ENVIRONMENTAL ASSESSMENT

Standard of review, delay & the discretion to refuse relief

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Sources and materials

Hong Kong (HK)

Environmental Impact Assessment Ordinance, Cap. 499 ("**the EIA Ordinance**")

Technical Memorandum on Environmental Impact Assessment Process ("**TM**")

High Court Ordinance, Cap. 4 ("**the High Court Ordinance**")

The Rules of the High Court, Cap. 4A

England and Wales (E&W)

Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) (England only) (Amended 2015, SI 2015/660) ("**EIA Regulations 2011**")

Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) (Wales only)

The Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1663) ("**SEA Regulations**")

Regulations in Northern Ireland and Scotland are in similar form (they all derive from the EIA and SEA Directives), e.g. the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012 SR 2012 No 59.

Senior Courts Act 1981 (formerly the Supreme Court Act 1981) s. 31.

The Civic Procedure Rules ("**CPR**") 1998.

Europe

Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment ("**EIA Directive**") amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (to be transposed into national law by 16 May 2017).

Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ("**SEA Directive**").

Web resources

http://www.epd.gov.hk/eia/index.html

http://ec.europa.eu/environment/eia/eia-legalcontext.htm

http://planningguidance.planningportal.gov.uk/blog/guidance/environmental-impact-assessment/

http://planningguidance.planningportal.gov.uk/blog/guidance/strategic-environmental-assessment-and-sustainability-appraisal/

https://www.justice.gov.uk/courts/procedure-rules/civil/rules

Discussion

INTRODUCTION

1. Environmental assessment in Hong Kong, the UK and EU serves a similar purpose, namely to assess the environmental effects of projects (and strategic plans/programmes in the case of SEA) in order to better protect the environment[1]. The technique of environmental assessment is frequently used throughout the world for that reason, though the legislative provisions and details unsurprisingly vary from jurisdiction to jurisdiction.

2. This paper examines three general areas of the law relating to environmental assessment, and challenges to the legality of EIA in particular, including considering of a number of recent decisions of the UK Supreme Court and lower courts which may be of interest and assistance when considering similar issues arising under the EIA Ordinance.

(1) STANDARD OF REVIEW

3. When considering the adequacy of an exercise in EIA or SEA, whilst the general standard of review is the ***Wednesbury*** standard applicable to most administrative decisions, a distinction has to be drawn between most hard-edged questions of the interpretation and application of the legislation and issues of expert judgment. See ***Shiu Wing Steel Ltd. v. Director of Environmental Protection*** [2006] 3 HKLRD 33, ***Chu Yee Wah v. Director of Environmental Protection*** [2011] 5 HKLRD 469 at §84 (Tan VP), ***Leung Hon Wai v. Director of Environmental Protection*** [2014] 5 HKLRD 194 at §§25-26 (Lam VP and Kwan JA), ***Jones v. Mansfield DC*** [2004] Env. L.R. 21 at §§14-18 (Dyson LJ), ***R. (Blewett) v. Derbyshire CC*** [2004] Env. L.R. 29[2], ***R (Edwards) v. Environment Agency*** [2008] Env LR 34 at §§38 and 61 and ***R. (Loader) v. Secretary of State*** [2013] P.T.S.R. 406 at §§28-31. Note in ***Jones***, Carnwath LJ observed at §58:

> "58. It needs to be borne in mind that the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle-race. Furthermore, it does not detract from the authority's ordinary duty, in the case of any planning application, to inform itself of all relevant matters, and take them properly into account in deciding the case."

4. The Courts in HK and the UK have therefore unsurprising drawn a distinction between:

   (1) issues which go to whether there has been a proper interpretation of, and formal compliance with, the statutory requirements for EIA/SEA; and

   (2) challenges which relate to the judgment of the decision-maker considering the adequacy and form of the assessment and the environmental information provided. For recent examples of the rejection of challenges to such judgments, see ***Ho Loy v. Director of Environmental Protection*** (HCAL100/2013) at §§70-76 and

5. These issues have been expressed differently in HK and E&W because of the different statutory/procedural requirements but the procedural stages are broadly similar:

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[1] See the long title to the EIA Ordinance, and ***Shiu Wing Steel Ltd. v. Director of Environmental Protection*** [2006] 3 HKLRD 33 at §7 and the preamble to the EIA Directive at §§1-9 in particular.

[2] A helpful and detailed discussion of the role of EIA and defects in process, not considered on appeal and approved by the HL in ***Edwards***.

(1) UK screening decision (planning authority or Secretary of State), HK decision by the Director of Environmental Protection whether to issue an EIA study brief or permit an applicant to apply directly for an environmental permit;

(2) UK scoping opinion, HK EIA study brief;

(3) UK environmental statement (EIA) or environmental report (SEA), HK EIA report.

6. There is also a significant regulatory difference in that the UK does not have the equivalent of the TM made pursuant to s. 16 of the EIA Ordinance. This is more prescriptive a framework than the policy guidance issued in the UK regarding the undertaking of EIA in the National Planning Policy Guidance[3] and thus the UK cases need to be read in the context where there more scope of the application of expert judgment even in terms of the format and contents of the ES. However, although the TM is made pursuant to the EIA Ordinance, it is not itself subsidiary legislation (s. 16(12)) its proper construction is a matter of law: ***Shiu Wing Steel Ltd. v. Director of Environmental Protection*** [2006] 3 HKLRD 33, §§23-25[4] and 29-30. This is equivalent to the approach adopted by the Supreme Court in ***Tesco Stores Ltd v. Dundee City Council*** [2012] P.T.S.R. 983 at §§18-19 (Lord Reed JSC) that the interpretation of planning policy was a matter of law for the courts given the need for consistency of interpretation, but that a broad approach should be taken to interpreting such material.

7. In ***Shiu Wing Steel***, in the context of a quantitative risk assessment for HK Airport Authority's proposed air fuel farm, the CFA drew a distinction at §§29-30 between:

(1) Compliance with the formal, technical requirements of the EIA Ordinance; and

(2) The exercise of judgment with the context of those requirements.

8. The Court held:

> "30. If the Director, in approving an EIA report, is found to have misunderstood the requirements of the SB and the TM, his misunderstanding may suggest error in his decision that the requirements have been met (cf. *Henderson Real Estate Agency Ltd v. Lo Chai Wan* (PC) [1997] HKLRD 258 at 267 although in that case and in *South Somerset District Council and Secretary of State for the Environment* [1993] 1 PLR 80 the misunderstanding of the governing guidelines was itself the ground of invalidity). But the question of the EIA report's meeting the requirements of the SB and TM is for the Court to determine. It is a question of construction, albeit the TM and the SB are to be construed not as legislative instruments but as they would be understood by an expert risk assessor. In other words, the court determines what the TM and the SB require but technical evidence may be needed to show that an EIA report meets or does not meet the requirements so determined. It is one thing to acknowledge that satisfaction of the requirements or proof of satisfaction calls for expertise; it is another to allow the Director or an expert risk assessor to define for himself or herself the requirements to be satisfied. The definition of the legal effect of the TM and the SB is necessarily a matter of law but it is necessary to appreciate any special or technical meaning which experts may attribute to particular terms."

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[3] A web-based policy resource which is subject to regular updating: http://planningguidance.planningportal.gov.uk/. See in particular the Sections on Environmental Impact Assessment (ID 4) and Strategic environmental assessment and sustainability appraisal (ID 11).

[4] Citing Sir Thomas Bingham MR in ***R. v Director of Passenger Rail Franchising Ex p. Save Our Railways*** [1996] CCH Commercial Law Cases 589. See also ***R. v North Derbyshire HA Ex p. Fisher*** (1998) 10 Admin. L.R. 27.

9. There may be a fine line to be drawn between the two broad types of case and they made shade into each other, depending on the factual context. This is more hard-edged in HK than the UK because of the regulatory requirement to apply the TM but nonetheless there are bound to be instances where the issue of technical compliance shades into a question of expert judgment. See e.g. judgments to be reached under the TM with regard to the identification of impacts (Annex 3 and the topic annexes) or mitigation measures.

10. In ***Bowen-West v. Secretary of State*** [2012] Env. L.R. 22, at §§32-33 Laws LJ drew a parallel distinction between challenges which went to the question as to whether there should be EIA and the judgments exercised in the context of the substance of the EIA:

> "32. I should next point up the fact that some of the principal authorities relied on by the appellant as demonstrating the breadth of the EIA provisions are not about the scope of the EIA to be undertaken in a case where, as here, an Environmental Statement admittedly falls to be made. Rather, they address the question whether an EIA is required at all. They are "screening" rather than "scoping" positions… It is in this type of case, screening cases, that the courts have been concerned, energetically concerned, to put a stop to the device of using piecemeal applications as a means of excluding larger developments from the discipline of EIA. That approach cannot simply be read across to a case which is not about screening at all, but rather about the appropriate scope of an EIA.
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> 33. At the heart of this case, it seems to me, is the proposition that the issues arising here are not comparable with those that arose in these screening decisions. In a case such as the present as I have indicated, we are dealing with what is quintessentially a matter of judgment…"

11. Contrast ***R. (Brown) v. Carlisle City Council*** [2011] Env. L.R. 5 where the Court of Appeal quashed a planning permission for a freight distribution centre since the ES had failed to assess the cumulative impacts required by the EIA Regulations for an airport freight centre together with other works to the airport (runway improvements and a new terminal building) which were not the subject of the planning application but which were required by the planning obligation which accompanied the permission. Sullivan LJ pointed out at §27:

> "Although the issue had been flagged up by the defendant prior to the application, it was not addressed in the Interested Party's Environmental Statement, and for whatever reason the defendant thereafter failed to consider the implications for the purposes of reg. 3(2) of the EIA Regulations of its insistence on a s. 106 Agreement which would ensure that the freight distribution centre could lawfully be developed only if it was developed in conjunction with the airport works."

12. In ***Blewett***, above, Sullivan J (as he then was) gave useful guidance at §§32-42 on how to treat defects in environmental reports[5] and that the purpose of EIA does not require perfection at least where the question of the adequacy of judgment arises:

> "39. This process of publicity and public consultation gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies. … Once the requirements of Sch.4 are read in the context of the Regulations as a whole, it is plain that a local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number

[5] ***Blewett*** was approved by the House of Lords in ***R (Edwards) v. Environment Agency*** [2008] Env LR 34 (§§38 and 61) and the principle has since been reaffirmed on numerous occasions.

of respects.

"40. … In the light of the environmental information the local planning authority may conclude that the environmental statement has failed to identify a particular environmental impact, or has wrongly dismissed it as unlikely, or not significant. Or the local planning authority may be persuaded that the mitigation measures proposed by the applicant are inadequate or insufficiently detailed. That does not mean that the document described as an environmental statement falls outwith the definition of an environmental statement within the Regulations so as to deprive the authority of jurisdiction to grant planning permission. The local planning authority may conclude that planning permission should be refused on the merits because the environmental statement has inadequately addressed the environmental implications of the proposed development, but that is a different matter altogether. Once the requirements of Schedule 4 are read in the context of the Regulations as a whole, it is plain that a local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects.

41. In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations ... but they are likely to be few and far between.

42. .. It would be of no advantage to anyone concerned with the development process – applicants, objectors or local authorities – if environmental statements were drafted on a purely "defensive basis", mentioning every possible scrap of environmental information just in case someone might consider it significant at a later stage. Such documents would be a hindrance, not an aid to sound decision-making by the local planning authority, since they would obscure the principal issues with a welter of detail."

"68. I have dealt with it in some detail because it does illustrate a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by Sch. 4 it was therefore not an environmental statement and the local planning authority had no power to grant planning permission. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, such an approach is in my judgment misconceived. It is important that decisions on EIA applications are made on the basis of 'full information', but the Regulations are not based on the premise that the environmental statement will necessarily contain the full information. The process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the 'environmental information' of which the statement will be but a part."

13. In the SEA context, similarly, considerable latitude has been acknowledged by the E&W Courts as to the judgments made by the decision-making bodies as to the reasonable alternatives to be considered alongside the preferred strategic option: see ***Ashdown Forest Economic Development Llp v. Wealden DC*** [2015] EWCA Civ 681 at para. [42]. However, contrast with this the quashing of the strategic policy in that case (paras. [44]-[51, Richards LJ) because it had simply failed to consider reasonable alternatives to the policy as required by the Regulations, a failure akin to the failure with regard to undertaking a QRA in ***Shiu Wing Steel***.

(2) TIME FOR BRINGING JUDICIAL REVIEW AND DELAY

14. See the broadly similar provisions in:

    (1) S. 21K(6) of the High Court Ordinance and O. 53 r. 4 of the High Court Rules; and

    (2) Senior Courts Act 1981 s. 31(6) and (7) and the CPR Part 54.5. In planning (and procurement) cases in E&W the requirement for promptness has been removed[6] and the three month challenge period reduced to 6 weeks (CPR Part 54.5(A1) and (5)). For other cases, the three month period and requirement for promptness remains. Most EIA and SEA cases will fall within the planning time limits.

15. In E&W in ***R. (Malster) v. Ipswich BC*** [2002] P.L.C.R. 14 Sullivan J. (as he then was) considered that the time for challenging an EIA decision (there the decision in principle not to require EIA) ought to run from the date of the decision and not the later substantive planning decision. This approach was disapproved by the Court of Appeal in ***R (Catt) v. Brighton and Hove City Council*** [2007] Env LR 691, following the decision on the running of the judicial review period for challenging planning decisions in ***R (Burkett) v. Hammersmith and Fulham LBC*** [2002] 1 WLR 1593 - considered in HK by the CFA in ***Shiu Wing Steel*** (2006) at §83.

16. However, there may be grounds for reconsidering this more generous approach. In the recent SC decision in ***R. (Champion) v. North Norfolk DC*** [2015] 1 WLR 3710, Lord Carnwath JSC noted *obiter*:

> "63 I would add two final comments. First, as I have said, no issue has been taken on the delay which elapsed between the screening opinion in April 2010 and the date when it was first challenged in correspondence more than a year later. The formal provision, in both the EIA Directive and the Regulations, for a decision on this issue at an early stage seems designed to provide procedural clarity for the developer and others affected. It is in no-one's interest for the application to proceed in good faith for many months on a basis which turns out retrospectively to have been defective. However, in *R (Catt) v Brighton and Hove City Council* [2007] Env LR 691, para 39ff, it was decided by the Court of Appeal (applying by analogy the decision of the House of Lords in *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] 1 WLR 1593) that a failure to mount a timeous legal challenge to the screening opinion was no bar to a challenge to a subsequent permission on the same grounds. Although we have not been asked to review that decision, I would wish to reserve my position as to its correctness. I see no reason in principle why, in the exercise of its overall discretion, whether at the permission stage or in relation to the grant of relief, the court should be precluded from taking account of delay in challenging a screening opinion, and of its practical effects (on the parties or on the interests of good administration)."

17. This therefore opens the question as to whether the principles of promptness and undue delay should now be applied as from e.g. the date the Director issues the study brief under s. 5 or permits application to be made directly for an environmental permit or approves the EIA report under s. 6 if the errors of law are said to arise at one of those stages, rather than the

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[6] Due to the application of the EU principle of legal certainty, the additional requirement of promptness no longer applies in E&W or the other UK jurisdictions where EU law is engaged. See e.g. ***Uniplex (UK) Ltd v NHS Business Services Authority*** (C-406/08) [2010] 2 C.M.L.R. 47 (CJEU) and ***R. (Berky) v. Newport City Council*** [2012] Env. L.R. 35. In E&W this issue has been resolved by the general reduction of the period for judicially reviewing decisions under the planning acts from 3 months to 6 weeks with no requirement for promptness: see CPR Part 54.5(A1) and (5).

substantive decision to issue a permit – the date which appears to have been applied in ***Shiu Wing*** at §§83 and 87. Had the ***Malster*** approach been followed time might have run from the date of the approval of the EIA report under s. 6(3) in mid-June 2002[7] rather than the permit approval in late August 2002. On that footing the application would have been outside the 3 month challenge period rather than within it. The advantage of an earlier challenge period is that the challenge then focusses on the specific decision which is alleged to have been flawed and time and costs are not wasted in carrying through a process which may have been flawed from an earlier stage.

18. In that context, the approach of Sullivan J. in ***Malster*** should be noted:

> "99. … Where such a challenge is to be made, it is of vital importance that it is made promptly. Faced with a challenge to the lawfulness of a screening opinion, the local planning authority may wish to reconsider its position … or the developer may volunteer an EIA. It is not appropriate to wait until after planning permission has been granted, when it is too late to remedy the omission, and then complain that the screening opinion, which has been on the public register for some months, was erroneous. Each case will of course depend on its own particular facts, but, as a general rule, where there is a discrete challenge to a screening opinion, it should, in my judgment, be made promptly so that any error, if there is one, can be remedied before the planning application is considered by the local planning authority.
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> 100. Turning from the screening opinion to the challenge to the planning permission itself, whether a challenge to a grant of permission has been made promptly depends on the circumstances of the particular case… I can readily accept that all other things being equal, in most cases a claimant would be acting sufficiently promptly if a resolution to grant planning permission on April 25 was challenged on June 1. But all other things are not equal. The Club had made it clear that it needed to proceed as a matter of urgency with the proposed redevelopment in the closed season. The tight timetable was referred to in the report to committee. As soon as the decision was issued, demolition began at the end of Alderman Road. This is not a case where a local resident is suddenly confronted out of the blue with an unexpected and unwelcome planning decision because, for example, there has been a failure to notify residents of a proposed development. It was well-known by all the residents in Alderman Road that the Council would be considering the application for permission on April 25. The claimant could see the old stand being demolished. By the time the application for judicial review was made, it had been completely demolished.
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> 101. In my judgment, it is plain that in the particular circumstances of this case, the challenge to the grant of planning permission was not made promptly; and moreover, that this lack of promptness has resulted in substantial prejudice to the Club. It has proceeded with the demolition of the existing stand. It is clear from the evidence provided on behalf of the Club that had it appreciated that there was doubt as to the lawfulness of the permission, it would not, for obvious reasons, have proceeded to demolish the existing accommodation for spectators.
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> 102. Very considerable costs have been incurred by the Club which would be wasted if this permission had to be quashed or indeed if the development was to be delayed. … Suffice it to say that even if I had concluded that there was some merit in any of the grounds of challenge, I would, as a matter of discretion, have unhesitatingly refused to grant permission to apply for judicial review upon the ground of delay and substantial prejudice."

19. On the question of promptness, prior to the amendment to the CPR time limits, the E&W courts in the planning context had taken a strict approach to promptness in making challenges

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[7] When the defect which led to quashing arose, i.e. the approval of the EIA Report without the appropriate QRA for catastrophic failure plus 100% instantaneous loss of fuel. As the CFA held at §19, the approval of the Report was the pivotal point in the process.

generally expecting proceedings to be brought well within the 3 month judicial review period. See, for example, Keene LJ in ***Finn Kelcey v. Milton Keynes BC*** [2009] Env LR 299 at §§22-24 and Simon Brown J (as he then was) in ***R v. Exeter City Council Ex p. JL Thomas & Co Ltd*** [1991] 1 Q.B. 471 at 484G:

> "... I cannot sufficiently stress the crucial need in cases of this kind for applicants to proceed with the greatest possible urgency, giving moreover to those affected the earliest warning of an intention to proceed. In this connection it should be remembered that there is conspicuously absent from the legislation any right to appeal in fact or law from a planning authority's grant of planning permission. And even when a right of challenge is given the right of statutory application under section 245 to challenge a ministerial decision it must be exercised within six weeks. Only rarely is it appropriate to seek judicial review of a section 29 permission; rarer still will be the occasions when the court grants relief unless the applicant has proceeded with the greatest possible celerity."

(3) THE COURT'S DISCRETION TO REFUSE RELIEF

20. The general approach in both HK and E is that if a decision is found to be unlawful the Court will usually reflect that in the grant of relief, if not quashing the decision then at least declaratory relief: see the CFA in ***Shiu Wing Steel*** (2006) at §§90-91. However, when reviewing administrative decisions the Court retains a discretion to refuse relief which is also underpinned by legislation in ss. 21I and K of the High Court Ordinance and the Senior Courts Act 1981 s. 31(6) and (7), both of which make it clear that there is power to grant relief, but no requirement to do so.

21. The approach to discretion in EIA in ***Berkeley v. Secretary of State*** [2001] 2 AC 603, cited by the CFA in ***Shiu Wing Steel*** at §90, has been subject to significant reconsideration and qualification at Supreme Court level albeit that this has been underpinned by a detailed consideration of the requirements of EU law:

- ***Walton v. Scottish Ministers*** [2013] PTSR 51
- ***R. (Champion) v. North Norfolk District Council*** [2015] 1 WLR 3710

22. This process was the result of a growing unhappiness by the UK Courts that ***Berkeley*** was being applied over rigorously in a context where the facts were extreme, namely a failure to undertake any EIA at all in a case where EIA was required. Lord Hoffman, who gave the main speech in ***Berkeley***, had given a warning to that effect in ***R (Edwards) v. Environment Agency*** [2008] Env LR 70 at paras. [61]-[64] where the HL upheld both the adequacy of the environmental information and refusal of relief by the lower court on the ground that the air quality forecasts not consulted upon had in any event now been superseded. Carnwath LJ also expressed misgivings in ***Bown v. Secretary of State*** [2004] Env. L.R. 509 at 526, and ***Jones v. Mansfield*** (above) at §59 before developing them in detail in the SC in the two recent decisions.

Walton v. Scottish Ministers [2013]

23. In ***Walton***, Lord Carnwath JSC drew attention to the distinction between that case and the circumstances in ***Berkeley***:

> "131. In the present case, both the statutory context and the factual circumstances are again distinguishable from those applicable in *Berkeley*. The factual differences are dramatic. In *Berkeley* there was no countervailing prejudice to public or private interests to weigh against the breach of the directive on which Lady Berkeley relied. The countervailing case advanced by the Secretary of State was one of pure principle. Here by contrast the potential prejudice to public and private interests from quashing the order is very great. It would be extraordinary if, in relation to a provision which is in terms discretionary, the court were precluded by principles of domestic or European law from weighing that prejudice in the balance.
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> 132. The statutory context, as I have explained it above, is also significantly different from that applicable in *Berkeley*. First, under the 1984 Act, even in respect of EIA, a breach of the regulations does not, as under the planning Acts, render the subsequent decision outside the powers of the Act. It is a breach of the requirements laid down by section 20A, and as such is within the second ground of challenge, but is thus also subject to the need to show "substantial prejudice". Secondly, and more importantly for the purposes of this case, there is nothing to assimilate the requirements of the SEA Directive to the requirements of the 1984 Act, breach of which alone may give rise to a challenge under that procedure. No doubt the adoption of a plan or programme in breach of the SEA Directive would be subject to challenge by judicial review at the appropriate time. But the legislature has not thought it necessary to provide for a separate right of challenge on those grounds in relation to the approval of a subsequent project made under the 1984 Act."

24. Having reviewed the EU authorities, Lord Carnwath then rejected the proposition that they required quashing in all cases and sought instead to align the cases involving breaches of EU law with those under challenge in the purely domestic context (emphasis added):

> "138. It would be a mistake in my view to read these cases as requiring automatic "nullification" or quashing of any schemes or orders adopted under the 1984 Act where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests. As *Wells*[8] makes clear, the basic requirement of European law is that the remedies should be "effective" and "not less favourable" than those governing similar domestic situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered "impossible in practice or excessively difficult". Proportionality is also an important principle of European law.
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> 139. Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source.
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> 140. Accordingly, notwithstanding Mr Mure's concession, I would not have been disposed to accept without further argument that, in the statutory and factual context of the present case, the factors governing the exercise of the court's discretion are materially affected by the European source of the environmental assessment regime."

25. Lord Hope agreed at [156]:

> "156 The scope for the exercise of that discretion in that context is not therefore as narrow as the speeches in Berkeley might be taken to suggest. The principles of European law to which Lord Carnwath refers in para 138 support this approach. Where there are good grounds for thinking that the countervailing prejudice to public or private interests would be very great, as there are in this case, it will be open to the court in the exercise of its discretion to reject a challenge that is based solely on the ground that a procedural requirement of European law has been breached if

[8] ***R. (Delena Wells) v Secretary of State*** (C-201/02) [2004] Env. L.R. 27.

it is satisfied that this is where the balance should be struck."

26. Lord Carnwath's approach was to consider whether the substance of the EU rights had, in fact, been enjoyed in the case and, if so, no different approach should be taken as would be the case in a domestic law procedural challenge. This is based on the EU principle of effectiveness referred to ***Wells*** at [67] and echoes the "substantial compliance" considerations in ***Berkeley*** and ***Edwards***. It also leaves open the prospect of quashing where the breach has had the effect of undermining the rights under EU law. It does not follow from this approach that the outcome in ***Berkeley*** would have been different since the HL found that there had been was no enjoyment in substance of the rights under EU law, but ***Walton*** does make it clear that ***Berkeley*** is not to be taken as a general approach to the exercise of discretion in cases alleging breaches of EU law[9].

R. (Champion) v. North Norfolk DC [2015]

27. The Defendant Council granted planning permission for barley storage silos and a lorry park, on land close to a river which was protected under both UK (site of special scientific importance) and EU law (special area of conservation). The Council decided that neither an EIA assessment nor a Habitats Directive appropriate assessment were required but imposed planning conditions as to the monitoring and restoration of water quality in the drainage network between the site and the river for the express purpose of avoiding harm to the river.

28. The SC found that it was an archetypal case for an EIA and the planning authority's failure to treat the proposal as development requiring such a process was defective and that the defect could not be remedied subsequently since the classification of the proposal was governed by its characteristics and effects as presented to the planning authority and not by steps subsequently taken to address them. Mitigation measures might be considered at the screening stage and it was expressly envisaged by the EIA Directive and EIA Regulations that such measures would, where appropriate, be included in the ES. Having regard to the precautionary principle underlying the Directive and Regulations, and since at that stage the mitigation measures had been complex and doubts remained as to their resolution, the screening opinion constituted a procedural irregularity which was not cured by the final decision. However, the SC declined to quash the decision since the only substantial issue related to the measures to prevent pollution to the river, that the procedural defect had not prevented the fullest possible investigation and the involvement of the public and a different process would not have produced a different result.

29. At paras. [55]-[57], Lord Carnwath JSC considered the CJEU decision in ***Gemeinde Altrip v. Land Rheinland-Pfalz (Vertreter des Bundesinteresses beim Bundesverwaltungsgericht intervening) (Case C-72/12)*** [2014] PTSR 311 where he noted consideration of the issue whether a procedural defect necessarily meant that there had been failure to comply with the Directive. The CJEU ruled (emphases added):

[9] It appears not to resolve the distinct question of "promptness" in CPR Part 54.5 where issues arise as to compliance with the general principle of legal certainty following ***Uniplex (UK) Ltd v. NHS Business Services Authority*** Case C-406/08 [2010] P.T.S.R. 1377. See ***R (Berky) v. Newport CC*** [2012] 2 C.M.L.R. 44.

> "49. Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it. In that case, it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be compromised if, under the law of a member state, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision.
>
> 50. In that regard, it should be borne in mind that article 10a of that Directive leaves the member states significant discretion to determine what constitutes impairment of a right …
>
> 51. In those circumstances, it could be permissible for national law not to recognise impairment of a right within the meaning of sub-paragraph (b) of article 10a of that Directive if it is established that it is conceivable, in view of the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked.
>
> 52. It appears, however, with regard to the national law applicable in the case in the main proceedings, that it is in general incumbent on the applicant, in order to establish impairment of a right, to prove that the circumstances of the case make it conceivable that the contested decision would have been different without the procedural defect invoked. That shifting of the burden of proof onto the person bringing the action, for the application of the condition of causality, is capable of making the exercise of the rights conferred on that person by Directive 85/337 excessively difficult, especially having regard to the complexity of the procedures in question and the technical nature of environmental impact assessments.
>
> 53. Therefore, the new requirements thus arising under article 10a of that Directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant.
>
> 54. In the making of that assessment, it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of Directive 85/337."

30. Lord Carnwath regarded the language used, though different to that in the national courts, was consistent with the approach in ***Walton***:

> "58. …. It leaves it open to the court to take the view, by relying "on the evidence provided by the developer or the competent authorities and, more generally, on the case file documents submitted to that court" that the contested decision "would not have been different without the procedural defect invoked by that applicant". In making that assessment it should take account of "the seriousness of the defect invoked" and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive.
>
> 59. Judged by those tests I have no doubt that we should exercise our discretion to refuse relief in this case. In para 52 of its judgment, the Court of Appeal summarised the factors which in its view entitled the authority to conclude that applying the appropriate tests, and taking into account the agreed mitigation measures, the proposal would not have significant effects on the SAC. That, admittedly, was in the context of its consideration whether the committee arrived at a "rational and reasonable conclusion", rather than the exercise of discretion. However, there is nothing to suggest that the decision would have been different had the investigations and consultations over the preceding year taken place within the framework of the EIA Regulations.
>
> 60. This was not a case where the environmental issues were of particular complexity or novelty.

> There was only one issue of substance: how to achieve adequate hydrological separation between the activities on the site and the river. It is a striking feature of the process that each of the statutory agencies involved was at pains to form its own view of the effectiveness of the proposed measures, and that final agreement was only achieved after a number of revisions. It is also clear from the final report that the public were fully involved in the process and their views were taken into account. It is notable also that Mr Champion himself, having been given the opportunity to raise any specific points of concern not covered by Natural England before the final decision, was unable to do so …
>
> 62 … Although the proposal should have been subject to assessment under the EIA Regulations , that failure did not in the event prevent the fullest possible investigation of the proposal and the involvement of the public. There is no reason to think that a different process would have resulted in a different decision, and Mr Champion's interests have not been prejudiced."

Application of the Walton approach in recent decisions

31. Recent examples of consideration of the ***Walton*** approach show an unwillingness in appropriate cases to quash for technical defects of little substance or where less drastic means of remedy may be available in contrast to the apparently strict approach which appeared to prevail following ***Berkeley***:

    (1) ***R. (Buckinghamshire CC) v Secretary of State for Transport*** [2013] EWHC 481 (Admin) where Ouseley J, whilst holding that SEA did not apply to the Government's White Paper on High Speed Rail (HS2), held that had SEA been applicable, he would have quashed since the report that had been produced would not have assessed the reasonable alternatives to aspects of the infrastructure[10].

    (2) ***McGinty v Scottish Ministers*** 2014 S.C. 81, where the Inner House of the Court of Session declined to quash for failures in consultation on Scottish national planning policy where the failure did not have a substantial effect and issues of need and location of a power station would be considered as open question in the project EIA (paras. [55]-[59]).

    (3) ***West Kensington Estate Tenants & Residents Association v. Hammersmith & Fulham LBC*** [2013] EWHC 2834 (Admin) where Lindblom J. refused to quash for a strict failure to comply strictly with SEA requirements (production of a statement of compliance with SEA process) since the technical error could be readily corrected by a direction (paras. [203]-[209]) which would not be as draconian.

    (4) The ***Ashdown Forest*** case [2015] (above), which concerned the imposition in a local plan of zones restricting development around the designated conservations sites in the Ashdown Forest, where the Court of Appeal rejected the submissions that relief should be used on the basis that it could not be said that quashing would not lead to a different outcome (paras. [52]-[60], Richards LJ) given that the evidence demonstrated the possibility of a different approach.

[10] This issue was not considered or challenged before the SC [2014] 1 W.L.R. 324, which affirmed the decision that SEA was not required in any event.

(5) ***R. (Devon Wildlife Trust) v. Teignbridge DC*** [2015] EWHC 2159 (Admin) Hickinbottom J. refused to quash for failure to screen or undertake EIA because the authority had decided that the relevant information would have to be provided pursuant to the appropriate assessment (AA) to be undertaken under the EU Habitats regime. Although a breach of the EIA regime might materially rob the public of a right to put forward their views on the environmental impact of a particular development, whether it did so depended on the circumstances of the case. Since the planning officer had decided that there was no need for an EIA because the only possible adverse environmental impacts would be considered as part of the AA so that any issues would be dealt with by the mitigating measures as part of that assessment. It was open to the officer to have confidence that the development would not be likely to have a significant adverse environmental effect because it would not proceed unless the AA confirmed that it did not have any such effect[11].

32. Also note the possibility, if flaws are detected at a late stage in the assessment process, it may be possible to remedy them without invalidating the exercise and the subsequent decision to permit: ***Cogent Land LLP v. Rochford DC*** [2013] 1 P. & C.R. 2 approved in ***No Adastral New Town Ltd v. Suffolk Coastal DC*** [2015] Env. L.R. 28 at §§48-60.

33. In the HK context, clearly the EU principles applied in the UK cases are not relevant except to the extent that the Courts may find them echoed within the context of HK law and to the extent that they explain the apparently strict approach of the HL in ***Berkeley*** cited by the CFA in ***Shiu Wing Steel***. However, the importance of the decisions is that the SC has aligned the decisions where EU law is engaged much more closely with the general position on discretion and the apparently restrictive approach to discretion in ***Berkeley*** can now be understood as a decision on its own facts.

David Elvin QC

September 2015

[11] This is a consequence of the Conservation of Habitats and Species Regulations 2010, and European Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, which require the refusal of permission if the AA does not rule out adverse effects on the integrity of the protected site.