Neutral Citation Number: [2017] EWHC 2306 (Admin)

Case No: CO/690/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/09/2017

Before :

MR JUSTICE DOVE

- -

Between :

THE QUEEN (on the application of) **(1) EMILY SHIRLEY** **(2) MICHAEL RUNDELL**	**Claimants**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
- and -	
CANTERBURY CITY COUNCIL	**1st Interested Party**
- and -	
CORINTHIAN MOUNTFIELD LIMITED	**2nd Interested Party**

Mr Robert McCracken QC and Mr Charles Streeten for the **Claimants**
Mr James Maurici QC & Ryan Kholi (instructed by **Government Legal Department**) for the **Defendant**
Mr John Hobson QC for the **1st Interested Party**
Mr Reuben Taylor QC for the **2nd Interested Party (**instructed by **Clyde & Co LLP**)

Hearing dates: 25th & 26th July 2017

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Approved Judgment

MR JUSTICE DOVE :

1. On 4th March 2016 the 2nd Interested Party applied for planning permission for an urban extension to the south east of Canterbury, comprising some 4,000 dwellings together with a variety of other forms of complementary development. Land was reserved within the application for the potential relocation of the Kent and Canterbury Hospital and the examination of the development proceeded on two alternative bases, both with and without the hospital. The 2nd Interested Party's application was supported by an Environmental Statement. Part of the Environmental Statement was an Air Quality Assessment which assessed the impact of the development upon air quality, both in the vicinity of the site and also in the city centre. The reason for examining the air quality in the city centre was that the 1st Interested Party had designated an Air Quality Management Area ("AQMA") within the city centre in 2006 as a result of the high concentrations of nitrogen dioxide ("NO_2") found within the area. The designation was expanded in 2011 so as to incorporate the city centre ring road.

2. The 2nd Interested Party's Air Quality Assessment focused in particular on the pollutants NO_2, PM_{10} and $PM_{2.5}$. In relation to NO_2 the study examined whether or not the effect of the development both in its immediate environs and within the city centre would lead to exceedances of the annual mean threshold of $40\mu g/m^3$. In essence the report concluded that in either of the development options (with or without the relocation of the hospital) the threshold value for NO_2 would not be exceeded.

3. Professor Stephen Peckham provided a critique of the 2nd Interested Party's Air Quality Assessment on 25th March 2016. The modelling work which had been undertaken by the 2nd Interested Party in their Air Quality Assessment, in common with other assessments of this kind, conducted its estimations on the basis of the traffic modelling work commissioned to examine the transport effects of the proposal. Professor Peckham observed a number of detailed criticisms of that traffic modelling; he suggested that the flaws in the traffic modelling affected the outputs in the modelling reported. His conclusions were, in broad terms, that the flaws in the modelling had led to underestimates of the levels of pollutants that would arise in the future with the development. He also expressed concern in relation to the base data on which the modelling had been undertaken stating that it substantially underestimated local conditions. He contended that existing air quality, in particular in the AQMA, was poor. In particular his critique observed the following:

> "3.2 The assessment undertaken for the South East non-agglomeration zone indicates that the annual limit value for NO_2 is likely to be exceeded in 2010 and 2015 but achieved by 2020 through introduction of measures included in the baseline modelling, a low emission zone (LEZ) scenario (if applied) and the non-quantifiable local measures outlined in the plan. There are no proposals indicated being taken by Canterbury City Council and the current air quality action plan for the city is out of date and is being revised. The assessments for the proposed Mountfield development [the 2nd interested party's development] draw on assumptions within the CDLP

> [Canterbury District Local Plan]. Due to the limited availability of air quality data in Canterbury the assessment uses receptor modelling, rather than actual pollution levels, adjusted to bring them into line with current levels identified by diffusion tubes and the four automatic monitoring stations in operation at that time (three roadside and one background). Modelling is based on the traffic volume assessments in Corinthian's Transport Assessment which critically underestimates traffic growth.
>
> 3.3 The new Canterbury City Council Air Quality Management Plan will need to comply with the overall South East Air Quality Action plan to reduce levels of NO_2 pollution so that no roads exceed EU limits by 2020. Currently nine of the air quality monitoring points in Canterbury record levels exceeding the annual average level limit of 40μ/mg.
>
> 3.4 The air quality report submitted with the planning application has significant faults. While it is true than when viewed over a long-term period the levels of NO_2 in Canterbury have been falling this ignores a generalised increase in NO_2 since 2013. In the last 12 month period eight of the 26 diffusion tubes in Canterbury City have recorded an average annual level of NO_2 of over 40μ/mg – above the maximum levels. Key areas of concern are the inner ring road and Wincheap."

4. The 1st Interested Party were also concerned to obtain their own advice in relation to the Air Quality Assessment. They commissioned their own independent consultants to conduct a peer review of the Air Quality Assessment. As a consequence of the observations of the peer review a further report was prepared on behalf of the 2nd Interested Party in the form of an Air Quality Assessment Addendum ("the Addendum Report"), produced on 12th August 2016. Following the adjustments required by the peer review, the Addendum Report still showed that the modelled results did not predict any exceedance of the 40μg/m^3 threshold. Sensitivity testing was undertaken which did show adverse impacts, in particular within the AQMA. Some of those adverse impacts were characterised as "moderate adverse" and "substantial adverse". The Addendum Report contended, however, that the sensitivity analysis was not realistic and that the effects identified were "extremely unlikely to be actually ever realised".

5. Professor Peckham responded to the Addendum Report in a further submission dated 23rd September 2016. He again reiterated his concerns both as to the air quality data which had been used, and also in respect of the traffic modelling which underpinned the modelling of air quality. Following the decision of Garnham J in ClientEarth (No. 2) v Secretary of State for the Environment, Food and Rural Affairs [2016] EWHC 2740, Professor Peckham provided further observations in respect of the air quality issues. His submissions included the following:

"3. Air quality in Canterbury remains a significant concern with current breaches of NO_2 limits (annual mean of 40µg/m3) in the AQMA. In addition, there have been 17 breaches (subject to data ratification) of 8-hourly mean levels of ozone (100µg/m^3 – 10 allowed per annum) to date in 2016 recorded at the Canterbury background air quality measuring site at Chaucer School. This follows 11 recorded breaches in 2015. Nationally, Canterbury was one of 10 local councils reported by DEFRA as having Measured Exceedances of the Ozone Information Threshold Value in 2015 of the 1-hour maximum threshold when a level of 185µg/m^3 was recorded."

…

8. Modelling by the developer is based on laboratory emission data as set out in DEFRA guidance from 2009 and is based on the Emissions Factor Toolkit EFT v.6.0.1 which was released in 2014. The judge was clear in his ruling that this underestimates the actual level of emissions. He relied strongly on evidence by Dr Claire Holman from the Institute of Air Quality Management who explained how EU regulations have set "*...progressively more stringent emission limits for NOx*" … but that the "*... imposition of Euro standards have failed to deliver reductions in NOx emissions from diesel vehicles in real-world driving conditions in the last 20 years*". While Euro 6 standard for cars "*...became mandatory for new models from September 2014 and for all new vehicles for September 2015*". Dr Holman argued that "*...the emission limit is currently based purely on laboratory testing. Various real-world tests carried out on Euro 6 cars have shown that they exceed the emission limit by a very large margin*" …

9. Justice Garnham notes that "*it is apparent that DEFRA recognised that they* [the government] *were adopting an optimistic forecast as a foundation of their modelling*" (Para 83).

10. In his ruling Justice Garnham dismissed the Government's argument that the COPERT model was "widely used", was insufficient defence given that it has been recognised for some time that the data on Euro 6 vehicle emissions was incorrect (see for example see House of Commons Environmental Audit Committee 2014). It is also pertinent that additional guidance was published by the Highways Agency in 2015 (IAN 185/15) which relates to trunk roads which includes the Canterbury ring road as the A28 is a designated trunk road. In addition, in September and October 2016 Emisia

SA released new emissions guidance for Euro 6 and Euro 5 vehicles.

11. The COPERT 5 v1.0 and COPERT 4 v11.4 calculation of emissions guidance contain a new set of Euro 6 NOx emission factors (EFs) for passenger cars and light commercial vehicles (LCVs) and updated NOx emission factors for Euro 5 LCVs. These are based on latest emission information collected by the European Research on Mobile Emission Sources (ERMES) parties and by individual European Member States. This is an interim set of EFs aim at reflecting average measured levels so far and the best estimate of future technology progress.

12. These new EFs lead to almost twice as high levels for Euro 6 diesel NOx for vehicles put in circulation until 2016 compared to our previous estimates. With the transitional introduction of Euro 6 Real Drive Emissions (RDE) regulation, diesel emission levels are considered to further improve in time. Additional data are being collected in the EU that will help establish the rate of improvement. Based on these, a more refined dataset is prepared to be included in the 2017 version of COPERT 5 but the current assessment is that it should not substantially differ from the 2016 interim one.

…

23. In this context, the recent High Court ruling is important and needs to be considered as material in the context of decisions about the proposed South Canterbury development. The ruling places a specific emphasis on assessing the impacts of developments on air quality where limits set by the Air Quality Directive are being, or are likely to be breached as a result of the development. The developers already accept that even based on their own calculations there would be an increase in emissions. Clearly given the analyses from Railton, KCC VISUM modelling and the revised COPERT emissions factor guidance, the impact on air quality will be substantially higher than that predicted by the developer.

24. Any development that negatively impacts on the AQMA and air quality limits more generally (eg ozone levels) should automatically be considered of significant importance in planning decisions. I would argue that:

    - any development that would impede achieving air quality limits in Canterbury before 2020 should be refused planning permission

- developments that would impede maintaining pollution within current air quality limits in Canterbury beyond 2020 should also be refused."

6. On the 13th December 2016 the 1st Interested Party's planning committee considered an officer's report in relation to the application. Having noted the importance of improving air quality and the existence of the AQMA in Canterbury, the report went on to provide the following analysis:

> 326. The applicant submitted as part of their Environmental Statement an assessment of the air quality impacts of the development, which found that the development (either Option A (hospital is relocated to the site) or Option B (hospital remains at current location) did not have any adverse impact upon air quality in Canterbury. The Council's air quality consultants assessed these findings, and their conclusion was that incorrect methodology and out of date guidance had been used in the modelling process, leading to a potential underestimate of the impact upon air quality (particularly in relation to NO_2 (nitrogen dioxide) concentrations). The Council therefore required the applicant to undertake additional air quality modelling work.
>
> 327. The conclusion of the additional air quality modelling work was that the Option A (with the hospital relocated to the site), once completed, resulted in a neutral impact upon air quality, but Option B (hospital remains at current location), there would be a moderate adverse impact in 2031 on the St Dunstan's junction, and three minor adverse impacts on junctions in Wincheap, St George's Place and New Dover Road. However, it is important to recognise that, in accordance with official guidance from Defra, the baseline concentration in 2031 at this junction without the South Canterbury development is predicted to be 37.2µg/m3, only marginally below the limit value of 40µg/m3. In reality the impact of the proposed development is only 0.8µg/m3 resulting in a 2031 'with' development concentration of 38.0µg/m3. This equates to a very low 2% increase.
>
> 328. Furthermore, it is predicted that by 2031, and taking into account background traffic growth, St. Dunstan's junction would be removed from any Air Quality Management Area, given the expected general decrease in vehicle emissions levels by 2031 in line with official guidance from Defra. Although, it is not possible to establish this with any certainty, following the High Court ruling which raised question about the reliability of the assumptions relating to predicted vehicle emissions, and therefore the applicant also assessed a 'worst case scenario', in which

emissions do not improve from 2014 levels which showed a scenario whereby the predicted baseline levels far exceeded objective levels however, this is an overly conservative scenario, based upon the assumption that road traffic emissions will not improve between 2014 and 2031, whilst even then the proposed development accounted for only 2% increase in NO_2.

329. The Council has required the applicant to put together a proposed mitigation package in relation to air quality impacts, in line with adopted Local Plan policy C38 and draft Local Plan policy QL11. In order to mitigate air quality impacts, the Council has requested additional air quality mitigation measures. These have been agreed by the developer to a sum of approximately £3.7m:

- Installation of domestic electric vehicle charging points (EVP) – 1 EVP per dwelling with dedicated parking or 1 EVP for 10 spaces for unallocated parking

- Installation of electric vehicle charging points in commercial/retail areas – 10% of parking spaces to have EVP

- The monitoring of St. George's Place (so that the impact of the development can be fully understood over time)

- The provision of an electric bicycle per dwelling to make up the difference to achieve an overall sum of approximately £3.7m

330. The Council is satisfied that the measures outlined above will mitigate air quality impacts arising from the proposed development, and these will be secured through the legal agreement. Furthermore, these measures will assist in achieving modal shift in relation to cycle use, and provide electric vehicle charging points in properties to facilitate the use of electric or hybrid cars in the future. Measures such as improvements to cycle and bus lanes within the vicinity of the development will also promote means of transport other than the car for journeys into the City and beyond."

7. As will have been noted, the officer's analysis included the question of modal shift (the extent to which measures included within the application would bear down on trips involving car use and encourage the use of public transport and cycling and walking for those trips). Within the report a wide range of measures which were to be provided with the development, such as the provision of a fast bus link prior to the completion of the development, were recorded.

8. At the meeting a number of people were permitted to address the planning committee. Professor Peckham was one of the individuals who had the opportunity to make such a presentation. Indeed, Professor Peckham had prior to the meeting provided further observations on the committee report to the 1st Interested Party's planning officer. In those observations, he criticised the suggestion that the 2nd Interested Party's Air Quality Assessment had used the latest DEFRA Emission Factor Toolkit: in fact the assessment had been using the 2014 release when a more recent release had been issued in August 2016. He further criticised what he regarded as being the over-optimistic assumptions about the modal shift that might be achieved in relation to the trips generated by the proposed development. He expressed the concern that there was no reference in the officer's report to the fact that air quality was currently in breach of statutory limits. Having debated the merits of the application the members resolved by a majority to grant the application subject to the completion of a Planning Obligation under section 106 of the Town and Country Planning Act 1990 "The 1990 Act".

9. Following the 1st interested party resolution a number of individuals, including Professor Peckham, wrote to the Defendant encouraging him to call the application in for his own determination under section 77 of the 1990 Act. Professor Peckham wrote to the Defendant on the 19th December 2016. Within his letter he reiterated the points that he had raised in his objections to the 1st interested party in respect of the Air Quality Assessment and the Addendum report. His submission to the Defendant focused in particular on the impact of the judgment in ClientEarth (No. 2) on the evidence relating to air quality on which the decision had been based. Having set out his submissions both in relation to the effect of the judgment in ClientEarth (No. 2) and the relevant provisions of the National Planning Policy Framework ("the Framework"), Professor Peckham made the following observations:

> "3.2 The City Council accepts that the AQMA does not comply with the EU Directive and that it does not have an Air Quality Action Plan that covers the AQMA. At the Planning Committee, a council officer stated that while they acknowledged a breach of the EU Directive, the Secretary of State has not directed the council to comply with national standards. ClientEarth would appear to change this position and the letter sent to Councils with AQMAs from DEFRA on 14 November suggests that councils are being asked to take action. No mention of this letter was made at the Planning Committee…
>
> 3.4 It is not reasonable, as the applicant has stated, to argue that the air quality impacts of the proposed development in South Canterbury are only negligible and of no consequence. In particular, assessing the cumulative impact of increases in traffic and vehicle emissions on air quality is essential to ensure pollution levels are not increased. It is clear that the current modelling submitted with the placation is flawed and cannot be relied on.
>
> 3.5 There would appear to be an *a priori* requirement to ensure that the Air Quality Management Area complies with the Air

Quality Directive 2008/50/EC and to maintain levels within such limits in the future.

3.6 Consequently, even increases of a negligible nature must be deemed unacceptable if decisions on developments are to meet the requirements of this ruling within the meaning of the NPPF para 124.

3.7 An Air Quality Action Plan was published in 2009 for the initial smaller AQMA, but no Air Quality Action Plan exists for the current AQMA. Nor, despite statements by the City Council, has another one been in preparation.

3.8 The applicant's argument of negligible impact is based on its calculation of traffic levels and future reductions in vehicle emissions. The applicant's case is strongly predicated on the hypothesis that by using emissions factors based on 2014 levels, improvements in emissions from vehicles, together with other mitigation factors would mean that the moderate and serious adverse effects identified in their Air Quality assessment submitted with the planning application would not materialise in 2031 when the development is completed.

3.9 The argument of the applicant is based entirely on an incorrect assumption that 2014 emissions factors are accurate.

3.10 Even after the ClientEarth ruling, despite the new guidelines being brought to the attention of the City Council, no additional air quality modelling was requested despite the clear implications the new guidance would have on the air quality assessment. In addition, as previously stated, before ClientEarth, Emisia SA was already revising COPERT guidance reinforcing the need to incorporate higher emissions values in modelling…

4 Conclusion

4.1 Any development that negatively impacts on the AQMA and air quality limits more generally (eg ozone levels) should automatically be considered of significant importance in planning decisions. It is unquestionably apparent that the air quality impact in the Canterbury AQMA of this development would be materially worse than without it. It would in all probability have a negative effect on air quality within the Canterbury AQMA. As a result, it would conflict with the provisions of paragraphs 109, 120 and 124 of the NPPS, and, consequently, with the adverse impact of the proposal in this respect significantly and demonstrably outweighing its benefits.

4.3 The applicant has also failed to use the most up to date emissions factor toolkit (7.0) in calculating future emission

> levels. The fact that the older EFT (6.0.1) was used rather than the latest version was brought to the attention of the Council before the application was considered. The failure of the Council and the applicant to *re-calculate* the adverse impact, in accordance with the method mandated as a result of ClientEarth, is in addition a valid reason for calling in the application; especially in view of the obvious error of process, which occurred in the days before the Planning Committee meeting and in the course of it, when my submissions regarding the failure were not considered.
>
> 4.2 I would therefore respectfully request for the application to be called in and determined by the Secretary of State."

10. On 29th December 2016 the Defendant wrote to the 1st interested party explaining that the Defendant did not propose to call the application in for his own determination. The letter is expressed as follows:

> "The Secretary of State has carefully considered the case against call-policy, as set out in the Written Ministerial Statement by Nick Boles on 26 October 2012. The policy makes it clear that the power to call in a case will only be used very selectively.
>
> The Government is committed to give more power to councils and communities to make their own decisions on planning issues, and believes planning decisions should be made at the local level wherever possible.
>
> In deciding whether to call in the application, the Secretary of State has considered his policy on calling in planning applications. This policy gives examples of the types of issues which may lead him to conclude, in his opinion that applications should be called in. The Secretary of State has decided, having had regard to this policy, not to call in the application. He is content that the application should be determined by the local planning authority.
>
> In considering whether to exercise the discretion to call in the application, the Secretary of State has not considered the matter of whether the application is EIA Development for the purpose of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. The local planning authority responsible for determining these applications remains the relevant authority responsible for considering whether these Regulations apply to these proposed developments and, if so, for ensuring that the requirements of the Regulations are complied with."

11. Following receipt of that letter Professor Peckham wrote a pre-action protocol letter to the Defendant threatening judicial review proceedings on 13th January 2017. On 27th

January 2017 the Defendant provided a response to Professor Peckham's letter which contained the following observations:

> "On 19 December 2016 you made representations to the Secretary of State as to why, in your view, the planning application for the South Canterbury Urban Extension should be called in. It was confirmed to you by Mrs Michelle Peart (an officer acting on the Secretary of State's behalf) in her email of the same date that your representations would be taken into account. It is confirmed that the representations made in your letter dated 19 December 2016 were, indeed, taken into account by the Secretary of State when deciding whether to call in the relevant planning application.
>
> However, a call in decision letter is one addressed to a local planning authority and its sole purpose is to tell the planning authority whether the Secretary of State has decided, exceptionally, to determine the application himself. Unlike and Inspector's or Secretary of State's decision letter after an inquiry, it is not a reasoned decision letter which must deal adequately with the principal issues in dispute between the parties at an inquiry, see R(Persimmon Homes) v Secretary of State for Communities and Local Government [2007] EWHC 1985 (Admin) per Sullivan J at paragraphs 41 to 49.
>
> In any event, the decision on whether or not to call in applications can only be challenged if it is "wildly perverse". See R v Secretary of State for Environment ex parte Newprop [1983] JL 386, per Forbes J at 387. There are no grounds for asserting the decision is wildly perverse on the present facts. The issue of whether to call in the application is pre-eminently one of planning judgment for the Secretary of State. The Secretary of State is not mandated to call in an application if any particular criteria are met. Even where your representations raise matters of real concern about the substantive decision of the local planning authority, these can be dealt with by the local planning authority itself and/or by any legal challenge to their decision."

Others also wrote pre-action protocol letters, including the first claimant, but the Defendant's decision stood. That led to the instigation of the present proceedings.

Procedural matters

12. Permission to apply for judicial review was granted at an oral hearing before Ouseley J on 2nd May 2017. Ouseley J did not grant permission to apply on all of the Grounds which were advanced in the claim. In particular, permission was granted on Grounds 1-3 (to which I shall turn in due course) but permission was refused on Ground 4. Ground 4 was pleaded in the following terms:

> "Ground 4: the refusal of the SoS to give full reasons for his decision is wrongful under applicable EU law as it was in response to a request to him to use his powers to achieve a result required by EU environmental law."

13. In the course of his succinct judgment Ouseley J observed as follows:

> "17. The third ground relates to the duty to give reasons. I am not going to grant permission on that ground. It seems to me that the Secretary of State has given reasons adequately along with his policy. He said, "It does not fall within the scope of my policy". The reasons may not be good enough to avoid an error of law, but he has given reasons that are clear. If it is thought that they betray an error of law, then that is a different point, but the reasons are there. "I have a policy and this does not fit within it"."

14. It is necessary to set out these matters because they become pertinent to an argument developed by Mr McCracken QC, who appeared on behalf of the Claimants, during the course of his oral submissions.

15. Shortly prior to the hearing a second witness statement was produced by Professor Peckham. At the hearing I indicated that I would admit the witness statement to inform the arguments which were developed at the hearing without prejudice to the objections raised by the Defendant that its admission was in breach of the directions which had been given by Ouseley J following the permission hearing. Having heard the argument on all sides on the merits, I am satisfied that whether or not that second witness statement was in breach of Ouseley J's order the Defendant has suffered no prejudice as a consequence of the evidence in it being adduced. For the sake of completeness it is in my view sensible to formally admit that witness statement, and any order pursuant to this judgment should reflect that decision.

The claimant's Grounds in brief

16. It is convenient at this stage to sketch out the Claimants' Grounds prior to embarking upon an examination of the relevant law. The Claimants challenge the Defendant's decision not to call in the application on three, in my view, closely interrelated Grounds. Ground 1 is that the Defendant failed in taking his decision on call in to recognise, take into account and fulfil his obligation as the competent authority under EU Directive 2008/50/EC on Ambient Air Quality and Cleaner Air for Europe ("the AQD") to bring air quality into compliance with the threshold values required by the AQD, and avoid worsening or the extension of time within which there was non-compliance with those values. The Claimants contend that in exercising his discretion as to whether or not to call in the application the Defendant failed to take into account his obligations and responsibilities as the competent authority in England and failed to take account of the requirements under the AQD to achieve the threshold exposure values in particular in relation to NO_2 within as short a time as possible. Ground 2 is that the decision not to call the application in was irrational. Ground 3 is a variant on the rationality argument founded in particular on an observation raised in the Defendant's pre-action protocol response. It is contended by the Claimants that it was irrational or perverse for the Defendant to consider that any error of law could be

adequately remedied either by raising the concerns over air quality with the 1st Interested Party (who is not the competent authority under the AQD) or by way of legal challenge to the 1st Interested Party's decision given the restricted jurisdiction of the court. This brief review of the Claimants' Grounds provides the backdrop for the examination of the relevant law which now follows.

The law

17. Section 62 of the 1990 Act requires that applications for planning permission should be made to the local planning authority. The discretion as to whether or not to grant planning permission is exercised applying section 70 of the 1990 Act alongside section 38(6) of the Planning and Compulsory Purchase Act 2004. So far as relevant, section 77 of the 1990 Act provides as follows:

> "77 Reference of applications to Secretary of State.
>
> (1) The Secretary of State may give directions requiring applications for planning permission … to be referred to him instead of being dealt with by local planning authorities.
>
> (2) A direction under this section—
>
> (a) may be given either to a particular local planning authority or to local planning authorities generally; and
>
> (b) may relate either to a particular application or to applications of a class specified in the direction.
>
> (3) Any application in respect of which a direction under this section has effect shall be referred to the Secretary of State accordingly.
>
> (4)Subject to subsection (5),
>
> (a) where an application for planning permission is referred to the Secretary of State under this section, section, 70, 72(1) and (5), 73 and 73A shall apply, with any necessary modifications, as they apply to such an application which falls to be determined by the local planning authority;
>
> (b) where an application for permission in principle is referred to the Secretary of State under this section, section 70 shall apply, with any necessary modifications, as it applies to such an application which falls to be determined by the local planning authority;
>
> (5) Before determining an application referred to him under this section, the Secretary of State shall, if either the applicant or the local planning authority wish, give each of them an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State for the purpose."

18. On 26th October 2012 the then under Secretary of State for Communities and Local Government provided a Ministerial Statement to Parliament setting out the policy that the Defendant would use in exercising the section 77 discretion. The policy was stated to be as follows:

> "The policy is to continue to be very selective about calling in planning applications. We consider it only right that as Parliament has entrusted local planning authorities with the responsibility for day-to-day planning control in their areas, they should, in general, be free to carry out their duties responsibly, with the minimum of interference…
>
> The Secretary of State will, in general, only consider the use of his call-in powers if planning issues of more than local importance are involved. Such cases may include, for example, those which in his opinion:
>
> May conflict with national policies on important matters;
>
> May have significant long-term impact on economic growth and meeting housing needs across a wider area than a single local authority;
>
> Could have significant effects beyond their immediate locality;
>
> Give rise to substantial cross-boundary or national controversy;
>
> Raise significant architectural and urban design issues; or
>
> May involve the interests of national security or of foreign Governments.
>
> However, each case will continue to be considered on its individual merits. "

19. It is, in effect, common ground between the parties that the discretion of the Defendant under section 77 is a very broad discretion and pre-eminently a matter of planning judgment for the Defendant (see paragraph 49 of the judgment of Sullivan J in R (on the application of Persimmon Homes Ltd) v Secretary of State for Communities and Local Government and Others [2008] JPL 323). In Saunders v Secretary of State for Communities and Local Government [2011] EWHC 3756 Edwards-Stuart J accepted counsel's formulation of the relevant legal principles which he set out at paragraph 48 of his judgment in the following terms:

> "48. Turning to the substance of the application, Mr Strachan reminded me that a decision under section 77 was a decision that concerned process and not substance. He submitted that the courts had identified on a number of occasions that the statutory power is expressed in wide discretionary terms, that there is no duty to give reasons for a decision not to call in an application under section 77 and that a challenge to the

> Defendant's exercise of discretion on rationality grounds would be very difficult indeed. He submitted that the authorities on this could be summarised in following way: (a) the Secretary of State's decision on whether or not to call in applications can only be challenged if it is "wildly perverse." See R v Secretary of State for Environment ex parte Newprop [1983] JPL 386, per Forbes J at 387; (b) there is no obligation to give reasons for a decision not a call in an application. Where reasons are given they can be examined to see whether they disclose any error of law; see R(Carter Commercial Developments Limited) v Secretary of State for Environment, Transport and Regions [1998] EWHC (Admin) 798, Robin Purchas QC sitting as a Deputy High Court judge at paragraphs 5 and 46; (c) the decision under section 77 is not a decision to grant permission, but it is the exercise of a procedural discretion which deals with the responsibility for the determination of the application. The discretion is unfettered when exercised lawfully, see Carter Commercial, above, at paragraph 23; (d) a call in decision letter is one addressed to a local planning authority and its sole purpose is to tell the planning authority whether the Secretary of State has decided, exceptionally, to determine the application himself. Unlike an Inspector's or Secretary of State's decision letter after an inquiry, it is not a reasoned decision letter which must deal adequately with the principal issues in dispute between the parties at an inquiry, see R(Persimmon Homes) v Secretary of State for Communities and Local Government [2007] EWHC 1985 (Admin) per Sullivan J at paragraphs 41 to 49; finally, (e) the discretion conferred by section 77 is very broad indeed. Within that very broad discretion, it is pre-eminently a matter of planning judgement for the Secretary of State to determine which, among what may well be a mass of relevant considerations, are the main matters relevant to his consideration, see Persimmon Homes at paragraph 49. As Mr Straker pointed out, the section identifies no criteria or requirements that the Secretary of State is to apply when exercising his judgment. ”

20. In addition to this, when considering a submission that Article 6 of the ECHR required the Defendant to exercise the section 77 discretion in R (Adlard) v Environment Secretary [2002] 1WLR 2515; [2002] EWCA Civ 735 Dyson LJ (as he then was) observed as follows at paragraphs 48 and 49 of his judgment:

> “48. Mr McCracken submits that the Secretary of State is under a duty to exercise his section 77 power so as to prevent violations of article 6. In my judgment, this submission is misconceived. He relies strongly on a single sentence in paragraph 159 of the speech of Lord Clyde in *Alconbury* which has been quoted by Simon Brown LJ at paragraph 34 above. But, properly understood, that sentence provides no support for

Mr McCracken's argument. It is necessary to cite a little more from the passage in question:

"As I indicated at the outset, Parliament, democratically elected, has entrusted the making of planning decisions to local authorities and to the Secretary of State with a general power of supervision and control in the latter. Thereby it is intended that some overall coherence and uniformity in national planning can be achieved in the public interest and that major decisions can be taken by a minister answerable to Parliament. Planning matters are essentially matters of policy and expediency, not of law. They are primarily matters for the executive and not for the courts to determine"

Lord Clyde was referring back, in particular, to paragraphs 140 and 141 of his speech. At paragraph 140, he had said:

"Planning and the development of land are matters which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be achieved"

It can be seen, therefore, that, when he spoke of "supervision and control" of local planning authorities by the Secretary of State, Lord Clyde was not referring to a function analogous to the supervisory jurisdiction exercised by the court when determining, for example, an application to quash the grant of a planning permission. He was referring to something very different, namely a planning function exercisable by the Secretary of State on planning merits, having regard to the public interest and the policy considerations identified by Lord Clyde.

49. Accordingly, the passage in Lord Clyde's speech relied on by Mr McCracken affords no support for his argument. Quite the contrary. I would add that, the fact that the exercise of the section 77 power is an alternative to an application for planning permission being "dealt with" by the local planning authority shows that it was not the intention of Parliament that the function of the Secretary of State should be to make good any shortcomings in the process undertaken by the planning authority. Parliament intended that applications for planning permission would usually be dealt with at local level by local planning authorities; but that, exceptionally, they could be dealt with by the Secretary of State if he decided to call them in. The two procedures are plainly alternatives. The purpose of the power conferred by section 77 is as described by Lord Clyde. It is to give the Secretary of State the power to call in planning

> applications where he considers that this is necessary or desirable in the national interest. It is not to exercise some supervisory control over the process by which local planning authorities perform their functions in individual cases. That is the function of the courts."

Thus, whilst that case was concerned specifically with the relationship of section 77 of the 1990 Act to Article 6 of the ECHR, Dyson LJ made plain that the power under section 77 is not provided so as to enable the Defendant to exercise some sort of supervisory control over the processes of a local planning authority performing its function in individual cases.

21. As set out above, these legal principles in relation to the breadth of the discretion and, as a consequence, the limited scope for intervention by the court, is not essentially disputed by the Claimants in so far as they are engaged in the general run of cases. Mr McCracken's submission is that the legal requirements upon the Defendant as a consequence of the AQD place this case in an altogether different category. The particular requirements of the AQD, he submits, mandated the Defendant exercing his call in jurisdiction so as to either refuse planning permission, or exercise the power to condition development or restrict it using a planning obligation under section 106 of the 1990 Act, so as to secure compliance with his duties under the AQD. In the first instance, therefore, it is necessary to examine the nature and reach of the obligations placed on the Defendant by virtue of the relevant EU and domestic legislation pertaining to air quality in order to examine the merits of Mr McCracken's submission.

22. At an EU level, limit values for NO_2 were established in Directive 1999/30/EC. This and other Directives pertaining to air quality were superseded by the AQD on 21st May 2008. The pertinent recitals of the AQD provide as follows:

> "2. In order to protect human health and the environment as a whole, it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level. Therefore, emissions of harmful air pollutants should be avoided, prevented or reduced and appropriate objectives set for ambient air quality taking into account relevant World Health Organisation standards, guidelines and programmes...
>
> 9. Air quality status should be maintained where it is already good, or improved. Where the objectives for ambient air quality laid down in this Directive are not met, Member States should take action in order to comply with the limit values and critical levels, and where possible, to attain the target values and long-term objectives…
>
> 30. This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to promote the integration into the policies of

> the Union of a high level of environmental protection and the improvement of the quality of the environment in accordance with the principle of sustainable development as laid down in Article 37 of the Charter of Fundamental Rights of the European Union."

23. Article 1 of the Directive lays down that part of its purpose is "defining and establishing objectives for ambient air quality designed to provide, prevent or reduce harmful effects on human health and the environment as a whole". Of particular importance to Mr McCracken's argument is Article 3 which requires the designation by member states of competent authorities and bodies. Article 3 provides as follows:

> "Article 3
>
> Responsibilities
>
> Member States shall designate at the appropriate levels the competent authorities and bodies responsible for the following:
>
> (a) assessment of ambient air quality;
>
> (b) approval of measurement systems (methods, equipment, networks and laboratories);
>
> (c) ensuring the accuracy of measurements;
>
> (d) analysis of assessment methods;
>
> (e) coordination on their territory if Community-wide quality assurance programmes are being organised by the Commission;
>
> (f) cooperation with the other Member States and the Commission.
>
> Where relevant, the competent authorities and bodies shall comply with Section C of Annex I."

24. Article 13 establishes an obligation in relation to "limit values" and "alert thresholds" of certain pollutants:

> "Article 13
>
> Limit values and alert thresholds for the protection of human health
>
> 1. Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM_{10}, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.

> In respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein.
>
> Compliance with these requirements shall be assessed in accordance with Annex III.
>
> The margins of tolerance laid down in Annex XI shall apply in accordance with Article 22(3) and Article 23(1).
>
> 2. The alert thresholds for concentrations of sulphur dioxide and nitrogen dioxide in ambient air shall be those laid down in Section A of Annex XII."

25. The limit value for NO_2 set out in Annex XI is, as set out above, 40μg/m^3 per calendar year. The margin of tolerance laid down in Annex XI commenced on 19th July 1999 at 50% and then decreased by equal annual percentages so as to reach 0% by 1st January 2010. In other words, as Annex XI specified, by 1st January 2010 the limit value had to be met. Annex III specifies that ambient air quality falls to be assessed at all locations save those specifically excepted by paragraph 2 of Annex 3. Those exceptions are locations within areas where members of the public do not have access and there is no fixed habitation; factory premises or industrial installations to which health and safety work regulations apply and, lastly, the carriageway of roads and the central reservations of roads save where there is normally pedestrian access to the central reservation. Annex III directs sampling points to areas where the highest concentrations occur and where populations are likely to be directly or indirectly exposed for a period which is significant in relation to the averaging period of the limit value.

26. Having established these thresholds the Directive goes on to provide requirements firstly in relation to the postponement of the attainment of deadlines and secondly in relation to the preparation of an Air Quality Plan ("AQP"). Firstly in respect of the postponement of the attainment of deadlines Article 22 of the Directive provides as follows:

> "Article 22
>
> Postponement of attainment deadlines and exemption from the obligation to apply certain limit values
>
> 1. Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide or benzene cannot be achieved by the deadlines specified in Annex XI, a Member State may postpone those deadlines by a maximum of five years for that particular zone or agglomeration, on condition that an air quality plan is established in accordance with Article 23 for the zone or agglomeration to which the postponement would apply; such air quality plan shall be supplemented by the information listed in Section B of Annex XV related to the pollutants concerned and shall demonstrate how conformity will be achieved with the limit values before the new deadline."

27. Article 23 provides the following in relation to AQPs:

> "Article 23
>
> Air quality plans
>
> 1. Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.
>
> In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children.
>
> Those air quality plans shall incorporate at least the information listed in Section A of Annex XV and may include measures pursuant to Article 24. Those plans shall be communicated to the Commission without delay, but no later than two years after the end of the year the first exceedance was observed.
>
> Where air quality plans must be prepared or implemented in respect of several pollutants, Member States shall, where appropriate, prepare and implement integrated air quality plans covering all pollutants concerned.
>
> 2. Member States shall, to the extent feasible, ensure consistency with other plans required under Directive 2001/80/EC, Directive 2001/81/EC or Directive 2002/49/EC in order to achieve the relevant environmental objectives."

Directive 2001/80/EC is the Directive related to large combustion plants; Directive 2001/81/EC is the Directive in relation to national emissions ceilings and Directive 2002/49/EC is the environmental noise Directive.

28. The Directive is transposed into national legislation in the UK through the Air Quality Standards Regulations 2010 ("the 2010 Regulations"). The relevant parts of the 2010 Regulations for the purposes of the arguments in this case are as follows:

> "3. The Secretary of State is designated as the competent authority—
>
> (a) for the United Kingdom for the purposes of article 3(f) of Directive 2008/50/EC, and

> (b) save as set out in paragraph (a), in England for the purposes of Directive 2008/50/EC and for the purposes of Directive 2004/107/EC….
>
> 17 (1) The Secretary of State must ensure that levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and particulate matter do not exceed the limit values set out in Schedule 2.
>
> (2) In zones where levels of the pollutants mentioned in paragraph (1) are below the limit values set out in Schedule 2, the Secretary of State must ensure that levels are maintained below those limit values and must endeavour to maintain the best ambient air quality compatible with sustainable development….
>
> 26 (1) Where the levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and PM_{10} in ambient air exceed any of the limit values in Schedule 2 or the level of PM2.5 exceeds the target value in Schedule 3, the Secretary of State must draw up and implement an air quality plan so as to achieve that limit value or target value.
>
> (2) The air quality plan must include measures intended to ensure compliance with any relevant limit value within the shortest possible time."

29. It is important at this stage to observe that measured against this legislative framework the central submission of the Defendant was that the duty of the member state in the event of exceedances of the threshold values was the preparation and implementation of an AQP to address those exceedances within as short a time as possible. That was the only obligation created by the legislative framework. The parties relied upon a number of cases from the CJEU to support their competing submissions in respect of the reach and extent of the obligations created by the AQD.

30. Starting with the Claimants, Mr McCracken drew attention to the decision of the CJEU in Case C-404/13 ClientEarth v Secretary of State for the Environment, Food and Rural Affairs. That case followed from a reference by the UK Supreme Court in respect of the effects of Articles 13, 22 and 23, in circumstances where it was contended that there was a continuing failure by the UK to secure compliance in certain of its zones with the threshold levels for NO_2. In answer to the first and second questions posed by the Supreme Court, which related to whether or not there was an obligation to seek postponement under Article 22 of the Directive, and if so in what circumstances a member site might be relieved of that obligation, the court observed as follows:

> "28 Article 22(4) of Directive 2008/50 obliges the Member State concerned to notify the Commission of the zones and the agglomerations to which it considers Article 22(1) applies and to submit the air quality plan referred to in the latter provision.

> 29 Next, that is the interpretation most suited to achieving the aim pursued by the EU legislature of ensuring better ambient air quality because it obliges the Member State concerned to anticipate that conformity with the limit values will not be achieved by the deadline specified and to formulate an air quality plan giving details of measures that are capable of remedying that pollution by a later deadline.
>
> 30 However, it should be noted that while, as regards sulphur dioxide, PM_{10}, lead and carbon monoxide, the first subparagraph of Article 13(1) of Directive 2008/50 provides that Member States are to 'ensure' that the limit values are not exceeded, the second subparagraph of Article 13(1) states that, as regards nitrogen dioxide and benzene, the limit values 'may not be exceeded' after the specified deadline, which amounts to an obligation to achieve a certain result"

31. The CJEU set out the third and fourth questions which had been raised and answered them in the following paragraphs:

> "36 By its third question, the referring court asks, in essence, whether, where it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a Member State by 1 January 2010, the date specified in that annex, and that Member State has not applied for postponement of that deadline under Article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second subparagraph of Article 23(1) of the directive has been drawn up permits the view to be taken that that Member State has nevertheless met its obligations under Article 13 of the directive...
>
> 40 It follows, next, from the second subparagraph of Article 23(1) of Directive 2008/50 that where the limit values for nitrogen dioxide are exceeded after the deadline laid down for their attainment, the Member State concerned is required to establish an air quality plan that meets certain requirements.
>
> 41 Thus, that plan must set out appropriate measures so that the period during which the limit values are exceeded can be kept as short as possible and may also include specific measures aimed at protecting sensitive population groups, including children. Furthermore, under the third subparagraph of Article 23(1) of Directive 2008/50, that plan is to incorporate at least the information listed in Section A of Annex XV to the directive, may also include measures pursuant to Article 24 of the directive and must be communicated to the Commission without delay, and no later than two years after the end of the year in which the first breach of the limit values was observed.

42 However, an analysis which proposes that a Member State would, in circumstances such as those in the main proceedings, have entirely satisfied its obligations under the second subparagraph of Article 13(1) of Directive 2008/50 merely because such a plan has been established, cannot be accepted.

43 First, it must be observed that only Article 22(1) of Directive 2008/50 expressly provides for the possibility of a Member State postponing the deadline laid down in Annex XI to the directive for achieving conformity with the limit values for nitrogen dioxide established in that annex.

44 Second, such an analysis would be liable to impair the effectiveness of Articles 13 and 22 of Directive 2008/50 because it would allow a Member State to disregard the deadline imposed by Article 13 under less stringent conditions than those imposed by Article 22…

46 Finally, this interpretation is also supported by the fact that Articles 22 and 23 of Directive 2008/50 are, in principle, to apply in different situations and are different in scope.

47 Article 22(1) of the directive applies where conformity with the limit values of certain pollutants 'cannot' be achieved by the deadline initially laid down by Directive 2008/50, account being taken, as is clear from recital 16 in the preamble to the directive, of a particularly high level of pollution. Moreover, that provision allows the deadline to be postponed only where the Member State is able to demonstrate that it will be able to comply with the limit values within a further period of a maximum of five years. Article 22(1) has, therefore, only limited temporal scope.

48 By contrast, Article 23(1) of Directive 2008/50 has a more general scope because it applies, without being limited in time, to breaches of any pollutant limit value established by that directive, after the deadline fixed for its application, whether that deadline is fixed by Directive 2008/50 or by the Commission under Article 22(1) of the directive.

49 In the light of the foregoing, the answer to the third question is that, where it is apparent that conformity with the limit values for nitrogen dioxide established in Annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a Member State by 1 January 2010, the date specified in that annex, and that Member State has not applied for postponement of that deadline under Article 22(1) of Directive 2008/50, the fact that an air quality plan which complies with the second subparagraph of Article 23(1) of the directive has been drawn up does not, in itself, permit the view

to be taken that that Member State has nevertheless met its obligations under Article 13 of the directive.

The fourth question

50 By its fourth question, the referring court asks, in essence, whether Articles 4 TEU and 19 TEU and Article 30 of Directive 2008/50 must be interpreted as meaning that, where a Member State has failed to comply with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by Article 22 of the directive, it is for the national court having jurisdiction, should a case be brought before it, to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the directive in accordance with the conditions laid down by the latter…

52 As regards Article 4 TEU, it should be recalled that according to settled case-law, under the principle of sincere cooperation laid down in paragraph 3 of that article, it is for the Member States to ensure judicial protection of an individual's rights under EU law (see, to that effect, inter alia the judgment in *Unibet*, C-432/05, EU:C:2007:163, paragraph 38). In addition, Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

53 If the limit values for nitrogen dioxide are exceeded after 1 January 2010 in a Member State that has not applied for a postponement of that deadline under Article 22(1) of Directive 2008/50, the second subparagraph of Article 23(1) of that directive imposes a clear obligation on that Member State to establish an air quality plan that complies with certain requirements (see, by analogy, judgment in *Janecek*, C-237/07, EU:C:2008:447, paragraph 35).

54 In addition, the Court has consistently held that individuals are entitled, as against public bodies, to rely on the provisions of a directive which are unconditional and sufficiently precise. It is for the competent national authorities and courts to interpret national law, as far as possible, in a way that is compatible with the purpose of that directive. Where such an interpretation is not possible, they must disapply the rules of national law which are incompatible with the directive concerned (see, to that effect, judgment in *Janecek*, EU:C:2008:447, paragraph 36 and the case-law cited.)

55 Lastly, as the Court of Justice has noted on numerous occasions, it is incompatible with the binding effect that Article 288 TFEU ascribes to Directive 2008/50 to exclude, in

> principle, the possibility of the obligation imposed by that directive being relied on by the persons concerned. That consideration applies particularly in respect of a directive whose objective is to control and reduce atmospheric pollution and which is designed, therefore, to protect public health (see, to that effect, judgment in *Janecek*, EU:C:2008:447, paragraph 37).
>
> 56 It follows that the natural or legal persons directly concerned by the limit values being exceeded after 1 January 2010 must be in a position to require the competent authorities, if necessary by bringing an action before the courts having jurisdiction, to establish an air quality plan which complies with the second subparagraph of Article 23(1) of Directive 2008/50, where a Member State has failed to secure compliance with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by Article 22 of the directive (see, by analogy, judgment in *Janecek*, EU:C:2008:447, paragraph 39).
>
> 57 As regards the content of the plan, it follows from the second subparagraph of Article 23(1) of Directive 2008/50 that, while Member States have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible."

32. Mr McCracken draws particular attention to paragraphs 30 and 49 of the judgment as supporting his contention that provision of an AQP alone is not sufficient to satisfy the requirements of the AQD.

33. Mr McCracken also relied upon the recent decision in case C-488/15 of Commission v Republic of Bulgaria. The case arose out of a reasoned opinion given by the Commission to the Republic of Bulgaria complaining that Bulgaria had failed to comply with the obligations of Article 13 of the AQD. In their response to that reasoned opinion the Republic of Bulgaria did not deny that PM_{10} concentrations exceeded the threshold values, but drew attention to the fact that the PM_{10} concentrations which had been recorded were improving over the course of time. The Commission were unsatisfied with that response and brought an action before the CJEU. In relation to the first complaint in respect of an infringement of Article 13 the court found as follows:

> "67 In that context, the first subparagraph of Article 13(1) of that directive provides that the Member States must ensure that, throughout their zones and agglomerations, levels of PM^{10}, in particular, in ambient air do not exceed the limit values laid down in Annex XI to the directive...
>
> 69 Exceeding the limit values is, therefore, sufficient for a finding to be made that there has been an infringement of the

> provisions of Article 13(1) in conjunction with Annex XI to Directive 2008/50 (see, to that effect, judgments of 10 May 2011, *Commission* v *Sweden*, C-479/10, not published, EU:C:2011:287, paragraphs 15 and 16, and of 15 November 2012, *Commission* v *Portugal*, C-34/11, EU:C:2012:712, paragraphs 52 and 53).
>
> 70 In that regard, an analysis which proposes that a Member State would have entirely satisfied its obligations under the second subparagraph of Article 13(1) of Directive 2008/50 merely because an air quality plan has been established, cannot be accepted (see, to that effect, judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, paragraph 42).
>
> 71 In the present case, the data from the annual air quality reports submitted by the Republic of Bulgaria show that that Member State exceeded the daily and annual limit values for PM^{10} concentrations in the zones and agglomerations BG0001 AG Sofia, BG0002 AG Plovdiv, BG0003 AG Varna, BG0004 North Bulgaria, BG0005 South-West Bulgaria and BG0006 South-East Bulgaria from 2007 until 2014 inclusive, with the exception of the annual limit value in the zone BG0003 AG Varna in 2009, which it does not indeed dispute…
>
> 75 As regards the Republic of Bulgaria's argument that its efforts to reduce PM^{10} levels are hindered by its socio-economic situation, it is to be noted that, as provided for in Annex III to Directive 1999/30, the date from which the daily and annual limit values for PM^{10} concentrations had to be met was 1 January 2005. That obligation applied to the Republic of Bulgaria on the day of its accession to the European Union, that is on 1 January 2007.
>
> 76 When it has been objectively found that a Member State has failed to fulfil its obligations under the FEU Treaty or secondary law, it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical difficulties encountered by it (see judgments of 1 October 1998, *Commission* v *Spain*, C-71/97, EU:C:1998:455, paragraph 15, and of 4 September 2014, *Commission* v *Greece*, C-351/13, not published, EU:C:2014:2150, paragraph 23).
>
> 77 Consequently, Republic of Bulgaria's argument relating to its socio-economic situation cannot be accepted."

34. There was a second complaint alleging an infringement of Article 23. The conclusions which the court reached in relation to that complaint were as follows.

> "102 It is apparent from the second subparagraph of Article 23(1) of Directive 2008/50 that in the event of

exceedances of the limit values for PM^{10} concentrations for which the attainment deadline is already expired, the Member State concerned is required to draw up an air quality plan meeting certain requirements.

103 Accordingly, that plan must set out appropriate measures, so that the exceedance period can be kept as short as possible, and may additionally include specific measures designed to protect sensitive population groups, including children. In addition, in accordance with the third subparagraph of Article 23(1) of Directive 2008/50, that plan must incorporate at least the information listed in Section A of Annex XV and may also include measures pursuant to Article 24 of that directive. The plan must be communicated to the Commission without delay, but no later than two years after the end of the year the first exceedance was observed.

104 According to the Court's case-law, Article 23(1) of Directive 2008/50 has a general scope because it applies, without being limited in time, to breaches of any pollutant limit value established by that directive, after the deadline fixed for its application, whether that deadline is fixed by Directive 2008/50 or by the Commission under Article 22 of the directive (see judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, paragraph 48).

105 In the context of the interpretation of Directive 96/62, the Court has held that while the Member States have a discretion, Article 7(3) of that directive includes limits on the exercise of that discretion which may be relied upon before the national courts, relating to the adequacy of the measures which must be included in the action plan with the aim of reducing the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests (see judgment of 25 July 2008, *Janecek*, C-237/07, EU:C:2008:447, paragraphs 45 and 46).

106 As the Advocate General observed in point 96 of her Opinion, the same approach must be followed as regards the interpretation of Article 23(1) of Directive 2008/50. Consequently, the air quality plans may be adopted only on the basis of the balance between the aim of minimising the risk of pollution and the various opposing public and private interests.

107 Therefore, the fact that a Member State exceeds the limit values for PM^{10} concentrations is not in itself sufficient to find that that Member State has failed to fulfil its obligations under Article 23(1) of Directive 2008/50.

> 108 In those circumstances, it must be ascertained, on the basis of a case-by-case analysis, whether the plans drawn up by the Member State concerned comply with that provision.
>
> 109 In that regard, it follows from Article 23(1) of Directive 2008/50 that while Member States have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible (judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, paragraph 57)."

35. Turning away from cases in the CJEU concerned with the AQD, Mr McCracken drew attention to two further decisions in support of his submissions. Firstly, in Case C-253/00 Munoz v Frumar [2002] ECR I 7289 the CJEU, when considering legislation concerned with standards applying to fruit, considered that it was necessary, in order to give full effectiveness to the rules on quality standards, to enable an individual to bring civil proceedings so as to ensure that EU rules on quality standards were adhered to. The opportunity to do so, and supplement the action of the authority designated by the member state to take action, supported the objectives of fair trading and the transparency of markets. Mr McCraken relied upon this case by analogy and contended that it supported his submissions in relation to the use of the power of call in to provide full effectiveness of the obligations of the Secretary of State under the AQD.

36. He further drew attention to Case C-461/13 Bund für Umwelt Und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland. He relied upon this case as an example of reliance upon a plan alone being insufficient to discharge the requirements of an environmental directive in respect of a project which impacts upon the interests protected by the directive. The case concerned a number of engineering projects involving development of the River Weser. Implementation of the projects involved dredging the river bed. Naturschutz Deutschland challenged the approval of the projects on the basis of their impact upon the water body and its associated habitats. The relevant provisions of the Water Framework Directive were the provisions of Article 4 which provide as follows:

> "4(1) In making operational the programmes of measures specified in the river basin management plans:
>
> (a) for surface waters
>
> (i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8"

Article 4(6) deals with temporary deterioration in the status of water bodies and Article 4(7) provides circumstances in which there may be a derogation from the requirements of the Directive. The first question which was posed by the national court was as follows:

> "28…

> (1) Is Article 4(1)(a)(i) of Directive 2000/60…to be interpreted as meaning that the Member States must – unless a derogation is granted – refuse to authorise a project if it may cause a deterioration in the status of a body of surface water, or is that provision merely a statement of an objective for management planning?"

The answer to this question was set out by the court in the following terms:

> "29 By its first and fourth questions, which it is appropriate to deal with together, the referring court asks, in essence, whether Article 4(1)(a)(i) to (iii) of Directive 2000/60 must be interpreted as meaning that the Member States are required — unless a derogation is granted — to refuse authorisation for a project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive.
>
> 30 In accordance with settled case-law of the Court, the scope of those provisions must be determined by taking into account both the terms in which they are couched and their context, as well as the objectives pursued by the legislation of which they form part (see, in particular, judgments in *Lundberg*, C-317/12, EU:C:2013:631, paragraph 19; *SFIR and Others*, C-187/12 to C-189/12, EU:C:2013:737, paragraph 24; and *Bouman*, C-114/13, EU:C:2015:81, paragraph 31) and, in the circumstances of this case, the history of that legislation.
>
> 31 It should be noted that, contrary to the submissions of Bundesrepublik Deutschland and the Netherlands Government, the wording of Article 4(1)(a)(i) of Directive 2000/60, which provides that 'Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water', attests to the binding force of that provision. The words 'shall implement' involve an obligation on the Member States to act to that effect.
>
> 32 It is necessary, as the referring court has done, to construe authorisation of an individual project as such implementation.
>
> 33 Furthermore, as provided in Article 4(1)(a) of Directive 2000/60, it is '[i]n making operational the programmes of measures specified in the … management plans' that the Member States adopt the measures necessary in order to achieve the objectives of preventing deterioration of the status of bodies of surface water and protecting and enhancing their status. The use of the words '[i]n making operational' supports an interpretation of that provision to the effect that it entails

obligations which must be complied with by the competent authorities when approving individual projects in the context of the legal regime governing the protection of waters…

45 That regime includes several categories. In particular, under Article 4(7) 'Member States will not be in breach of this Directive when failure … to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater'.

46 That derogation is, however, applicable only on condition that all practicable steps have been taken to mitigate the adverse impact on the status of the body of water concerned and that the programmes of measures and management plans have been adapted accordingly.

47 The structure of the categories of derogation which are laid down in Article 4(7) of Directive 2000/60 permits the inference that Article 4 of the directive does not contain solely basic obligations, but that it also concerns individual projects. As the Advocate General has observed in point 78 of his Opinion, the grounds for derogation apply in particular where failure to comply with the objectives follows new modifications to the physical properties of the body of surface water, resulting in adverse effects. That may occur following new authorisations for projects. Indeed, it is impossible to consider a project and the implementation of management plans separately.

48 Consequently, those projects are covered by the obligation, laid down in Article 4 of Directive 2000/60, to prevent deterioration of the status of bodies of water. However, the projects may be authorised pursuant to the system of derogations provided for in Article 4.

49 The European Commission submits in its written observations that the prohibition of deterioration of the status of bodies of water is an objective of the duty to enhance their status. In that regard, it must be held that the obligation to prevent deterioration of the status of bodies of water was granted autonomous ranking by the EU legislature and is not merely an instrument placed at the service of the obligation to enhance the status of bodies of water.

50 It follows that, unless a derogation is granted, any deterioration of the status of a body of water must be prevented, irrespective of the longer term planning provided for by management plans and programmes of measures. The obligation to prevent deterioration of the status of bodies of surface water remains binding at each stage of implementation

> of Directive 2000/60 and is applicable to every surface water body type and status for which a management plan has or should have been adopted. The Member State concerned is consequently required to refuse authorisation for a project where it is such as to result in deterioration of the status of the body of water concerned or to jeopardise the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4(7) of the directive.
>
> 51 In the light of all the foregoing considerations, the answer to the first and fourth questions is that Article 4(1)(a)(i) to (iii) of Directive 2000/60 must be interpreted as meaning that the Member States are required — unless a derogation is granted — to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive."

37. Mr James Maurici QC, who appeared on behalf of the Defendant, drew attention to two further CJEU authorities relevant to the competing submissions in the case, and which he relied upon in support of his contention that the only obligation on the Defendant as a result of the AQD was to prepare and implement a compliant and effective AQP in the event of exceedance of the threshold levels for pollutants. The first case was C-237/07 Janecek v Freistaat Bayern [2009] Env LR 12. As a preliminary point it is necessary to note that the claim was brought under Direction 96/62, a predecessor of the AQD, within which Article 7(3) was in essence the predecessor of Article 23. The Claimant lived on Munich's central ring road and brought an action complaining that air quality thresholds were being exceeded (in particular in relation to PM_{10}s) and requiring Freistaat Bayern to draw up an air quality action plan to address the exceedences. The national court concluded that Article 7(3) of Directive 96/62 did not confer "a personal right to have an action plan drawn up". The approach of the national court was distilled in paragraph 19 of the court's judgment as follows:

> "19 The referring court states that, even though the – albeit unlawful – failure to adopt an action plan does not, under national law, prejudice the rights of the applicant in the main proceedings, he is not without the means to ensure compliance with the legislation. Protection against the harmful effects of particulate matter PM_{10} should be secured by measures that are independent of such a plan, which the persons concerned are entitled to require the competent authorities to implement. Thus, effective protection is assured, under the same conditions as those that would result from the drawing-up of an action plan."

38. The findings of the court in relation to the preparation of action plans were as follows:

"34 By its first question, the Bundesverwaltungsgericht is asking whether an individual can require the competent national authorities to draw up an action plan in the case – referred to in Article 7(3) of Directive 96/62 – where there is a risk that the limit values or alert thresholds may be exceeded.

35 That provision places the Member States under a clear obligation to draw up action plans both where there is a risk of the limit values being exceeded and where there is a risk of the alert thresholds being exceeded. That interpretation, which follows from a straightforward reading of Article 7(3) of Directive 96/62, is, moreover, confirmed in the 12th recital in the preamble to the directive. What is laid down in relation to the limit values applies all the more with regard to the alert thresholds, in respect of which, moreover, Article 2 – which defines the various terms used in the directive – provides that 'immediate steps shall be taken by the Member States as laid down in this Directive'.

36 In addition, the Court has consistently held that individuals are entitled, as against public bodies, to rely on the provisions of a directive which are unconditional and sufficiently precise (see, to that effect, Case 148/78 *Ratti* [1979] ECR 1629, paragraph 20). It is for the competent national authorities and courts to interpret national law, as far as possible, in a way that is compatible with the purpose of that directive (see, to that effect, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8). Where such an interpretation is not possible, they must disapply the rules of national law which are incompatible with the directive concerned.

37 As the Court of Justice has noted on numerous occasions, it is incompatible with the binding effect which Article 249 EC ascribes to a directive to exclude, in principle, the possibility of the obligation imposed by that directive being relied on by persons concerned. That consideration applies particularly in respect of a directive which is intended to control and reduce atmospheric pollution and which is designed, therefore, to protect public health.

38 Thus, the Court has held that, whenever the failure to observe the measures required by the directives which relate to air quality and drinking water, and which are designed to protect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives (see Case C-361/88 *Commission* v *Germany*; Case C-59/89 *Commission* v *Germany*; and Case C-58/89 *Commission* v *Germany*).

39 It follows from the foregoing that the natural or legal persons directly concerned by a risk that the limit values or

> alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts.
>
> 40 The fact that those persons may have other courses of action available to them – in particular, the power to require that the competent authorities lay down specific measures to reduce pollution, which, as indicated by the referring court, is provided for under German law – is irrelevant in that regard."

39. The second case relied upon by Mr Maurici was the case of Case C-165/09 & C/167/09 Stichting Natuur en Milieu and Others v College van Gedeputeerde Staten Van Groningen [2011] 3 CMLR 21. Each of the sets of proceedings before the court related to the granting of permits for power stations. The permits in question in the various proceedings related both to the construction and operation of power stations and also to the revision of an existing permit. The power stations would give rise to emissions of SO2 and NO_2 which were, for instance in relation to the third set of proceedings, 1.8% of the national emissions ceiling for SO2 and 0.6% of the national emissions ceiling for NOX provided by the National Emissions Ceiling Directive 2001/81 ("the NECD"). The NECD establishes for each member state a maximum total amount of certain atmospheric pollutants that can admitted within the member state each year. The ceilings came fully into force in 2010. Article 6 of the NECD required the drawing up of plans for the progressive reduction of national emissions in order to comply with the national ceilings. Plans were required to be drawn up by 1st October 2002 so as to lead to effective compliance by 2010 at the latest. The relevant question posed by the national court for the purposes of the present proceedings was couched in the following terms:

> "Does it follow from the NEC Directive that, even where the national emissions ceiling for sulphur dioxide and/or nitrogen oxides is exceeded or risks being exceeded, a Member State has the discretion to bring about the result prescribed by the Directive not by refusing the permit or by making it subject to further conditions or restrictions, but rather by adopting other measures such as other forms of compensation?"

40. Advocate General Kokott reached the conclusion in answer to this question that a member state must refuse an application for an environmental permit if the installation would contribute to a national emissions ceiling for polluting substances laid down in the NEC Directive being exceeded, or give rise to the risk of it being exceeded and the member state had not drawn up and implemented adequate programmes for the reduction of emissions. The court, however, reached the contrary view. The court's conclusions on this issue were expressed in the following terms:

> "86 It should be noted that the NEC Directive itself lays down certain positive obligations on the Member States during that period, concerning in particular the establishment of overall action strategies with the aim of progressively reducing annual emissions of the pollutants concerned, by the end of

2010 at the latest, to amounts not exceeding the ceilings laid down by Annex I to the directive.

87 More specifically, under Articles 6 and 8(2) of the NEC Directive, the Member States must draw up by 1 October 2002 at the latest, and then update and revise as necessary by 1 October 2006 at the latest, programmes for the progressive reduction of the emissions in question, which they are obliged to make available to the public and appropriate organisations by means of clear, comprehensible and easily accessible information, and to notify to the Commission within the time-limit prescribed. Articles 7(1) and (2) and 8(1) of the NEC Directive also oblige the Member States to prepare and annually update national inventories of those emissions and national emission projections for 2010. The final emission inventories for the previous year but one and the provisional emission inventories for the previous year, as well as the national emission projections for 2010, must be reported to the Commission and the European Environment Agency each year, by 31 December at the latest (see, to this effect, the judgment of 18 December 2008 in Case C-273/08 *Commission* v *Luxembourg*, not published in the ECR, paragraphs 2 and 11).

88 As regards the specific content of those national programmes, it must nevertheless be found that, as noted in paragraph 75 of the present judgment, the wide flexibility accorded to the Member States by the NEC Directive prevents limits from being placed upon them in the development of the programmes and their thus being obliged to adopt or to refrain from adopting specific measures or initiatives for reasons extraneous to assessments of a strategic nature which take account globally of the factual circumstances and the various competing public and private interests.

89 The imposition of any requirements to that effect would run counter to the intention of the European Union legislature, whose aim in particular is to allow the Member States to strike a certain balance between the various interests involved. Furthermore, that would result in excessive constraints being placed on the Member States and would, accordingly, be contrary to the principle of proportionality, laid down in Article 5 TEU and expressly borne in mind in recital 13 in the preamble to the NEC Directive, which requires that the means deployed by a provision of European Union law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them (see Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 68 and the case-law cited, and Case C-58/08 *Vodafone and Others* [2010] ECR I-0000, paragraph 51).

90 It accordingly follows that, during the transitional period from 27 November 2002 to 31 December 2010, the third paragraph of Article 288 TFEU and the NEC Directive itself do not require the Member States to refuse or to attach restrictions to the grant of an environmental permit such as those at issue in the main actions, or to adopt specific compensatory measures for each permit granted of that kind, even where the national emission ceilings for SO_2 and NO_x are exceeded or risk being exceeded.

91 In light of all the foregoing reasoning, the answer to the second and third questions is that during the transitional period from 27 November 2002 to 31 December 2010, provided for in Article 4 of the NEC Directive:

– Article 4(3) TEU, the third paragraph of Article 288 TFEU and the NEC Directive require the Member States to refrain from adopting any measures liable seriously to compromise the attainment of the result prescribed by that directive;

– adoption by the Member States of a specific measure relating to a single source of SO_2 and NO_x does not appear liable, in itself, seriously to compromise the attainment of the result prescribed by the NEC Directive. It is for the national court to review whether that is true of each of the decisions granting an environmental permit for the construction and operation of an industrial installation such as the permits at issue in the main actions;

– the third paragraph of Article 288 TFEU and Articles 6, 7(1) and (2) and 8(1) and (2) of the NEC Directive require the Member States, first, to draw up, to update and to revise as necessary programmes for the progressive reduction of national SO_2 and NO_x emissions, which they are obliged to make available to the public and appropriate organisations by means of clear, comprehensible and easily accessible information, and to notify to the Commission within the time-limit prescribed, and second, to prepare and annually update national inventories of those emissions and national emission projections for 2010, which they must report to the Commission and the European Environment Agency within the time-limit prescribed;

– the third paragraph of Article 288 TFEU and the NEC Directive itself do not require the Member States to refuse or to attach restrictions to the grant of an environmental permit for the construction and operation of an industrial installation such as the permits at issue in the main actions, or to adopt specific compensatory measures for each permit granted of that kind, even where the national emission ceilings for SO_2 and NO_x are exceeded or risk being exceeded."

Submissions and conclusions

41. All parties sought to make submissions in relation to the merits of the case for planning permission in respect of the air quality analysis of the implications of the 2nd Interested Party's proposed development. As all parties recognised the court is not in a position, nor does it have jurisdiction, to resolve those issues on the merits. I have set out above the competing positions of the 2nd Interested Party in the Addendum Report and Professor Peckham and the objectors. I do not propose to go further. I am particularly anxious about expressing any views in relation to the merits of the issues on air quality, not simply because of the limits of the court's jurisdiction, but also because the 1st Interested Party has yet to form a concluded view on the application. True it is that it has resolved to grant planning permission but as Mr John Hobson QC, who appeared on behalf of the 1st interested party, pointed out in the course of his submissions the 1st Interested Party will have to give consideration to whether the application should be reconsidered applying the principles of R (on the application of Kides) v South Cambridgeshire District Council [2003] 1 P&CR 19 were the Defendant's decision not to call the application in to stand for whatever reason. For present purposes it suffices to note, firstly, that there is a serious issue joined between the 2nd Interested Party and the Claimants in respect of the air quality issues and, secondly, that it is the clear and unequivocal view of the Claimants that there are current exceedences of the threshold values contained in the AQD within the AQMA. I propose to evaluate the parties submissions on the basis of these propositions.

42. I turn, therefore, to the claimants' Ground 1. It will be recalled that this is the Ground in which it is contended by the claimants that the calling in of the application was mandated by the duties and obligations of the Defendant under the AQD as the competent authority. Alternatively, it is contended that the duties and obligations owed by the Defendant under the AQD were either not taken into account by him, or alternatively not properly understood if he did have regard to them. The essence of this secondary submission is that, in particular, Article 13 of the AQD is of free-standing effect and requires the Defendant to take appropriate measures in addition to his duty to make an AQP such as exercising powers like the one he enjoys under section 77 of the 1990 Act in order to bring about compliance with the thresholds.

43. Mr McCracken submits that the provisions of Article 3 of the Directive, requiring the identification of competent authorities, do not limit the responsibilities which a competent authority has to only those set out at Article 3(a)-(f). Further, when the Defendant is designated as the competent authority in England "for the purposes of Directive 2008/50/EU" by Regulation 3(b) of the 2010 Regulations that is a designation which is made for all purposes. Those purposes therefore include the requirement to comply with Article 13 and ensure that threshold values of pollutants are not exceeded. This was, he submitted, a responsibility which as competent authority extended to using powers such as the power under section 77 to exercise development control so as to avoid the exceedence of thresholds or enable their achievement within as short a time as possible.

44. I am unable to accept Mr McCraken's construction of Article 3 of the AQD and Regulation 3 of the 2010 Regulations. It appears to me clear when the two pieces of legislation are placed alongside each other that, firstly, the responsibilities created by Article 3 are those specifically identified within Article 3(a) – (f). This construction is supported by other elements of the Directive. For instance, Articles 3(a)-(d) are

essentially concerned with the monitoring and measurement of ambient air quality, and the requirement to comply with section C of Annex I by competent authorities cross refers to a part of the Directive which provides further specification in relation to the accuracy of measurements and compliance with data quality objectives. Article 3(e) and (f) relate to transboundary issues. This responsibility in my view cross-refers to Article 25(4) which provides as follows:

> "4. Where the information threshold or alert thresholds are exceeded in zones or agglomerations close to national borders, information shall be provided as soon as possible to the competent authorities in the neighbouring Member States concerned. That information shall also be made available to the public."

Similarly, Article 26(3), which is part of an article dealing with the making information about air quality public, requires as part and parcel of that for "the public to be informed of the competent authority or body designated in relation to the tasks referred to in Article 3."

45. It is clear to me that the AQD provides for specific and circumscribed responsibilities for a competent authority under Article 3 which interlink and dovetail with other elements of the Directive. I can see no justification for a broader interpretation of Article 3 which provides the possibility of a competent authority having far wider responsibilities. Against that background Regulation 3 of the 2010 Regulations accurately transposes Article 3 and again, in my view, does not constitute the Defendant as a competent authority with wider responsibilities than those specifically identified in Article 3. For reasons which will be set out below, that does not create any lacuna in terms of the duties created by Article 13 of the AQD, which it should be noted are placed upon Member States, and that are dealt with in a different manner by the 2010 Regulations.

46. It follows that I am unable to accept Mr McCracken's construction of Article 3 of the AQD and Regulation 3 of the 2010 Regulations and do not accept that the Defendant as competent authority has a wider range of responsibilities than those set out in Article 3(a)-(f) in England. Thus, his argument that the designation of the Defendant as competent authority includes a responsibility which extends to the use of the section 77 power to call in planning applications cannot be supported. It is therefore necessary to examine whether or not there is some other basis within the legislation for identifying a duty upon the Defendant which would require him to exercise his section 77 power in relation to planning applications with implications for compliance with the AQD air quality thresholds.

47. As set out above, the essence of Mr McCracken's submissions in this respect is that the requirements to comply with the limit values for pollutants provided by Article 13 is a responsibility that is not to be remedied solely by the production of an AQP. He submits that Article 13 creates a broad responsibility upon Member States and, in particular by virtue of Regulation 17 of the 2010 Regulations the Defendant, such that all appropriate measures pursuant to Article 4(3) of the Treaty on European Union ("the TEU") should be taken to ensure compliance with Article 13. The exercise of the power under section 77 of the 1990 Act amounted to an "appropriate measure" within the terms of the TEU for these purposes.

48. Mr McCracken reinforces this submission (and meets the contentions made by the Defendant and the 1st and 2nd Interested Parties that the powers of the Defendant would be no different from the powers of the 1st Interested Party and therefore his argument has no content) by drawing attention, firstly, to the national overarching purview which the Defendant must have in terms of the coordination of activity to tackle breaches of the threshold values. This responsibility is all the more acute in Mr McCracken's submission when no national AQP has been adopted. Secondly, he draws attention to the difference between the 1st Interested Party, who is not under the duty comprised in Article 13, and the Defendant who is. That duty, he submitted, would be an overriding consideration in circumstances where either the thresholds would be exceeded or the development would have the potential to impact upon the requirement to reduce exceedences in a period which has to be kept as short as possible. Without a national AQP to guide local planning authorities the responsibility upon the Defendant to impose measures to meet the Article 13 duty points, in Mr McCracken's submission, ever more clearly at an imperative for the section 77 power to be exercised. He further submits that when approaching these submissions it is important to bear in mind the principles from Marleasing SA v La Commerical Internacional de Alimentacion SA Case C-106/89 [1990] ECR 1-4135 namely that national legislation must so far as possible be interpreted so as to be consistent with EU law and its obligations and, consequently, domestic legislation which cannot be so interpreted should be disapplied.

49. I am unable to accept Mr McCracken's submissions in this respect. Firstly, starting from the legislation itself, it is clear to me that when Article 13 is read alongside Articles 22 and 23, that the specific and bespoke remedy provided for by the AQD in the event that threshold values are exceeded is the production and implementation of an AQP to cease exceedences and ensure that any exceedence period is kept as short as possible. There is in my view simply no room within the scheme set out in the AQD for any freestanding responsibility to take any specific actions in relation to permits or development consents as a consequence of the AQD's requirements. The legislation makes plain, particularly in the second paragraph of Article 23(1), that when there are exceedances of limit values AQPs are to be established and implemented so as to resolve those exceedances. The AQD does not in its terms require any other action to be taken apart from the preparation and implementation of an AQP.

50. This legislative scheme is in my view carefully and accurately transposed in Regulations 17 and 26 of the 2010 Regulations. It is in my view clear that Regulation 17 transposes the duty under Article 13 into domestic law and places the responsibility which Article 13 places on the member state on the shoulders of the Defendant. Regulation 26 accurately transposes into domestic law the provisions of Article 23. Regulations 17 and 26 read together make clear that the duty of the Secretary of State in relation to ensuring that limit values are not exceeded is to be enforced by the drawing up and implementation of an AQP in the event that exceedances occur to achieve the limit value and ensure any period of time when it is exceeded is resolved within the shortest possible time. It follows that I am unable to read into the legislation any requirement to take particular actions in relation to permits or development consents. Further I am unable to read into the legislation any requirement in the event of the limit values being exceeded other than the remedying of that through the preparation and implementation of an AQP. There is no

inconsistency between the obligations in the AQD and the obligations in domestic legislation and no tension between them.

51. Dealing with Mr McCracken's submissions in relation to Article 4(3) of TEU, it must be noted that this provision is as follows:

> "4(3) Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

Since the clear and proper construction of the Directive is that it creates an obligation to prepare and implement an AQP I am unable to accept that any other measure is necessary to ensure fulfilment of the obligations arising from the Directive. The Directive, as I have explained above, provides its own bespoke remedy to cure any failure to ensure that the limit values of pollutants are met. I therefore do not consider that Article 4(3) of the TEU adds anything material to Mr McCracken's arguments. There is no warrant within the legislation to regard to the exercise of the power under section 77 of the 1990 Act as some form of "appropriate measure" required to ensure fulfilment of the obligations under the AQD. The obligations under the AQD are clear and are addressed through the preparation of an AQP when limit values have been exceeded and its implementation to ensure rectification of the exceedances within as short a time as possible.

52. My conclusions in relation to the proper construction of the legislation are reinforced by the authorities cited from the CJEU as set out above. Dealing firstly with those cases concerned with the AQD and its predecessors, the first of those cases in time, namely Janecek, clearly reflects the interpretation of the AQD that it contains a specific and bespoke remedy for the individual citizen affected by breaches of threshold values, and that remedy is a requirement that an AQP is made and implemented. Indeed, the suggested existence in domestic law of other remedies to which recourse might have been had was regarded as irrelevant to the centrality of the AQD's requirement that in the circumstance of exceedances an AQP should be drawn up (see paragraph 40).

53. This approach is also clearly reflected in the ClientEarth litigation. Mr McCracken is right to draw attention to paragraph 30 of the CJEU's judgment which specifies that Article 13 is an obligation to achieve a certain result, namely not exceeding the limit values specified within the Directive. Furthermore, paragraph 36 of the judgment identifies that simply drawing up an AQP does not permit the view to be taken that a Member State has met its obligations under Article 13. However, as paragraphs 40-42 elaborate, when the obligations under Article 13 are breached the manner in which

they are to be rectified is as specified by Article 23. This is further reinforced, in my judgment, by the answer which the CJEU provided to the fourth question raised, as discussed in paragraphs 50-57 of the judgment. The court makes clear (and relies upon the case of Janecek in this respect) that where limit values are being exceeded there is a clear obligation to establish and implement an AQP, and that is an obligation which can be relied upon by citizens in national courts. This authority therefore further reinforces the proposition that correctly understood the remedy provided for breaches of the limit values in Article 13 is the obligation to create and implement an AQP under Article 23 which is effective and reduces any periods of exceedences to as short a time as possible.

54. I see nothing to disturb this interpretation in the Bulgaria case. The observations in paragraph 70 of the judgment of the CJEU upon which Mr McCracken relies must be seen in context. In that case there was a clear and accepted breach of Article 13, and the Republic of Bulgaria were seeking to rely open their socio-economic situation and the past reduction in the extent of exceedances to avoid the Commission's complaint. As the CJEU found, that argument could not be accepted in the light of the clear requirements of Article 13. Once more, in reliance on Janecek, in particular at paragraphs 102-107 of the CJEU's judgment, the court reinforced that the means prescribed by the AQD to address exceedences of limit values is the preparation of an AQP.

55. The authorities from the CJEU to which I was referred which relate to other Directives do not dissuade me from this view. The Naturscutz Deutschland case was one which dealt with a Directive which was drafted in materially different terms from the AQD. Article 4 of that Directive, as set out above, created a requirement to be observed "in making operational the programmes of measures specified in the river basin management plans". That language is not replicated in the AQD, and has a very different effect to the language of the AQD. Furthermore, it is clear from paragraphs 45-51 of the CJEU's judgment that they were persuaded in reaching their construction of that Directive that it could require action to be taken in the context of applications for individual permits or consents by the existence within Article 4(7) of that Directive of derogations. They formed the view at paragraph 47 of the judgment that the structure of the categories of derogation permitted an inference that Article 4 applied to individual projects as well as to management plans. Again, that is very different from the drafting of the legislation in the AQD.

56. The conclusions reached by the CJEU in the Stichting Natuur en Milieu case are supportive of the construction of the AQD which I have set out above, namely that the specific remedy prescribed is the preparation and implementation of an AQP in the event that there are breaches of the obligations under Article 13. The reference within the extract from the judgment set out above to the requirement to provide plans within the NEC Directive, and the flexibility in the measures to be adopted in those plans being in consistent with the imposition of any requirements being imposed by the court such as a requirement to refuse or attach restrictions to the granting of a permit, have some analogy with the AQD. Whilst I would have reached the conclusions which I have as to the proper construction of the AQD (and thereafter the 2010 Regulations) by reference solely to the wording of the legislation itself, when that is coupled with those cases which have been decided by the CJEU upon the AQD, the

Stichting Natuur en Milieu case in my view provides further reinforcement of the position.

57. It follows that, in my judgment, there is no substance in Mr McCracken's contention that there is a broader duty or responsibility placed upon the Defendant by the AQD in the event of exceedences of limit values beyond the preparation and implementation of an AQP to address those exceedences and to bring about compliance with the limit values in as short a time as possible. That is a construction which is both clear on the face of the legislation, and also supported by the relevant CJEU authority on the AQD and its predecessors. It follows that I am unable to accept that there was some wider duty or responsibility placed on the Defendant by virtue of the AQD and the 2010 Regulations which required him to exercise his discretion under section 77 of the 1990 Act to call the application in for his own determination.

58. There is a further subsidiary point which was raised by Mr McCracken orally during the course of the hearing. He submitted that, on the basis of authorities such as C-22/86 UNCTEF v Heylens [1987] ECR 4097 and C-75/08 Mellor v Secretary of State for Communities and Local Governments [2009] ECR 1-3799, since EU obligations were involved the Defendant was under a duty to provide reasoning by EU law as to why the request based on the AQD raised by objectors had been rejected. Mr McCracken relied upon the observations of Ouseley J in paragraph 17 of his judgment that the Defendant's reasons were clear. He submitted that in that it had been concluded that the reasons were clear, and they made no reference to the AQD, it was open to him to submit that the Defendant had failed to have regard to the AQD at all in reaching his decision.

59. In my view there are a number of difficulties in Mr McCracken's way when advancing this submission. Firstly, I accept the submission made by Mr Maurici that this is in effect the argument which was pleaded under Ground 4 of the claimant's case as set out above in a very thin and ill-fitting disguise. In effect, Mr McCracken is seeking to argue failure to give reasons required by EU law. Permission to advance such a case was refused at the permission stage and cannot be resurrected now. There are very sensible procedural reasons for not allowing a point based upon the requirement to provide reasons under EU law to be argued at this stage, including in particular that it may have been a matter about which the Defendant might have wished to provide evidence at the stage of providing his Detailed Grounds for Resisting the Claim.

60. Further, in my view, this point owes more to forensic dissection and the undoubted skill of Mr McCracken's presentation than the actual reality of the case. Bearing in mind the representations which the Defendant received, as set out above, it is inconceivable in my view that the Defendant was not aware, and therefore did not take account of, the representations made about compliance with the AQD. Indeed, the decisions relied upon by Mr McCracken in both the letter declining to call the application in of 29th December 2016 and the response to Professor Peckham's pre-action protocol letter responded to representations to the Defendant which were heavily reliant upon submissions based on the implications of the development in relation to the AQD. The reality here is that, as Mr Maurici submits in the light of the judgment in Saunders, it is not permissible for Mr McCracken to argue that the absence of reference to the AQD specifically means that it was not taken into account. I have no doubt that the Defendant considered Professor Peckham's submission which

was founded in large measure on the AQD but concluded, as I have found correctly, that there was no duty placed upon him by the AQD to act so as to exercise his section 77 discretion and call the application in for his own determination.

61. Returning in the light of these conclusions to the Grounds raised I am satisfied that there is no substance in Ground 1 in the light of the correct construction of the legislation. It will be recalled that Mr McCracken's submission was that it was the AQD dimension to the section 77 decision which founded the contentions that the Defendant's decision was unlawful and irrational. In that I have found against him in respect of his submissions on the AQD it follows that Ground 2, based on irrationality must similarly fail. As Mr McCracken accepted, his submission was that but for the AQD dimension the Defendant had a broad discretion as to whether or not to call the application in. It was the obligations of the Defendant under the AQD which he relied upon to contend in respect of Ground 2 that the decision reached was perverse and irrational.

62. So far as Ground 3 is concerned I do not consider that it was perverse or irrational for the Defendant to point out that matters of substantive concern in relation to air quality remained to be addressed by the local planning authority or, alternatively, within a legal challenge to their decision. There are a number of points which need to be made in this connection. Firstly, it is undoubtedly true that the powers of the 1st Interested Party are precisely identical to the powers of the Defendant in terms of granting or refusing planning permission or imposing any conditions or restrictions by way of section 106 obligation. In the absence of the Defendant calling the matter in, as I have set out above, the 1st Interested Party remains seized of the 2nd Interested Party's application and has still to make a decision upon it. Whilst they have already formed a resolution in relation to the application it remains open to them, on the basis of the principles set out in Kides, to revisit their resolution if that is warranted.

63. I do not accept that the duty placed upon the Defendant by Articles 13 and 23 to produce and implement an AQP (with the national prospective on necessary measures in mind) renders the decision in the present case not to exercise the power to call in perverse or irrational. As the Defendant and the Interested Parties were at pains to point out, the question of air quality and the exceedance of any limit values or thresholds is clearly and obviously a material consideration in the decision as to whether or not to grant planning permission. It is also material to the determination of whether mitigation measures are required and the effect of any mitigation measures that are proposed. These are matters which the Defendant was entitled to conclude, on the basis of the evidence before him, were material considerations under active consideration by the 1st Interested Party and forming a material consideration for the purposes of considering whether planning permission should be granted and if so subject to what conditions and restrictions. Whilst it is well known and obvious that a challenge by way of judicial review would not be the forum for a full merits consideration of the issues in relation to air quality, the point at which a judicial review might be considered had not arrived. The Defendant was, at the stage at which he formed his decision in relation to whether or not to exercise his power under section 77 of the 1990 Act, entitled to expect that the 1st interested party would exercise their discretion as to whether or not to grant planning permission lawfully. That is the task upon which the 1st Interested Party are still engaged and which, in the light of the conclusions which I have reached, they will now have to complete.

Conclusions

64. For the reasons which have been set out above, I am unable to accept that the Claimants' Grounds are well founded and their application for judicial review must be dismissed.