gas to be produced. On 18 January 2024 the Oslo District Court ruled that there was a legal requirement to assess the combustion emissions under both the EIA Directive and the Norwegian regulations which implement the EIA Directive. As such an assessment had not been made, the consents granted for the development and operation of the three oil fields were declared to be invalid: see *Greenpeace Nordic v The State of Norway (represented by the Ministry of Petroleum and Energy)* (Case No 23-099330TVI-TOSL/05), 18 January 2024.

172 In interpreting the EIA Directive, the court thought it clear, in particular from article 3(1) and Annex IV, paragraph 5, that not only direct local environmental impacts resulting from the development and production are covered, and that all relevant climate impacts resulting from the project must be taken into account. The express requirement to assess "indirect" effects shows that "it cannot be decisive that the combustion emissions do not occur on site in connection with production, and that instead they occur later via one or more intermediate steps as combustion emissions elsewhere": p 52. In rejecting the Government's argument that combustion emissions are not effects of the project for the purpose of the EIA Directive, the court held, at pp 53–54, that:

> "combustion emissions from petroleum extraction are such a significant and particularly characteristic consequence of these kinds of projects that they must clearly be considered indirect climate effects within the meaning of the EIA Directive. The whole purpose of petroleum extraction is to make geologically stored carbon available in the form of oil or gas. Greenhouse gas emissions from the carbon are thus both an inevitable and intentional effect from the project. … If combustion emissions are not included, this will mean that the provisions of the EIA Directive on the assessment of indirect climate impacts from petroleum operations will in practice have no real content."

173 As a judgment of a foreign court, although on the very question in issue before us, this decision only has authority in so far as its reasoning is persuasive. I do find the reasoning of the Oslo court persuasive and agree with it. It entirely accords with what I consider to be the proper interpretation of the EIA Directive.

15. Conclusion

174 The council's decision to grant planning permission for this project to extract petroleum was unlawful because (i) the EIA for the project failed

A to assess the effect on climate of the combustion of the oil to be produced, and (ii) the reasons for disregarding this effect were flawed. I would therefore allow the appeal.

LORD SALES JSC (dissenting, with whom **LORD RICHARDS JSC** agreed)

B

175 This appeal is concerned with the obligation to carry out an environmental impact assessment ("EIA") in relation to a development to drill for oil. The question is whether the public authority with responsibility to carry out the EIA before granting planning consent for such development is required to assess the impact of greenhouse gas emissions resulting not just from the drilling operation itself but also from the eventual use of
C the oil as fuel, once it has been refined elsewhere. This depends on the proper construction of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment ("the EIA Directive") and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations") which implement that Directive.
D These downstream emissions were referred to at the hearing by counsel for the appellant as scope 3 greenhouse gas emissions, drawing on the terminology used in the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard developed under the auspices of the World Resources Institute and the World Business Council for Sustainable Development ("the GHG Protocol").

176 The parties are agreed that the EIA Regulations accurately transpose
E the EIA Directive into national law, so it is appropriate to focus on the Directive, which is the basic source for the relevant rules, rather than the Regulations. The detail regarding the corresponding provisions in the EIA Regulations is set out in the judgment of Holgate J at first instance [2021] PTSR 1160, at paras 33–45 and it is not necessary to repeat it here. Article 3(1) of the EIA Directive provides that an EIA of a project should identify,
F describe and assess "the direct and indirect significant effects of a project" on various factors, including "land, soil, water, air and climate". Put shortly, the question which arises is whether, on proper interpretation of the EIA Directive, the downstream greenhouse gas emissions at issue are "indirect significant effects" on the climate "of [the] project" in this case, namely the drilling to extract crude oil to be refined elsewhere and then used by
G consumers.

177 The first respondent ("the Council") is the local planning authority for its area. On 27 September 2019 it granted planning permission for development of an oil well at the Horse Hill Well Site ("the Site"), near Horley in Surrey. The second respondent ("HHDL") is the developer. It wishes to drill at the Site for crude oil which has been discovered there.

178 The appellant represents the Weald Action Group which objects to
H drilling at the Site. She has brought these judicial review proceedings to challenge the grant of planning permission.

179 The third respondent ("the Secretary of State") opposes the appeal. The first intervener, Friends of the Earth, made written submissions in support of the appellant's case, as they did below. Greenpeace Ltd was given permission to intervene in the appeal to make written submissions.

It supports the appellant's case. The Office for Environmental Protection, an independent non-departmental public body established under section 22 of the Environment Act 2021, was also given permission to intervene in the appeal to make written submissions. It too supports the appellant's case. West Cumbria Mining Ltd has an interest in a similar mineral extraction development elsewhere and was also given permission to intervene in the appeal to make written submissions. It supports the submissions made by HHDL and the Secretary of State.

180 After the hearing, the court asked for additional submissions in writing to explain the background to amendments which were incorporated into the EIA Directive by Directive 2014/52/EU ("the 2014 Directive").

Scope 1, scope 2 and scope 3 greenhouse gas emissions

181 The appellant's counsel framed their submissions with reference to the concept of scope 3 greenhouse gas emissions. This calls for some explanation. The terminology of scope 1, scope 2 and scope 3 greenhouse gas emissions is taken from the GHG Protocol developed to assist companies to understand and report on their greenhouse gas emissions. The first edition of the GHG Protocol was issued in 2001. It defined three "scopes" of greenhouse gas emissions for accounting and reporting purposes. Scope 1 is direct emissions from sources that are owned or controlled by the company, for example emissions from combustion in owned or controlled boilers, furnaces, vehicles etc. Scope 2 is "electricity indirect [greenhouse gas] emissions" from the generation of purchased electricity consumed by the company within the organisational boundary, for which the company should account even though the emissions physically occur at the facility where the electricity is generated. Scope 3 is all other indirect greenhouse gas emissions, an optional reporting category under the GHG Protocol that covers emissions which are a consequence of the activities of the company but occur from sources not owned or controlled by the company. This is a very wide category which covers both emissions which are "upstream" from the company's own activities but to which those activities give rise and emissions which are "downstream" from the company's activities.

182 Reference to scope 3 greenhouse gas emissions can be a useful shorthand and was treated as such in the course of argument. However, the EIA Directive does not refer to the GHG Protocol and does not employ the concepts or the scope 1, scope 2 and scope 3 framework set out in it. None of the authorities from the Court of Justice of the European Union (formerly the European Court of Justice—I refer to them both as "the CJEU") or domestic or other courts explains the scope and application of the EIA Directive in terms of the concepts used in the GHG Protocol.

Factual background

183 The extraction of hydrocarbons for exploration or production is a type of minerals development which requires planning permission to be granted by the local planning authority. Other regulatory approvals may be required as well, including environmental permits. Applications for planning permission for fossil fuel development relate both to the works on the site (such as well construction) and to the process of extraction of the fuel from the ground which follows. Planning permission for such development is not

concerned with the refinement or processing of the extracted oil at other places.

184 On 16 January 2012 the Council granted planning permission for the construction of an exploratory well and for short-term testing for oil at the Site. When oil was discovered, HHDL applied for planning permission to drill and test an appraisal well and a sidetrack well, which was granted on 1 November 2017. Following further work, HHDL decided that the extraction of oil at the Site was commercially viable.

185 On 20 December 2018 HHDL applied for planning permission to drill a well at the Site and to operate it for commercial extraction of the oil ("the development"). The development would take place over a total period of about 25 years, allowing for a first stage of drilling and commissioning of the well, oil production lasting about 20 years, and then decommissioning and site restoration works.

186 The amount of crude oil to be extracted over the lifetime of the development could be as much as about 3.3 million tonnes. Once extracted, it would be taken by tankers to refineries elsewhere for processing. Once refined, it would become useable as fuel. The refined product is likely to be used predominantly for transportation, with some used also for heat, manufacturing and petrochemicals. It is not possible to say at this stage whether the refining would take place in the UK or overseas, nor whether the refined product would be used in the UK or overseas.

187 The development is EIA development within the meaning of the EIA Directive and the EIA Regulations, and so required an EIA to be carried out before the grant of planning permission, because it is a project for the "extraction of petroleum … for commercial purposes where the amount extracted exceeds 500 tonnes/day": see article 4(1) of the EIA Directive and point 14 of Annex I to the EIA Directive ("Annex I") and regulation 2 of the EIA Regulations and paragraph 14 of Schedule 1 to those Regulations.

188 Where an EIA is required, the developer has to submit an environmental statement to provide relevant environmental information to the local planning authority. The developer can ask the local planning authority for a scoping opinion to ascertain what matters should be covered in its environmental statement, and HHDL duly asked the Council for such an opinion.

189 On 25 October 2018 the Council issued its scoping opinion ("the Scoping opinion"), which stated (para 3.9):

> "[The Council] is of the opinion that the primary focus for the EIA should be the potential effects of the scheme on population and human health (regulation 4(2)(a) [of the EIA Regulations]), on the water environment (regulation 4(2)(c) [of the EIA Regulations]) and on the global climate (regulation 4(2)(c) [of the EIA Regulations])."

190 The Scoping opinion observed that direct emissions of greenhouse gases associated with the construction and operation of the well site, and the consumption of fuel by vehicle, plant and equipment associated with the well site, would be likely to be small in scale "and whilst contributing to increased concentrations of greenhouse gases in the atmosphere could not be classed as significant in their own right" (para 3.12). On the other hand, the Scoping opinion said "the indirect effects associated with the production and sale of fossil fuels which would likely be used in the generation of heat or

power, consequently giving rise to carbon emissions, cannot be dismissed as insignificant", but continued "[i]t is acknowledged that the contribution of the proposed development would be modest when considered in a national or regional context" (para 3.13). The Scoping opinion set out the Council's recommendation, at para 3.14, that the environmental statement "should consider, in particular, the global warming potential of the oil and gas that would be produced by the proposed well site."

191 In December 2018 HHDL submitted its environmental statement ("the Environmental Statement"). This dealt with a wide range of matters relevant to the development. Chapter 6 of the statement addressed greenhouse gas emissions. It stated that the scope of the assessment it contained on that topic was "confined to the direct releases of greenhouse gases from within the well site boundary resulting from the site's construction, production, decommissioning and subsequent restoration over the lifetime of the proposed development". The emissions assessed were those from the combustion of diesel fuel in the process of construction and by heavy goods vehicles servicing the development and by on-site engines and generators used in the development, and from the combustion of natural gas in flares in the course of the operation of the development. The Environmental Statement did not contain an assessment of the scope 3 greenhouse gas emissions associated with the downstream refining of the oil and use of the refined fuel away from the Site.

192 HHDL justified this by saying that "[t]he essential character of the proposed development is the extraction and production of hydrocarbons and does not extend to their subsequent use by facilities and process[es] beyond the planning application boundary and outwith the control of the site operators". It referred to national planning policy and guidance which indicated that decision-makers should focus on whether development is an acceptable use of land rather than on control of downstream emissions from hydrocarbons, which is the subject of regulation under regimes apart from planning law.

193 It is common ground, and indeed obvious, that it is inevitable that oil produced from the Site will be refined and that the refined end product will eventually undergo combustion which will produce greenhouse gas emissions. The refining process and eventual combustion of the refined oil will take place at locations other than the Site. It is agreed that it is scientifically possible to calculate the likely level of greenhouse gas emissions from the combustion of a given quantity of hydrocarbons using a methodology set out in guidance issued by the Institute of Environmental Management and Assessment.

194 In June 2019 the Council's designated officer, Dr Jessica Salder, carried out a review of the Environmental Statement ("the ES Review"). She concluded that the Environmental Statement responded "in an appropriate and proportionate manner" to regulation 4(2) and the relevant parts of Schedule 4 to the EIA Regulations (which correspond to article 1(g) and Annex IIA to the EIA Directive) and contained sufficient information to comply with the EIA Regulations and the EIA Directive. She stated that the Council accepted the justification given by HHDL for excluding consideration of the global warming potential of the hydrocarbons produced from the development from the scope of the EIA process.

195 The Council's Planning and Regulatory Committee ("the Council Committee") considered HHDL's planning application at a meeting on 11 September 2019, with the benefit of an officers' report ("the Officers' Report") which recommended the grant of planning permission for the development, subject to conditions. The report summarised the EIA process, which had included three consultation exercises. In all, 1,658 written representations had been received, of which about 921 supported the development and 717 objected to it. The issue of climate change was identified as one of about 30 main points of public concern. The report summarised the Environmental Statement on that topic. It stated that the Council had concluded that the development would not give rise to significant impacts on the climate as a result of emissions of greenhouse gases directly attributable to its implementation and operation. The officers were not thereby indicating that they had ignored the reference to "indirect" effects of the project contained in article 3(1) of the EIA Directive (they had already referred to the relevant legislation), but rather that they took the view that the downstream greenhouse gas emissions at issue in this case did not fall within the scope of that provision.

196 The Officers' Report set out the European Union and national policy context, including in relation to climate change. So far as concerns national policy guidance in relation to the grant of planning permission for mineral extraction, paragraph 205 of the National Planning Policy Framework ("NPPF") states that great weight should be given to its benefits, including to the economy. Relevant national policy in relation to energy was set out in the UK's 2007 Energy White Paper, "Meeting the Energy Challenge" (Cm 7124), which included as policy goals reduction of CO_2 emissions by some 60% by 2050 and maintenance of the reliability of energy supplies. The policy in the White Paper was reflected in a number of statutes, including the Climate Change Act 2008 and the Energy Act 2008. The Officers' Report explained that the Climate Change Act 2008 introduced a target for reduction of the UK's greenhouse gas emissions by 2050, with a system of national carbon budgets for five-year periods to drive progress towards that objective (in June 2019, the target set out in the Climate Change Act 2008 was amended to the current net zero target by the Climate Change Act 2008 (2050 Target Amendment) Order 2019, (SI 2019/1056)). In addition, the UK had signed up to the EU Renewable Energy Directive 2009/28/EC which set individual targets for each member state. The Government produces Annual Energy Statements which reflect the policy adumbrated in the 2007 Energy White Paper and recognise the need for investment in oil and gas production as a component of the transition towards a low carbon economy.

197 The Officers' Report referred to objections that the development would be incompatible with international and national objectives on climate change. The authors concluded that "given the production function of the development, it is not in conflict with the Government's policy and climate change agenda" and that on the basis of Government policy guidance "there is a national need for the development", subject to it satisfying other national policies and policies in the development plan. This view was repeated in an update prepared for the meeting of the Council Committee, which took account of the effect of a successful legal challenge to part of the Government's policy guidance in the NPPF. There is no challenge in

this appeal to this assessment that the development is supported by national policy in relation to energy production and climate change.

198 However, the appellant says that there is an inconsistency in the analysis of material planning considerations in the Officers' Report, as adopted by the Council in its decision ("the inconsistency point"). The Council did not take quantified downstream greenhouse gas emissions into account in its EIA in relation to its decision to grant planning permission, but it did take into account as a material consideration the Government's relevant policies relating to climate change, which had regard to the use to which the refined oil would ultimately be put as fuel for combustion. This is said to demonstrate unlawfulness on the part of the Council, in that the need for the oil which was to be extracted weighed in favour of the proposed development, but the Council omitted to weigh in the balance the negative impact that downstream greenhouse gas emissions would have on climate change. The inconsistency point was not one of the grounds of challenge in the appellant's pleaded claim in the High Court, but was introduced by way of reply submissions for the appellant in the Court of Appeal.

199 The Officers' Report also explained that in addition to planning permission, the operation of the Site would require other consents including an environmental permit issued by the Environment Agency and licences for drilling and flaring issued by the Oil and Gas Authority. It explained that the Government licenses the exploration, appraisal and production of hydrocarbons.

200 At its meeting on 11 September 2019 the Council Committee approved the grant of planning permission for the development.

The legal challenge

201 On 8 November 2019 the appellant commenced her judicial review challenge to the Council's decision to grant planning permission for the development. Permission to apply for judicial review was initially refused by Lang J. However, upon renewal of the application in the Court of Appeal Lewison LJ granted the appellant permission to apply for judicial review of the Council's decision on the grounds that (1) the Council failed to comply with its EIA obligations under the EIA Directive and the EIA Regulations by (a) failing to assess the indirect downstream greenhouse gas emissions in relation to the development arising from the combustion of the oil it will produce and/or (b) failing to take into account the environmental protection objectives established by the UK which are relevant to the project, namely the urgent need to address the climate crisis and the requirement to reduce greenhouse gas emissions by at least 100% below the 1990 baseline; (2) the Council misinterpreted provisions of the NPPF and the Minerals section of the national Planning Policy Guidance ("nPPG") as permitting downstream greenhouse gas emissions to be excluded from assessment, in breach of the EIA Directive and the EIA Regulations; and (a new ground which Lewison LJ directed should be added to the claim) (3) the NPPF and the nPPG fail to conform with the EIA Directive and the EIA Regulations. As a result of the addition of ground (3), the Secretary of State was added as a party to the proceedings. The inconsistency point was not a part of the grounds of challenge.

202 Holgate J dismissed the claim on all grounds: [2021] PTSR 1160. In his view, the downstream greenhouse gas emissions were not effects, direct

A or indirect, "of [the] project" comprised in the development and so did not fall within article 3(1) of the EIA Directive. On its proper interpretation, the EIA Directive required there to be a closer connection between any direct and indirect effects relied upon and the project in question. He pointed out the wide-ranging effect of the appellant's submissions in relation to ground (1)(a), which was the main issue in the claim. The Environmental Statement and the Council's EIA assessed the greenhouse gases that would B be produced from the operation of the development itself, but the appellant contended that the EIA should have assessed the greenhouse gases which would be emitted when the crude oil produced from the Site is refined elsewhere and then used by consumers. It was agreed that once the crude oil was transported off-site it enters, in effect, an international market, and the refined product could be used anywhere in the world. Moreover, if C correct, the appellant's submissions would have ramifications for a range of other production processes. For example, the production of metals, then their use to manufacture components and then motor vehicles or aircraft, all at different locations where the processes will result in greenhouse gas emissions, will also lead to greenhouse gas emissions from their use by consumers and airlines. Holgate J also gave the example of the successive D stages involved in the handling of waste, recycling, recovery and disposal to landfill, each one of which can generate greenhouse gases.

203 Holgate J set out the statutory and national policy framework and reviewed the facts in detail. As to ground (1)(a), he emphasised that the formula used in the EIA Directive is that an EIA is required of the effects (direct and indirect) "of the project" (the corresponding formula in the EIA Regulations used the word "development" in place of "project", in order E to integrate the EIA Directive into the UK planning system through use of the relevant national terminology). Holgate J rejected the suggestion that it is sufficient if the environmental effects of consuming an end product will flow inevitably from the use of a raw material in making that product, and held instead that "the true legal test is whether an effect on the environment is an effect of the development for which planning permission F is sought"; he observed that "[a]n inevitable consequence may occur after a raw material extracted on the relevant site has passed through one or more developments elsewhere which are not the subject of the application for planning permission and which do not form part of the same 'project'": para 101. His conclusion from a review of domestic and European case law on the EIA Directive was that, as a matter of law, on the proper interpretation of the Directive, an "EIA must address the environmental effects, both direct G and indirect, of the development for which planning permission is sought … but there is no requirement to assess matters which are not environmental effects of the development or project": para 126. He noted that an obligation could arise to carry out an EIA of any larger project of which the development forms part, but it was not suggested that the development was part of any such larger project.

H **204** Although not critical for his decision, Holgate J also pointed out that there are other measures in place within the UK for assessing and reducing greenhouse gas emissions from the combustion of oil products in motor vehicles, including the net zero target in the Climate Change Act 2008 and the statutory carbon budgets on a national level issued pursuant to that Act. In addition, the estimation of greenhouse gas emissions from downstream

combustion of oil and control through the statutory carbon budgets is carried out at a national level annually and emissions of greenhouse gases from road transport are the subject of national policy designed to reduce them as part of the steps being taken to achieve the 2050 net zero target. As part of the national policy response to the need to reduce greenhouse gas emissions, a national Emissions Trading Scheme has been introduced by the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (SI 2012/3038).

205 Holgate J held that ground (1)(b) lived with ground (1)(a) and fell away with it. He considered grounds (2) and (3) together and rejected them because of his conclusion on ground (1)(a). In any event, the NPPF and the nPPG did not purport to limit the scope of EIA obligations arising under the EIA Directive and the EIA Regulations.

206 With permission granted by Lewison LJ, the appellant appealed to the Court of Appeal in relation to ground (1)(a). The Court of Appeal, by a majority (Sir Keith Lindblom SPT and Lewison LJ, Moylan LJ dissenting), dismissed the appeal: [2022] PTSR 958. Sir Keith Lindblom SPT reviewed the legislative regime and case law on that regime of the CJEU. Like Holgate J, Sir Keith Lindblom SPT held that an EIA was required of the direct and indirect environmental effects "of the proposed development" itself (that is, of the construction and operation of the oil well at the Site) not of end products far-removed from that project: paras 31 and 38–39. The extraction of crude oil for commercial purposes was "the essential content and character of the proposed development": "[t]hat was the project", and neither the subsequent refinement of the crude oil nor the ultimate use of the products generated by that refinement were part of that project: para 33.

207 However, departing from Holgate J's approach, Sir Keith Lindblom SPT considered that whether the degree of connection required between a development and its putative effects was sufficiently close for them to count as "indirect" effects of a project within the meaning of the EIA Directive and the EIA Regulations is a matter for evaluative assessment by the Council as the planning authority: paras 41–43. In his view, therefore, the outcome of the appeal turned not on a hard-edged question of law, but on the lawfulness of the decision of the Council to decide that the scope 3 greenhouse gas emissions were not "indirect significant effects" of the proposed development or project (see article 3(1) of EIA Directive). This was a matter of fact and evaluative judgment for the Council, challengeable only on *Wednesbury* rationality grounds (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223): para 57. The Council's assessment could not be said to be irrational: para 61. It was relevant to this conclusion that there were many intermediate steps to be gone through before the crude oil from the Site could be combusted as fuel, including that it had to be refined, yet it had not been suggested that the environmental impacts resulting from the intermediate process of refinement ought to have been subject to an EIA in the context of the development: paras 65–66.

208 Partly as a response to this analysis, the appellant introduced the inconsistency point in her submissions in the Court of Appeal. No objection seems to have been taken to this and it is agreed by the parties to be an issue for determination in the appeal to this court. Sir Keith Lindblom SPT dismissed the challenge based on the inconsistency point: paras 90–92. He held that it was proper for the Council to take into account as material considerations that the development would "in a general sense"

help to meet a continuing national need for identified reserves of on-shore hydrocarbons to be husbanded and the relevant Government policies relating to climate change. It was not incumbent on the Council to estimate the precise contribution which the oil produced at the Site might make to meeting the continuing national need for hydrocarbons, nor the particular impacts, positive or negative, of using the refined products of that oil.

209 Lewison LJ delivered a short concurring judgment. He agreed that the real question was not that posed by Holgate J, as to the proper interpretation of the EIA Directive, but the degree of connection needed to link a "project" and a putative effect. This was a question of fact or evaluative judgment for the Council as the planning authority, which could only be impugned for irrationality or on other public law grounds. He considered that the Council had not ignored the downstream global warming effect of the development and that it was lawfully entitled to decide that this was not an indirect effect of the project for the purposes of the EIA Directive.

210 Moylan LJ agreed with much of the judgment of Sir Keith Lindblom SPT, but dissented on the basis that the Council's assessment regarding the lack of connection between the project and the downstream greenhouse gas emissions was legally flawed. He focused on point 14 in Annex I to the EIA Directive. Annex I sets out cases where an EIA is mandatory, without the need for any screening assessment. Point 14 is the provision of Annex I applicable in this case, which meant that an EIA of the development was required. Point 14 stipulates that an EIA is required in the case of a project of this description:

> "(14) Extraction of petroleum and natural gas *for commercial purposes* where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500,000 cubic metres/day in the case of gas." (Emphasis added.)

In Moylan LJ's view, the language of the provision indicates that it is the extraction of petroleum "for commercial purposes", and not the surface installations or the deep drilling (matters covered in point 2 of Annex II to the EIA Directive, headed "Extractive Industry", and in Schedule 2 to the EIA Regulations, as cases requiring a screening assessment) which caused the drafters of the EIA Directive to include this item in Annex I. He accepted the appellant's submission that since an EIA in relation to the development was required by point 14 of Annex I to the EIA Directive by virtue of the extraction of petroleum for commercial purposes, this showed that the downstream greenhouse gas emissions associated with it were impacts (and so indirect effects) of the project: paras 109–112 and 125–128. Moylan LJ referred in particular to the decision in *R (Squire) v Shropshire Council* [2019] Env LR 36 ("*Squire*") and the judgments of the CJEU in *Abraham v Wallonia* (Case C-2/07) [2008] Env LR 32 ("*Abraham*") and *Ecologistas en Acción-CODA v Ayuntamiento de Madrid* (Case C-142/07) [2009] PTSR 458 ("*Ecologistas*") and also called attention to amendments introduced into the EIA Directive by the 2014 Directive to provide for a specific and increased focus on climate change and greenhouse gas emissions. In his view cogent reasons would need to be given to justify exclusion of such emissions, which were an inevitable effect of the downstream use of the oil, from the EIA exercise, and those given by the Council were not sufficient.

The EIA legislative regime

The 1985 Directive

211 The requirement to undertake an EIA before granting planning consent for certain projects was first introduced into European law by Council Directive 85/337/EEC ("the 1985 Directive"). The essential elements of the regime were the same as those under the EIA Directive in its present form. In outline, by virtue of article 4(1) an EIA was required for projects listed in Annex I (the list being shorter than it now is in the EIA Directive) whereas, by virtue of article 4(2), for projects listed in Annex II a screening assessment would be required in order to determine whether they should be made subject to an EIA. Article 3 provided that an EIA should identify, describe and assess "the direct and indirect effects of a project on", among other factors, "soil, water, air, climate and the landscape". Article 2(2) provided that the EIA process could "be integrated into the existing procedures for consent to projects in the member states"; so in the UK, by regulations to implement the 1985 Directive, it was made part of the procedure leading to the grant of planning permission. Article 1(5) provided that the 1985 Directive did not apply to "projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process."

212 The language used in article 3(1) of the EIA Directive which is central to this appeal, requiring an EIA to cover "significant indirect effects" of a project, is taken from the 1985 Directive, which was consolidated into the EIA Directive. The appellant relies on the similarity of that language with the way in which scope 3 emissions are defined in the GHG Protocol to refer to "indirect" greenhouse gas emissions in order to suggest that the EIA Directive requires an EIA for a project to cover all of the scope 3 emissions associated with that project.

213 However, the language of the EIA Directive, as derived from the 1985 Directive, was adopted by the EU legislator well before the GHG Protocol was drafted and does not refer to the concepts set out in that protocol. Moreover, the concepts in the GHG Protocol have been developed for a different purpose from the purposes pursued by the 1985 Directive and the EIA Directive: in the former case to provide a standardised approach to accounting for and reporting on the activities of corporate entities; in the latter, to ensure consideration of the effects of particular projects for which planning permission is sought. The 1985 Directive and the EIA Directive which replaced it have their own scheme and conditions of application and I do not consider that one can infer any intention on the part of the EU legislator that the indirect effects of a project to which the Directives refer should be taken to include the full ambit of scope 3 emissions as referred to in the GHG Protocol.

The EIA Directive

214 The 1985 Directive was amended several times. The EIA Directive was enacted "in the interests of clarity and rationality" to codify the 1985 Directive as amended: recital (1) to the EIA Directive. It was intended to harmonise "the principles of the assessment of environmental effects", including the main obligations of developers and the content of the

A assessment: recital (3) (which also notes that member states could lay down stricter rules to protect the environment). Recital (6) states that general principles for the assessment of environmental effects should be laid down with a view to supplementing and co-ordinating development consent procedures. Other relevant provisions of the EIA Directive are as follows.

215 Recital (7) provides:

B

> "Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question."

C

Recital (8) states that projects of certain types "have significant effects on the environment" and so should generally be subject to an EIA (ie Annex I projects), while recital (9) says that projects of other types may not have such effects in every case but should be subject to an EIA where member states "consider that they are likely to have significant effects on the environment" (ie Annex II projects, which are to be screened to determine whether they should be subject to an EIA). Recital (10) states that member states may set thresholds or criteria for screening purposes.

D

216 Recitals (22) and (24) provide:

> "(22) However, this Directive should not be applied to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process."
>
> "(24) Since the objectives of this Directive cannot be sufficiently achieved by the member states and can therefore, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that article, this Directive does not go beyond what is necessary in order to achieve those objectives."

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217 The EIA Directive post-dates the GHG Protocol but the recitals make no reference to it. The EIA Directive does not refer to or seek to employ the scope 1, scope 2 and scope 3 concepts set out in the protocol. Instead, it is made clear that the EIA Directive re-enacts the scheme of the 1985 Directive and uses the same basic concepts and terms as had been employed in that Directive.

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218 Article 1(1) of the EIA Directive provides that the Directive "shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment."

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219 Article 1(2) sets out certain definitions. "Project" is defined in sub-paragraph (a) to mean "the execution of construction works or of other installations or schemes" and "other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources". "Public concerned" is defined in sub-paragraph (e)

to mean "the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in article 2(2)", with an extension to deem certain non-governmental organisations promoting environmental protection as having an interest. EIA is defined in sub-paragraph (g) to mean:

> "a process consisting of:
> (i) the preparation of an environmental impact assessment report by the developer, as referred to in article 5(1) and (2);
> (ii) the carrying out of consultations as referred to in article 6 and, where relevant, article 7;
> (iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with article 5(3), and any relevant information received through the consultations under articles 6 and 7;
> (iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and
> (v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in article 8a."

220 Article 2(1) stipulates that member states shall adopt measures to ensure that before development consent is given "projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location" are made subject to a requirement for such consent and "an assessment with regard to their effects on the environment", such projects being defined in article 4. As in the 1985 Directive, article 2(2) provides that the EIA "may be integrated into the existing procedures for development consent to projects in the Members States", which in the UK means the existing planning system in which decisions on planning permission are usually taken by local planning authorities. Throughout the EU the implementation of the EIA Directive tends to be decentralised, as it is often the case that regional and local authorities are responsible for its application: see para 235 below.

221 Following the equivalent provision in the 1985 Directive, article 3(1) provides in relevant part as follows:

> "The [EIA] shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors: … (c) land, soil, water, air and climate …"

222 Article 4(1) provides that projects listed in Annex I shall be subject to an EIA. Article 4(2)–(4) provides that projects listed in Annex II should be screened to determine whether an EIA is required according to selection criteria set out in Annex III, and on the basis of information provided by the developer as specified in Annex IIA. As set out in Annex IIA, this information comprises a description of the project (point 1), "a description of the aspects of the environment likely to be significantly affected by the project" (point 2) and "a description of any likely significant effects … of the project on the environment resulting from: (a) the expected residues and emissions and

A the production of waste, where relevant; (b) the use of natural resources, in particular soil, land, water and biodiversity" (point 3).

223 Annex III sets out the selection criteria applicable under article 4(3). These include the "characteristics of projects" (point 1), "with particular regard to", among other things, "cumulation with other existing and/or approved projects" (paragraph (b)), "the use of natural resources, in particular land, soil, water and biodiversity" (paragraph (c)), "the B production of waste" (paragraph (d)), "pollution and nuisances" (paragraph (e)) and "the risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change …" (paragraph (f)). They also include the "location of projects", meaning that "the environmental sensitivity of geographical areas likely to be affected by projects must be considered" (point 2); and the "type and characteristics C of the potential impact" (point 3), meaning that "the likely significant effects of projects on the environment must be considered in relation to criteria set out in points 1 and 2 [of Annex III], with regard to the impact of the project on the factors specified in article 3(1), taking into account" various matters including "the magnitude and spatial extent of the impact (for example geographical area and size of the population D likely to be affected)" (paragraph (a)), "the transboundary nature of the impact" (paragraph (c)) and "the cumulation of the impact with the impact of other existing and/or approved projects" (paragraph (g)).

224 Article 5(1) provides that where an EIA is required the developer shall prepare an EIA report (that is, in the present case, the Environmental Statement) which shall include:

E "(a) a description of the project comprising information on the site, design, size and other relevant features of the project;

(b) a description of the likely significant effects of the project on the environment;

(c) a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;

F (d) a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment;

(e) a non-technical summary of the information referred to in points (a) to (d); and

G (f) any additional information specified in Annex IV relevant to the specific characteristics of a particular project or type of project and to the environmental features likely to be affected.

"Where an opinion is issued pursuant to paragraph 2, the [EIA] report shall be based on that opinion, and include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment …"

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Article 5(2) provides for the developer to be able to request an opinion from the authority which is competent to issue a development consent on the scope and level of detail of the information to be provided for the EIA. This was the procedure followed in this case: see paras 189–190 above. Article 5(3) provides that where necessary the authority should seek supplementary

information from the developer "in accordance with Annex IV, which is directly relevant to reaching the reasoned conclusion on the significant effects of the project on the environment". A

225 Annex IV sets out the information required for the EIA report (it reflects points previously set out in less detail in Annex III to the 1985 Directive). The information includes the following listed items:

(1) Point 1 is "Description of the project", including "a description of the main characteristics of the operational phase of the project … for instance, energy demand and energy used, nature and quantity of the materials and natural resources (including water, land, soil and biodiversity) used" (paragraph (c)) and "an estimate, by type and quantity, of expected residues and emissions (such as water, air, soil and subsoil pollution, noise, vibration, light, heat, radiation) and quantities and types of waste produced …" (paragraph (d)). B C

(2) Point 2 is "a description of the reasonable alternatives (for example in terms of project design, technology, location, size and scale) studied by the developer … and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects".

(3) Point 3 is "a description of the relevant aspects of the current state of the environment (baseline scenario) and an outline of the likely evolution thereof without implementation of the project as far as natural changes from the baseline scenario can be assessed …". D

(4) Point 4 is "a description of the factors specified in article 3(1) likely to be significantly affected by the project: population, human health, biodiversity …, soil …, water …, air, climate (for example greenhouse gas emissions, impacts relevant to adaptation), material assets, cultural heritage … and landscape". E

(5) Point 5 is "a description of the likely significant effects of the project on the environment resulting from, inter alia: (a) the construction and existence of the project …; (b) the use of natural resources, in particular land, soil, water and biodiversity …; (c) the emission of pollutants, noise, vibration, light, heat and radiation, the creation of nuisances, and the disposal and recovery of waste; (d) the risks to … the environment (for example due to accidents or disasters): (e) the cumulation of effects with other existing and/or approved projects …; (f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change; …". It continues: F

> "The description of the likely significant effects on the factors specified in article 3(1) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project. This description should take into account the environmental protection objectives established at Union or member state level which are relevant to the project." G

(6) Point 7 is "a description of the measures envisaged to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the environment and, where appropriate, of any proposed monitoring arrangements …". H

(7) Point 8 is "a description of the expected significant adverse effects of the project on the environment deriving from the vulnerability of the project

to risks of major accidents and/or disasters which are relevant to the project concerned …".

226 Recitals (16) and (17) refer to public participation in the taking of decisions. Recitals (18) to (21) refer to the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"), to which the European Community was a party. These recitals introduce article 6. Article 6(1) provides in relevant part that "member states shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent …". Article 6(2) provides in relevant part that "[i]n order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and by public notices or by other appropriate means, of [various matters relating to EIA of the project] early in the environmental decision-making procedures referred to in article 2(2) and, at the latest, as soon as information can reasonably be provided." article 6(4) provides that "[t]he public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in article 2(2) …".

227 Recital (15) refers to EIA in a transboundary context. This introduces article 7. The relevant part of article 7 provides that "[w]here a member state is aware that a project is likely to have significant effects on the environment in another member state or where a member state likely to be significantly affected so requests", the first member state shall send a description of the project and give the affected member state an opportunity to participate in the decision-making procedures referred to in article 2(2). In addition, information should be provided to the public concerned in the territory of the affected member state so that they have an opportunity to participate in the consultation process. Article 7(4) provides that the member states concerned "shall enter into consultations regarding … the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable time-frame for the duration of the consultation period. …".

228 Article 8 provides that the results of the consultations and information gathered pursuant to articles 5 to 7 "shall be duly taken into account in the development consent procedure". Article 8a(1) provides that the decision to grant development consent shall incorporate (a) the authority's reasoned conclusion referred to in article 1(2)(g)(iv) and (b) "any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures". Member states shall ensure that any such features of the project and measures "are implemented by the developer" and shall determine monitoring procedures; and "[t]he type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the project and the significance of its effects on the environment": article 8a(4). The main reasons for a refusal of development consent should be stated: article 8a(2).

229 Article 11(1) requires member states to ensure that "members of the public concerned: (a) having a sufficient interest, or alternatively; (b) maintaining the impairment of a right, where administrative procedural law of a member state requires this as a precondition" have access to a review procedure before a court of law or equivalent body "to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive".

230 Annex I sets out the projects referred to in article 4(1) for which an EIA is mandatory. These include "crude-oil refineries … and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day" (point 1); "thermal power stations and other combustion installations with a heat output of 300 megawatts or more" and nuclear power stations and reactors "except research installations" whose output is below a certain level (point 2); "integrated works for the initial smelting of cast iron and steel" and certain "installations for the production of non-ferrous crude metals from ore, concentrates or secondary raw materials" (point 4); installations for extraction and processing of asbestos and products containing asbestos, and "for asbestos-cement products, with an annual production of more than 20,000 tonnes of finished products, for friction material, with an annual production of more than 50 tonnes of finished products …" (point 5); construction of "airports with a basic runway length of 2,100 m or more" and of roads of four or more lanes which are 10 km or more in length (point 7); waterways and ports for vessels of over 1,350 tonnes (point 8); waste disposal installations for the incineration of non-hazardous waste with a capacity exceeding 100 tonnes per day (point 10); certain projects for the extraction of petroleum and natural gas (point 14, set out at para 210 above); industrial plants for the production of paper and board with a production capacity exceeding 200 tonnes per day" (point 18); "Quarries and open-cast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares" (point 19); and "installations for storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tonnes or more" (point 21). Points 1, 2, 4, 5, 7 and 8 replicated in whole, or in substantial part, items listed in Annex I to the 1985 Directive as requiring an EIA.

231 Annex II sets out the projects referred to in article 4(2) for which a screening opinion is required. These include under point 2, "Extractive Industry", "quarries, open-cast mining and peat extraction" so far as not covered by Annex I (paragraph (a)); "underground mining" (paragraph (b)); "deep drillings", "with the exception of drillings for investigating the stability of the soil" (paragraph (d)); and "surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale" (paragraph (e)). They also include under point 3, "Energy Industry", "industrial installations for the production of electricity, steam and hot water", so far as not covered by Annex I (paragraph (a)); and under point 4, "Production and Processing of Metals", the "manufacture and assembly of motor vehicles and manufacture of motor-vehicle engines" (paragraph (f)); "shipyards" (paragraph (g)); "installations for the construction and repair of aircraft" (paragraph (h)); and "manufacture of railway equipment" (paragraph (i)). Other projects are listed in relation to the mineral industry (point 5), the chemical industry (point 6), the food industry

(point 7), infrastructure projects (point 10) and so forth. In large part these repeat items in Annex II to the 1985 Directive. Certain items listed there were omitted from Annex II to the current EIA Directive, including under point 2 (extractive industry) "extraction of petroleum" (paragraph (f)) and "extraction of natural gas" (paragraph (g)).

The 2014 Directive

232 The text of the EIA Directive in its current form had been amended by the 2014 Directive. Among other changes, this introduced references to "climate change" and to "greenhouse gases". The highpoint of the appellant's case focuses upon this language and these changes, so it is appropriate to consider the object and purpose of the 2014 Directive in amending the EIA Directive. Again, although the 2014 Directive post-dates the GHG Protocol it does not refer to the protocol; nor does it seek to make use of the concepts of scope 1, scope 2 and scope 3 emissions set out in the protocol.

233 The 2014 Directive originated in a proposal by the European Commission ("the Commission") dated 26 October 2012 ("the 2012 Proposal"). The 2012 Proposal was accompanied by a lengthy Impact Assessment ("the 2012 Impact Assessment") which identified certain shortcomings in relation to the implementation of the EIA regime regarding the screening procedure, the quality and analysis of the EIA and risks of inconsistencies within the process itself. The 2012 Impact Assessment noted that "[a]t present [ie in 2012], EIA reports do not look at the contributions from projects to the causes of global climate change (in terms of directly and indirectly inducing GHG [greenhouse gas] emissions)" (p 83). The shortcomings identified by the Commission did not relate to the absence of consideration of downstream or scope 3 greenhouse gas emissions from EIA of proposed projects. In the section of the 2012 Impact Assessment headed "Detailed description of the environmental impacts", the Commission proposed the integration of a "climate assessment" in EIA reports, for which the focus was on the direct and indirect emissions associated with a project subject to an EIA:

> "As part of the climate assessment, depending on the character of the project, in some cases not only direct greenhouse gas emissions (eg from on-site combustion of fossil fuels) would have to be assessed, but also indirect impacts of the projects on climate change. For example, for transport infrastructure this could include increased or avoided carbon emissions associated with energy use for the operation of the project …; for a commercial development this could include carbon emissions due consumer trips. member states have legally binding greenhouse gas reduction targets and many member states have also defined greenhouse gas reduction targets at the local level (main cities, regions etc), so the EIA could assess to what extent projects contribute to the achievement of these targets and could identify relevant mitigation and/or offsetting measures that would need to be implemented" (pp 138–139).

The Commission noted (p 9) that incorporation of climate change issues in EIA reports "could be a good opportunity to integrate environmental impacts into the project's design thereby ensuring a more complete assessment of environmental and climate change impacts of projects and foreseeing

appropriate mitigation measures". The relevant problem identified with the existing EIA regime was that "potential (environmental) impacts of projects to new environmental issues (eg climate, biodiversity) are not sufficiently covered by the EIA Directive"; the solution proposed was to "specify the content of the EIA report and of the final decision", "streamline environmental assessments" and "adjust the Directive to the new environmental issues" (p 21). The changes proposed in the 2012 Proposal and introduced by the 2014 Directive did not specify that downstream or scope 3 greenhouse gas emissions should be covered by the EIA report and the final decision.

234 In a summary review of issues identified in a consultation exercise in relation to the EIA regime, the 2012 Impact Assessment had earlier noted (p 79) that although article 3 of the EIA Directive refers to both direct and indirect effects of a project, "in practice the environmental impacts described in EIAs are mostly related to direct impacts …, while indirect impacts and life-cycle impacts are rarely covered in detail (eg depletion of natural resources due to the use of certain products and materials, greenhouse gas emissions from transportation activities induced by the project, environmental impacts of products manufactured or services provided)". In so far as this item refers to greenhouse gas emissions in terms, the focus is on those from transportation activities in relation to the project itself. This is the only reference in the 2012 Impact Assessment to the environmental impacts of products which have been manufactured, and in that regard it is imprecise, in that a distinction is drawn between indirect impacts and life-cycle impacts. It was not reflected in the Commission's own assessment in the 2012 Impact Assessment of the problems then existing with the EIA regime nor in its proposed solution. This is a significant omission, since the proposed solution involved specifying in more detail what should be included in EIA reports and final decisions in order to ensure greater uniformity of approach across member states. If the aim of the proposed changes to the EIA Directive had been to require competent authorities to assess all downstream or scope 3 greenhouse gas emissions, one would have expected this to be specified clearly.

235 The 2012 Proposal recommended that the first area of shortcomings referred to above should be addressed by clarifying the screening procedure by modifying the criteria in Annex III and specifying the content and justification of screening decisions; the second area by quality control of EIA information, specification of the EIA report (mandatory assessment of reasonable alternatives etc) and adaptation of the EIA to challenges (ie biodiversity, climate change, disaster risks, availability of natural resources); and the third area by specifying time-frames for the stages of EIA and co-ordination with other environmental assessments required under other EU legislation. The Commission noted that further guidance was necessary because "the implementation of the Directive is often highly decentralised, as the regional and local authorities are responsible for its application …". There was a review of the additional costs for developers and public authorities associated with the proposed changes and it was stated that the proposal for amendment complied with the proportionality principle.

236 In 2013, in advance of amendment of the legislation, the Commission published *Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment* ("the 2013 Guidance"). In the section

entitled "Understanding key climate mitigation concerns" the Commission set out a table of "examples of key questions that could be asked when identifying key climate change mitigation concerns", comprising questions relating to direct greenhouse gas emissions, "indirect GHG [greenhouse gas emissions] due to an increased demand for energy" ("will the proposed project significantly influence demand for energy? Is it possible to use renewable energy sources?") and "indirect GHG caused by any supporting activities or infrastructure that is directly linked to the implementation of the proposed project (eg transport …)" ("Will the proposed project significantly increase or decrease personal travel? Will the proposed project significantly increase or decrease freight transport?"): see p 30. The focus of the proposed questions was an increase in greenhouse gases closely associated with the project itself, as would be involved in increased energy use or vehicular transportation to which the project would give rise.

237 The text of the amendment Directive as proposed by the Commission in the 2012 Proposal was slightly modified in the 2014 Directive, as adopted. However, it clearly continued to reflect the policy objectives specified in the 2012 Proposal and the 2012 Impact Assessment. Recital (7) referred to the greater prominence of certain environmental issues, including climate change, which had become more important in policy making and should constitute "important elements in assessment and decision-making processes". Recital (13) stated: "Climate change will continue to cause damage to the environment and compromise economic development. In this regard, it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change". Neither the recitals to the 2014 Directive nor the text it introduced into the EIA Directive indicate that it was intended that all downstream or scope 3 greenhouse gas emissions should be included within the concept of "indirect effects" of projects for the purposes of the EIA Directive. As the 2012 Impact Assessment explained, authorities across member states had not previously regarded them as "indirect effects" of projects "on … climate" within article 3(1) of the EIA Directive (according to the then version of the text of that provision, before the addition of the word "significant" by amendment by the 2014 Directive). The 2013 Guidance only referred to a limited class of emissions as "indirect effects" of projects. If it had been intended that the entirety of the very wide class of scope 3 emissions should also be so regarded, the amendments effected by the 2014 Directive would have made that clear. That would have been necessary in order to ensure a uniform and harmonised approach across member states in relation to such a fundamental point. It would have constituted a major change of direction and focus for the EIA regime. Instead, as explained further below, the text of the EIA Directive as so amended focused on greenhouse gas emissions arising from the construction and operation of a project itself, together with possible measures for minimising and mitigating such emissions.

238 In 2017 the Commission issued new guidance entitled "Environmental Impact Assessment of Projects: Guidance on the preparation of the Environmental Impact Assessment Report (Directive 2011/92/EU as amended by 2014/52/EU)". Under the heading "Legislative requirements and key considerations" the guidance states (p 38) that under Annex IV to the EIA Directive "the emphasis is placed on two distinct aspects of the climate change issue—climate change mitigation: this considers the impact

the Project will have on climate change, through greenhouse gas emissions primarily, [and] climate change adaptation: this considers the vulnerability of the Project to future changes in the climate, and its capacity to adapt to the impacts of climate change, which may be uncertain". So far as the former is concerned, therefore, the emphasis is on what can be done in the course of the planning consent procedure to modify the project to mitigate its effects in terms of greenhouse gas emissions. In relation to this, under the heading "Climate change mitigation: project impacts on climate change", the guidance states (p 39) that the EIA should include an assessment of the direct greenhouse gas emissions of the project over its lifetime, "eg from on-site combustion of fossil fuels or energy use", and of emissions "generated or avoided as a result of other activities encouraged by the Project (indirect impacts) eg transport infrastructure: increased or avoided carbon emissions associated with energy use for the operation of the Project; [and] commercial development: carbon emissions due to consumer trips to the commercial zone where the Project is located." This confirms the Commission's understanding that the relevant "indirect effects" of a project in relation to greenhouse gas emissions are those relating to the operation of the project itself. There is no reference to all downstream or scope 3 emissions, as one would have expected in this guidance if the Commission regarded these as falling within the scope of the EIA Directive. Instead, at p 38, the guidance referred back to the 2013 Guidance, which as noted above only referred to far more limited aspects of greenhouse gas emissions.

The Aarhus Convention

239 The Aarhus Convention, referred to in the recitals to the EIA Directive, is concerned, among other things, with promoting access to information and public participation in decision-making in environmental matters. This was followed by Directive 2003/35/EC which amended the previous version of the EIA Directive to align it with the provisions on public participation in the Convention (that is, well before the 2014 Directive). In fact, the relevant part of the Aarhus Convention followed the basic framework for EIA set out in the 1985 Directive. Article 6 of the Convention makes provision for participation by "the public concerned" in decisions on specific activities, which corresponds to an EIA in relation to the grant of planning consent for particular projects. "The public concerned" is defined in article 2(5) in terms similar to the definition of that term in article 1(2)(e) of the EIA Directive (para 219 above). The right to involvement pursuant to article 6 is for the public affected by a specific decision, not for anyone who might be affected by global warming. Article 6(6) of the Convention requires that the public concerned should be provided with, among other things, "a description of the significant effects of the proposed activity on the environment" (sub-paragraph (b)). No further definition is provided. It is not stated that the significant effects "of the proposed activity" include all downstream or scope 3 greenhouse gas emissions and the practice of EU member states in the period before the 2014 Directive referred to above indicates that they did not regard these as covered by that provision. In like manner, *The Aarhus Convention: An Implementation Guide*, 2nd ed (2014) published by the United Nations Economic Commission for Europe does not suggest that all such emissions fall within article 6(6)(b) of the Convention (see, in particular, p 151).

National policies on climate change and planning

240 The UK's national climate objectives are set out in the Climate Change Act 2008. Under that Act the national government must account at the national level for all the UK's greenhouse gas emissions, including scope 3 type emissions within UK territory. Among other things, the Act sets a national carbon target (section 1) and requires the Government to establish carbon budgets for the UK (section 4). It contains mechanisms to adjust the national target and carbon budgets (in sections 2 and 5, respectively) in the light of new information. The national target is for reduction of greenhouse gas emissions by 2050 and the national system of periodic carbon budgets is directed to achieving that reduction. The statutory carbon budgets are not sub-divided by sector, but are expressed as a total number of tonnes of carbon dioxide equivalent. Under section 14(1), the Secretary of State must lay before Parliament a report setting out proposals and policies for meeting carbon budgets for the current and future budget periods. In December 2011 the Government presented to Parliament a report pursuant to this provision on how it proposed to meet the first four carbon budgets covering the period 2008 to 2027: "The Carbon Plan: Delivering our low carbon future". This policy document sub-divides greenhouse gas emissions by sector, by reference both to sources and end users, notably power stations, industry, buildings, transport, agricultural and land use, waste and exports. Pursuant to section 16(2), the Secretary of State must submit to Parliament an annual statement of emissions in respect of each greenhouse gas, setting out the steps taken to calculate the net carbon account for the UK. The statement includes scope 3 type emissions (such as from road traffic) and shows whether the national carbon budgets are being met.

241 Emissions of greenhouse gases from road transport are the subject of national policy which is designed to reduce usage of vehicles using combustible carbon fuel as part of the steps taken to achieve the 2050 net zero target, including in particular the Government's "The Road to Zero" strategy published in 2018 for transition to zero emission road transport.

242 At a conference held pursuant to the United Nations Framework Convention on Climate Change (1992), on 12 December 2015 the text of the Paris Agreement on climate change was agreed and adopted ("the Paris Agreement"). The Paris Agreement set out certain obligations to reduce emissions of greenhouse gases with the object of seeking to reduce the rate of increase in global warming and to contain such increase to well below 2°C above, and if possible to 1.5°C, above pre-industrial levels. On 17 November 2016 the UK ratified the Paris Agreement. The obligations arising from the Paris Agreement directed to reduction of greenhouse gas emissions operate at a national level by reference to "nationally determined contributions": see the summary in *R (Friends of the Earth) v Secretary of State for Transport* [2021] PTSR 190 ("*Friends of the Earth*"), paras 70–71. It is through the national target and budgeting mechanisms set out in the Climate Change Act 2008 that the UK seeks to comply with its obligations under the Paris Agreement: see *Friends of the Earth*, paras 71 and 122–124.

243 In the EU, the Effort Sharing Regulation (EU) 2018/842 adopted in 2018 and revised in 2023 established for each member state a national target for the reduction of greenhouse gas emissions by 2030 in specified sectors, including domestic transport. The same approach based on national

targets had been adopted prior to the promulgation of the 2014 Directive and was referred to in the 2013 Guidance (p 20). On 13 February 2009 the EU Council issued a set of conclusions (17271/1/08) from a Council meeting in December 2008, Part III of which addressed an agreement reached in relation to "energy and climate change" regarding national reduction targets. Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of member states to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 laid down the minimum contributions of member states to meeting those commitments "and rules on making these contributions and for the evaluation thereof" (article 1). The Decision provided for annual national emission allocations (see recitals (8)–(9) and article 3). The package of measures introduced at this time, and in place when the 2014 Directive was promulgated, set out what were known as "the 20–20–20 targets", including by 2020 to reduce by 20% the emissions of greenhouse gases compared to 1990 levels.

244 The Petroleum Act 1998 is the primary legislation under which oil and gas extraction is regulated in the UK through the grant of licences by the Oil and Gas Authority (now called the North Sea Transition Authority). The revised Oil and Gas Authority Strategy (2021), issued pursuant to the 1998 Act, imposes a "central obligation" on relevant persons in the exercise of licensed activities to take the steps necessary to "(a) secure that the maximum value of economically recoverable petroleum is recovered from the strata beneath relevant UK waters; and, in doing so, (b) take appropriate steps to assist the Secretary of State in meeting the net zero target, including by reducing as far as reasonable in the circumstances greenhouse gas emissions from sources such as flaring and venting and power generation, and supporting carbon capture and storage projects". There is no reference to responsibility in relation to scope 3 emissions.

245 In addition to these regimes, the Secretary of State operates the non-statutory Climate Compatibility Checkpoint ("the CC Checkpoint"), introduced in 2022 with the aim of ensuring the compatibility of future oil and gas licensing with the UK's climate objectives and energy requirements. The CC Checkpoint includes tests regarding reduction of operational greenhouse gas emissions from the UK oil and gas production sector against targets agreed as part of the North Sea Transition Deal in 2021, benchmarking of such emissions from the sector against international benchmarks and assessment of the UK's energy requirements. The Government consulted on the CC Checkpoint and the tests to be included and issued a response. The question of the inclusion of scope 3 greenhouse gas emissions in the CC Checkpoint tests was debated by consultees. In its response the Government explained why it decided against this:

> "The inclusion of Scope 3 emissions was mentioned throughout the consultation questionnaire by stakeholders. Many stakeholders opposed the measurement of international Scope 3 emissions as part of the checkpoint, given the difficulties and complexities associated with accurate measurement, existing consideration in the Carbon Budgets and Nationally Determined Contributions of consumers of UK-produced fuels, and the coverage of Scope 1 and Scope 2 emission

A reductions in other tests, which many responses suggested may be more relevant and controllable."

"The government acknowledges that there are a range of methods for estimating scope 3 emissions and has reviewed the methods proposed. It is acknowledged that it would be possible to calculate an estimate, or range of estimates for UK scope 3 emissions. One approach would be to pick a calculation methodology that is already employed by the B industry, another approach would be to produce a range of scope 3 estimates based on using a number of different approaches. However, given this information, it is not clear what action Ministers would take, as there is no agreed target for the reduction of scope 3 emissions."

"… the government's view is that scope 3 emissions are not directly relevant to the decision on whether to endorse further licensing round[s]. C Including any estimate of scope 3 emissions in the checkpoint would add little value, and it is not clear how Ministers would take such a number into account."

"A key argument presented by some consultees why scope 3 emissions should not be included in the CC Checkpoint was that they "are covered by consuming nations' carbon accounts and therefore at a global level scope 3 emissions will be reduced through widespread D demand reduction as sources of alternative energy come online"; the Government agreed with this submission (Designing a Climate Compatibility Checkpoint for Future Oil and Gas Licensing in the UK Continental Shelf: Government Response to the consultation (2022), pp 27–28)."

E **246** Chapter 17 of the NPPF published in February 2019 is entitled "Facilitating the sustainable use of minerals". Paragraph 205 provides that when determining planning applications, "great weight should be given to the benefits of mineral extraction, including to the economy", and planning authorities should, among other things, "ensure that there are no unacceptable adverse impacts on the natural and historic environment, F human health or aviation safety, and take into account the cumulative effect of multiple impacts from individual sites and/or from a number of sites in a locality".

247 Chapter 14 of the NPPF addresses "the challenge of climate change". It states in general terms that the planning system should support the transition to a low carbon future. It should help to shape places in ways that contribute to radical reductions in greenhouse gas emissions and G support renewable and low carbon energy infrastructure: para 148. New development should be planned for in ways that "can help to reduce greenhouse gas emissions, such as through its location, orientation and design": para 150.

248 Paragraph 183 of the NPPF provides:

H "The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should

not be revisited through the permitting regimes operated by pollution control authorities." A

249 Para 12 of the Minerals section of the nPPG states that the planning and other regulatory regimes are "separate but complementary", with the former focusing on whether new development would be appropriate for the location proposed. It concludes:

> "… the focus of the planning system should be on whether the development itself is an acceptable use of the land, and the impacts of those uses, rather than any control processes, health and safety issues or emissions themselves where these are subject to approval under regimes. Mineral planning authorities should assume that these non-planning regimes will operate effectively." B

250 Para 112 of the Minerals section of the nPPG addresses the issue of what hydrocarbon issues can be left by mineral planning authorities to other regulatory regimes. In relevant part it states: C

> "Some issues may be covered by other regulatory regimes but may be relevant to mineral planning authorities in specific circumstances. For example, the Environment Agency has responsibility for ensuring that risk to groundwater is appropriately identified and mitigated. Where an Environmental Statement is required, mineral planning authorities can and do play a role in preventing pollution of the water environment from hydrocarbon extraction, principally through controlling the methods of site construction and operation, robustness of storage facilities, and in tackling surface water drainage issues. D
>
> "There exist a number of issues which are covered by other regulatory regimes and mineral planning authorities should assume that these regimes will operate effectively. Whilst these issues may be put before mineral planning authorities, they should not need to carry out their own assessment as they can rely on the assessment of other regulatory bodies. However, before granting planning permission they will need to be satisfied that these issues can or will be adequately addressed by taking the advice from the relevant regulatory body …" E F

Analysis

(1) The purpose and scheme of the EIA Directive (as amended by the 2014 Directive)

251 The basic purpose of the EIA Directive is to ensure that relevant environmental issues in respect of a project are identified and taken into account in the procedure for the grant of planning consent for the project, in particular with a view to examining whether environmental impacts can be avoided or mitigated by measures taken in designing the project or by the imposition and then monitoring of conditions attached to such consent. The EIA Directive lays down harmonised rules and procedures with a view to ensuring that a common approach is adopted across all member states. G H

252 The EIA Directive contemplates that decisions on the grant of planning consent will often be taken by local or regional authorities, rather than national authorities: see article 2(2) and the review in the 2012 Impact Assessment (paras 234–235 above). The procedures and rules laid down in

A the Directive are intended to be appropriate for decision-making at local or regional level by such authorities.

253 This is an important point. As explained above, scope 3 or downstream greenhouse gas emissions are addressed by central governments at the level of national policy. That is the general position for all member states, and the UK. Decisions regarding the distribution of greenhouse gas emissions between different sectors of the economy, the striking of a B balance between promotion of national economic objectives and reduction of greenhouse gas emissions in various sectors and the rate of transition sector by sector towards the achievement of the 2050 net zero target are all matters of national policy to be determined by central Government.

254 The same is true for debates with other states regarding the methodology for accounting for scope 3 greenhouse gas emissions, where C these emissions may well occur in states other than the state where emissions which are closely associated with an originator activity arise (such as scope 1 and, typically, scope 2 emissions). For example, oil extracted at the Site may be transported to be refined in another state, and the fuel so produced may be transported to be used by motor vehicles in other states. Which states should have responsibility pursuant to the Paris Agreement and other D international initiatives for accounting in terms of their national carbon figures for greenhouse gas emissions arising from the production chain running from extraction of minerals through refinement (in this case) or the manufacture of products, to the end use of the refined fuel or manufactured products, and the methodology to be used to identify and allocate such emissions, are matters for international discussion and agreement between states.

E **255** These are all "big picture" issues which a local planning authority such as the Council is simply not in a position to address in any sensible way.

256 Further, it would be constitutionally inappropriate for a local planning authority to assume practical decision-making authority based on its own views regarding scope 3 or downstream emissions and how these should be addressed in a manner which would potentially be in conflict with F central Government decision-making and its ability to set national policy. This is true in relation to the UK and in relation to EU member states as a whole, especially in light of the international and EU frameworks set out above according to which carbon budgets and carbon reduction policies are set at the national level. The EIA Directive as amended by the 2014 Directive was not intended to cut across this basic decision-making architecture in relation to meeting the challenge of climate change.

G **257** The information to be provided in the EIA process pursuant to the EIA Directive is intended to inform the decision whether to grant development consent for a project, and if so on what conditions, in a way that enables the decision-making authority—typically a local authority—to engage in practical decision-making within the remit of its own competence under existing procedures for development consent (see article 2(2) of the H EIA Directive, para 220 above). In doing that it should decide whether a particular project is in accordance with national policy (for which purpose the NPPF and nPPG have been promulgated by the central Government) and consider whether there are appropriate adjustments which can be made to the project to mitigate its environmental impacts, including to reduce the direct and indirect greenhouse gas emissions associated with it. The EIA process is

intended to furnish information to enable the planning authority to exercise its judgment about such matters, not to create some general databank about possible downstream or scope 3 effects which could not bear on what the planning authority has to do. As was observed in the judgment of the CJEU in *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* (Case C-275/09) [2011] PTSR D37; [2011] Env LR 26 ("*Brussels Airport*") at para 25, article 2(1) of the 1985 Directive (now in the EIA Directive) "does not … require that any project likely to have a significant effect on the environment be made subject to the environmental impact assessment provided for in that Directive, but only those referred to in Annexes I and II to that Directive".

258 The fact that the EIA Directive is directed towards regulating practical decision-making in this way is generally apparent from the scheme of the Directive and the exercise of judgment by a planning authority which it contemplates, and is also clear from recital (22) (para 216 above) which explains that the Directive does not apply in relation to specific acts of national legislation because the objective of supplying information relevant to the decision is "achieved through the legislative process". It is no part of the object of the EIA Directive to generate information which does not have a direct and practical bearing on the matters to be decided by the decision-making authority. It is difficult to see what, in practical terms, a local planning authority is supposed to do with general information about downstream or scope 3 emissions other than to say that in its opinion they are so great that the project ought not to proceed at all and to refuse planning consent on that basis. But that would constitute unjustified disruption of the proper decision-making hierarchy contemplated by the EIA Directive, since in effect it would involve the local planning authority second guessing or supplanting the decision-making authority of the national Government regarding the appropriate reaction to the existence of downstream or scope 3 greenhouse gas emissions.

259 Further, in promulgating the EIA Directive the EU institutions were obliged to comply with the principle of proportionality. Proportionality is a general principle of EU law: see T Tridimas, *The General Principles of EU Law*, 2nd ed (2006), chapters 3–5. As Tridimas points out (p 137) the principle permeates the whole of the EU legal system; and see Geiger, Khan and Kotzur (eds), *European Union Treaties: A Commentary* (2015), p 40: "The principle of proportionality is one of the general principles of Community law". Article 5(1) of the Treaty on European Union provides (among other things) that the use of EU competences is governed by the principle of proportionality and article 5(4) states that under that principle the content and form of Union action shall not exceed what is necessary to achieve the objectives of the EU Treaties. The EIA Directive falls to be interpreted in the light of this principle. Also, recital (24) to the EIA Directive (para 216 above) states that, in accordance with the principle of proportionality set out in article 5 of the Treaty on European Union, the Directive does not go beyond what is necessary to achieve its objectives, that is, including in relation to the supply of information to assist in decision-making (see recital (22), para 216 above). It would clearly impose disproportionate costs and burdens on both developers and national authorities if information about all downstream or scope 3 greenhouse gas emissions had to be gathered and presented by developers and had to be assessed by planning authorities (in particular, at the local level) in

circumstances where such information could not inform in any helpful or appropriate way the decisions to be taken by those authorities.

260 Accordingly, application of the principle of proportionality indicates that the appellant's proposed interpretation of the EIA Directive, arguing that all downstream or scope 3 emissions are to be regarded as "indirect effects of a project", is not correct. In fact, quite apart from the existence of the background principle of proportionality, in putting forward its 2012 Proposal for the amendment of the EIA Directive to take account of climate change issues the Commission positively asserted that the proposed amendments complied with the principle of proportionality, taking account of the burdens on developers and planning authorities: para 235 above. That statement was made in the context of amendments to the EIA process intended to ensure that greenhouse gas emissions closely associated with a project were taken into account in order to enable planning authorities to require mitigating measures to be taken in relation to matters such as the design of the project. It indicates that there was no intention for all downstream or scope 3 emissions to be taken into account in the EIA process, since information about that could have no proper bearing on actions to be taken by local planning authorities.

261 In addition to this, the general scheme of the EIA Directive indicates that the entirety of scope 3 or downstream greenhouse gas emissions do not qualify as "indirect effects of a project" within the meaning of the Directive. Oil extracted from the Site will have to be refined before it is used. Construction of a refinery would constitute a project listed within Annex I to the EIA Directive (at point 1: para 230 above) for which an EIA would be required. Greenhouse gas emissions from the construction and operation of such a refinery would have to be assessed in the context of an EIA for that project. It would be disproportionate for them to have to be assessed twice, once in the context of an EIA for that project and also in the context of an EIA for the Site.

262 Also, to construe the EIA Directive as requiring this would lead to incoherence. The decision-making processes by authorities deciding on each separate project are not integrated, and so would have a tendency to cut across each other on a potentially determinative issue as is alleged to arise here if each authority made its own assessment of the extent and significance of the same set of greenhouse gas emissions for the project on which it had to decide; all the more so where the projects might be in different member states. The authority carrying out an EIA in relation to the refinery project, which clearly has the authority under the EIA Directive to determine such matters, might decide that the direct and indirect greenhouse gas emissions of the refinery could be limited or mitigated in an acceptable way (including by having regard to whatever national policy was applicable in that member state). But the authority carrying out an EIA in relation to the oil well might reach different conclusions about that (and might not give weight to the national policy of the different member state of the refinery). The EIA Directive has no mechanism for resolving this sort of difference of view, nor for allocating decision-making authority in relation to such matters, other than by maintaining a focus on the particular project in question and greenhouse gas emissions associated with that project.

263 On the other hand, the relevant refinery might already exist, so that no EIA obligation arises in relation to it under the EIA Directive. In such a

case it is difficult to see why the EIA in relation to the oil well should extend to cover the greenhouse gas emissions associated with the operation of a refinery which is not subject to the EIA regime. It would be odd to construe the Directive as imposing indirectly, by the back door, an obligation on the authority considering an EIA for the oil well project (ie a different project, possibly in a different member state) to assess the greenhouse gas emissions of a refinery outside the regime altogether as part of that authority's EIA responsibilities in respect of the oil well project.

264 Further, if the refinery in this example were located outside the EU, to construe the EIA Directive as requiring the local authority carrying out an EIA in relation to the oil well to assess the downstream greenhouse gas emissions of the refinery in a third state with a view to (possibly) reaching a decision which would prevent the construction of the oil well and so, to that extent, prevent the supply of oil to that refinery, would be to give the Directive exorbitant jurisdictional effect. That would potentially cut across the conduct of relations between the UK and the EU and its member states with such third state at an international level in a way which cannot have been intended (at any rate without that being clearly indicated in the drafting of the EIA Directive, which is not the case). There is no indication of what methodology should be used in such an assessment exercise, which one would have expected to see spelled out in a harmonising instrument like the EIA Directive if this had been intended.

265 The international regime in place before the promulgation of the 2014 Directive relied on a different mechanism for addressing cross-border effects in terms of greenhouse gas emissions, namely a scheme of national emissions targets designed to encourage policies for reductions in emissions at the place of use of carbon-based products (that is, to effect a reduction in demand), rather than by producing restrictions of output on the supply side. If it had been intended that the EIA Directive should promote a different mechanism of control, one would have expected that to be explained in the various documents setting out the policy underlying the EIA Directive and to be imposed by express drafting in the EIA Directive itself, which is not the case. These points apply with equal force in relation to control of greenhouse gas emissions from motor vehicles and so forth in other member states and in third states, which are still more remote from the production of crude oil at the oil well at the Site and the decision-making responsibility of the Council. They are the same reasons why the CC Checkpoint was not drafted to include reference to scope 3 greenhouse gas emissions (see para 245 above).

266 In fact, the EIA Directive does include provisions regarding its cross-border operation. These are far more limited in their effect than the interpretation proposed by the appellant would suggest. This provides a further indication that such an interpretation is incorrect.

267 Recital (15) of the EIA Directive (para 227 above) refers to the desirability of strengthening EIA in a transboundary context, having regard to the UN Convention on Environmental Impact Assessment in a Transboundary Context (1991) (also called the Espoo Convention). Article 1(vii) of that Convention defines "impact" to mean "any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures …" and article 1(viii) defines "transboundary impact" to mean "any impact, not exclusively of a global nature, within

A an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party". This excludes the impact of global warming (an impact of an exclusively global nature) and refers to effects caused by a proposed activity, and so does not cover downstream or scope 3 greenhouse gas emissions caused by other activities. Article 3 requires notification of a
B proposed activity "that is likely to cause a significant adverse transboundary impact" to the state which is affected, to allow consultation involving that state pursuant to article 5.

268 Article 7 of the EIA Directive (para 227 above) reflects the policy explained in recital (15). There is no adjustment in the EIA Directive in the definition of relevant effects of a project for the purposes of this provision. The inference is that none was required in order to align the operation of
C this part of the EIA Directive and the Espoo Convention because the full range of downstream or scope 3 greenhouse gas emissions is not covered by the concept of "indirect effects of a project" on which the EIA Directive is based. The information to be provided under article 7(1)(a) by way of notification to another member state ("a description of the project, together with any available information on its possible transboundary impact") is
D intended to be aligned with the requirements under the Espoo Convention, as is the provision pursuant to article 7(2) and (3) of the further information available for the purposes of public consultation under article 6 of the EIA Directive. Its focus is the effects of the project itself, not downstream effects. It is by virtue of that focus that a member state subject to the obligation in article 7 is able to know which other member states it is required to involve in its domestic consultation and decision-making procedure under article 2(2).

E **269** In addition, the appellant's interpretation of the EIA Directive would again produce disproportionate effects in terms of the operation of that decision-making procedure, by requiring the involvement of every other member state in relation to projects associated with significant downstream greenhouse gas emissions. There is nothing in the practice of member states of which the court has been made aware which suggests that any of them have
F done this. Nor is there any indication that the Commission, in its supervisory role under article 12 of the EIA Directive, has suggested that their failure to do so is in contravention of the requirements of the Directive.

270 The Commission's concern regarding the operation of the EIA Directive in relation to matters affecting climate change was directed elsewhere. As explained in the 2012 Impact Assessment (paras 233–234 above), prior to the promulgation of the 2014 Directive the general practice
G across all member states was that there was no assessment at all of greenhouse gas emissions of projects, including those closely associated with a project. In the 2012 Impact Assessment and the 2013 Guidance, the Commission indicated that the indirect effects of a project should be taken to include greenhouse gas emissions such as those associated with increased power consumption at the project and increased motor vehicle
H transportation to and from the project (paras 235–236 above). The object of the 2014 Directive was to tighten up procedures across the EU to produce a harmonised approach which ensured that both "direct effects" of projects in terms of their own generation of greenhouse gas emissions and "indirect effects" in terms of greenhouse gas emissions associated with the project such as from any increased power consumption and motor transportation it would

involve were taken into account in the EIA for a project, whereas they had been omitted previously (para 237 above).

271 As explained above, neither the 2012 Proposal nor the 2012 Impact Assessment proposed that the EIA Directive should be changed so that, for the first time, in contrast to existing member state practice, all scope 3 or downstream greenhouse gas emissions should be included within the concept of "indirect effects of a project" and brought within the EIA regime. This would have been a major change in the operation of the EIA regime and, if it had been intended, this would have been stipulated in clear terms in the amendments to the EIA Directive brought about by the 2014 Directive. As Holgate J rightly pointed out (paras 5 and 6), the effects of the interpretation urged by the appellant would be profound across many areas, not limited to the extraction of oil, since, for instance, the production of aircraft would involve the manufacture of components in a number of factories, leading to the construction of an aircraft in another, and its eventual use for transportation, with greenhouse gas emissions produced at each stage. If it had been intended that the EIA for a factory project to produce components should include all the downstream emissions, this would have been set out clearly in the EIA Directive.

272 Further, if that had been intended, the 2014 amendments of the EIA Directive would have given clear guidance regarding the approach and methodology to be adopted in relation to the assessment of scope 3 or downstream impacts of a project. In the absence of such guidance, there would have been an obvious risk of capricious and arbitrary differences in approach and methodology arising as between local authorities within a particular member state and also across member states on a basic point of principle. This would have undermined a fundamental objective of the EIA Directive, which was to promote a harmonised and consistent approach to the conduct of EIA for projects.

(2) The text of the EIA Directive

273 Against the background of this discussion of the purpose and scheme of the EIA Directive, the points in relation to its text can be made quite shortly. In my view, they indicate clearly that the "indirect effects of a project" do not extend to the downstream or scope 3 greenhouse gas emissions of the kind which are in issue in this case. The relevant provisions are set out at paras 211–231 above.

274 "Project" is defined in article 1(2)(a) to mean "execution of construction works …" or "other interventions in the natural surroundings …". This definition focuses on a specific set of physical works. As the CJEU observed in *Abraham* at para 23, "[i]t is apparent from the very wording of [what was then article 1(2) of the 1985 Directive] that the term 'project' refers to works or physical interventions"; see also *Brussels Airport*, paras 20–24.

275 The relevant environmental effects, both direct and indirect, of a project for EIA purposes are those "of the project". This is the formula used throughout the EIA Directive: see, for example, the Directive's title, recital (7), article 1(1), article 1(2)(g)(iv), article 3(1), article 5(1)(b) and the tailpiece of article 5(1), article 5(3)(c), paragraph 3 of Annex IIA, paragraph 3 of Annex III, and the introduction and tailpiece of paragraph 5 of Annex IV.

Article 3(1) (para 221 above) is of particular importance, because this sets out the basic obligation regarding what the EIA of a project should achieve.

276 Holgate J and Sir Keith Lindblom SPT rightly emphasised the importance of this formula. It is difficult to read it as based on an expansive "but for" approach to causation of effects, ie that it is sufficient to say that but for the production of crude oil at the Site, greenhouse gas emissions would be lower. Very few legal rules to do with causation of effects operate according to a pure "but for" principle, and there is no reason to interpret the EIA Directive in this way. On the contrary, the formula used in the Directive indicates that, even in relation to "indirect" environmental effects, they still have to be effects "of the project". This imports the idea that the effects have to be relatively closely connected with the project and do not qualify if they are remote from it. On a natural reading of this phrase, downstream or scope 3 greenhouse gas emissions of the kind in issue in this case could not be said to be "of the project". If it had been intended that they should be covered by the obligation in article 3(1), some wider formula would have been used. Furthermore, this interpretation allows for the coherent accommodation of the EIA regime under the EIA Directive and the general background approach to combating climate change based on policies and targets established at the national level.

277 An EIA is required before development consent is given for projects "likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location": article 2(1). The focus is on the impact of the project itself. An EIA is to be made part of existing development consent procedures, which are usually conducted by local authorities: article 2(2) and paras 220 and 235 above. There is to be consultation involving the public before development consent is given (article 6). The obligation under article 6 is to consult "the public concerned", which is defined in article 1(2)(e) to mean "the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in article 2(2) …". The focus is again on the impacts which the project itself has on the environment which may affect people in the locality, who should be given the opportunity to participate in the local decision-making procedure. There is no suggestion that the population of the whole world, who are affected by global climate change, qualify as "the public concerned" for these purposes.

278 An EIA of a project is required to take account of possible environmental effects deriving from the vulnerability "of the project" to risks of major accidents or disasters "that are relevant to the project concerned": article 3(2). The focus is on the effects which may be produced by the project itself, if affected by an accident or environmental disaster.

279 An EIA may be integrated into existing procedures for development consent: article 2(2) and recital (6). As explained above, the EIA Directive contemplates that an EIA will be carried out by local authorities which have responsibility for granting development consent, and an EIA is directed to furnishing such bodies with information relevant to their own decision-making functions and in relation to matters over which they have practical control. Such local bodies are not responsible for national climate policy, do not have the legitimacy or authority to second-guess assessments of national bodies in relation to it, do not have powers to impose their own judgments regarding national or global climate change policy, are not equipped to make the relevant judgments about how the national or global economy should

adjust to climate change, and are not provided with coherent criteria to make assessments regarding downstream effects of projects (whether in relation to climate change, or in relation to other environmental impacts of other projects likely to follow on from adoption of a particular project).

280 The scheme of the EIA Directive is that some projects are taken to have significant effects on the environment and so are automatically subject to an EIA (Annex I projects) and others (Annex II projects) may be subject to an EIA when screened: recitals (7)–(9) and article 4(1) and (2). In the case of both Annex I and Annex II, the focus is on the specific project. The basis for inclusion in Annex I is the size of the project and its likely physical impacts on the local area, not its likely emissions of greenhouse gases. The fact that fossil fuel refining and burning projects (eg points 1, 2(a) and 4(a)) are listed separately from fossil fuel extraction projects (points 14 and 19) reinforces the project-focused nature of the Directive. The same point applies in relation to the projects listed in Annex II as potentially requiring a screening opinion.

281 Article 4(3) introduces Annex III, which sets out the criteria to determine whether an Annex II project should be selected for an EIA. These criteria are the "characteristics of projects" (point 1), the "location of projects" (point 2) and the "type and characteristics of the potential impact [sc of projects]" (point 3). See also recitals (9)–(11). In setting out guidance for the selection for projects to be subject to an EIA, Annex III provides an indication as to the purpose and focus of the EIA Directive.

282 In Annex III, point 1, paragraph (b) ("cumulation with other existing and/or approved projects") is directed to identifying specific projects with a view to assessing their effects; it is not directed to identifying the cumulation of downstream greenhouse gas emissions from distinct projects or activities, such as motor transport, which do not constitute projects at all. Paragraph (d) ("the production of waste") and paragraph (e) ("pollution and nuisances") are listed as characteristics of the project itself. They are project-focused and do not refer to wider climate change effects. Paragraph (f) ("risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change …") refers to climate change in the context of its contribution to environmental risk posed by the project itself. Annex III, point 2, focuses specifically on the sensitivity of the immediate location of the project ("the environmental sensitivity of geographical areas likely to be affected by projects … with particular regard to" specific environmental features), not on general areas around the world affected by global climate change. Annex III, point 3, refers to "the likely significant effects *of projects* on the environment" in relation to the criteria in points 1 and 2, having "regard to the impact *of the project* on the factors specified in article 3(1), taking into account" a series of impacts referable to the project itself (emphasis added). These include "the transboundary nature of the impact" (paragraph (c), which marries up with the point on transboundary effects under article 7 discussed above) and "the cumulation of the impact with the impact of other existing and/or approved projects" (paragraph (g), which is focused on the cumulative effect of the project with specific existing and approved projects, and does not refer to cumulative effects of greenhouse gas emissions as a contributor to general climate change).

283 Article 4(4) introduces Annex IIA, which specifies the information a developer has to provide for screening of Annex II projects. This is all

specific to the project itself and its immediate environment: a description of the project including the physical characteristics of the whole project and "a description of the location of the project, with particular regard to the environmental sensitivity of geographical areas likely to be affected" (not the impact on the whole planet from climate change) (point 1); "a description of the aspects of the environment likely to be significantly affected by the project" (point 2); and "a description of any likely significant effects … of the project on the environment resulting from" use of natural resources and "the expected residues and emissions and the production of waste" (point 3), meaning residues, emissions and waste from the project, not from other projects or activities.

284 Article 1(2)(g) defines what is meant by an EIA. Article 5 specifies how the first stage of it is to be conducted (corresponding to recitals (12)–(14)), and introduces Annex IV, which specifies the information to be set out in the developer's EIA report (the "environmental statement", as it is called in the EIA Regulations). Article 5(1) sets out a series of matters all focused on the project itself. As well as a description "of the project" (sub-paragraph (a)) and "of the likely significant effects of the project on the environment" (sub-paragraph (b)), these include "a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce … likely significant adverse effects on the environment" (sub-paragraph (c)), that is, to inform the relevant authority of steps taken in relation to the design of the project to reduce its effects; "a description of the reasonable alternatives studied by the developer" and an indication of the reasons for selecting the particular option chosen "taking into account the effects of the project on the environment" (sub-paragraph (d)), that is, to inform the relevant authority of the reasoning process in relation to siting, design and so forth of the project to keep its effects on the environment to a minimum; and any additional information specified in Annex IV "relevant to the specific characteristics of a particular project or type of project and to the environmental features likely to be affected" (sub-paragraph (f)), meaning by that particular project or type of project.

285 The significance of sub-paragraphs (c) and (d), in particular, is that they refer to information which will allow the relevant authority to test in a practical way and in light of its own power of assessment for the purposes of giving development consent for the particular project or attaching conditions thereto, whether the project has been developed with a view to minimising its environmental impact and whether more could be done in terms of its siting or design to achieve that.

286 The purpose of the EIA process is to enable the relevant authority to make this assessment, to facilitate consultation relevant to that (articles 6 to 8), to enable the authority to give a reasoned conclusion to explain its actions (article 1(2)(g)(iv)) and then integrate that reasoned conclusion into the grant of development consent (article 1(2)(g)(v), read with article 8a), and to ensure enforcement of any minimisation measures (article 8a(1)(b) and (4)). The information required to be provided and assessed in an EIA is that directed to fulfilling that purpose.

287 Article 5(2) provides for a mechanism for the relevant authority to give guidance to the developer, taking into account the project-focused information already provided by it "on the specific characteristics of the project, including its location and technical capacity, and its likely impact

on the environment", regarding any further detail required. The purpose of this part of the procedure is to enable the authority to ensure it is equipped with sufficient information to enable it to exercise its powers in relation to the grant of development consent in a practical way, not to acquire general information about the effect of greenhouse gas emissions on climate change, nor about downstream or scope 3 effects generally. Article 5(3)(c) stipulates that where necessary the authority shall seek supplementary information in accordance with Annex IV "which is directly relevant to reaching the reasoned conclusion on the significant effects of the project on the environment" ("the reasoned conclusion" is that required by article 1(2)(g)(iv) and article 8a(1)(a)). The object of this is so that the authority can seek information relevant to the exercise of its own powers in relation to granting development consent.

288 Annex IV, referred to in article 5(1), specifies the information to be provided by the developer. Its focus is the project itself. Point 1 requires a "description of the project, including in particular" various project-focused information including a description of its location (paragraph (a)), the physical characteristics of the whole project (paragraph (b)), a description of "the main characteristics of the operational phase of the project" including energy demand and natural resources used (paragraph (c)), and "an estimate … of expected residues and emissions (such as water, air, soil and subsoil pollution, noise, vibration, light, heat, radiation) and quantities and types of waste produced during the construction and operation phases" (paragraph (d)), which refers to emissions of various types physically associated with the project itself, not to downstream or scope 3 greenhouse gas emissions.

289 Annex IV, point 2, requires a "description of the reasonable alternatives (for example in terms of project design, technology, location, size and scale) … relevant to the proposed project and its specific characteristics, and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects". This information is directed to informing the planning authority about matters relevant to steps it can practically take in exercise of its own powers in relation to the grant of development consent in order to minimise the environmental impact of the project itself, eg by requiring improvement of its design to limit emissions (including its own greenhouse gas emissions) by filters, carbon capture and so on.

290 Annex IV, point 3, requires a description of "the relevant aspects of the current state of the environment" and how it is likely to evolve "without implementation of the project", to provide a "baseline scenario". The object of this is to allow the planning authority to make an assessment of the impact of the implementation of the project on the environment in which it is located, with a view to enabling it to exercise its own powers in relation to the grant of development consent.

291 Annex IV, point 4, requires a description of the factors specified in article 3(1) likely to be significantly affected by the project. Article 3(1) refers to "climate", and has done so since the 1985 Directive. The predecessor of point 4 in the 1985 Directive listed "climatic factors" among a range of other factors. This was somewhat expanded by amendment pursuant to the 2014 Directive to refer to "climate (for example greenhouse gas emissions, impacts relevant to adaptation)", but this effect and the long list of other effects set

A out are project-focused and are only relevant if significantly affected "by the project".

292 Annex IV, point 5, requires a description "of the likely significant effects of the project on the environment resulting from, inter alia" a list of project-focused matters: construction and existence of the project (paragraph (a)); use of natural resources (that is, by the project) (paragraph (b)); emission of pollutants, noise etc, the creation of nuisances, and the disposal and B recovery of waste (paragraph (c)), which does not include reference to downstream effects, for example on the climate; risks to human health, cultural heritage "or the environment (for example due to accidents or disasters)", that is, from accidents or disasters affecting the project itself which lead to impacts on the environment (paragraph (d)), which does not include reference to downstream effects; "the cumulation of effects with other C existing and/or approved projects …" (paragraph (e)), which, like Annex III, point 3(g), is focused on the cumulative effect of the project with specific existing and approved projects, and does not refer to cumulative effects of greenhouse gases in relation to general climate change; "the impact *of the project* on climate (for example the nature and magnitude of greenhouse gas emissions [sc from the project]) and the vulnerability *of the project* to D climate change" (paragraph (f), emphasis added); and "the technologies and the substances used [sc in the project]" (paragraph (g)). The tailpiece of point 5 (para 225 above) refers to the effects "of the project".

293 Annex IV, point 7, requires a description "of the measures envisaged to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the environment and, where appropriate, of any proposed monitoring arrangements …". The object of this is to equip the planning E authority with information relevant to the exercise of its powers, so as to ensure that the effects of the project itself on the environment are minimised.

294 Article 7(1) provides for enhanced, cross-border consultation where a member state "is aware that a project is likely to have significant effects on the environment in another member state", as explained above. The focus is on the environmental effects of the project itself, not downstream effects.

F **295** Articles 12 and 13 of the EIA Directive make provision for oversight of the EIA regime by the Commission. Their predecessors were articles 11 and 12 of the 1985 Directive. There is no indication in the materials before the court that the Commission has at any stage regarded the absence of assessment by planning authorities in member states of downstream or scope 3 greenhouse gas emissions in relation to the grant of development consent for projects as involving infraction of the 1985 Directive or the EIA Directive. G Nor is there any jurisprudence of the CJEU which indicates that the "indirect effects of a project" include downstream or scope 3 greenhouse gas emissions. Given the long period of time involved since the promulgation of the 1985 Directive, the EIA Directive and the 2014 Directive, the absence of such indications seems to me to be significant.

H *(3) Relevant case law*

296 There is limited assistance to be derived from the jurisprudence of the CJEU and domestic case law. No judgment of the CJEU addresses the question whether scope 3 or downstream greenhouse gas emissions of the kind at issue in the present case qualify as "indirect effects of a project" within the meaning of the EIA Directive. The question has to be addressed

primarily by analysis of the purpose, scheme and text of the EIA Directive itself, as set out above.

297 In England and Wales, the leading decisions on this issue are those of Holgate J and the Court of Appeal in the present proceedings. In Scotland, the Court of Session (Inner House) in *Greenpeace Ltd v Advocate General* 2021 SLT 1303 ("*Greenpeace*") followed and applied the analysis of Holgate J in the present case. Little assistance can be derived from other domestic authorities.

298 In *An Taisce – The National Trust for Ireland v An Bord Pleanála (Kilkenny Cheese Ltd, Notice Party)* [2022] 2 IR 173 ("*Kilkenny Cheese*") the Supreme Court of Ireland examined in detail the issue whether an EIA pursuant to the EIA Directive of a project involving the construction and operation of a large cheese factory should include assessment of upstream greenhouse gas emissions in relation to the project. Upstream emissions to which an activity gives rise qualify as scope 3 emissions within the scheme of the GHG Protocol. The Supreme Court endorsed the reasoning of Holgate J in the present case and concluded that assessment of those emissions was not required by the EIA Directive. The Council, the Secretary of State and HHDL seek to rely on *Kilkenny Cheese* as persuasive authority on the proper interpretation of the EIA Directive. The appellant seeks to rely on certain other authorities.

(a) EU case law

299 The appellant relies in particular on *Abraham*, para 210 above, which concerned the application of the 1985 Directive in the context of a project to expand an airport for commercial use. The claimants, who lived nearby, objected to the development on grounds of noise pollution. In the relevant part of its judgment (paras 41–46), the CJEU held that the competent authorities had "to take account of the projected increase in the activity of an airport when examining the environmental effect of modifications made to its infrastructure with a view to accommodating that increase in activity" when screening the project to see whether an EIA was required. The CJEU observed (para 42) that the scope of the 1985 Directive "is wide and its purpose very broad", and held (para 43) that it would be contrary to that approach to take account only of the direct effects of the works themselves, "and not of the environmental impact liable to result from the use and exploitation of the end product of those works" (that is, the increased infrastructure of the airport).

300 At point 31 of the opinion of Advocate General Kokott, she said "[t]he rules on the information to be provided by the developer under article 5(1) of the [1985] Directive show that the notion of indirect effects is to be construed broadly and in particular includes the effects of the operation of a project". At point 33 she said that "[i]n the case of an airport, the type and extent of the proposed air traffic and the resulting effects on the environment are relevant. The developer can also as a rule be expected to provide that information".

301 Therefore, the indirect environmental effects of the increase in activity which the CJEU and the Advocate General identified as relevant in this case were closely connected to the project in issue. The judgment does not support the appellant's claim in the present case that downstream or scope 3 greenhouse gas emissions which are remote from the operation

of the project itself are properly to be regarded as "indirect … effects of the project" within the meaning of article 3(1) of the EIA Directive. It is consistent with the interpretation of the EIA Directive set out above that the indirect environmental effects of a project include increased greenhouse gas emissions in connection with the activities carried out in association with it after its construction as an addition to the direct environmental effects of the project itself. The careful language used by the CJEU in the judgment is not compatible with adoption of a simple "but for" test in relation to any environmental effects of a project however far removed downstream or upstream they might be. See also the judgment in *Ecologistas*, para 210 above, at paras 39–42.

302 Reference should also be made to *Brussels Airport*, para 257 above, in which *Abraham* was considered. The focus of *Abraham* was again taken to be on the indirect environmental effects closely associated with the operation of the airport. Advocate General Mengozzi said (point 30) that in the case of an airport project "the obligation to carry out an impact assessment will be triggered, and not only the immediate effects of the construction works, but also the indirect effects which may be caused to the environment due to the subsequent activity carried on at the airport, will have to be examined". He also observed (point 28) that "[even] though it is settled case law that the scope of [the 1985 Directive] is rather broad, a purposive interpretation of [the word 'construction' in Annex I] cannot disregard the clearly expressed intention of the legislator". At para 29 of the judgment the CJEU expressly approved point 28 of the Advocate General's opinion.

(b) UK case law

303 The principal domestic authority relied on by the appellant in this court is *Squire*, para 210 above. That concerned an application for planning permission to erect extensive buildings for rearing poultry, for which an EIA was required. A neighbour objected to this development on the grounds that the storage and spreading of manure from it would result in odour and dust. The environmental statement submitted by the developer simply relied on the fact that a permit for these operations would be required in due course from the Environment Agency, and did not include an assessment of the direct and indirect effects of the development in this regard. The grant of planning permission on the basis of this limited form of environmental statement was quashed by the Court of Appeal. The EIA by the local planning authority was deficient because it did not examine the environmental impacts of the storage and spreading of manure both on-site and off-site as an indirect effect of the proposed development. Lindblom LJ, giving the lead judgment for the court, referred in particular to *Abraham*. The environmental statement indicated that manure would be produced in such quantity that off-site disposal would be required (paras 64–65). It did not set out any meaningful assessment of the effects of odour and dust from its disposal on-site and off-site (para 66); nor assess the measures by which those harmful effects might be reduced (para 67). There had been no proper EIA in relation to the effects of the poultry manure which would be generated by the operation of the development (para 73).

304 In my view, *Squire* does not assist the appellant in her argument in the present proceedings. As in *Abraham*, the indirect environmental effects from the disposal of manure were closely connected with the operation of the

project in issue. Like *Abraham*, *Squire* does not support the appellant's claim in the present case that downstream or scope 3 greenhouse gas emissions which are remote from the operation of the project itself are properly to be regarded as "indirect effects of the project" within the meaning of article 3(1) of the EIA Directive. Holgate J was right to distinguish it (paras 119–120), as was Sir Keith Lindblom SPT (as Lindblom LJ had become) in the Court of Appeal (paras 48–49). As Sir Keith Lindblom SPT pointed out (para 48), "[t]he production of manure and its storage and spreading, with the concomitant impacts of odour and dust, was clearly an outcome of the proposed development itself and its use"; and "[t]he Court of Appeal [that is, in his own lead judgment in *Squire*] did not take itself to be explicating the general meaning of the term 'indirect significant effects'".

(c) *Kilkenny Cheese*

305 In *Kilkenny Cheese,* in the judgment of Hogan J with which the other members of the court agreed, the Supreme Court of Ireland addressed the interpretation of the EIA Directive, among other issues. The relevant question under the EIA Directive was whether the obligation on the respondent Board to assess the indirect environmental impacts of the proposed cheese factory under article 2(1) of the EIA Directive included an assessment of the indirect environmental impact of the off-site production of milk which would be needed to supply the factory (para 17(a) of the judgment). This issue related to environmental effects upstream from the project subject to an EIA, in that the factory was so large that it was assessed that, by reason of the substantial increase in demand for milk which it would create, it would lead to a significant increase in the number of cattle kept on farms in Ireland. Those cattle would have a detrimental impact on the environment, including by substantial production of greenhouse gases.

306 A preliminary question for the court was whether there was in fact a causal relationship between the factory and enhanced milk production (para 53). While the court accepted that "the factory will not *in and of itself* create a demand for milk" (para 75, emphasis in original), because it could absorb existing production levels of milk, the court concluded on the evidence that "the existence of the factory is likely to reinforce and strengthen overall demand for milk" well above the demand which would exist if the factory were not constructed (paras 77–78). Accordingly, the court's analysis proceeded on the footing that there would be a significant increase in the number of cattle upstream from the project in order to meet the enhanced demand for milk associated with the project.

307 It was necessary first to determine the scope of the "project" which was required to be subject to the EIA, by reference to the definition of a "project" in article 1(2)(a) of the EIA Directive (para 81). It was accepted that off-site milk production was not part of the project itself, so the Supreme Court had to ask what the words "direct and indirect significant effects of a project" in article 3(1) of the Directive meant, since they determined what was required to be assessed in the context of the project involving the operation of the cheese factory (para 86). There were two possibilities: that the phrase had an open-ended meaning in relation to indirect effects of a project to cover any effects associated with the project, or that the indirect effects must be those which the development itself has on the environment. After an extended discussion, the court concluded that the

A latter interpretation was correct. Therefore, the EIA in relation to the factory project was not required to assess the upstream environmental impacts associated with the increased off-site production of milk.

308 The Supreme Court reasoned that the difficulty with an open-ended interpretation of article 3(1) is that it places no limits on the range of indirect effects that would have to be assessed for EIA purposes (para 93). This cannot have been intended. The court cited with approval (paras 94–100) Holgate B J's analysis on this issue in the present case and endorsed (paras 96 and 100) the "legal test" set out by him, namely that the indirect effects of a project must be effects which the project itself has on the environment (paras 101 and 112 of Holgate J's judgment). The Supreme Court entered one caveat (para 102), namely that there may "be special and unusual cases where the causal connection between certain off-site activities and the operation and C construction of the project itself is demonstrably strong and unbreakable" such that the significant indirect environmental effects of those activities would be required to be subject to an EIA.

309 By this qualification, the Supreme Court was able to integrate into its analysis the decisions in the previous Irish cases of *An Taisce – The National Trust for Ireland v An Bord Pleanála (Edenderry Power Ltd, Notice Party)* D [2015] IEHC 633 (the environmental effects of extraction of peat for use in a thermal power plant had to be assessed in the EIA for the power plant project as indirect effects of that project within the meaning of article 3(1) of the EIA Directive) and *Ó Grianna v An Bord Pleanála* [2014] IEHC 632 (the connection of a wind turbine development with the national grid was fundamental to the project so that the cumulative effect of both should be assessed). In the *Edenderry* case, the judge held (para 66) that what could E count as an indirect effect of a project was subject to a remoteness test, which was satisfied on the particular facts of the case, and the Supreme Court endorsed this analysis: paras 88–91. (I interpose that this indirect effect could be regarded as analogous to the inclusion of greenhouse gas emissions "caused by any supporting activities or infrastructure that is directly linked to the implementation of the proposed project" within the concept of "indirect F effects of a project" as indicated by the Commission in the 2013 Guidance: para 236 above.) By contrast, the environmental effects of an increase in cattle population were too remote from the cheese factory project to qualify as "indirect effects" of that project.

310 The Supreme Court justified its conclusion as follows: (i) the alternative open-ended interpretation of article 3(1) would mean that there were "hardly any limits but the sky" regarding the extent of indirect G effects of a project which had to be brought into account in the EIA for that project (paras 100 and 104–105), which would be incompatible with coherent decision-making by the relevant planning authorities by reference to determinate factors; (ii) the language of article 5(1) and in Annex IV, point 1, paragraph (c) "strongly suggest[s] that the information to be supplied must be firmly tethered to the project itself, so that the indirect significant H effects to be assessed must be intrinsic to the construction and operation of the project" (para 106); and (iii) the EIA Directive "was ultimately designed to assist in identifying and assessing the direct and indirect significant environmental effects of a specific project, including (post-2014) the climate change effects of such a project", and its scope "should not be artificially expanded beyond this remit" and it should not "be conscripted into the

general fight against climate change by being made to do the work of other legislative measures …" (para 107).

311 Those measures included the Irish Climate Action and Low Carbon Development (Amendment) Act 2021 which, like the UK's Climate Change Act 2008, sets out the Irish Government's commitment at a national level to achieve the goal of carbon-neutrality by 2050. The Supreme Court pointed out that the wider indirect environmental consequences of milk production and the activities of the dairy sector should be the subject of national or sectoral measures, rather than being considered at the local level in relation to a decision on planning permission (para 107).

312 The Supreme Court's analysis regarding the interpretation of the EIA Directive is closely aligned with that set out above. I agree with it. The Supreme Court considered that its interpretation of the EIA Directive was acte clair and therefore no reference to the CJEU was required: paras 155–157. The Commission has not brought infraction proceedings against Ireland for adopting that interpretation, which indicates that the EU institutions do not consider the Supreme Court was wrong.

(d) Other authorities

313 The appellant referred to several cases in other jurisdictions which concerned projects for extraction of hydrocarbons: *Vereniging Milieudefensie v Royal Dutch Shell plc* (Case No C/09/571932) 26 May 2021 (decision of the Hague District Court); *Nature and Youth Norway v The State of Norway (represented by the Ministry of Petroleum and Energy)* HR-2020-2472-P (Case No 20-051052SIV-HRET), 22 December 2020 (decision of the Norwegian Supreme Court); *Gray v Minister for Planning* (2006) 152 LGERA 258 (decision of the New South Wales Land and Environment Court); *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257 (decision of the New South Wales Land and Environment Court); and, from the USA, *WildEarth Guardians v Zinke* (2019) 368 F Supp 3d 41, 73 (decision of the Federal District Court for the District of Columbia). The legal regimes applicable in these cases were different from the EIA Directive. As Sir Keith Lindblom SPT pointed out in the Court of Appeal (paras 72–78), none of these authorities has any direct bearing on the legal issues in the present case, which are primarily concerned with the proper interpretation of the EIA Directive. It is not necessary to lengthen this judgment by referring to them in detail.

314 After the hearing, the appellant sent to the court a first instance authority from Norway: *Greenpeace Nordic v The State of Norway (represented by the Ministry of Petroleum and Energy)* (Case No 23-099330TVI-TOSL/05), 18 January 2024 (judgment of the Oslo District Court). A similar comment applies. That case considered challenges to the grant of oil production licences for North Sea oil fields where there had not been an assessment of the downstream greenhouse gas emissions which would be produced by combustion of the oil extracted from those fields. The challenges were based on a number of legal regimes, including Norwegian statute law, the EIA Directive as applied in Norwegian law pursuant to the European Free Trade Agreement to which Norway is party, the European Convention on Human Rights and the Norwegian Constitution. The District Court held that the grant of the licences was invalid by reason of the

omission of an assessment of the downstream emissions, relying primarily on Norwegian statute law as interpreted in light of the Norwegian Constitution. It then turned to consider the EIA Directive. As an addition, in part of its reasoning which was not critical for its decision, the District Court held that there had been a breach of the EIA Directive. The District Court was referred to the judgment of the Court of Appeal in the present case but declined to analyse it because "a comparative analysis of other countries' domestic law … has limited significance" (p 50 of the official translation). We have been informed that the District Court's decision is now under appeal to the Norwegian Supreme Court.

315 With all due respect, I do not consider that the judgment of the District Court can be regarded as a persuasive authority. The reasoning is relatively short. The judge did not attempt to face up to the analysis set out by Holgate J and the Court of Appeal. She did not refer at all to the judgment of the Irish Supreme Court in *Kilkenny Cheese*, nor to the judgment of the Inner House of the Court of Session in *Greenpeace*. In my view the judge placed undue weight on the words "indirect significant effects" in article 3(1) read outside the context of the scheme of the EIA Directive and without regard to its drafting history. She seems to have assumed that simply by use of the word "indirect" the downstream emissions at issue were within the ambit of that provision, without considering the purpose and scheme of the EIA Directive in the detail in which they have been examined in these proceedings and in those other cases. The judge wrongly considered that *Abraham* supported her view (pp 49–50 of the official translation; contrast paras 299–301 above); she did not refer to *Brussels Airport*, which provides guidance regarding the proper interpretation of *Abraham* (see para 302 above); and she misquoted the judgment in *Abraham* at para 43 as referring to possible effects "from the use and exploitation of the end product" (which, in a case involving a project to extract oil, suggests a reference to the oil). In fact, in that passage the CJEU said only that it would be contrary to the purpose and scope of the 1985 Directive "to take account, when assessing the environmental impact of a project or its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation *of the end product of those works*" (emphasis added), meaning the physical works involved in the project itself (in that case, the building of an extended airport runway).

(4) The approach of Moylan LJ in the Court of Appeal

316 As noted above, Moylan LJ in his dissenting judgment in the Court of Appeal placed particular emphasis on point 14 in Annex I (para 210 above). With respect, I do not consider that this provision can bear the weight he places on it.

317 The provision was not included in Annex I to the 1985 Directive. It first appeared in Directive 97/11, which was the first Directive amending the 1985 Directive, in part to bring it into line with the Espoo Convention. In fact the Espoo Convention, in its original version, did not include this text. Instead, point 15 of Appendix I to the Convention referred to "Offshore hydrocarbon production". Directive 97/11 introduced significant revisions to Annex I to the 1985 Directive, including Annex I, point 14. Recital (6) of Directive 97/11 introduced the revisions in very broad terms, simply stating that "… it is appropriate to make additions to the list of projects which have

significant effects on the environment and which must on that account as a rule be made subject to systematic assessment". A

318 The Aarhus Convention was adopted in June 1998, after the promulgation of Directive 97/11. The Annex to the Aarhus Convention copied the revised form of Annex I to the 1985 Directive, including the text at point 14. Later, with effect from 2017, the Espoo Convention copied that Annex as well.

319 This history is significant. There was no indication when the text of Annex I, point 14 was adopted that it was intended to extend the concept of "indirect … effects of a project" in article 3(1) of the 1985 Directive to cover scope 3 or downstream greenhouse gas emissions. Neither the Commission nor any member state considered that it had that effect: see the discussion in the 2012 Impact Assessment and the 2013 Guidance (paras 233–236 above). Nor was it considered to have that effect in the Aarhus Convention (para 239 above). It was not a revision brought in by the 2014 Directive to address the issue of climate change. B C

320 Further, when one looks at Annex I, point 14 in the context of Annex I and the EIA Directive as a whole, there is no good reason to interpret it as being concerned with scope 3 or downstream greenhouse gas emissions. No other item in the list of Annex I projects for which an EIA is mandatory are singled out for such treatment on the basis of their downstream environmental effects, even though several of them are likely to be associated with such effects (eg point 1, crude-oil refineries; point 6, chemicals production; points 7 and 8, construction of certain roads, railways, waterways and ports; point 19, quarries and open-cast mining). Rather, where in Annex I projects are identified by reference to the volume of production, as in point 14, the reason is that this indicates that they are construction projects of such a substantial size as to warrant a mandatory EIA without the need for a screening opinion. The reference in point 14 to the relevant volume of production being for commercial purposes seems to me to be included simply in order to emphasise this, as that is likely to affect the extent of the construction involved by comparison to, say, a project for experimental drilling which might meet that volume level but only for a short period. D E F

(5) The approach of the majority in the Court of Appeal

321 As noted above, the majority in the Court of Appeal considered that Holgate J was wrong to conclude that the answer to the question of the proper application of the EIA Directive could be determined as a matter of law by reference to the terms of the Directive. Instead, in their view, it was a matter for the evaluative assessment of the Council as local planning authority, subject to the requirement of *Wednesbury* rationality, whether the downstream environmental effects from the combustion of refined hydrocarbon fuel produced from the crude oil extracted from the Site should be brought into account in the EIA as indirect effects of the project or not. G H

322 In that regard, at paras 57–60, Sir Keith Lindblom SPT cited a number of authorities, including *R (Blewett) v Derbyshire County Council* [2004] Env LR 29; *Bowen-West v Secretary of State for Communities and Local Government* [2012] Env LR 22; and *Friends of the Earth*, paras 126–144 in the judgment of Lord Hodge DPSC and Lord Sales JSC. Sir Keith

Lindblom SPT and Lewison LJ considered that the Council's assessment that the downstream greenhouse gas emissions from eventual use of the refined fuel were not indirect effects of the project within the meaning of article 3(1) of the EIA Directive could not be said to be irrational, and therefore was a lawful assessment according to this standard.

323 In my respectful opinion, however, that is not a satisfactory way of examining the issue regarding the application of the EIA Directive which arises in this case. If correct, it would mean that one local authority conducting an EIA for a project to drill for oil could lawfully regard the downstream greenhouse gas emissions following on from that project as "indirect significant effects of the project" within the meaning of article 3(1) of the Directive, while another local authority conducting an EIA for the same kind of project could lawfully conclude that such emissions were not "indirect significant effects" of that project within the meaning of that provision. This would lead to inconsistent and unprincipled differences in result depending on the political and policy approach of the relevant decision-maker.

324 That cannot have been intended to be the effect of the EIA Directive in relation to such a fundamental issue of its interpretation which is common across a range of equivalent cases. The EIA Directive is intended to harmonise the approach to be adopted on common issues, not to authorise radically different approaches to identical common fundamental issues of this kind.

325 Accordingly, I consider that there is considerable merit in the approach of Holgate J at first instance in this case. The answer to be given on such a fundamental question affecting the application of the EIA Directive ought to be the same and should be taken to be determined one way or the other as a matter of principle according to the terms of the Directive, read in the light of the purpose and the scheme of the Directive.

326 This is not to doubt the guidance in the authorities referred to in para 322 above. In many cases, whether a particular environmental effect is sufficiently connected with a particular project so as to qualify as an "indirect effect of the project" will call for an evaluative assessment by the planning authority in the light of the scientific and other evidence in the specific circumstances of that case. Where the application of the general test set out in the EIA Directive turns on the specific circumstances of an individual case, it is the rationality standard which applies. However, in some circumstances an issue concerning the application of that test may be so fundamental to the operation of the EIA Directive and so clearly framed in a common way across a range of cases that only one answer can lawfully and rationally be given regarding the application of that test. In my view, that is the position here.

(6) The approach of Holgate J: interpretation of the EIA Directive as a matter of law

327 It follows from the discussion above that I consider that Holgate J was right to approach the issue regarding the application of the EIA Directive in this case as a matter determined directly by a proper interpretation of the Directive as a matter of law, rather than as determined by an assessment of whether the Council was rational or not in deciding that the downstream greenhouse gas emissions relied on by the appellant were not "indirect effects" of the oil well project at the Site. If the Council had assessed, to the contrary, that they were "indirect effects" of that project,

requiring consideration as part of the EIA, it would have erred in law. On a fundamental issue like this, there was only one proper answer that could lawfully and rationally be given when applying the EIA Directive according to its terms. This was the approach which Mr Richard Moules KC, for the Secretary of State, endorsed at the hearing in this court. I agree with his submission.

(7) The inconsistency point

328 The inconsistency point raised on the appeal is explained at para 198 above. In my judgment, in agreement with the Court of Appeal, there is no merit in it. In considering whether to grant planning permission, the Council was obliged to have regard to national policy promulgated by the Government regarding climate change and the extraction of oil. It did not err in doing so. National planning policy is a relevant material consideration when considering whether planning permission should be granted for a development. As I have explained above, the approach to be adopted when balancing the economic desirability of extraction of minerals, including oil, and security of energy supply against wider detrimental impacts from such activity, including their effect on climate change, is pre-eminently a matter for national policy, not local determination.

329 On the other hand, the application of the EIA Directive in relation to the proposed development was the responsibility of the Council, as local planning authority. The Council had to comply with its legal obligations under the EIA Directive. It did so.

330 There was no inconsistency involved in the Council's approach to these two matters. The EIA Directive leaves matters of general policy in relation to the extraction of oil and climate change open for determination at a national level, and the Council was right to take national policy on this point into account in the way it did.

Conclusion

331 For the reasons given above, which differ from those given by the majority in the Court of Appeal but accord with those given by Holgate J, by the Court of Session in *Greenpeace* and by the Supreme Court of Ireland in *Kilkenny Cheese*, I would dismiss this appeal.

332 In relation to the attempt in *Kilkenny Cheese* and in the present case to enlist the EIA Directive in the worthy cause of combating climate change, by seeking to press it into service in relation to requiring EIA in respect of downstream or scope 3 greenhouse gas emissions, it is relevant to bear in mind the cautionary words of Lord Bingham of Cornhill in *Brown v Stott* [2003] 1 AC 681, 703, quoting from *Hamlet* in relation to the European Convention on Human Rights:

> "The Convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. It does not, as is sometimes mistakenly thought, offer relief from 'The heart-ache and the thousand natural shocks That flesh is heir to'."

As Lord Bingham pointed out, that Convention had to be interpreted according to its terms, not in an effort to produce a remedy for every problem which might be identified in a particular situation. So, in the present

A context, the EIA Directive, interpreted according to its terms, has a valuable role to play in relation to mitigating greenhouse gas emissions associated with projects for which planning permission is sought, but it should not be given an artificially wide interpretation to bring all downstream and scope 3 emissions within its ambit as well. That has not been stipulated in the text of the EIA Directive, is not in line with its purpose and would distort its intended scheme.

B **333** In *Brussels Airport*, the CJEU observed (para 29) that "a purposive interpretation of the Directive [in that case the 1985 Directive, now the EIA Directive] cannot … disregard the clearly expressed intention of the legislature". In my view, in the present case both the clearly expressed intention in the text of the EIA Directive and a purposive interpretation of that Directive point to the same result.

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Appeal allowed.

COLIN BERESFORD, Barrister

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