ARDAGH GLASS LTD v CHESTER CITY COUNCIL

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

H.H. Judge Mole Q.C.: April 8, 2009

[2009] EWHC 745 (Admin); [2009] Env. L.R. 34

Development; Enforcement; Environmental impact assessments; Local authorities; Planning permission; Retrospective permission

H1 *Environmental assessment—planning permission—enforcement action—whether local authority required to take enforcement action—time when operations "substantially completed" for purposes of enforcement action limitation—whether retrospective planning permission lawful for developments requiring environmental impact assessment*

H2 The claimant (AG) was a company which sought the grant of a mandatory order for enforcement action against the interested party (Q) and also prohibiting planning permission by the defendants (C). Q had commenced development of a very large glass container factory without planning permission in 2003, but applied for permission when the plant was already under construction in 2004. The Secretary of State called in those applications in 2005, by which stage much of the plant was functioning. After the Secretary of State refused planning permission in 2007, Q submitted a retrospective planning application, accompanied by an Environmental Statement. The Secretary of State issued a direction to C not to grant planning permission without express authority. In judicial review proceedings brought by AG, the two questions asked of the court were whether C should be required to take immediate enforcement action and whether planning permission could lawfully be granted for the development. It was common ground that the development was currently unlawful and that if effective enforcement action was to be taken the enforcement notices had to be served within four years of the ''substantial completion'' of the development. It was also common ground that the development could not be lawfully granted planning permission without an environmental impact assessment (EIA). The main issues were (a) when the operations were ''substantially completed'' and (b) whether retrospective ''development consent'' was lawful in such cases. AG contended that to grant retrospective planning permission would undermine the preventive objectives of Directive 85/37, of which the principal one was that effects on the environment should be taken into account at the earliest possible stage and before works were carried out (*Commission v Ireland* (C-215/06) relied upon). C submitted that retrospective planning permission might properly

be granted as, on its true interpretation, Community law did not preclude the regularisation of existing EIA development in exceptional cases.

H3 **Held,** in granting the application:

H4 (1) It would be a betrayal by C of its responsibilities, and a disgrace upon the proper planning of the country, if the development were to achieve immunity because enforcement action was not taken in time. C had made errors of law in considering when a large and complex development, made up of several distinct, though physically and functionally connected, elements was ''substantially complete'', and so whether it was expedient to issue an enforcement notice. Accordingly, a mandatory order would be made requiring C to issue an enforcement notice in respect of the unlawful development requiring the removal of the buildings and works, and cessation of activities.

H5 (2) On a literal analysis, art.2(1) of the Directive did not appear to rule out the possibility of retrospective development consent, provided it was preceded by a full and genuine opportunity for the public to understand the proposals, express their views, and have them taken into account. Whilst that may be much harder to achieve where the development in question was an accomplished fact, it was not impossible and not beyond the reach of a fair-minded decision maker.

H6 (3) The enforcement procedures under English law were effective and well able to take into account and protect the fundamental objectives of the Directive. Whilst English law did leave open the possibility that a pre-emptive developer might achieve immunity without any proper EIA, a purposive interpretation of art.2(1) strongly suggested that for C to permit the development to achieve immunity, whether by a positive decision not to take enforcement action or by mere inaction, would amount to a breach of the UK's obligations under the Directive.

H7 (4) There was a distinction to be drawn between the Irish statutory provisions and procedures that were the subject of the *Commission v Ireland* case and those in England. Retrospective planning permission could lawfully be granted, as long as the competent authorities paid careful regard to the need to protect the objectives of the Directive. The procedures adopted were a matter for the State and once an enforcement notice was issued, the existing procedures were able to ensure compliance with the Directive.

H8 **Legislation referred to:**

Town and Country Planning (General Interim Development) Order 1946
EC Treaty arts 10 and 249
Directive 85/337 (Environmental Assessment) arts 1, 2, 4 and 6 and Annex II
Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1199)
Town and Country Planning Act 1990 ss.55, 57, 73A, 171B, 172, 174, 175, 177, 178, 179, 183 and 191
Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419) arts 4 and 14 and Sch.2
Directive 97/11

Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) reg.25

H9 **Cases referred to:**

Aannamaersbedrijf PK Kraaijveld BV v Gedeputeerde Staten van Zuid-Holland (C-72/95) [1997] All E.R. (EC) 134; [1996] E.C.R. 5403; [1997] 3 C.M.L.R. 1; [1997] Env. L.R. 265

Amministrazione delle Finanze dello Stato v Simmenthal SpA (C-106/77) [1978] E.C.R. 629; [1978] 3 C.M.L.R. 263

Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1) [2001] 2 A.C. 603; [2000] 3 W.L.R. 420; [2000] 3 All E.R. 897; [2001] 2 C.M.L.R. 38; [2001] Env. L.R. 16

Commission v Germany (C-431/92) [1995] E.C.R. I-2189; [1996] 1 C.M.L.R. 196

Commission v Ireland (C-215/06) [2009] Env. L.R. D3

Francovich v Italy (C-6/90) [1991] E.C.R. I-5357; [1993] 2 C.M.L.R. 66; [1995] I.C.R. 722

Marleasing SA v La Comercial Internacional de Alimentacion SA (C-106/89) [1990] E.C.R. I-4135; [1993] B.C.C. 421; [1992] 1 C.M.L.R. 305

R. (on the application of Hammerton) v London Underground Ltd [2002] EWHC 2307 (Admin); [2003] J.P.L. 984; [2002] 47 E.G. 148 (C.S.)

R. (on the application of Prokopp) v London Underground Ltd [2003] EWCA Civ 961; [2004] Env. L.R. 8; [2004] 1 P. & C.R. 31

R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions (C-201/02) [2005] All E.R. (EC) 323; [2004] E.C.R. I-723; [2004] 1 C.M.L.R. 31; [2004] Env. L.R. 27

Rheinmuhlen-Dusseldorf v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel (166/73) [1974] E.C.R. 33; [1974] 1 C.M.L.R. 523

Sage v Secretary of State for the Environment, Transport and the Regions [2003] UKHL 22; [2003] 1 W.L.R. 983; [2003] 2 P. & C.R. 26

H10 *Mr R. McCracken Q.C.*, *Mr J. Pereira* and *Mr G. Jones*, instructed by DLA Piper UK LLP, appeared on behalf of the claimant.

Mr V. Fraser Q.C. and *Mr I. Ponter*, instructed by Denton Wilde Sapte LLP and Hammonds LLP, appeared on behalf of the first and second defendants.

Mr N. King Q.C. and *Mr R. Taylor*, instructed by CMS Cameron McKenna LLP, appeared on behalf of the interested party.

JUDGMENT

H.H. JUDGE DAVID MOLE Q.C. SITTING AS A DEPUTY HIGH

1 **COURT JUDGE:** In this ''rolled up'' application the claimant company, Ardagh Glass Ltd, seeks permission to seek and the grant of first a mandatory order that enforcement action be taken by each defendant council against Quinn Glass Ltd, the interested party, before April 2009 and secondly an order prohibiting the grant or the making of a resolution to grant planning permission,

alternatively a declaratory order that it would be unlawful for the defendants to grant a planning permission for the proposed development.

2 Throughout this judgment I refer to Chester City Council and Ellesmere Port and Neston BC as the ''defendant councils''. I am aware that on April 1, 2009 those councils' responsibilities devolve upon another authority, Cheshire West and Chester BC. It was, I think, agreed by all counsel that the burden of any order I were to make would fall upon that council as successor to the defendant councils and there was no need to make any specific reference to the new body. I therefore do not do so.

History

3 This case is a further chapter in the history of the Quinn Glass works at Elton, near Chester. Quinn Glass is a major manufacturer of glass and wished to set up business in England. The Elton works were designed to be the largest glass container factory in Europe. The site had previously been occupied by a power station. It lies partly within the area of Chester City Council and partly within that of Ellesmere Port and Neston BC. The construction and operation of this plant required, amongst other authorisations, the grant of planning permission. Those authorisations were not obtained in advance.

4 Quinn Glass acknowledges that it took a calculated risk in commencing the development without permission. There is a difference between the parties about the degree of risk that was involved. There was permission for a smaller development. It was thought that could be amended to permit the proposed development, which Quinn Glass was, by then, carrying out. The local planning authorities purported to amend the permission but that amended permission was ultimately quashed following an application by the claimant, Ardagh Glass Ltd (formerly known as Rockware Glass Ltd), another glass manufacturer and competitor to Quinn Glass.

5 Site enabling works for the development began in October 2003. New applications for planning permission were made in July 2004 when the plant was already under construction. The Secretary of State called in these applications for determination on March 2, 2005. By this stage much of the plant was functioning. Mr O'Reilly, the Health and Security Manager of Quinn Glass, in his written statement dated June 16, 2005 records that the furnace was fired up on April 11, 2005 and produced the first glass for customers on May 2, 2005.

6 An inquiry was held over various dates from November 22, 2005 to March 27, 2006. The inspector produced a comprehensive report on July 13, 2006 and recommended that planning permission should not be granted. The Secretary of State ultimately accepted that recommendation and refused planning permission on January 22, 2007. The Secretary of State agreed that the application site should be should be treated as if it were yet to be built, on a cleared brown field site (decision letter, para.19). Like the inspector, and for the same reasons, the Secretary of State did not weigh in the planning decision the fact that Quinn Glass had constructed the development without first securing planning permission or an IPPC permit. However the Secretary of State did give some

limited encouragement to the proposition that the matters that had led to refusal could be addressed in a new application.

7 At the beginning of 2008 Quinn Glass submitted a retrospective planning application, accompanied by an Environmental Impact Statement, to the defendant councils. In June 2008 the Secretary of State used her power under art.14 to direct the defendants not to grant planning permission without express authorisation.

The Issues — Summary

The first issue — the timing of enforcement action.

8 It is common ground that the Quinn Glass development is currently unlawful development. If effective enforcement notice action is to be taken against Quinn Glass the enforcement notices must be served within four years of the substantial completion of the development. In the claimant's view, and the council's view until recently, that means by April 2009. In the defendants' view, on a proper interpretation of the law, that means by November 2009, at the earliest. The claimant says that, because there is a real risk that April 2009 is the correct date, a precautionary approach should be taken. The defendants are unwilling to issue enforcement notices. They should be ordered to do so. The defendants say that it is for them to decide whether and when it is expedient to take enforcement action against Quinn Glass. It cannot be said that their decision not to take immediate action is beyond the range of choices open to them on the facts.

The second issue — whether the Defendants or the Secretary of State may lawfully grant planning permission for the Quinn Glass development.

9 It is common ground that the Quinn Glass development is such that it cannot lawfully be granted planning permission without an environmental impact assessment (EIA).

10 A new application for planning permission, supported by an EIA, is currently before the defendants. The defendants intend to determine that application shortly. The Secretary of State has issued a direction to the defendants prohibiting them from granting permission without express authorisation. Given that the development has already taken place and is in operation, such a permission would be retrospective.

11 The claimant submits that to grant retrospective permission would undermine the preventive objectives of Directive 85/337, of which the principal one is that effects on the environment should be taken into account at the earliest possible stage and before the works are carried out. The UK domestic provisions that permit the grant of retrospective permission do not properly incorporate the Directive. The defendant planning authorities are obliged to take the measures necessary to remedy the failure to carry out an EIA before undertaking works. That means taking enforcement action and issuing a stop notice. To grant permission would be unlawful. The claimant relies upon the case of *Commission v Ireland* (C-215/06).

12 The defendant councils and Quinn Glass submit that retrospective planning permission may properly be granted. On its true interpretation Community law does not preclude the regularisation of existing EIA development in exceptional cases. It is for the local planning authorities to decide if the case is exceptional. It would be disproportionate to require the removal of every EIA development that had failed to get consent in advance, without regard to its circumstances and in particular whether it would be detrimental to the objectives of the directive.

The First Issue

The Law

13 The starting point is that by virtue of s.57 of the Town and Country Planning Act 1990 planning permission is required for development. Development is defined in s.55 and includes "building and engineering operations". What amounts to an operation is a matter of fact and degree. As has often been observed, it is unlawful to develop without permission in the United Kingdom and the development that is thus carried out is unlawful development. It is not, however, a criminal offence. Parliament expressly considered and rejected such a course in drafting the legislation.

14 The power to issue an enforcement notice is found in s.172(1):

> "The local planning authority may issue a notice (in this Act referred to as an 'enforcement notice') where it appears to them -
>
> (a) that there has been a breach of planning control; and
>
> (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations."

15 A time limit for enforcement action is set by s.171B:

> "(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.
>
> (2) . . .
>
> (3) . . .
>
> (4) The preceding subsections do not prevent-
>
> (a) .. or
>
> (b) taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach."

16 Operations will become lawful if no enforcement action may be taken in respect of them because time has expired. (See s.191(2)(a)).

17 An enforcement notice may be backed up by a Stop Notice:

> "183 (1) Where the local planning authority consider it expedient that any relevant activity should cease before the expiry of the period for compliance with an enforcement notice, they may, when they serve the copy of the

enforcement notice or afterwards, serve a notice (in this Act referred to as a 'stop notice') prohibiting the carrying out of that activity on the land to which the enforcement notice relates, or any part of that land specified in the stop notice.''

18 Section 73A(1) confirms that development will become lawful development if it is permitted retrospectively.

''73A Planning permission for development already carried out

(1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.
(2) Subsection (1) applies to development carried out-
(a) without planning permission;''

19 On an appeal to the Secretary of State under s.174, there is a deemed application under s.177(5) for planning permission and power under ss.177(1)(a) and (3) to grant planning permission for the matters constituting a breach of planning control. However, where the development in question is EIA development, there is no power to do so without first undertaking an EIA. (See Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 reg.25(1).)

20 In the present case, therefore, the Quinn Glass development would become immune from enforcement action and lawful if no enforcement notices were served before the end of four years beginning on the date on which operations were ''substantially completed''. The question is, when were the operations in connection with the Quinn Glass development ''substantially completed''?

21 In the case of *Sage v Secretary of State for Environment, Transport and the Regions* [2003] 1 W.L.R. 983, the House of Lords considered the meaning of the phrase in s.171 B (1) of the 1990 Act ''the operations were substantially completed''. The building in question in that case was said by Mr Sage to be an agricultural building. The inspector who saw it rejected that proposition. He thought it best described as a dwelling house in the course of construction. It was, however unfit for habitation. The ground floor was rubble, there were no service fittings or staircase, the interior walls were not plastered and the windows were unglazed.

22 Lord Hobhouse said:

''[23] When an application for planning consent is made for permission for a single operation, it is made in respect of the whole of the building operation. There are two reasons for this. The first is the practical one that an application for permission partially to erect a building would, save in exceptional circumstances, fail. The second is that the concept of final permission requires a fully detailed building of a certain character, not a structure which is incomplete. . ... As counsel for Mr Sage accepted, if a building operation is not carried out, both externally and internally, fully in accordance with the permission, the *whole* operation is unlawful. . . .

> [24] The same holistic approach is implicit in the decisions on what an enforcement notice relating to a single operation may require. Where a lesser operation might have been carried out without permission or where an operation was started outside the four-year period but not substantially completed outside that period the notice may nevertheless require the removal of all the works including ancillary works: . . .
> [25] These decisions underline the holistic structure of planning law and contradict the basis upon which the Court of Appeal reached its decision in favour of Mr Sage.''

23 Lord Hope said (in [6]),

> ''. . . it makes better sense of the legislation as a whole to adopt the holistic approach which my noble and learned friend has described. What this means, in short, is that regard should be had to the totality of the operations which the person originally contemplated and intended to carry out. That will be an easy task if the developer has applied for and obtained planning permission. It will be less easy where, as here, planning permission was not applied for at all. In such a case evidence as to what was intended may have to be gathered from various sources, having regard especially to the building's physical features and its design.''

The "Substantial Completion" of the Quinn Glass development

24 The development Quinn Glass applied for retrospectively is described in the application as ''the construction of a glass container manufacturing, filling and distribution facility and associated works''. I was taken to the Quinn Glass ''Proposed Illustrative Master Plan'' dated January 25, 2008 and two aerial photographs taken prior to the end of April 2005. Together they enable the identification of some of the elements of the development such as the production building, the batch plant, the tank farm, the warehouse building, the filling hall and its storage, the new administration building and the pre-existing retained office buildings.

25 Useful elaboration on the function of these buildings was provided by Mr Adrian Curry's statutory declaration. He has been the Operations Director and General Manager of Quinn Glass Ltd since 2004. He explained that the production building was split into two bays, each housing one furnace and each serving its own production lines, six on one furnace and seven on the other. The first furnace (Furnace B) was in production by May 2005. In January 2006 glass production had reached 43 per cent of its total capacity. The second (Furnace A) was in production by February 2006.

26 A document headed Site Inspection Notes from the building surveyors Mr Large, Mr Rogers and Mr Courtney was produced by the defendant councils following a request by the claimant. It revealed a series of inspections starting on March 22, 2004 and continuing with several visits every month until the end of November 2004. There was then a gap, whether in the inspections or in the records was unclear but the latter seems more likely. The next record of a visit was on March 24, 2005 and discussed ''temporary walling to divide the existing

construction work to the first-floor''. After that, the only note of an inspection was on June 16, 2005. It was recorded that ''production hall phase 1 oven in operation and glass bottles being produced and stored in the phase 2 side at first-floor''. (This accords with the statement of Mr O'Reilly mentioned above, which, it will be noted, was made on the same day.) It was also noted that ''offices at first-floor now being partly utilised . . .''.

27 No explanation has been given for the absence of any notes for December 2004 and January, February, April and May 2005. This is a particularly unfortunate absence, given the potential importance of April and May for the defendant councils' consideration.

28 Mr Brian Hughes is Chester City Council's Development Coordination Manager and a Senior Planning Advisor to the Council, with responsibility, amongst other things, for advising the council on matters relating to the determination of planning applications and enforcement. He set out in his witness statement of February 23, 2009 his recollection of consideration of enforcement action by Chester City Council.

29 He said that the question of the four-year rule and the possibility that the Quinn Glass development would achieve immunity was first raised in a Report of April 25, 2007. He had taken the view then that the point at which production of glass containers started would be a relevant and appropriate date. This would be April 2005. He recorded Quinn Glass's view, based on the *Sage* judgment that, the start date would not be before January 2006 but he said that did not persuade him. He recommended to the council that it was not expedient to take immediate action but the council must nevertheless be careful that it did not lose the ability to control the operation of the site. The position must be kept under regular review. Mr Hughes explained that he felt that this was a sufficiently precautionary approach. He did not examine the matter further at that stage.

30 In the autumn of 2008 he reconsidered the need for enforcement action again. He took counsel's advice and discussed the matter with his colleagues at Ellesmere Port Council. He said that it was at that stage that the question of what constituted ''substantial completion'' in the light of *Sage* emerged. He said that he,

> ''formed the view that as the development to be enforced against consisted of three distinct but integrated operations within a single planning unit, it may well be that substantial completion would only take place once all the constituent elements were completed to a point where it was possible to carry out all of the operations — ie the manufacture of glass containers, filling of glass containers and distribution''.

31 My attention was drawn by Mr McCracken Q.C. to Mr Hughes's letter of August 12, 2008 to the claimant's solicitors in which he said,

> ''discussions on the implications of the assertion by Quinn Glass that the date for substantial completion should be January 2006 were held between officers of the Council and counsel but no records were retained of that discussion''.

Mr Fraser Q.C., on behalf of Chester City Council told me that statement was simply wrong and offered Mr Hughes' apologies. He did not offer any explanation how Mr Hughes came to say it.

32 The letter continued,

> ''the decision to establish April 2005, and by this I am taking it to mean the beginning of April, as the date for substantial completion was based on the operational knowledge of officers who have been involved with the site. While I appreciate that the point of substantial completion may be open to interpretation, I am satisfied that in adopting this date, the Council is taking a proper precautionary approach to this matter. As you will note, Quinn are on record, and this was set out in the report of the 25 April 2007, that in their view substantial completion was January 2006.''

33 He said that if the council considered it expedient to take enforcement action, ''action will be taken before April 1, 2009''.

34 In his report to committee dated January 28, 2009 he recalled his earlier advice and Quinn Glass's response to the PCN. He reported the advice he had received from counsel, Mr Ponter and Ms Reid on December 17 thus,

> ''substantial completion (and therefore the beginning of the four-year period for taking enforcement action) will occur when the totality of the works necessary to give the structure its character as a glass manufacture, filling and distribution facility have taken place''.

He continued (para.4.4),

> ''having considered the Quinn Glass's response to the PCN, the statutory declaration supplied by Quinn Glass, the Council's building control records, and third party material (press articles associated with contractors involved in the construction process) officers are satisfied that substantial completion will not occur before November 2005. Therefore the development will not achieve immunity from enforcement action until November 2009.''

35 Mr Hughes then proceeded to consider the need for enforcement action and reminded members that the outcome of the planning application was not yet resolved. Members might decide against it. The Secretary of State might call it in. There could be significant delay, so it was imperative for the council to keep the need for enforcement action under review.

36 Mr David Rees, Senior Planning Officer in the Development Control Unit at Ellesmere Port and Neston BC, made a witness statement. He explained that the position of that borough was very similar to that of Chester City Council. The report dated June 12, 2007 to the planning committee set out (at para.6.13) Mr Rees' then view that the development was substantially completed when production started, which was understood to be April or May 2005. If so, he said it would be possible to take enforcement action at any time before May 2009. He repeated this view in his report to committee dated October 14, 2008. However, in his report of February 10, 2009, Mr Rees told his committee that ''(Quinn's) response to the PCN, together with other available information, had shown there was clear evidence to indicate that the substantial completion of the devel-

opment had not taken place before November 2005'' and therefore the development would not become immune until the end of October 2009. He also advised that it was essential to keep the matter under review. The committee resolved not to take enforcement action at that time.

Submissions

37 Mr McCracken submitted on behalf of the claimant that the Quinn Glass Works is EIA development, carried out ''at risk'' in breach of domestic planning control and in breach of EIA Directive 85/337 art.2 (1), which requires that before consent is given, projects likely to have significant effects on the environment must be subject to environmental assessment and obtain development consent. That means that an applicant cannot lawfully commence the works in question before he carries out the EIA and obtains development consent, if the requirements of the Directive are not to be disregarded. (See *Commission v Ireland* (C-215/06) at [51].)

38 The court and the defendant councils are required to take enforcement action to nullify that breach of law. (See *Francovich v Italy* (C-6/90) [1991] E.C.R. I-5357 at [36].) The appropriate enforcement action is the issue of an enforcement notice and a stop notice. While it would normally be a matter for the defendant councils to decide whether it is ''expedient'' to issue an enforcement notice (see s.172 (1) (b) Town and Country Planning Act 1990) the defendant councils or the court must interpret that discretion as a duty in order to achieve the purposes of the directive. (*Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) [1990] E.C.R. I-4135 at [8].) The defendant councils have clearly been contemplating enforcement action for some time and the claimant has been holding back in the hope that they would take it. Now the time limit for enforcement action is rapidly approaching. There is a strong case for saying that on a proper interpretation of *Sage* at least part of the building works were completed when glass manufacture began in April or May. This was until recently regarded as being a tenable view, at least, by the councils.

39 The documents and statutory declaration provided by Quinn Glass in response to the planning contravention notice do not justify the view that substantial completion cannot have taken place until November 2005. On the service of the enforcement notice, Quinn Glass, or perhaps their successors, cannot be prevented from appealing to the Secretary of State on the ground that, at the date the enforcement notice was issued, no enforcement action could be taken in respect of one or more breaches of planning control constituted by the matters stated in the notice. (Section 174(1)(d).) That will then be a matter to be determined, as a matter of fact and degree, by the Secretary of State or his inspector on the evidence put before them. Nothing now said by Quinn Glass can prevent that company or its successors from claiming on appeal that one or more of the component structures had been substantially completed at an earlier date than the date Quinn Glass currently asserts and that structure has therefore achieved immunity from enforcement action. The noticeable and unexplained gaps and contradictions in the evidence so far produced by Quinn Glass and the defendant

councils leave open the real possibility that records or witnesses may be put forward later to support a different evidential case for the date of substantial completion of components of the development.

40 The only safe and ''precautionary'' approach that would prevent a serious breach of the objectives of the Directive, is to issue an enforcement notice immediately, before the defendant councils resolve whether to grant planning permission or not.

41 It was difficult to see how the defendant councils could first resolve to grant permission and then take enforcement action. To issue and then withdraw an enforcement notice in the expectation that this would start the four-year countdown running again, as counsel had advised, would be a most uncertain manœuvre. Enforcement action must be taken first.

42 Mr Vincent Fraser Q.C. submitted that the law left to the defendant councils the function of deciding whether it was expedient to issue an enforcement notice. It was clear that both authorities had considered the issue of enforcement action very carefully. Both authorities clearly understood the importance of keeping the question of timing under review. The councils had examined all the material available to them and had taken legal advice about the meaning of ''substantially completed''. It could not be said that either authority had misdirected itself or acted irrationally. The conclusion both councils had reached, namely that it would not be necessary to take enforcement action before October 2009, was well within the range of their discretion. Indeed, Mr Fraser went further and submitted that on the basis of the objective information before the court any concern that substantial completion had occurred before October or November 2005 could be excluded.

43 Mr Fraser did, however, end his submissions by saying that if I were to conclude that, contrary to his submissions, there was a risk that Quinn Glass might acquire immunity before November 2009, the councils would not resist any indication from the court as to the action they should take.

44 Mr Neil King Q.C., on behalf of Quinn Glass, adopted Mr Fraser's submissions on this issue. He submitted that it was wrong to suppose that it would necessarily take many more months before planning permission would be granted. Both Quinn Glass and the defendant councils wished to take the applications to committee before the end of the month, if they were allowed to do so. It was perfectly possible that the Secretary of State would not decide to call the application in. Such matters should be left to the discretion allowed by statute to the planning authorities.

45 I asked Mr King to assist my understanding of the disadvantages to Quinn Glass that would flow from the issue of an enforcement notice. After taking instructions he told me that Quinn Glass had already been contacted by a number of its major customers who had been concerned by reports that they had seen in the newspapers about the company's planning difficulties. It had been necessary for Quinn Glass to hold meetings to reassure its customers that no interruption in business was anticipated. In addition, some employees had recently started to ask whether they should turn up for work. The issue of an enforcement notice would further undermine both the confidence of its customers in the company's ability

to service them and the stability of jobs at the plant. A bundle of documents were put in evidence in support of these contentions. They included solicitors' letters directed to various newspapers that had published reports that Quinn Glass found objectionable.

Consideration

46 Mr Rose, a concerned local resident, in his witness statement, said that it would be disgraceful if the Quinn Glass development were to achieve immunity because enforcement action was not taken in time. I entirely agree with him. It would be a betrayal by the planning authorities of their responsibilities and a disgrace upon the proper planning of this country. Although the defendant councils have not expressed themselves in such emphatic terms they also, it seems to me, acknowledge that immunity must not be permitted to arise. This is an important factor in the planning authority's consideration of the expediency of taking enforcement action and one which strongly suggests a cautious or precautionary approach.

47 Expedience as a test suggests the balancing of the advantages and disadvantages of a course of action. The advantage of taking enforcement action by issuing an enforcement notice is that it will at once prevent immunity arising at least for another four years and it will avoid the need for certainty about the date of substantial completion of the plant.

48 It is to the *Sage* case and its application to the Quinn Glass plant that I now turn. The view of the councils is that ''*substantial completion . . . when the totality of works necessary etc*'' this view is said to be distilled from the speeches of their Lordships in *Sage*.

49 The starting point is s.171B. No enforcement action may be taken against a breach of planning control consisting in the carrying out of building engineering, mining or other operations on land after the end of the period of four years beginning with the date on which the operations were ''substantially completed''. The first issue will be what are ''the operations'' in question? That will depend upon the facts and circumstances of each development. In the case of a simple development, the erection of a single dwelling house for example, the answer may be clear: in such a case the operations are the operations to build a house.

50 But even a straightforward development can involve several elements that are or may be distinct operations; for example, a single dwelling, with a quarter-mile long access road and a 4-metre high, 100-metre long planted noise bund along the edge of the nearby motorway, might well be regarded as one building operation and two engineering operations. A complex development, a housing or an industrial estate, a shopping centre or a manufacturing plant is highly likely to have the potential to be regarded as many operations, even though they are comprehended in one planning application. This is well recognised. The possible need to tie the various operations together, so that the local planning authority does not end up faced with incomplete development but a number of completed but immune elements, is something commonly addressed in planning conditions.

51 It is important not to lose sight of what the *Sage* case was about. The development in question was a single incomplete dwelling house. In such a straightforward case it is easy to apply the holistic approach described by Lord Hobhouse. That, it seems to me, is clearly what Lord Hobhouse was saying. In [23] he said:

> ''When an application for planning consent is made for permission for a *single operation*, it is made in respect of the whole of the operation.'' (emphasis added)

52 In [24] he said,

> ''the same holistic approach is implicit in the decisions on what an enforcement notice relating to a *single operation* may require'' (emphasis added).

53 What Lord Hope of Craighead said at para.6 of his speech must also be read in that light:

> ''What this means, in short, is that regard should be had to the totality of the operations which the person originally contemplated and intended to carry out. That will be an easy task if the developer has applied for and obtained planning permission. It will be less easy where, as here, planning permission was not applied for at all.''

54 I do not read that as meaning that in every case the totality of all the operations included in the planning application must be substantially completed before any element becomes immune. That is not what Lord Hope said. He said *regard* must be had to the totality of the operations. In the straightforward case that he was considering, having such regard to the totality of the operations Mr Sage contemplated, it was found to be clear that those operations were intended to produce one dwelling house. Those operations had not been substantially completed. Neither Lord Hope nor Lord Hobhouse were saying that, faced with a complex development, and having regard to the totality of the operations contemplated and intended to be carried out, the conclusion would still necessarily be that it all amounted to one set of operations all of which needed to be substantially completed before time began to run. Nothing they said rules out the possibility that having regard to the totality of the development leads to the conclusion that the development is made up of several distinct elements, each one of which is carried out by means of its own separate and distinguishable operations and each element of which is capable of being substantially completed and (in the absence of a condition to the contrary) acquiring its own immunity.

55 Whether on appeal that would or would not be the right analysis of the development would, I repeat, be a matter of fact and degree for the inspector or Secretary of State. The point is not that the inspector or Secretary of State would necessarily find that a holistic approach would lead to identifying different elements as having been substantially completed at different times. The point is that, in my view, nothing said in *Sage* would prevent the Secretary of State from reaching that view as a matter of fact and degree.

56 In my judgement *Sage* does not support the proposition that, in respect of a very large and complex development, made up of several distinct, though physi-

cally and functionally connected, elements, substantial completion cannot be achieved for any part of it until the totality of all the operations are complete. And yet this appears to me to be at the heart of the defendant councils' consideration of the timing of enforcement action. That involves an error of law.

57 It is not necessary to go that far, however. It is enough that the view I have expressed of the law may be right and that therefore on an appeal against an enforcement notice served before October 2005 the Secretary of State may reasonably hold on the law and the facts that components of the Quinn Glass development have become immune. Mr McCracken is right, in my view, both in his submission that this, as a matter of law is a possibility and that if substantial components—Furnace B and its immediate ancillary development, for example—were found to be immune, that could change substantially the planning balance in favour of granting permission. It does not appear to me from the committee reports that the defendant councils have contemplated that there is a real possibility that the legal advice they have received may prove to be wrong. They have not considered what action they should take to guard against that eventuality.

58 Mr Fraser says that there is really no need to guard against it because it is objectively clear as a matter of fact that the Quinn Glass development is all one totality of which substantial completion cannot have been reached as early as April 2005. That is not a conclusion that I would be prepared to reach on the facts. It is unrealistic to look at an aerial photograph of a development of this enormous size, to observe that various edges of the development are plainly not complete and to infer that therefore there is no separately distinguishable element substantially completed beneath the visible shell. On the contrary, there are clear indications that important parts of the business were functioning. Furnace B was producing glass for sale by May 2005. The warehouse was not complete by then but the glass produced was being stored somewhere. The note of June 16, 2005 records that the bottles were ''stored in the phase 2 side at first-floor'' and ''the offices at first-floor'' were ''being partly utilised''. (See [26] above.) The ability, beneath the roof, to wall off the works of construction while other activity gets going is demonstrated by the comment on March 24, 2005 about temporary walling. It was not suggested that the councils have access to any significant additional information that has not been disclosed and which would paint a clearer picture.

59 Mr McCracken also argues that the councils should issue a stop notice. This, as it seems to me, relates more to his second point based upon EC law, to which I shall shortly turn, rather than this first issue. It is not necessary, in order to ensure that the Quinn Glass development does not become immune, that a stop notice be issued; an enforcement notice is enough.

Timing

60 It is submitted by Mr Fraser on behalf of the defendant councils that the application is premature. It is for the councils to determine when enforcement action should be begun. They are plainly considering the matter in a way that cannot be said to be unreasonable. They are fully aware of their responsibilities. The court

does not need to intervene. Mr King, for Quinn Glass, supports this contention and adds in the alternative that the challenge is already over four years out of time. He points out that the claimant has been attempting to persuade the defendant councils and the Secretary of State to exercise their enforcement powers for years. The same arguments were raised long ago. The claim could have been brought at any time since the purported amendment planning permission was quashed in July 2004. To allow it now would give rise to significant prejudice to Quinn Glass, as set out in Mr Kitson's written statement.

61 Mr McCracken responded that it is not easy to say from when the time for a challenge for a failure to take enforcement action can be said to run. This challenge was made promptly once it was obvious that the defendant councils were to further defer a decision on enforcement action beyond the date when it was arguable that immunity might begin to arise. It would not have been sensible to start proceedings while there was still a prospect that either the councils or the Secretary of State might take timely enforcement action. Quinn Glass had obtained far more advantage from the delay than it had suffered disadvantage. The application raises a difficult and very important point of general application that should be resolved.

62 I am not persuaded that it would have been sensible for the claimant to bring this action earlier. I see that the point of law was always there but there was a real possibility that the practical issues would be resolved by action by the planning authorities, casting the point of law into a different light and making its litigation premature. In such circumstances I adopt with gratitude the flexible and commonsense approach of Ouseley J. in *R. (on the application of Hammerton) v London Underground Ltd* [2002] EWHC 2307 (Admin):

> "199. If I had been of the view that there had been a lapse of more than three months since grounds arose, I would have extended time. Mr Clayton would be either too early because he ought to await a reviewable decision of the planning authorities, which might help this defendant today whilst storing up trouble for the future, or too late because he had to start proceedings by 9th May or in relation to those arguments which arise from the listing of the viaduct, 8th June. I do not consider that where there is such a dilemma, courts should be astute to penalise the claimant; rather a flexible and commonsense approach is called for. This case also raises issues of importance and it is much more sensible for them to be resolved now rather than perhaps later. In saying that, I do recognise that a decision not to take enforcement proceedings could be couched by the councils in such a way as to avoid expressing any concluded view on whether the planning permission had lapsed. But the possibility of that perhaps tactical decision does not alter my view."

Discretion

63 In considering the exercise of my discretion to order the commencement of enforcement action it seems to me that the balance of advantage is all one way. I have in mind the points made by Mr King on behalf of Quinn Glass. I

do not find them persuasive. They show firstly that the issue of enforcement notices at this stage is unlikely to make much difference to Quinn Glass's customers and employees, who are already aware of the company's possible difficulties. But so far as it does, it is a foreseeable consequence of the decision to run the risk of developing without consent. They also show that Quinn Glass is capable of looking after itself so far as the press is concerned. (Whether their solicitors' letters would be more effective if they were more legally accurate, I cannot say.) It seems to me that there are pressing reasons for taking enforcement action now.

Conclusion on the First Issue

64 I conclude that the councils have made errors of law in their consideration of whether it is expedient to issue an enforcement notice on the Quinn Glass development. Time is now short. I grant permission for the application. There will be a mandatory order to both councils and their successors to issue within 14 days of this judgment an enforcement notice in respect of the unlawful Quinn Glass development.

65 In written representations in response to the draft judgment my attention has been drawn to the provisions of s.173(11) of the 1990 Act. These provide that where an enforcement notice could have required any buildings or works to be removed or any activity to cease, but does not do so, and the notice is complied with, planning permission is to be treated as having been granted for those buildings, works or activities not required to be removed. I must acknowledge the theoretical possibility that the enforcement notices I have just ordered might fail to require the removal of the glass container manufacturing, filling and distribution facility and its associated works and fail to require the cessation of the activities of glass manufacturing and filling and distribution, with the effect that retrospective development consent would follow in flagrant (because conscious) breach of the Directive. Such enforcement notices would defeat the whole purpose of the order I have just made so comprehensively that they not only be unlawful for the reasons I set out but would almost certainly amount to a contempt of court.

66 Lest there be any doubt I order that the enforcement notices require the removal of the Quinn Glass buildings and works and the cessation of the Quinn Glass activities. No less than that would meet the point. To that extent there is no avoiding interference with the defendant councils' discretion under s.173. Subject to that, it is not for me to draft the enforcement notices. I expect the defendant councils or their successor, as responsible bodies, to respect the tenor of this judgment and to draft their notices in the light of it. It will be for them to word their notices and determine those matters left to them under s.173.

The Second Issue

67 The starting point for Mr McCracken Q.C.'s submissions was that the Quinn Glass project was acknowledged to be development requiring an assessment of its environmental affects before the grant of development consent, falling as it

did within Appendix 2, Sch.2 of the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988. (It was EIA development.) By virtue of reg.4(2) planning permission may not be granted for such development unless the decision maker has first taken into consideration the EIA and any representations made in respect of it. Those regulations purport to be the means whereby the United Kingdom transposed into domestic law the requirements of the EIA Directive 85/337. The United Kingdom was obliged to bring about this transposition by virtue of arts 10 and 249 of the EC Treaty. There further arises upon the State, which includes a local authority or a court, the obligation to take such action as will nullify any breach of community law. (See *Francovich v Italy* (C-6/90) [1991] E.C.R. I-5357 at [36].) This may be achieved by the interpretation of national law in the light of the wording and purpose of the directive, if possible. If it is not possible, then it is European law that must be applied. (*Marleasing* [1990] E.C.R. I-4135 at [8].) A national law in conflict with the directive must be set aside. (*Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] E.C.R. 629 at [21]–[22].)

68 I was taken to EC Directive 85/337. Article 2 (1) requires member states to adopt all measures necessary to ensure that before consent is given projects likely to have significant effects on the environment are made subject to an assessment. A glass works is such a project by virtue of art.4, Annex II 5(2). This assessment may be incorporated into existing procedures for obtaining consents to projects (see art.2(2)). The procedures are to ensure not only that the public is given the opportunity to express an opinion about the development but also that the opportunity should be given before the development is carried out (art.6(2)). While it is for the authorities of the Member State to take necessary measures to ensure those projects that require it are subject to an assessment, those measures may include revocation or suspension of a consent already granted (see *R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* at [65]). The only way to achieve that purpose where EIA development has already been carried out is to require it to be removed or to stop. That means, in England, the service of an enforcement notice backed by a stop notice. It is possible to exempt a specific project in exceptional circumstances (art.2(3)). That provision is subject to a number of conditions. In the present case, no authority has yet given its mind to the question of exemption under art.2(3), let alone to the satisfaction of the conditions laid down. Those conditions are to be applied strictly (see *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603 HL). If there were to be an exception made for retrospective planning permission it should have been transposed into the regulations. References to possible "regularisation" were to be read in that light. In the absence of any such provision, the inevitable result must be that the offending project would have to be physically removed. In answer to my question, he confirmed that his submission would be the same in a case where it was evident, because of a full and persuasive post-development EIA and a thorough consideration by the planning authority, that development consent and rebuilding could immediately follow demolition. Such a strict approach was justified by the deterrent effect it would have and the difficulties of reaching

a judgement that was genuinely unaffected by the existence of the unpermitted development.

69 Mr McCracken's central submission was that on its proper interpretation EC law does not permit the grant of retrospective planning permission for EIA development. It would be even more offensive to EC law for the defendant authorities to allow Quinn Glass to obtain immunity through their inaction. This submission was based upon the case of *Commission v Ireland* (C-125/06), which considered the enforcement regime in that country. While there are important differences between the legislation of the Republic of Ireland and the United Kingdom, the Irish regime is the stricter and the authority of *Commission v Ireland* is even more compelling under UK law. The case of *R. (on the application of Prokopp) v London Underground Ltd* [2003] EWCA Civ 961 is distinguishable; if it is not distinguishable it ought not to be followed, as it is manifestly incompatible with European law, in which case this court is not bound by the decision of a higher domestic court. (*Rheinmuhlen-Dusseldorf v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* [1974] E.C.R. 33.)

70 Mr McCracken's conclusion was that I should order the issue of an enforcement notice backed by a stop notice directed to Quinn Glass and I should make a declaration that neither defendant and authority (nor, indeed, the Secretary of State) had the power to grant retrospective planning permission.

71 Mr Vincent Fraser Q.C. submitted that, as a matter of domestic law, it was plainly lawful to grant retrospective planning permission and there were powerful reasons for doing so, both in general and in this particular case. The current application is now the subject of a comprehensive environmental statement which covers both the development already undertaken and certain proposed new development. As for *Commission v Ireland*, it is important to appreciate that it was the Irish system that was under challenge and that case ought not to be read as establishing some broader principle. There were significant differences between the English and Irish legislation and it would be unsafe to equate them.

72 *Commission v Ireland* accepts that retrospective regularisation of EIA development is permissible. The existing English statutory provisions, such as s.73A, are the rules that permit regularisation. Nothing more is needed.

73 To insist on removal in every case would be quite disproportionate. It is clear that this was a point raised in *Commission v Ireland*, less clear how the European Court dealt with it, unless it was by permitting regularisation in an appropriate case. In the current case, if it were necessary to determine that there were exceptional circumstances, there were good grounds for so doing. These grounds were matters of which the defendant councils and the Secretary of State were well aware. Therefore the question becomes whether, at this stage, the court could hold that neither the defendant councils (nor the Secretary of State) could reasonably conclude that exceptional circumstances justifying retrospective regularisation exist. On the evidence it is not possible to reach such a view.

74 Mr King Q.C. adopted Mr Fraser's submissions on this point while helpfully elaborating them. He emphasised that a decision not to enforce was not a ''development consent''; it does not entitle the developer to proceed with the

development in question and therefore the procedural requirements of the directive would not be engaged by it. *Prokopp* was binding on this court. It was not distinguishable, nor is it inconsistent with *Commission v Ireland*.

The Law

75 The relevant Articles of Directive 85/337 as amended are these:

Article 1

"(2) For the purposes of this Directive:

'project' means the execution of construction works or of other installations or schemes . . ..,

'development consent' means: the decision of the competent authority or authorities which entitles the developer to proceed with the project."

76 Article 2 provides, so far as relevant:

"2(1) Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

2(2) The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive . . .

2(3) Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

6(2) Member States shall ensure that: any request for development consent and any information gathered pursuant to Article 5 are made available to the public, the public concerned is given the opportunity to express an opinion before the project is initiated."

77 The preamble to Directive 97/11 includes:

"Whereas projects for which an assessment is required should be subject to a requirement for development consent; whereas the assessment should be carried out before such consent is granted;"

(Not, it will be noted, "before the project is initiated".)

The Irish Legislation

78 The Commission's complaint was that Ireland had not taken all the measures necessary to comply with Directive 85/337. This was based on three points. The first was that "Ireland has not taken the measures necessary in order to ensure that checks are made to ascertain . . . whether proposed works are likely to have significant effects on the environment, and, if that is the case, in order to render it obligatory that an environmental impact assessment be carried out . . .. before

the grant of development consent.'' Secondly, and importantly for this case, ''the Irish legislation which allows an application for retention permission to be made after a development has been executed in whole or in part without consent undermines the preventive objectives of Directive 85/337 as amended''. Thirdly, the Commission claimed that the enforcement regime established by Ireland does not guarantee the effective application of the directive and put forward a number of examples of alleged deficiencies.

79 The decision summarised (in paras 23–29) the provisions of the Planning and Development Act 2000. Section 32 (1) says that permission shall be required:

> ''(a) in respect of any development of land, ...and in the case of development which is unauthorised, for the retention of that unauthorised development.''

80 Section 34 provides in detail for the way applications are to be dealt with and applies in subs.(12) those provisions to retention applications. To carry out unauthorised development is a criminal offence (s.151) and it is not a defence to prove (the burden being upon the defendant) a subsequent permission obtained as a result of an application made after the initiation of proceedings, the sending of a warning letter under s.152 or the issue of an enforcement notice under s.154 (see s.162). The planning authority shall investigate and consider enforcement action under s.153 and may decide to take it. An enforcement notice may require development to cease or not continue and may require the demolition or removal of development (s.153(5)). Non-compliance is also a criminal offence. If the steps required are not taken the planning authority may enter and take them and recover its expenses from those on whom the notice was served (see ss.153 (6),(7) and (8)). Enforcement action, including an application under s.160 to the court for an order, is not stayed or withdrawn by reason of an application for or the grant of retention permission (s.162(3)).

81 I pause at this stage to note that a reading of the Irish Planning and Development Act 2000 reveals both similarities to the English legislation and substantial differences. The equivalent of Irish s.34(12) is English s.73A, for example. Once an enforcement notice is effective, an English planning authority has the same sort of powers to enter and do the work and prosecute for breach as an Irish one (see ss.178 and 179). However, so far as enforcement is concerned, there are significant differences. Mr McCracken submits that it is clear that the Irish legislation is notably stricter than the English and that therefore *Commission v Ireland* is an a fortiori case. An English planning authority also has a broad discretion under s.172 in deciding whether to issue a notice and it is not apparent to me that there is an equivalent in the Irish statute to the time limits on enforcement action found in s.171B in the English. There may be less scope in Ireland for EIA development to achieve immunity without an EIA and become lawful.

82 As in Ireland, an English planning authority must not consider EIA development without an EIA but, with such an assessment, there is nothing in the legislation to prevent the grant of retrospective permission without taking enforcement action. In England if a notice is issued, there is a right of appeal under s.174, which, if exercised, does suspend the notice (see s.175). In determin-

ing such an appeal the Secretary of State will consider whether retrospective planning permission ought to be granted for the development enforced against but cannot grant it for EIA development without an EIA (see s.177).

83 It is not my purpose in this judgment to attempt a detailed comparison of the two systems. It is enough to say that on the basis of no more than my own superficial reading of the Irish legislation and in the absence of any submissions on Irish law from counsel, other than those based on the references in *Commission v Ireland*[1], I do not think it would be right for me to say more than that the two systems are significantly different and that I should be very cautious about drawing conclusions on the basis of supposed differences or similarities between them.

84 Against that brief background I shall set out the arguments. The Commission claimed that since it is possible, under the national legislation, to comply with the obligations imposed by Directive 85/337 as amended during or after execution of a development, there is no clear obligation to subject developments to an assessment of their effects on the environment before they are carried out.

> "41. In accepting that projects can be scrutinised, in an environmental impact assessment, after their execution, when the principal objective pursued by Directive 85/337 as amended is that effects on the environment should be taken into account at the earliest possible stage in all planning and decision-making processes, the national legislation in question recognises a possibility of regularisation which results in the undermining of that directive's effectiveness.
>
> 42. The Commission adds that the rules relating to retention permission are incorporated within the general provisions applicable to normal planning permission, and that there is nothing to indicate that applications for retention permission and the grant of such permission are limited to exceptional cases."

85 The Irish response was recorded as follows:

> "43. Ireland contends that the Commission's analysis of the Irish legislation which transposes Directive 85/337 as amended is not accurate. Ireland states that Irish law expressly requires that permission be obtained for any new development before the commencement of works and that, as regards development which must be subject to an environmental impact assessment, the assessment must be carried out before the works. Failure to comply with those obligations is, moreover, a criminal offence and may result in enforcement action.
>
> 44. Ireland contends, in addition, that retention permission, established by the PDA and the Planning and Development Regulations, 2001, is an exception to the general rule which requires permission to be obtained before the commencement of a development, and best meets the objectives of Directive 85/337 as amended, in particular the general objective of protection of

[1] Mr McCracken did take me to the action taken by the Irish Government following the decision of *Commission v Ireland*.

> the environment, since the removal of an unauthorised development may not be the most appropriate measure to achieve that protection.
> 45. According to that Member State, the requirements of Directive 85/337 as amended are wholly procedural and are silent as to whether there may or may not be an exception by virtue of which an environmental impact assessment might, in certain cases, be carried out after commencement of works. Ireland adds that nowhere in the directive is it expressly stated that an assessment can solely be carried out before the execution of a project, and refers to the definition of the term 'development consent' given by Directive 85/337 as amended to argue that the use of 'proceed' is significant, that term not being confined to the commencement of works but also applying to the continuation of a development project.
> 46. Ireland contends, in addition, that retention permission is a reasonable fall-back mechanism to be resorted to in exceptional circumstances, designed to take account of the fact that some projects will inevitably, for various reasons, commence before the grant of development consent within the meaning of Directive 85/337 as amended.
> 47. On that point, Ireland relies on Case C-201/02 *Wells* [2004] ECR I-723 to argue that a remedial assessment may be carried out at a later stage, by way of exception to the general rule that the assessment must be carried out at the earliest possible stage in the decision-making process.''

86 It may be helpful to recall the case of *Wells* at this point. An old mining permission had been granted for Conygar Quarry under the Town and Country Planning (General Interim Development) Order 1946. When Mrs Wells bought her house nearby, in 1984, the quarry use was long dormant and the site had become extremely environmentally sensitive. In 1991 the owners sought to reactivate the permission. Registration of the old permission was granted but no development was to be undertaken unless new planning conditions were imposed. Eventually the Secretary of State approved a number of new conditions but without considering whether it was first necessary to carry out an EIA. The matter came before the European Court on a reference from the Administrative Court to determine, amongst other things, whether the approval of new conditions on the old permission amounted to ''development consent''. The European Court decided that it would undermine the directive to regard as a mere modification of an existing consent the taking of decisions that replaced the very substance of a prior consent such as an old mining permission. Hence it concluded that such a decision must be considered to amount to ''development consent'', the renewed working should have been subject to an EIA and it was for the relevant authorities to ''take all general or particular measures for remedying the failure to carry out such assessment''. The European Court's conclusion was summarised in the last sentence of [70] in the following words,

> ''. . .it is for the National Court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively,

if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.''

87 On that basis the submission of Ireland seems not unreasonable. The next submission was:

''48. That Member State considers also that it would be disproportionate to order the removal of some structures in circumstances where, after consideration of an application for retention permission, retention is held to be compatible with proper planning and sustainable development.''

88 These submissions seem to me not only to carry significant weight but also to be very much the same sort of submissions that might be made about the English law, so far as it relates to EIA development and enforcement. Indeed Mr McCracken makes exactly that point and invites careful attention to what happened to them in the Findings of the Court.

89 After reciting the duty to implement the Directive having regard to its fundamental objective and noting the definition of ''development consent'' the court continued:

''51. Given that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.''

90 Adding that this analysis was valid for every project that fell within the Directive, the court said.

''53. A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by Directive 85/337 as amended, set out in particular in recital 5 of the preamble to Directive 97/11, according to which 'projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted'.

54. As the Irish legislation stands, it is undisputed that environmental impact assessments and planning permissions must, as a general rule, be respectively carried out and obtained, when required, prior to the execution of works. Failure to comply with those obligations constitutes under Irish law a contravention of the planning rules.

55. However, it is also undisputed that the Irish legislation establishes retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed.

56. In addition, the grant of such a retention permission, use of which Ireland recognises to be common in planning matters lacking any excep-

tional circumstances, has the result, under Irish law, that the obligations imposed by Directive 85/337 as amended are considered to have in fact been satisfied.

57. While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

58. A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.''

91 The court turned to Ireland's point based on *Wells*.

''59. Lastly, Ireland cannot usefully rely on *Wells*. Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation in good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.

60. This cannot be taken to mean that a remedial environmental impact assessment, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, is equivalent to an environmental impact assessment preceding issue of the development consent, as required by and governed by that directive.

61. It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then before the grant of development consent and, therefore, necessarily before they are carried out must be subject to an application for development con-

sent and to such an assessment, Ireland has failed to comply with the requirements of that directive.

62. Consequently, the first two pleas in law are well founded.''

92 The decision then turned to the Third Plea in Law. There is, unsurprisingly, some overlap with the second plea. Again, to understand the matter it will be necessary to set out the arguments and findings in full.

''63. According to the Commission, there are shortcomings in the Irish legislation relating to enforcement measures and in the resulting enforcement practices which undermine the proper transposition and implementation of Directive 85/337 as amended, when, under that directive, an effective system of control and enforcement is mandatory.

64. First, the Commission claims that the enforcement measures provided for by Irish planning legislation do not offset the absence of provisions requiring compliance with the obligations as to an environmental impact assessment before development is carried out.

65. Secondly, the Commission claims that enforcement practices undermine the proper transposition of Directive 85/337 as amended. The Commission refers to specific situations which illustrate, in its opinion, the deficiencies of the Irish legislation regarding supervising compliance with the rules established by that directive.

66. As regards the procedure relating to enforcement, Ireland contends the choice and form of enforcement is a matter within the discretion of Member States, in particular as there has been no harmonisation at Community level of planning and environmental controls.

67. In any event, Ireland states that the system of enforcement established by the Irish legislation is comprehensive and effective. The Member State adds that, under environmental law, the applicable provisions are legally binding.

68. Thus, the legislation places planning authorities under the obligation of sending a warning letter when they learn that an unauthorised development is being carried out, unless they consider that the development is of minor importance.

69. Once the warning letter has been sent, the planning authorities must decide whether it is appropriate to issue an enforcement notice.

70. The warning letter is intended to enable the persons responsible for unauthorised developments to undertake remedial action before the enforcement notice and the other stages of enforcement proceedings.

71. If an enforcement notice is issued, that sets out obligations and failure to comply with its requirements constitutes an offence.

72. Ireland adds that the enforcement regime must take account of various competing rights held by developers, landowners, the public and individuals directly affected by the development, and the weight of those various rights must be measured in order to reach a fair result.

73. Lastly, Ireland does not accept that the examples reported by the Commission prove the alleged failure to fulfil its obligations, since the Commission limits itself to general assertions.''

93 I interpose at this point to draw particular attention to [68]–[73] because they may shed some light upon what is understood by the court as the ''remedial'' action, described in [60]. As portrayed in those paragraphs it is possible to see how it might be regarded as allowing rather too much latitude to sit comfortably with a strict enforcement of art.2 (1) into the Irish procedures. This impression is reinforced by the paragraphs that set out the court's findings on this plea.

''74. It is undisputed that, in Ireland, the absence of an environmental impact assessment required by Directive 85/337 as amended can be remedied by obtaining a retention permission which makes it possible, in particular, to leave projects which were not properly authorised undisturbed, provided that the application for such a permission is made before the commencement of enforcement proceedings.

75. The consequence of that possibility, as indeed Ireland recognises, may be that the competent authorities do not take action to suspend or put an end to a project that is within the scope of Directive 85/337 as amended and is being carried out or has already been carried out with no regard to the requirements relating to development consent and to an environmental impact assessment prior to issue of that development consent, and that they refrain from initiating the enforcement procedure provided for by the PDA, in relation to which Ireland points out that the powers are discretionary.

76. The inadequacy of the enforcement system set up by Ireland is accordingly demonstrated inasmuch as the existence of retention permission deprives it of any effectiveness, and that inadequacy is the direct consequence of the Member State's failure to fulfil its obligations which was found in the course of consideration of the first two pleas in law.

77. That conclusion is not affected by the fact that, according to Ireland, the enforcement regime must take account of the various competing rights held by developers, landowners, the public and individuals directly affected by the development. The need to weigh those interests cannot in itself provide justification for the ineffectiveness of a system of control and enforcement.

78. Accordingly, it becomes superfluous to analyse the various examples put forward by the Commission to illustrate the deficiencies in application of the enforcement measures, since those deficiencies are the direct result of the inadequacies of the Irish legislation itself.

Consequently, the third plea in law is also well founded, and therefore the first complaint must be upheld on all of the pleas in law.''

Consideration

94 The EC's findings start ([51]) with the declaration that the wording regarding the acquisition of entitlement in art.2(1) is entirely unambiguous. It must be understood as meaning that unless a developer has first conducted his assessment

and obtained consent, ''he cannot commence the works'' unless the requirements of the directive are to be disregarded. I do not find this an easy passage. It evidently does not mean that the developer cannot physically start the works. It must mean that he cannot lawfully do so. Such development would be unlawful under UK domestic law since an EIA must be carried out before development consent is given. The pre-emptive development would be vulnerable to an enforcement notice and stop notice. The only requirement of the Directive that might be said to be ''disregarded'' is that in art.6(2). Giving art.2(1) a literal analysis, would not appear to rule out the possibility of retrospective development consent, so long as it is preceded by a full and proper EIA and full and genuine opportunity for the public to understand the proposals, express their views and have them taken into account.

95 It is here that the authoritative guidance of Lord Hoffmann in *Berkeley v Secretary of State* [2001] A.C. 603 at 615 is particularly helpful. He said:

> ''I said in *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, 404 that the purpose of the Directive was 'to ensure that planning decisions which may affect the environment are made on the basis of full information'. This was a concise statement, adequate in its context, but which needs for present purposes to be filled out. The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA. And an essential element in this procedure is that what the Regulations call the 'environmental statement' by the developer should have been 'made available to the public' and that the public should have been 'given the opportunity to express an opinion' in accordance with article 6(2) of the Directive.''

96 Lord Hoffmann referred to the cases of *Commission v Germany* (C-431/92) [1995] E.C.R. I-2189, 2208–2209 at [35]: and continued:

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

97 He then quoted from *Aannamaersbedrijff PK Kraaijveld BV v Gedeputeerde Staten van Zuid-Holland* (C-72/95) [1996] E.C.R. I-5403, 5427 at [70], before saying:

> ''Perhaps the best statement of this aspect of an EIA is to be found in the UK government publication ' *Environmental Assessment: A Guide to the Procedures*' (HMSO, 1989), p.4:
>
> > 'The general public's interest in a major project is often expressed as concern about the possibility of unknown or unforeseen effects. By providing a full analysis of the project's effects, an environmental statement can help to allay fears created by lack of information. At the same time it can help to inform the public on the substantive issues which the local

planning authority will have to consider in reaching a decision. It is a requirement of the Regulations that the environmental statement must include a description of the project and its likely effects together with a summary in nontechnical language. One of the aims of a good environmental statement should be to enable readers to understand for themselves how its conclusions have been reached, and to form their own judgments on the significance of the environmental issues raised by the project.'''

98 The significance of the public having the opportunity to understand and comment on the environmental effects of the proposals is evident from these passages. A very important part of that objective is that the public should have the opportunity to understand and comment at a stage where they have a genuine chance to be heard dispassionately and to influence the decision. This may be much harder to achieve, and it will certainly appear so, where the development in question is an accomplished fact. But although the task of ensuring that the public's voice is properly and fairly heard may be harder, it is not impossible and it is not beyond the reach of a fair-minded decision-maker. Such a purposive interpretation of art.2(1), giving due weight to art.6(2), justifies the conclusion that the possibility that development could be given consent after it has taken place, even after an EIA has been carried out, would risk subverting the purposes of the Directive and ought not to be accepted by domestic procedures, save in exceptional circumstances if they are to ''ensure'' the proper incorporation of the Directive.

99 Paragraph 60 of the *Commission v Ireland* decision also requires careful attention, remembering that it is to be read in the context of consideration of the *Wells* case. If it simply meant that the Directive does not contemplate a ''remedial'' post-development assessment, meaning one that only assesses the work necessary to put things right after the event, as a possible equivalent of pre-development assessment, it is easily understood. If the only EIA undertaken post-development puts undue weight upon the existence of the project and insufficient weight upon the extra damage caused by proceeding without an EIA and development consent, or the prejudice to proper public participation, it will indisputably undermine the purposes of art.2(1). Such an EIA will plainly not be equivalent to a pre-development EIA. However, [60] can hardly have meant that an EIA, carried out post-development, could not be done on exactly the same basis in terms of assessing the pre-development position as a pre-development EIA and be equivalent to it in that sense. That sort of exercise is well within the skills of those who undertake such assessments in the United Kingdom and well within the expertise of the Planning Inspectorate and the Secretary of State to judge. It is the basis upon which the experienced inspector in this case proceeded, as did the Secretary of State. Indeed, given that the purpose of the EIA is to assess the impact on the environment, a post-development assessment is likely to be more comprehensive and more accurate since it will rely more on observation and measurement and less on hypothesis and judgement. Such a comparative judgement between an assessment carried out post-development and the position

if an assessment had been carried out pre-development would lie at the heart of the question of whether or not to grant a retrospective permission. It would enable a determination to be made whether the initiator of the project did stand to gain anything by breaching the domestic rules contrary to the objectives of art.2(1). It would enable the decision maker to be clear as to the central purposes of the Directive, namely whether the unlawful commencement of the development had meant any extra impact upon the environment or had made less effective the representations of those who wished to make them. It would enable the decision-making authority to insist that the central objectives of the Directive were respected. If, on proper analysis, it were to become plain that a developer would achieve an advantage by his unlawful action in the sense, for example, that if he were to be given retrospective consent, the environmental measures he would be required to undertake would be less rigorous than those he would have had to undertake to get consent after a pre-development EIA, that might well be conclusive against the grant of consent. This approach has the benefit that development consent is unlikely to be granted, save in exceptional circumstances.

100 This approach would also be proportionate. It would not require the removal, simply ''pour encourager les autres''[2] as Mr McCracken put it in response to his opponents' characterisation of his argument, of a development that could be seen by post-project analysis to have always been acceptable. I do not read the court's judgment as an approval of draconian deterrence as opposed to a proper insistence that the competent authorities defend the objectives of art.2(1) in a strict, but proportionate, way.

101 I read the decision as focussing upon the possibility of circumvention and the danger that it will be encouraged ([56]–[58]). The court feared that if retention permission were given in anything other than exceptional circumstances, the Directive would be got round and was concerned that the use of retention permission in Ireland was ''common in planning matters lacking any exceptional circumstances''. The court did not say whether it was referring to retention permission in general or retention permission for EIA consent only. (I have no reason to think that the grant of retrospective planning permission where an EIA is required is common in England, although the grant of retrospective permission in other cases certainly is.) Easy regularisation would encourage developers to ignore the criteria of art.2(1) and the Directive.

102 This proper concern is at the heart of the court's decision. It may be met by making it plain that a developer will gain no advantage by pre-emptive development and that such development will be permitted only in exceptional circumstances. Such an approach, it seems to me, could preserve and protect the objectives of the Directive. It is one that would be accommodated easily within the procedures for judging whether planning permission ought to be gran-

[2] I felt constrained to observe that this famous phrase does not come from some approving revolutionary zealot but from a French wit (Voltaire in ''Candide'') mocking the folly and hypocrisy of the British in shooting the unfortunate Admiral John Byng on his own quarterdeck. (The newly appointed Admiral was blamed for the loss of the battle of Minorca on May 20, 1756.) Voltaire was not recommending shooting Admirals as sound strategy.

ted for development subject to an enforcement notice. It is an approach that the Secretary of State would be able to take in deciding an appeal against an enforcement notice on ground (a), namely that planning permission ought to be granted for the development enforced against.

103 I am clear that, with one reservation, the enforcement procedures under English law are effective and are well able to take into account and protect the fundamental objectives of Directive 85/337. Once an enforcement notice is issued, either there will be no appeal, in which case the development ought to be removed by one method or another; or there will be an appeal and the Secretary of State will consider whether planning permission ought to be granted for the development enforced against. In that case permission will not be granted unless the Secretary of State is satisfied that a satisfactory EIA has been undertaken. The Secretary of State can and in my view should also consider, in order to uphold the Directive, whether granting permission would give the developer an advantage he ought to be denied, whether the public can be given an equal opportunity to form and advance their views and whether the circumstances can be said to be exceptional. There will be no encouragement to the pre-emptive developer where the Secretary of State ensures that he gains no improper advantage and he knows he will be required to remove his development unless it can demonstrate that exceptional circumstances justify its retention.

104 The reservation I have is that English law does leave open the possibility that the pre-emptive developer might achieve immunity without any proper EIA.

105 Here it is necessary to say something about the decision of the Court of Appeal in *R. (on the application of Prokopp) v London Underground Ltd* [2003] EWCA Civ 961. It is not necessary to set out the facts of that case in any great detail. There was an application to build a railway line extension. It was fully supported by an EIA, examined in public inquiry and permitted by the Secretary of State subject to conditions. Condition 21, which was perhaps not well thought out, was not complied with. Instead a unilateral obligation was offered to control the relevant works in a satisfactory way. The planning authority resolved to refrain from taking enforcement action if work proceeded in accordance with that obligation. The applicant was concerned about one aspect of the development, although not one that had anything to do with the broken condition, and argued that the decision not to take enforcement action was ''development consent'' and should have been preceded by an EIA.

106 Schiemann L.J. said (at [38]):

> ''I would accept for the purposes of the present appeal that if a project which falls within the Directive goes ahead without there having been an Environmental Impact Assessment and the national authorities simply stand by and do nothing then this might well amount to a breach of our obligations under the Directive. That is not this case.''

107 However, it might be the current case.

108 Schiemann L.J. identified the decisive question as whether the absence of enforcement proceedings were properly characterised as development consents. He observed that the resolutions in question had simply decided not to take

enforcement action at that time; it was not ruled out for the future. Therefore the resolutions of the local authority did not amount to development consent (see [47]–[50]).

109 Buxton L.J. approached the matter more generally. He declared himself satisfied as to the following points, amongst others:

> ''(i) A failure to take, or a deliberate decision not to take, enforcement action by a planning authority does not constitute 'development consent' in the terms of article 1(2) of the Directive. The appellant's case therefore necessarily fails.
>
> (ii) Even if the general proposition in (i) were incorrect, whether a particular failure constitutes development consent in the terms of the Directive must be determined on the basis of a purposive approach to the objectives of the Directive. On that basis, the environmental control objectives of the Directive do not require a further environmental assessment by reason of the breach of condition 21, and therefore a decision taken in relation to condition 21 cannot be a relevant development consent.'' ([57])

110 In my judgement, a purposive interpretation of art.2(1) strongly suggests that for the defendant councils to permit the Quinn Glass development to achieve immunity, whether by a positive decision not to take enforcement action or by mere inaction, would, as Schiemann L.J. contemplated, amount to a breach of the UK's obligations under the Directive. It may be that the provisions of s.171B need to be re-examined and perhaps disapplied in the case of EIA development so that for such development immunity would never arise and pre-emptive EIA development could only become lawful by, after full public participation, undertaking a comprehensive EIA comparing both initial and current circumstances and establishing exceptional justification. However, the circumstances of the *Prokopp* case are very different from the present case and, in my view, distinguishable. Whether the correct analysis would be to say that action or inaction on behalf of the planning authorities in the present case would be equivalent to development consent, is not a matter I need to decide. That is because there is no doubt that once enforcement notices are issued, as I order, and there is an appeal to the Secretary of State, as I anticipate there will be, any consent that might be given on the deemed application for permission would certainly be ''development consent''.

Conclusion on the second issue

111 I therefore decline to make a declaratory order in the terms sought. In my judgement there is a distinction to be drawn between the Irish statutory provisions and procedures that were the subject of *Commission v Ireland* and those in England. I do not find that retrospective planning permission cannot lawfully be granted; it can, as long as the competent authorities pay careful regard to the need to protect the objectives of the directive. The procedures adopted are a matter for the State. I am clear that, once an enforcement notice is issued, the existing procedures are able to ensure compliance with Directive 85/337.