BRIDLINGTON AREA ACTION PLAN

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9 May 2012

Proposals for the Harbour and Marina do not comply with the National Framework as regards the terms "sustainable" and "substantial"

"At the heart of the National Planning Policy Framework is a ***presumption in favour of sustainable development,*** *which should be seen as a golden thread running through both plan-making and decision-taking" (Para 14)*

1 The Bridlington Area Action Plan was formulated long before the National Planning Policy Framework ('Framework') was published on 22 March 2012. Some of the 'Planning Policy Statements' which the Plan originally relied upon, or took note of, have been replaced by the Framework (see Annex 3).

2 The proposals in the AAP for the Harbour Top and the Marina do not meet the policy requirements set out in the Framework. Therefore, these proposals must be excluded from the AAP, even if this means that a new Plan must be prepared. The Framework states at paragraph 213 *"Plans may, therefore, need to be revised to take into account the policies in this Framework. This should be progressed as quickly as possible, either through a partial review or* ***by preparing a new plan****" (my emphasis).*

3 In his "foreword" to the Framework the Minister for Planning, Rt. Hon. Greg Clark M.P. says "*The purpose of planning is to help achieve sustainable development".* He then defined the word "sustainable" : *"Sustainable means ensuring that better lives for ourselves don't mean worse lives for future generations" . . . . .* and *. . . . . " Sustainable development is about change for the better, and not only in our built environment".*

4 He continues and states the importance of both "Our natural environment" and "Our historic environment". He concludes that "*sustainable development is about positive growth - making economic, environmental and social progress for this and future generations" . . .* and *. . . "The planning system is about helping to make this happen"*

5 The key word is therefore the word **"sustainable".** The word "sustain" is defined in the 'Shorter 0xford English Dictionary' as including *"To provide for the upkeep of an institution or estate" . . . "To keep in being, to cause to continue in a certain state, to preserve the status of".* To these definitions may be added the

words of the Minister *"sustainable development is change for the better, and not only in our built environment".*

6 These definitions are relevant to the ERYC's policies for the Harbour Top and Marina. For the Council do not propose to sustain the Harbour Top, or the Listed Pier, or the irreplaceable prime beach environment, from negative change. Instead of '*keeping and preserving'* the status of what now exists, the Council proposes to wilfully not sustain them. Indeed, it sets out to impair and destroy them. It has learned nothing from the rejection of its former plans for a Marina. Thus ERYC fail to meet the Framework policies for the natural environment and historic environment. As such the Plan cannot be approved.

7 Section 12 of the Framework at paras126 to 141 deals with *"Conserving and enhancing* the historic environment". Para 126 requires local planning authorities to *"recognise that heritage assets are an irreplaceable resource and conserve them in a manner appropriate to their significance".* ERYC have consistently failed to recognise the importance of the Listed Piers and their setting within the ancient Harbour of Refuge. Indeed, when I sought their listing in 2000 the Council was the only objector and said that they were of no significance whatsoever (see Dr Moseley - Listed Building report 2003 at para 6.21). Little had changed over the last decade. Not only do ERYC seek to cut a huge chunk out of the South Pier, famous for the spectacle of its "Great Flank Wave" (see Dr Moseley 2003 at para 7.50) but they also seek to destroy the setting of the Harbour itself with a very large construction at the west end which would change its character for ever.

8 The Framework states at para 132 that *"When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through* ***alteration of destruction of the heritage asset or development within its setting.*** *As heritage assets are irreplaceable, any harm or loss should require* ***clear and convincing justification****. Substantial harm to or loss of a grade II listed building should be* ***exceptional*** *(my emphasis).*

Note - as to the word *'setting'* see Annex 2 : 'Glossary'

9 Any reasonable person would conclude that the proposals for the South Pier and the Harbour Top constitute "substantial harm", both to the structure of the pier and to the complete setting of the harbour. Dr Moseley concluded at para 7.85 that the Council's proposals for the South Pier would *"cause significant harm to the special character of this listed building and the setting of both listed buildings".* At para 19 of his decision letter 2003 re the Marina the Secretary of State agreed with Dr Moseley that *"the proposals would destroy the essential nature of the South Pier and would irreparably harm the setting of the two listed structures"*

10 At para 18 the Secretary of State agreed with the Environmental Assessor, Professor Tom Pritchard, that *"the loss of a very important stretch of beach . . . . is a major adverse impact in its own right".* It is this very same *"important stretch of beach"* which the Council once again seek to destroy completely.

11 At para 19 the Secretary of State further agreed with Professor Pritchard *"that the obliteration of the beach and the near shore environment, which is of* ***high ecological and visual quality,*** *would be seriously damaging to the natural heritage of Bridlington" (my emphasis).* He continued and stated *"that the proposed works would have a range of serious adverse effects on both the natural and man-made environment of Bridlington which together present a powerful case against allowing the proposed works".*

12 At para 20, after considering the *"potential benefits"* of the scheme he concluded that when those *"speculative"* benefits were balanced against the *"clear"* adverse effects *"a very compelling case against allowing those proposals"* emerged.

13 The obsession of a succession of local authorities to acquire part of the Harbour Estate is well documented (see para 15 Secretary of State's decision letter 2003 re Harbours Act). This 'desire' does not amount to the *"clear and convincing justification"* which the Framework requires to create "*exceptional"* circumstances (see para 132).

14 The Framework continues at para 133 "*Where a proposed development will lead to substantial harm or to total loss of significance of a designated heritage asset,* ***local planning authorities should refuse consent,*** *unless it can be demonstrated that the substantial harm or loss is necessary to achieve* ***substantial public benefits*** *that outweigh that harm or loss" (my emphasis).* The key word in this requirement is the word ***"substantial".***

15 In the absence of any statutory definition of the word *'substantial'* it is important to give the word its natural and ordinary meaning. This is defined by the Shorter Oxford English Dictionary as *"exists as a substance"* or *"having a real existence"* or *"not illusory" . . .* and also having *. . . "real importance or value".*

16 The word 'substantial' was considered in *Pulsar v Grinling (1948) AC 291*. There the court held that its primary meaning was *"considerable or solid or big".* Thus any *"substantial public benefits*" must be considerable or big rather than minimal or unsubstantial.

17 The word "substantial" was also considered at length by the Court of Appeal in the matter of *The Badger Trust v The Welsh Ministers (2010) EWCA* Civ. 807. At paras 37-40 the Court considered the various 'Authorities', agreed by the parties, regarding the meaning of the word. These were said to be *Majorstake*

Ltd v Curtis (2008) 1A C 787 : Palser v Grinling (1948) A C 291 : R v Monopolies and Mergers Commission Ex Parte South Yorkshire Transport (1993) 1 WLR 23 : R v Lloyd(1967) 1 QB 175 .

18 At para 32 the Court quoted from the judge below who had held that *"the word 'substantial' has a chameleon character, its precise meaning and hue varying according to its context".*

19 At para 37 the Court cited Baroness Hale in *Majorstake : "'Substantial' is a word which has a wide range of meanings. Sometimes it can mean 'not little'. Sometimes it can mean 'almost complete', as in a 'substantial agreement'. Often it means 'big' or 'solid', as in a 'substantial house'. Sometimes it means 'weighty' or 'serious', as in a 'substantial reason'. It will take its meaning from its context. But in an expression such as a 'substantial part' there is clearly an element of comparison with the whole : it is something other than a small or insignificant or insubstantial part".*

20 Para 38 the Court cited Viscount Simon in *Palser : "It is plain that the phrase requires a comparison with the whole rent . . . . .'Substantial' in this connexion is not the same as 'not unsubstantial' i.e. just enough to avoid the 'de minimis' principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case, the onus being on the landlord"*

21 Para 39 the Court cited Lord Mustill in *South Yorkshire Transport : "It is sufficient to say that although I do not accept that 'substantial' can never mean 'more than de minimis' or that in [Palser], Viscout Simon was saying more than that in the particular statutory context it did not have this meaning, I am satisfied that in section 64(3) [Fair Trading Act 1973] the word does indeed lie further up the spectrum than that".*

22 Para 40 the Court cited the trial judge in *Lloyd : "You are the judges, but your common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired, and, if so was it substantially impaired ?"*

23 Taking the authority set out by *The Badger Case,* it is clear that it is for the Inspector to decide whether the public benefits, which will arise from the Harbour and Marina proposals, will be *"substantial"* enough to outweight the "*substantial"* damage which would be caused to the natural and man-made environment. As in

Palser where the onus was upon the landlord, the burden of proof lies with ERYC to demonstrate that it is more likely than not that *"substantial public benefits"* will be certain to follow the implementation of its proposals. If the Council cannot do this its Plan must not be approved.

24 These definitions of the word 'substantial' places the Council in difficulty. It is not sufficient for it to merely demonstrate that the public benefits are just 'expected' or 'probable'. It has to prove, beyond the balance of probability, that the public benefits which **will arise** from its proposals will be **certain and considerable.** The Council has also to prove that the said public benefits are "solid" (i.e. in the context of the AAP *"financially sound"* and more probable than not likely to reach fruition). Thus there has to be certain and demonstrable "*substantial public benefits"* to outweigh the real and substantial threat to the heritage asset. Nothing less will suffice

25 There is no doubt that a huge hole in the listed pier amounts to "*substantial harm"* (Dr Moseley used the words *"significant harm"* and the Secretary of State used the words *"irreparably harm"*). The proposals for the Harbour Top also amount to *"substantial harm"* to the significance of the setting of the listed structures. Indeed, from the gardens opposite the Harbour Top, the proposals amount to the total obliteration of that setting. When considering "The setting of the listed buildings" Dr Moseley at para 3.6 said that this was the most striking view of the harbour *"Most striking of all is the view looking out to sea along the seaward length of the South Pier from South Cliff Road".* Professor Pritchard made the same point regarding this view of the setting of the Harbour in his conclusions at para 10.71.

26 Finally, on the matter of *"substantial harm"* to the environment. Should the marina proposal be approved there will also certainly be real "*substantial harm"* which will occur from the loss of a *"very important stretch of beach".* The loss of this stretch of beach was considered by the Secretary of State in 2003 to be *"a major adverse impact in its own right".* Nothing has changed since then. It is the very same section of beach, which is just as full of 'life' today as it was ten years ago, which will be covered in concrete and its important natural habitat destroyed. As the Inspector's report of 2003 stated at para 11.85 "*the loss of a significant area of beach was of* ***substantial significance*** *and could not be mitigated" (*my emphasis). Here the word *"substantial"* is used in its legal and natural sense.

27 But what of the public benefits - can they really be said with any certainty to be "*substantial"* and thus of *"real importance or value"* ? These benefits, by the very definition of the word, have to be of substance. Thus they must be either already coming into existence or very foreseeable in the near future. They cannot be merely illusory (*"having the character of an illusion" i.e. "deception : delusion :*

involving a false belief ").

28 However, the said *"substantial public benefits*" which ERYC claim will outweigh the substantial harm to the heritage asset are, at this moment in time, purely illusory. They are hypothetical : they are a fantasy : they are part of a 'wish-list' of 'goodies' which council officers think **may** (and I wish to emphasise the word 'may') come about if the AAP is approved. These so-called *"public benefits"* are not yet of substance, they are not certain, and they may never come about. On the other hand there is nothing illusory about a listed pier with a great big hole cut into its imposing southern face destroying the continuity of the surface swept by the Great Flank Wave. This is a real and foreseeable and certain '*significant harm"* and *"substantial harm"* to the heritage asset. When 'a certain outcome' is placed on the scales of probability against a 'theoretical outcome' the balance falls in favour of the former.

29 As a final comment upon the word *"substantial".* Whilst the Council may foresee public benefits arising from the purchase of the Harbour Top and the creation of a Marina, it cannot guarantee that they will be *"substantial"* or *"considerable, solid or big"* benefits. Therefore, the Council cannot pass the 'test' as set out and required by the Framework. This test is very strictly worded. It does not simply require "public benefits" in exchange for causing *"substantial harm"* to the listed piers and their setting. The Framework requires public benefits of a *"substantial"* nature. Nothing less will suffice in these circumstances. There is no evidence that the Council can meet this test. Therefore, the proposals in the Plan for the Harbour Top and for the Marina cannot be approved.

Conclusion

30 As my conclusion I wish to simply rely upon the words of Professor Tom Pritchard, the Environmental Assessor at the Marina Inquiry. In his final *"Summary of Conclusions"* para 10.71(4) he put into one sentence the consequences of the ERYC's applications :-

"Beach and seashore amenities of the South Beach would be destroyed or severely altered, including facilities for admiring the view of the historic harbour, enjoying the sands, seawater and the wildlife, and digging for bait and fishing from the shore and the South Pier"

31 This statement was true in 2003. It remains true today ten years later. The main footprint of the proposed marina may be smaller but the overall effect of the proposals remain the same : "*a major adverse level of significance".*

32 Therefore, it is my respectful opinion that the proposals for the Harbour Top and Marina should not be approved.

Neutral Citation Number: [2010] EWCA Civ 807

Case No: C1/2010/1316

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SWANSEA CIVIL JUSTICE CENTRE
THE HON. MR. JUSTICE LLOYD JONES
[2010] EWHC 768 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2010

Before :

LORD JUSTICE PILL
LADY JUSTICE SMITH
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

Badger Trust	**Appellants**
- and -	
The Welsh Ministers	**Respondents**

- -
- -

Mr David Wolfe (instructed by **Bindmans LLP**) for the Appellants
Mr Timothy Corner QC and Mr Jonathan Moffett (instructed by **Welsh Assembly Government**) for the Respondents

Hearing date : 30 June 2010

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Judgment

Lord Justice Pill :

1. This is an appeal against the decision of Lloyd Jones J dated 16 April 2010 whereby he refused an application by the Badger Trust ("the appellants") to quash a decision of the Minister for Rural Affairs ("the Minister") for the Welsh Ministers ("the respondents") pursuant to the Animal Health Act 1981 ("the 1981 Act") to make The Tuberculosis Eradication (Wales) Order 2009 (2009 No.2614 (W.212)) ("the Order"). The Order was made on 28 September 2009 and came into force on 21 October 2009. It authorises the respondents to carry out a non-selective cull of badgers in Wales.

2. The appeal was heard at the Cardiff Civil Justice Centre on 30 June 2010. As will appear in this judgment, the appeal was brought on two grounds and these were argued. In the course of the hearing, Stanley Burnton LJ raised a third issue and, following submissions, this was adopted by the appellants and permission to appeal on a third ground was granted. It was not a ground which had been argued before the judge and it did not appear in the grounds of appeal. Late though the application was, the members of the court were required to consider the effect of an important statute and thought it right to do so on all three grounds.

3. Mr Corner understandably asked for time in which to take instructions and to make written submissions on the new ground. In those submissions, the respondents conceded that the appeal should be allowed on ground 3. It was requested at the same time that the court give judgment on grounds 1 and 2. The court's guidance on those grounds will, it is said, be crucial to the respondents' further deliberations.

4. I accede to that request and accordingly state in this judgment the background to the appeal, the submissions made and my conclusions on grounds 1 and 2, before going on to consider ground 3.

The statutory background

5. Section 1 of the 1981 Act provides, insofar as is material:

> "1. General powers of Ministers to make orders.
>
> The Ministers may make such orders as they think fit –
>
> (a) generally for the better execution of this Act, or for the purpose of in any manner preventing the spreading of disease; …"

Section 21 provides, insofar as is material:

> "(1) This section –
>
> (a) applies to any disease other than rabies which is for the time being a disease for the purposes of section 1(a) above;…
>
> (2) The Minister, if satisfied in the case of any area –

> (a) that there exists among the wild members of one or more species in the area a disease to which this section applies which has been or is being transmitted from members of that or those species to animals of any kind in the area, and
>
> (b) that destruction of wild members of that or those species in that area is necessary in order to eliminate, or substantially reduce the incidence of, that disease in animals of any kind in the area,
>
> may, subject to the following provisions of this section, by order provide for the destruction of wild members of that or those species in that area.
>
> (3) Before making an order under this section the minister shall consult with the appropriate conservation body for the area to which it will apply, and every order so made shall specify-
>
> (a) the area to which it applies;
>
> (b) the disease to which it applies; and
>
> (c) the one or more species to which it relates."

The powers conferred by section 21 of the 1981 Act have been transferred to the Welsh Ministers insofar as they relate to Wales and Mycobacterium bovis ("M bovis") is a disease for the purposes of section 1(a) and section 21. The appropriate conservation body for Wales is the Countryside Council for Wales ("CCW"), whose members are appointed by the National Assembly for Wales.

6. Section 1(1) of the Protection of Badgers Act 1992 provides:

> "A person is guilty of an offence if, except as permitted by or under this Act, he wilfully kills, injures or takes, or attempts to kill, injure or take, a badger"

Supplementary protection is provided in the following sections of the Act. Section 10(2) provides that a licence to kill or take badgers may be granted for the purpose of preventing the spread of disease.

7. Council Directive 77/391/EEC of 17 May 1977 introduced Community measures for the eradication of brucellosis, tuberculosis and leucosis. The recitals in the Directive refer to the task of improving "the state of health of livestock" and also provide:

> "Whereas Community initiatives to this effect must initially concentrate on certain diseases against which immediate action is possible; whereas this is true of brucellosis, tuberculosis and leucosis."

8. Article 1 provides:

> "The purpose of this Directive is to improve the state of health of cattle in the Community by means of Community action to accelerate or intensify the eradication of brucellosis and tuberculosis and to eradicate leucosis."

9. Article 3 provides in so far as is material:

> "For the purposes of this Directive, Member States in which the cattle populations are infected with bovine tuberculosis shall draw up plans for accelerating the eradication of this disease in their national territories . . ."

Under article 3.3, reports from Member States are required.

10. Paragraph 2 of the Order provides:

> "Application of Order for the purposes of section 21 of the Animal Health Act 1981
>
> 2. For the purposes of section 21 (destruction of wildlife) of the Animal Health Act 1981 this Order-
>
> (a) applies to Wales;
>
> (b) applies to tuberculosis; and
>
> (c) relates to the species of badger."

Paragraph 3 of the Order authorises the destruction of badgers by an "authorised officer" using one of the methods set out in the paragraph. Under paragraph 1, authorised officer means an officer of the Welsh Assembly Government, a veterinary inspector and any other person authorised by the respondents to exercise the power conferred by the Order. Paragraph 5 provides power to enter any premises, except a dwelling house, for purposes including action which is necessary to, or is otherwise required in connection with destroying badgers. A power to treat badgers with vaccine is provided in paragraph 4.

The report to the Minister and the Order

11. Before considering the issues, I make a few general observations. There is no doubt that farming is a very important part of the Welsh economy and that bovine TB is a particularly serious problem in Wales. It arises from infection with M bovis. As will appear, the initial cull is proposed to be in an area of north Pembrokeshire known as the IAPA ("Intensive Action Pilot Area") and I have no doubt that the Minister, when making the order, was well aware of the serious effects of bovine TB upon livestock, and hence the farming community, in that area. I have no doubt that she was also aware that a substantial number of badgers are likely to be in the IAPA proposed for the cull. For the appellants, Mr Wolfe expressly and at the outset conceded that bovine TB is a significant issue in that area, that badgers may

contribute to its spread and that intervention with badgers may be necessary to achieve the implementation of government policies.

12. The Welsh Assembly Government is committed to pursue vigorously a programme of bovine TB eradication. That is a policy consistent with the purpose and text of the Directive and of the 1981 Act. On 23 March 2009, the Government's Chief Veterinary Officer ("CVO"), Professor Christianne Glossop, referred to that policy and submitted advice to the Minister in pursuance of it. The CVO stated:

> "The cattle TB situation in Wales is now out of control and unsustainable."

The CVO reported that in 2008 11,530 cattle were slaughtered in Wales because of bovine TB, a 44% increase over 2007. Of these, 68% were located in the former county of Dyfed, which of course includes Pembrokeshire. Further evidence was, without objection, placed before the court. Of 13,249 registered herds in Wales in 2009, 4,747 were in Dyfed. Of these, 1,134 were under TB restrictions during 2009 because of a TB incident. 697 herds in Dyfed were under movement restriction on 31 December 2009. There were 230 confirmed new TB incidents in Dyfed during the year and 309 in 2008.

13. Three options were considered, a non-selective badger cull (option 1), the vaccination of badgers and a combined test, vaccination and cull strategy. By way of summary of option 1, the submission stated at 6.3.8:

> "There is a complex relationship between badgers, cattle and M bovis which means that non-selective culling may have unpredictable effects on cattle TB. A pro-active, non-selective badger cull has the potential to reduce the level of cattle herd breakdowns within several years. The reported benefits of RBCT [randomised badger culling trial], which was a relatively well executed cull, were low (9% average reduction in the incidence of CHB [confirmed herd breakdowns]). The benefits continued to accrue at an increasing rate in the 2 years post trial. Further analysis is planned to determine if these trends continue in further years . . .
>
> Measures to mitigate against the effects of social perturbation caused by culling have been suggested and are discussed above. The mitigation measures with the highest likelihood of reducing perturbation effects on the increase in cattle herd breakdowns in areas surrounding a cull are maximising the benefits of boundaries, exclusion of badgers from farm buildings and vaccinating buffer zones before a cull is implemented. It is likely that a combination of these measures may have a greater effect than one measure in isolation. However, there is currently no evidence on what effects, if any, these measures may have on reducing the effects of perturbation or on cattle TB."

14. At 9.2.3 the CVO recommended option 1, stating:

> "The Programme Board [the CVO's committee] agreed that the disease levels and associated impacts and costs to government, industry and the taxpayer need to be addressed. Despite the risks associated with delivery, they considered that the potential of a culling strategy (Option 1) applied in an IAPA provided the greatest opportunity to achieve this.
>
> The Programme Board agreed that against the backdrop of an increasing disease incidence, an overall 9% reduction as achieved post culling in the RBCT was a significant achievement that should not be undervalued. Particularly given that knowledge on the effects of perturbation were unknown and that in any IAPA the potential benefits from a culling strategy would be reinforced by benefits from the cattle measures.
>
> It was recommended that culling should be applied initially in a single area and that cattle measures are applied in conjunction. The risks of this or any of the other policies were recognised and it was agreed that any of these policies would need careful consideration in their application. A blanket application across Wales was not appropriate. Instead both culling and vaccination should be considered as part of the veterinary assessment of policies on a regional and epidemiological basis."

It was plainly contemplated that culling should be applied initially in a single area. The advice was:

> "It is likely that an area in southwest Wales will be the most suitable location for an IAPA, in terms of having a high density of cattle TB, shared bovine TB strains between badgers and cattle, number of cattle slaughtered, average duration of bovine TB breakdowns, vicinity to cross border farms and level of compensation."

15. A comparative study of the options does not arise from the grounds of appeal and has not formed part of the appellants' case before this court. It has not been argued for present purposes that destruction of badgers is not 'necessary', within the meaning of section 21(1)(b), on the ground that alternative methods of control are better.

16. On 24 March 2009, the Minister stated her intention to establish an IAPA in north Pembrokeshire to deal simultaneously with bovine TB in cattle and badgers. A consultation exercise was conducted, on the basis of a document issued in April 2009, including consultation with the CCW. Under the provisions of Part VII of the Environmental Protection Act 1990, the CCW shall, under section 130(2) discharge its functions:

> ". . .

> (b) for encouraging the provision or improvement, for persons resorting to the countryside in Wales, of facilities for the enjoyment thereof and the enjoyment of the opportunities for open-air recreation and the study of nature afforded thereby;
>
> and shall have regard to the social and economic interests of rural areas in Wales.
>
> (3)The reference in subsection (2) above to the conservation of the natural beauty of the countryside includes the conservation of its flora, fauna and geological and physiographical features."

"Fauna" of course includes badgers as well as livestock. The "social and economic interests of rural Wales" must also be considered.

17. While the CCW, in the course of their measured and detailed response did state that they were of the opinion that "vaccination, for either cattle or badgers, represents the best long-term strategy for the management of bTB", they did not oppose in terms an Order covering the IAPA, or badger culling as such, but noted that "there should be clear criteria for any future rollout of the IAPA to other areas of Wales". The response began with a general statement:

> "CCW recognises the considerable impact that the increasing incidence of bTB in cattle is making within Wales. CCW believes that the inclusion of a badger culling policy as part of a Bovine TB Eradication Strategy should be based on sound evidence on the effectiveness of such a policy."

18. The CVO made a further submission to the Minister on 22 September 2009. At paragraph 3, the CVO made recommendations to the Minister:

> "It is recommended that you:
>
> Sign the Tuberculosis Eradication (Wales) Order 2009 and lay it before the National Assembly for Wales.
>
> Approve the Statement of Information at Document 1, its publication and the publication of the Summary of Responses document and all responses to the consultation, in their entirety, once you have made your decision on the Order and informed Cabinet Members.
>
> Note that the TB Programme Board has reviewed the responses to the consultation and has confirmed its view regarding the need for a badger cull within the IAPA.
>
> Note that the next step is the completion of the Environmental Impact Assessment by officials and the selection of the location of the IAPA.

> Note that you will need to issue licences under the Protection of Badgers Act 1992 to the people who will undertake the cull.
>
> Note that appropriate contractors must be identified and relevant contracts agreed between them and the Welsh Assembly Government."

The CVO also stated:

> "The powers provided by the Order are essential to undertake badger culling within the IAPA. There is increasing expectation that your decision on the IAPA is imminent."

19. The Order was made on 28 September 2009. On 13 January 2010, the Minister decided to commence the culling of badgers pursuant to the Order in an area of 288 sq. km., mainly within North Pembrokeshire, an area with a particularly serious problem of bovine TB. The Minister decided on annual culls over a 5 year period within that area, the first cull not to commence before the end of April 2010. The court was told that the precise boundaries of the IAPA have been decided but they have not been disclosed publicly either before or at the hearing. The proposed cull in the IAPA has been deferred pending the outcome of this appeal.

The appellants

20. The appellants promote the conservation and welfare of badgers and the protection of their setts and habitats for the public benefit. They support about 60 local voluntary badger groups, provides expert advice on badger issues and works closely with the Government, the police and other conservation and welfare organisations.

21. In his statement of 11 March 2010, Mr David Williams, the appellants' Chairman, stated that he wished to make it absolutely clear that the appellants are just as anxious as are the respondents to find a way to tackle bovine TB in Wales and elsewhere in the UK. They agree that action needs to be taken to address the problem and are not *per se* opposed to culling badgers. It can, however, be tolerated, it was submitted, only where it is underpinned by robust and up to date scientific evidence clearly showing that it would achieve a legitimate aim such as preventing the spread of bovine TB. That, submitted the appellants, is not the position here.

22. Mr Williams referred to the final report of an independent scientific group on bovine TB which concluded that "badger culling cannot meaningfully contribute to the control of cattle TB in Britain". "The rigorous application of heightened control measures directly targeting cattle will reverse the year on year increase in the incidence of cattle TB and halt the geographical spread of the disease". Examples of cattle based control measures are given. Culling, he submitted, is simply not necessary; the benefits of culling badgers are modest and transitory at the very best.

The appeal

23. Before Lloyd Jones J, the Order was challenged on several grounds. It was submitted that the Minister had not been given an accurate factual summary. She had

not been given sufficient assistance with the statistics and would have been under misapprehensions as to their effect. The judge rejected those submissions, holding that the Minister had been informed of the salient facts which gave rise to the shape and substance of the matter. Those submissions are not pursued before this court. The appeal was brought on two grounds:

The judge erred in holding:

> "(1) That 'substantially reduce' in section 21(2)(b) of the 1981 Act meant simply a reduction that was 'more than merely minor or trivial'; and
>
> (2) That, once it arose, the discretion to make an order under section 21(2) could lawfully be exercised without considering the balance between the extent of the benefit to be gained in terms of disease reduction and the extent of the killing of wild animals required to achieve it."

24. I approach the appeal initially on the basis of those two grounds, both of which were argued before and dealt with by Lloyd Jones J. That is necessary to understand the judge's reasoning and the case the respondents came to this court to meet. The appeal has, however, become dominated by the third ground which arose in circumstances already described. It is important in itself and also in its impact upon the two grounds hitherto advanced by the appellants. I will consider it later.

25. On the two grounds, Mr Wolfe submitted that the issues raised in the Grounds of Appeal are issues of pure law:

> (a) What is meant by 'eliminate, or substantially reduce the incidence of' in section 21(2)(b) of the Act
>
> (b)Can an Order lawfully be made under section 21(2) without regard to whether the extent of the disease incidence reduction outweighs the extent of the killing of badgers which will take place to bring it about?

Save on one point at paragraph 34 below (and the new ground), Mr Wolfe has not deviated from that approach.

Submissions

26. Mr Wolfe submitted that the word "substantially" in section 21(2)(b) appears in the context of, and cannot be isolated from, the word "eliminate" which precedes it. The word substantial in this context has the sense of "almost complete". "Substantially reduce" should be read as a stepping back from the starting point of "eliminate" and contemplates a major reduction.

27. Further, the section 21 power cannot be considered in isolation from the longstanding statutory protection for badgers. Killing badgers is a criminal offence and, because section 21 provides a derogation from that protection, it should be construed narrowly. The respondents have to justify something otherwise unlawful.

A "substantial reduction" cannot in context mean merely something more than an "insignificant or trivial" reduction. The situation is different from one in which the law is otherwise neutral. Mr Wolfe submitted, in the alternative, that 50% may give a good benchmark as to what is meant by "substantially".

28. On this ground, Mr Corner QC, for the respondents, submitted that the policy and purpose of the 1981 Act is clear. It deals with, and only with, diseases in cattle which are very serious. It creates a priority for the protection of livestock from those diseases. It does not distinguish between protected and unprotected species, such as rats. Orders may be required to protect livestock from any species of wild animal, for example, in order to obtain powers to enter land under section 22 of the 1981 Act. Construction of the word "substantially" must be consistent and should not be coloured by protection otherwise given to some species and not given to others. The section does not read, as it might have done, "eliminate or substantially eliminate". In context, substantial should be given the meaning chosen by the judge.

29. On the second ground of appeal, Mr Wolfe submitted that, even if the destruction could be said to have "substantially reduced" the incidence of TB in cattle, it was still necessary, when exercising a discretion to make a decision under section 21(2), to strike a balance between the benefit for livestock and the harm to badgers. The word "may" in section 21(2) confers that discretion. Parliament cannot have intended that the decision maker might sanction widespread slaughter without regard to whether the benefit to be gained justified that slaughter. The loss of badgers should be balanced against the loss of livestock. The requirement, under section 21(3), for consultation with the CCW demonstrated the need to strike a balance between the benefit to cattle and the scale of the impact on badgers.

30. Mr Corner's submissions on ground 2 I did not find altogether clear. I do not understand his submission that the point on need to strike a balance has not been taken by the appellants when in my view it clearly has been taken. Mr Corner submitted that the Minister was not required to put into the scale the number of badgers likely to be killed in the IAPA, and that I understand. The Minister knew that the number was likely to be substantial. In the alternative, Mr Corner borrowed from section 70 of the Town & Country Planning Act 1990 the expression "material considerations" and submitted that evidence of those considerations was present in the CVO's report and the Minister had taken it into account when taking her decision to make the Order. I understand the alternative submission to be that, if a balance is to be struck, it is necessary to take into account not only the effect on badgers but other considerations and the Minister has done that.

The judgment

31. The judge expressed his conclusions on the first ground at paragraphs 85 to 87:

> "85. This was the expert advice to the Minister. To my mind a possible reduction of 9% in the incidence of confirmed breakdowns in comparison with the position which would otherwise be reached can fairly be considered a substantial reduction. (Even if one brings into account, in addition, unconfirmed breakdowns in order to make allowance for the effects of incorrect diagnoses, as opposed to the actual extent of

> the disease, I still consider that the reduction of 6% can fairly be considered a substantial reduction.) I consider that Professor Glossop and the Programme Board were reasonably entitled to conclude that an overall 9% reduction in confirmed breakdowns was "a significant achievement that should not be undervalued". Equally I consider that the Minister was reasonably entitled to conclude on the basis of the advice she received that the reduction, which she was advised on the basis of Jenkins 2008 was achievable, was substantial.
>
> 86. This conclusion is further supported by the advice in the Submission "that in any IAPA the potential benefits from a culling strategy would be reinforced by benefits from the cattle measures". Whereas the RBCT had been carried out in isolation, the advice to the Minister emphasised that a comprehensive approach was required to pursue the eradication of bovine tuberculosis in Wales and that within an IAPA this would necessitate dealing with infection in both cattle and badgers. Professor Glossop's evidence makes clear that the Minister was advised that the culling of badgers can only be one element of the package of measures required to achieve the policy aim of eradicating tuberculosis in cattle in Wales and that any culling would have to take place alongside additional cattle control measures. Professor Glossop and the Programme Board advised and in my judgement were reasonably entitled to advise that the beneficial effects of culling could be enhanced through the application of a comprehensive approach aimed at tackling all sources of infection simultaneously.
>
> 87. For these reasons I consider that the Minister was reasonably entitled to conclude that the contemplated reduction in the incidence in bovine tuberculosis was substantial within the meaning of section 21(2), Animal Health Act, 1981."

32. In reaching that conclusion, the judge had stated:

> "79. . . . the word 'substantial' has a chameleon character, its precise meaning and hue varying according to its context . . . I do not consider that the statutory framework of the Animal Health Act 1981 creates a statutory presumption against the killing of animals. While it is correct that the exercise of the power under section 21 permits the killing of badgers, an activity which would otherwise be unlawful and criminal, I do not consider that this provision should be narrowly construed as a derogation from a prohibition on killing animals. The statutory purpose of section 21 is to prevent disease. The Animal Health Act 1981 is, as its short title suggests, an Act concerned with animal health. As the broad general power confirmed by section 1(a) indicates, it is concerned with the purpose of preventing the spread of disease in any manner. Part II of the Act, where section 21 is found, is concerned

> particularly with the control of disease. If the incidence of disease can be substantially reduced by the proposed conduct, there is a power to authorise it provided the other conditions are also satisfied. The statutory scheme does not justify a narrow reading of 'substantially reduce'."

The judge continued:

> "80. Nor do I consider that the juxtaposition of the two concepts "eliminate or substantially reduce" justifies a restrictive reading of "substantially reduce". The words "substantially reduce" clearly describe something other than elimination. The reference to "eliminate" does not cast any light on the meaning of "substantially".
>
> 81. To my mind the words "substantially reduce" when considered in the context of this statutory provision bear the meaning that the reduction should be of substance and something more than insignificant or trivial i.e. the meaning contended for by the Defendants. If conduct is reasonably considered capable of making a reduction which is more than insignificant or trivial the policy of the provision suggests that there should be a power to act in this way. I can see no justification for reading the words so as to require the higher standards for which the Claimant contends. . . ."

33. The judge added at paragraph 110:

> "Professor Glossop and the Programme Board have emphasised the importance of combining enhanced cattle measures with the proposed culling and have expressed the opinion that this may improve the efficacy of the culling. However, cattle measures in isolation were not even identified as a viable option and on the basis of the material placed before the Minister it is readily apparent why this was the case."

34. The judge's reference to 6% arose from the need to slaughter animals on suspicion that they have bovine TB even when it is eventually concluded that they do not. These are known as unconfirmed breakdowns, as distinct from confirmed breakdowns, and constitute about one third of the total breakdowns. It was submitted before the judge and in this court that unconfirmed breakdowns should be added to confirmed breakdowns when assessing the appropriate percentage reduction in disease. If unconfirmed breakdowns are taken into account, the percentage reduction on all breakdowns would be 6%. The 9% benefit is never in fact achieved, submitted Mr Wolfe, if one takes into account the total number of animals destroyed, both diseased and not diseased.

35. I do not accept that submission. Whether or not a cull occurs, there will, on the present state of scientific knowledge, be unconfirmed breakdowns. It is the reduction in the number of animals actually diseased (confirmed breakdowns) which are slaughtered, that is the 9%, which is, in my view, relevant for present purposes.

36. Subject to that, the appellants do not now challenge the figure of 9%. The figure emerges from a paper published by Jenkins and others in the International Journal of Infectious Diseases in 2008. It was based on a field trial in an area culled of 125 km^2 in England. The results of the trial [RBCT], including detailed figures, were set out by the CVO in her report. They show a reduction of confirmed herd breakdowns in the trial area of 30.2% and an increase of 12.5% outside the area, thought to be due to the effects of perturbation on the badger population. The report concludes:

> "Jenkins *et al*. (2008) estimated that 12 herd breakdowns, out of a potential 130, were prevented by the proactive cull. This equates to an overall 9% reduction in the incidence of cattle herd breakdowns."

Authorities

37. The parties agree that the word "substantial" has a wide range of meanings. Reference was made to *Majorstake Ltd v Curtis* [2008] 1 AC 787. Baroness Hale of Richmond considered a point which had not hitherto been argued in that case, which was whether in a block of flats 2 flats out of 50 constitute a "substantial part of" the "premises" within the meaning of section 47(2) of the Leasehold Reform, Housing & Urban Development Act 1993. Baroness Hale stated, at paragraph 40:

> "'Substantial' is a word which has a wide range of meanings. Sometimes it can mean 'not little'. Sometimes it can mean 'almost complete', as in 'in substantial agreement'. Often it means 'big' or 'solid', as in a 'substantial house'. Sometimes it means 'weighty' or 'serious', as in a 'substantial reason'. It will take its meaning from its context. But in an expression such as a 'substantial part' there is clearly an element of comparison with the whole: it is something other than a small or insignificant or insubstantial part. There may be both a qualitative element of size, weight or importance in its own right; and a quantitative element, of size, weight or importance in relation to the whole. The works intended by this landlord are substantial in relation to each of the flats involved, but those flats do not in my view constitute a substantial part of the whole premises."

38. In *Palser v Grinling* [1948] AC 291, it was necessary to consider whether "the amount of rent which is fairly attributable to the attendance or the use of furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent" within the meaning of section 10(1) of the Rent & Mortgage Interest Restrictions Act 1923, as amended. Viscount Simon stated, at page 316-7:

> "It is plain that the phrase requires a comparison with the *whole rent*, and the whole rent means the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. 'Substantial' in this connexion is not the same as 'not unsubstantial', i.e., just enough to avoid the 'de minimis' principle. One of the primary meanings of the word is

> equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case, the onus being on the landlord. If the judgment of the Court of Appeal in *Palser's* case were to be understood as fixing percentages as a legal measure, that would be going beyond the powers of the judiciary. To say that everything over 20 per cent. of the whole rent should be regarded as a substantial portion of that rent would be to play the part of a legislator : if Parliament thinks fit to amend the statute by fixing percentages, Parliament will do so. Aristotle long ago pointed out that the degree of precision that is attainable depends on the subject matter. There is no reason for the House to differ from the conclusion reached in these two cases that the portion was not substantial, but this conclusion is justified by the view taken on the facts, not by laying down percentages of general application."

39. In *R v Monopolies and Mergers Commission Ex Parte South Yorkshire Transport* [1993] 1 WLR 23, the expression "substantial part of the United Kingdom" in section 64(3) of the Fair Trading Act 1973 was considered. Lord Mustill stated:

> "It is sufficient to say that although I do not accept that 'substantial' can never mean 'more than de minimis' or that in [*Palser*], Viscount Simon was saying more than that in the particular statutory context it did not have this meaning, I am satisfied that in section 64(3) the word does indeed lie further up the spectrum than that. To say how far up is another matter. The courts have repeatedly warned against the dangers of taking an inherently imprecise word, and by redefining it thrusting on it a spurious degree of precision."

40. The expression "substantially impaired" in section 2(1) of Homicide Act 1957 (diminished responsibility) has been considered in a criminal context. In *R v Lloyd* [1967] 1 QB 175, at page 181, Edmund Davies J, giving the judgment of the Court of Appeal Criminal Division, approved the direction given to the jury by the trial judge:

> "You are the judges, but your own common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired, and, if so, was it substantially impaired?"

41. No advice as to the test to be applied appears in the CVO's report, as disclosed. It is not surprising that the CVO has not advised the Minister on statutory

construction. Parts of the report are redacted and it may be that the legal advice was included in those parts. In a post-decision letter of 3 December 2009, the respondents replied to a detailed letter of claim sent by the appellants' solicitors. Having referred to the evidence, they stated, at paragraph 10:

> "It seems to us that these two pieces of research plainly constitute evidence that the destruction of badgers would substantially reduce the incidence of disease, in the sense that the reduction would be more than insignificant or trivial. Accordingly, we are unable to accept your assertion that there was no evidence before the Welsh Ministers to support a conclusion that the destruction of badgers would eliminate or substantially reduce the incidence of disease and we reject your first purported ground of claim."

42. It may be that it is correct to infer from that paragraph, even though in a letter written a considerable time after the decision and in reply to the appellants' letter of claim, that the Minister did apply the test subsequently advocated on her behalf. It is unfortunate that the legal advice she received, if any, was not set out in a disclosable document. It is frequently set out, in a planning context, in the advice given to a decision maker and I see no reason why it should not have been transparent in this case. Failure to disclose may have resulted in an unfairness to the Minister. In the same way as a jury in a criminal case, if she was advised about the range of events the word substantial is capable of covering, she could form her own view.

Conclusion on Ground 1

43. I express my conclusions on the two grounds specified by Mr Wolfe, subject to the new ground, and on evidence dealing with a proposed IAPA in north Pembrokeshire. I agree with the conclusions of the judge. Against the background of the 1977 Directive, the purpose of the 1981 Act, which is of course primary legislation, in its application to the present situation is to protect livestock and control disease. To restrict the meaning, as the appellants contend, is to ignore that purpose and the seriousness of the impact of bovine TB. In context, it is not necessary to demonstrate a large percentage reduction to satisfy the test in section 21(2)(b). The priority is the protection of livestock whether or not the consequential destruction is of animals of an otherwise protected species. The reduction is, as the judge put it at his paragraph 81, "of substance", that is real and tangible.

44. I am not persuaded by the conjunction of the words "substantially reduce" and the word "eliminate" relied on by the appellants. The words "eliminate" and "reduce" are clear but some qualification of "reduce" is required to establish that a trivial reduction is insufficient. The word "substantial" is in my view used to make a distinction from and to eliminate minor or trivial reductions. The word "substantial" in section 21 achieves that object without thereby diminishing the very broad range of reductions which is comprehended. That range is not restricted in the way it was in cases such as *Palser*, *Majorstake* and *South Yorkshire Transport* where the word was used to qualify "a part of a whole", of "rent" in *Palser,* of "premises" in *Majorstake* and of "the United Kingdom" in *South Yorkshire Transport*.

45. In my judgment, and against the policy and factual background, the Minister was entitled to conclude that the evidence did demonstrate the prospect of a substantial reduction of the incidence of TB in livestock in the IAPA. The judge was also right to draw attention to the CVO's emphasis on a "package of measures" which could be taken into account along with the figure of 9%. (On Stanley Burnton LJ's analysis, at paragraph 108, not adopted by the Minister, the reduction of the incidence of the disease in the relevant area is, on the agreed Jenkins figures, 30%).

46. I accept that the word "substantial" in this context does have some quantitative connotation so that if, for example, the amount of livestock in the area was very small, and the numerical saving very small, even a high percentage reduction could not be said to have the "substance" contemplated by section 21(2)(b). It could be irrational in such circumstances, as disproportionate, to make an Order. That is not a factor in the present situation because there are numerous cattle and considerable bovine TB in the IAPA. Large numbers are involved.

47. The Minister is required to consult CCW and consider its views. Given CCW's functions, including those in relation to the social and economic interests of rural areas in Wales, that is not surprising. In my view, the inclusion of the word "fauna" in those functions does not mean that the ambit of the statutory power under section 21 is fundamentally altered. Moreover, the weight to be given to CCW's views in this context is for the Minister to decide.

Conclusion on Ground 2

48. On what is now ground 2, Lloyd Jones J expressed his conclusions at paragraph 112:

> "Section 21 does not expressly impose such an obligation. Nor do I consider that a duty to carry out such a balancing exercise is implicit in section 21 considered in isolation. For reasons set out earlier in this judgment, I do not accept that the statutory context creates a statutory presumption against the making of an order. Furthermore, there is nothing in the wording or statutory scheme to support the existence of the duty contended for. Section 21(2) creates preconditions which must be satisfied before the power may be exercised. The Minister must be satisfied that there exists among badgers in an area tuberculosis which is being transferred to cattle. The Minister must also be satisfied that destruction of badgers is necessary in order to eliminate or substantially reduce the incidence of tuberculosis in cattle in that area. If those preconditions are satisfied the Minister has a discretion to make an order. However, these pre-conditions do not include the obligation contended for by the Claimant. Had it been the intention of Parliament to impose such a duty it could be expected to have said so expressly. In my view, section 21 does not impose a further pre-condition of the kind contended for by the Claimant."

On this issue too, I agree with the conclusions of the judge.

49. The general principle to be applied was stated by Cooke J in the Court of Appeal in New Zealand in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR, 172 at 183, cited with approval by Lord Scarman in re *Findlay* [1985] AC 318, at 333:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision."

Cooke J added:

> "I think that there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the Ministers collectively would not be in accordance with the intention of the Act."

50. It is important to distinguish between factors the Minister is required to take into account and factors she is entitled to take into account, if she sees fit. The list in the second category may be long and include, for example, financial restraints. What Mr Wolfe submitted the Minister was required to take into account were not the broad considerations of which Mr Corner spoke but the specific question whether "the extent of the disease incidence reduction outweighs the extent of the killing of badgers".

51. There is no express requirement in the 1981 Act that the Minister take into account "the extent of the killing of badgers" when exercising the discretion conferred by the presence of the word "may" in section 21(2). The discretion is a broad one and the Minister's starting point in this context is the priority, arising from the Directive and the 1981 Act, given to the protection of livestock and the control of disease. The discretion was to be exercised in relation to an IAPA in which there were numerous cattle and it was in a county where bovine TB was widespread and caused a serious problem for the farming community. There is a link, as is conceded on behalf of the appellants, between badgers and bovine TB. In that context, I do not consider that the Minister was required to weigh the likely extent of the killing of badgers. Such a requirement cannot be read into section 21.

52. I have referred to the CCW representations at paragraph 17. The CCW have not suggested that the decision on the statutory test is other than for the Minister and have not suggested that, within the IAPA, the Minister should conduct the balancing exercise between cattle and badgers advocated by the appellants.

53. I have already considered the question of proportionality under ground 1 and accept that there could be a situation in which, for example, the number of cattle in the area is so small that the exercise of the discretion to make an Order would be irrational, notwithstanding the need identified in the statute. That is not the situation in this IAPA and the Minister is not constrained by a requirement to count heads of livestock and badgers.

54. In his alternative submission, Mr Corner referred to other considerations raised in the CVO's report and submitted that, if an assessment of other considerations was required, it should have been comprehensive and was in fact conducted by the Minister. I do not accept that submission. It was not claimed in the letter of 3 December 2009 that such an assessment had been made and there is no evidence to suggest that it was made.

55. The discretion in section 21(2) of the 1981 Act was in my judgment properly exercised. The Minister was undoubtedly aware of the general situation in the IAPA, by way of the presence of numerous cattle and badgers, was aware of the importance of agriculture in the area, and was not required in that situation to count the number of badgers likely to be killed.

56. Had the Order been confined to the IAPA in north Pembrokeshire, I would have dismissed the appeal.

New ground of appeal 3

57. At the hearing, the appellants were granted permission to add this third ground of appeal:

> "The respondents erred in law in making an Order for the whole of Wales having consulted on the basis of an IAPA and on the basis of evidence which at most supported culling in an IAPA."

58. The respondents' reasons in their post-hearing written submissions for conceding that the appeal should be allowed on ground 3 were:

> "The basis for the concession is that the evidence before the Minister focused on the likely effect of the destruction of badgers in an IAPA, only providing her with sufficient evidence to enable her to be satisfied that the destruction of badgers in that area would eliminate or substantially reduce the incidence of bovine TB in the area. The evidence did not focus on the position in relation to the whole of Wales."

59. That, in my judgment, is a sound concession. The justification for it will have emerged from the evidence already summarised but it may be helpful to collect relevant extracts in this part of the judgment.

60. It is necessary to start with section 21(2) which requires the Minister to be satisfied "in the case of any area". The word "area" is used in both paragraphs (a) and (b) of section 21(2) where the requirements of which the Minister must be satisfied are set out. The Order may provide for the destruction of badgers "in that area". The Order as made "applies to Wales" (paragraph 2.2) and not to an IAPA within Wales. The focus for the requirements in section 21(2) is on the area specified in the Order, which is in this case Wales.

61. The focus in the CVO's report to the Minister on 23 March 2009 was undoubtedly on the proposed IAPA in North Pembrokeshire. At paragraph 11, under the heading "Recommendations", it was stated:

> "That you agree that the priority area for the establishment of an IAPA is within the bovine TB endemic area of Dyfed and is specifically located to maximise the opportunities and benefits of the locality. Using the coast as an impermeable boundary would suggest that a location in the North of Pembrokeshire would be a preferred location."

62. At 6.7.2, it was stated:

> "It is likely that an area in southwest Wales will be the most suitable location for an IAPA, in terms of having a high density of cattle TB, shared bovine TB strains between badgers and cattle, number of cattle slaughtered, average duration of bovine TB breakdowns, vicinity to cross border farms and level of compensation."

63. In paragraph 9.2.3, already cited, it was stated:

> "It was recommended that culling should be applied initially in a single area and that cattle measures are applied in conjunction. The risks of this or any of the other policies were recognised and it was agreed that any of these policies would need careful consideration in their application. A blanket application across Wales was not appropriate. Instead both culling and vaccination should be considered as part of the veterinary assessment of policies on a regional and epidemiological basis."

The section of the report headed Delivery also concentrates upon an IAPA and notes that "monitoring and evaluation of the IAPA will be essential in assessing this policy for further roll out in endemic areas".

64. The presence of the word "pilot" in the expression Intensive Action Pilot Area is significant in itself and there are references in the March report to the lessons to be learned:

> "Lessons learnt from this pilot can then be applied to an extended roll out of the principles to other endemic areas of Wales as appropriate."

65. The consultation document issued by the Minister in the Summer of 2009 confirmed that focus. In paragraph 1.2, it was stated:

> "On 24 March 2009, based on comprehensive evidence, the Minister for Rural Affairs announced her intention to implement a cull of badgers, alongside additional cattle disease control measures, within an Intensive Action Pilot Area (IAPA)

> to simultaneously deal with both sources of infection. The IAPA would be located in an area where bovine TB is endemic, and located to maximise the opportunities and benefits of the locality. The Minister has agreed that North Pembrokeshire would be a preferred location."

66. The CCW understood the consultation in that sense, stating in their response:

> "CCW welcomes the recommendation by the TB Eradication Board that a blanket application of culling across Wales is not appropriate."

67. The CVO's further report of 22 September 2009, included, as a recommendation to the Minister:

> "Note that the TB Programme Board has reviewed the responses to the consultation and has confirmed its view regarding the need for a badger cull within the IAPA."

68. The powers provided by the Order are stated to be "essential to undertake badger culling within the IAPA". While powers under section 21 of the 1981 Act were certainly required to cull within the IAPA, it was not correct to say that the powers provided by the Order, which covered the whole of Wales, were essential for that purpose.

69. It cannot be said that the incidence of bovine TB is evenly spread throughout Wales. The evidence produced by the Ministers shows, for example, a very low incidence of herds subject to restrictions and of confirmed new incidents in the former counties of Gwynedd, South Glamorgan, Mid Glamorgan and West Glamorgan. In the CVO's March report, North West Wales was described as "a non-endemic area". The IAPA was chosen because of the "high density" of the disease in the part of Wales where it was located. Evidence which, in my view, would justify an Order for the IAPA in North Pembrokeshire does not justify the Order made, which covers all Wales.

70. As countries go, Wales is a small country but there will be situations, of which this is one, where power devolved to the Welsh Assembly Government will need to be exercised on a regional or area basis within Wales and not made subject to a single regime which applies throughout Wales. Different considerations may apply in different parts of Wales and that will need on occasion to be recognised.

71. I would allow the appeal on ground 3 and quash the Order.

72. I add this paragraph because a statement by the Minister on 5 July 2010 has been brought to the attention of the court. Whether further consultation would in any event be necessary I leave open but, on the view of the majority in this court, as it appears in the following judgments, it is not open to the Welsh Assembly Government immediately to make a fresh Order in the same terms but covering only the IAPA and to proceed forthwith with a badger cull there.

Lady Justice Smith:

73. I have read the judgment of Pill LJ in draft and gratefully adopt his exposition of the facts and law.

74. As Pill LJ explained, the arguments pursued before us at the hearing of the appeal from the order of Lloyd Jones J related to the meaning of the expression 'to eliminate or substantially reduce the incidence of disease' in section 21(2)(b) of the Animal Health Act 1981 and second whether that section required the Minister to balance the various relevant factors before exercising her discretion to make an order. The Court gave permission for the appellants to argue a third issue, raised by Stanley Burnton LJ at the start of the hearing. This was whether the Minister had been entitled to make a section 21 order covering the whole of Wales when the scientific information put before her related only to a limited area and when she had consulted with the relevant bodies on the basis that she was contemplating a cull only in a limited area in which there was a serious problem of bovine TB. Mr Corner QC for the respondent Welsh Ministers asked for further time to consider this new issue. He has now informed the Court that the respondents accept that the order made must be quashed as the Minister could not have been satisfied, on the basis of the material before her, that the culling of badgers permitted by the order (that is in the whole of Wales) was necessary in order to eliminate or substantially reduce the incidence of bovine TB in the whole of Wales. He has however requested that the court should express its views on the original two grounds so as to provide guidance for Ministers for the future.

75. I wish to begin by examining the structure of section 21, which is set out in paragraph 2 of Pill LJ's judgment. Section 21(1) defines the range of diseases to which the section will apply. Section 21(2) sets out the threshold requirements which must be satisfied before the Minister is invested with any discretion to make an order for the destruction of animals. In its first phrase, the section requires the Minister to identify and focus upon an area, in relation to which she is thinking of making an order. In respect to that area, she must be satisfied (see subsection (a)) that there exists a disease among the wild members of one or more species which is being transmitted to animals in that area. So the Minister must identify the disease, the wild species which is carrying it and the species to which it is being transmitted. In the present case, the Minister would have to be satisfied that tuberculosis existed in the population of wild badgers *in that area* and that it was being transmitted to cattle *in that area*. Then, under subsection (b), she must be satisfied that the destruction of badgers *in that area* is necessary in order to eliminate or substantially reduce the incidence of tuberculosis in the cattle *in that area*.

76. Only when those threshold conditions are satisfied does the Minister have discretion to make an order for the destruction of the identified wild species *in the area*. She **may** make such an order. As his ground 2, Mr Wolfe for the appellants argued that, even if the threshold requirements of section 21(2) were met, the Minister still had to weigh up the 'pros and cons' before exercising her discretion. Mr Corner maintained that no such process was called for but that, if it were necessary, it had been done. I will return to that issue in due course.

77. I do not think that it is disputed that the section 21 consideration of whether the destruction of members of a wild species is necessary to eliminate or reduce the incidence of a disease in animals must be based on scientific evidence. Hunch and anecdote would obviously not be sufficient; nor would impermissible extrapolation. In the present case, the scientific evidence put before the Minister was derived very

largely from the randomised badger culling trial (RBCT) which had been reported by Jenkins et al in the International Journal of Infectious Diseases in 2008. This trial, which appears to have been well conducted and to have provided reliable information, was carried out in a number of relatively small areas in which the incidence of bovine TB was high and where there was a significant badger population. It seems to me that the Minister would be entitled to rely on that study and to apply its results to an area or areas where similar conditions applied. In short, it would be entirely reasonable for her to infer that, if a cull were to be ordered in an IAPA in Pembrokeshire where there is a substantial badger population and a real problem with bovine TB, the results of that cull would be similar to the results of the RBCT. But in my view it would not be reasonable for her to infer, as she apparently did, that the results of a cull covering the whole of Wales would be of the same order as the results of the RBCT. Bovine TB is a problem in some parts of Wales but not others and the problem is by no means uniform. The Minister's acceptance that her order must be quashed is recognition of the shortcoming that I have just described.

78. I understand that the Minister may now wish to consider making an order referable to a specific area within Wales and wishes this Court to state its conclusions on the two grounds argued at the hearing.

79. It was accepted on both sides that the essential conclusion to be derived from the Jenkins paper of 2008 was that a badger cull produced a net reduction in the incidence of bovine TB of 9%. The significance of the word 'net' is that the reduction within the area where the cull actually took place was significantly higher than 9% but there was an increase in the incidence of TB in the areas immediately surrounding the cull area. This was thought to be due to the perturbation of the badger population leading to increased movement. When that increased incidence was offset against the reduction within the cull area, the result was a 9% net reduction.

80. The issue in ground 1 was whether the Minister was entitled to be satisfied, on the basis of that 9% reduction, that the cull was necessary in order to eliminate or substantially reduce the incidence of bovine TB. The whole issue of the area under consideration was ignored and I shall do likewise for present purposes. Can a 9% reduction properly be called a substantial reduction? Ought the phrase 'substantially reduce the incidence' be read together with 'eliminate'? The judge held that a substantial reduction was a reduction of substance and was something more than insignificant or trivial. He also held that the juxtaposition of the two concepts 'eliminate' and 'substantially reduce' did not assist in determining the meaning of the expression 'substantially reduce'. The one concept did not cast light on the other.

81. Before us, Mr Wolfe submitted first that the expression 'substantially reduce' must be read in conjunction with 'eliminate' so that 'substantially' reduce meant 'almost eliminate'. But I did not understand that to be his final position. That was that 'substantially reduce' was to be given its ordinary natural meaning which was that it was something less than 'almost eliminate' but something greater than trivial. In other words, it occupied a middle ground between 'almost eliminate' and merely 'greater than trivial'. He did not attempt to define the boundaries of the middle ground but submitted that the Minister (or now the Court) was well able to say whether a particular reduction in incidence fell within it.

82. Mr Corner's submission was that the judge had been right; indeed the judge had accepted Mr Corner's formulation.

83. I am grateful to Pill LJ for citing the relevant authorities on this issue. 'Substantial' is indeed a word which can only be construed in context. The context here is that there must be either elimination (that is a reduction from the present or anticipated incidence of the disease, (notionally 100%) to zero incidence) or a substantial reduction - that is a reduction of a substantial degree from the 100% level of incidence. There is here, as there was in the case of *Palser,* an element of comparison between the whole and the part. The size of the reduction must be considered against the total. A reduction of 9% is a reduction from 100% to 91%. I do not think it could be said that, as a matter of ordinary language, such a reduction could be described as a substantial reduction. I would call it modest. I would accept that that reduction might be worthwhile and might well be, to use the words of the submission to the Minister 'a significant achievement that should not be undervalued'. I would even accept that it could be described as a reduction of 'substance'. But that is not the test; the test is whether the reduction will be substantial and I do not think a reduction of 9% can be so described.

84. It seems to me that, if Parliament had intended that a reduction of that order should suffice, it would have required only that the Minister should be satisfied that there would be a 'reduction' in the incidence of the disease. A 'reduction' would have implied that there must be something more than a trivial or insignificant effect. The judge's holding means that the use of the word 'substantial' has no effect; the meaning of the phrase would be the same even if the word substantial were not there. With respect, I do not think that can be right.

85. However, I do not think that this conclusion makes the Minister's position as difficult as might appear. If the Minister focuses on the effect of a cull within a specified area, she will be entitled to take the higher figure of reduction relevant to the area itself and to disregard the adverse effect on the area outside the cull area. That reduction would plainly be greater than 9% and might well be a reduction of substance. The adverse perturbation effect on the area outside the cull area would no doubt be a matter which the Minister would have to take into account when exercising her discretion (a matter to which I am about to come) but I do not think it needs to be brought into account when the threshold requirements are considered.

86. Finally, I turn to ground 2 and the exercise of the Minister's discretion, if and when the threshold requirements are satisfied. I have already said that Mr Wolfe submitted that the section provides a discretion to make a decision but that the discretion can only be exercised following a weighing up of the 'pros and cons'. Mr Corner submitted that no such process was required.

87. I have no doubt that consideration of relevant matters is necessary before the discretionary power can be properly exercised. That is the usual situation where a statute provides that, if certain threshold conditions are satisfied, an order **may** be made. The use of the word 'may' implies that, notwithstanding the satisfaction of the threshold conditions, the decision may still go either way. In section 21, we have not only the word 'may' but also a positive requirement of consultation before the decision can be made. Parliament cannot have intended that the consultation should be a mere formality so that, whatever its results, whatever contrary arguments were

advanced, the Minister was entitled without considering them to make the order. If she has to consider the responses to the consultation, she has to weigh up 'pros and cons'.

88. Mr Corner's alternative argument was that, if the discretionary exercise was indeed necessary, it had been carried out. I cannot accept that. The position here is that the Minister did not give a reasoned decision. She simply made the order. No complaint is made about that. The appellants are content to accept that the Minister had read and properly taken account of the submissions which were put before her by her advisory board. We have those submissions, although some parts have been redacted – like Pill LJ, I am puzzled as to why.

89. Mr Wolfe submitted that there was no sign that the Minister had considered the potential impact of her order on badgers. Mr Corner submitted that she plainly had because, although there was no estimate as to how many badgers were likely to be killed, she knew that the cull would entail the deaths of many badgers.

90. In my view, Mr Corner's submission rather missed the point. It is not necessarily a question of how many badgers will be killed; the important matter is consideration of the nature and extent of the adverse effects of killing a large number of badgers and whether the benefits to be derived from the proposed cull outweigh those adverse effects. The submissions to the Minister contained nothing about the adverse effects of killing a large number of badgers; indeed, from those submissions it would not be possible to understand why killing badgers might be regarded as 'a bad thing'.

91. It must not be thought that the adverse effects of killing badgers are the only matters to be considered as part of the exercise of discretion. I have already mentioned that, if and when the Minister considers the expected reduction in the incidence of TB in cattle within the cull area, she should also consider the increase which is to be expected outside the cull area due to the perturbation effect. At the same time, it may be appropriate to consider the uncertainties inherent in the assessment of the likely effect of a cull, to which her attention was drawn in the submission she received. It seems to me that the Minister would also be entitled, in the exercise of her discretion, to consider the cumulative or even synergistic way in which the other cattle control methods which she intends to deploy might interact with the badger cull so as to produce a beneficial effect greater than that of the cull alone.

92. I would not wish it to be thought that those considerations comprise an exhaustive list. I mention them by way of example and to demonstrate the importance of the discretionary exercise.

93. I add that I agree with paragraph 72 of Pill LJ's judgment as to the consequences of the quashing of the Order.

Lord Justice Stanley Burnton :

Introduction

94. I have read the judgment of Pill LJ in draft. I gratefully adopt his exposition of the facts, the statutory framework and the authorities.

95. I have also read the judgment of Smith LJ in draft. I agree with it, but add some words of my own in deference to the arguments that have been put forward and to explain why I have been unable to agree with the conclusions of Pill LJ on grounds 1 and 2.

Ground 3: the application of the Order to the whole of Wales

96. If this order is valid, it would follow that, in the absence of devolution, the Act could be used, in effect, to disapply the Protection of Badgers Act 1992 throughout England and Wales, by means of a single statutory instrument. If the cull authorised by such an order were effective, the badger, an indigenous species, would be eradicated and become extinct in this country. I doubt that this is what Parliament envisaged or authorised when enacting section 21. An order under the Act must identify a specified area, and I incline to the view that Wales is not an area within the meaning of the Act: it is a country. It is however unnecessary to reach a conclusion on this point, which is likely to be academic, given the Minister's acceptance that her powers under section 21 must focus on a specified area, and the evidence indicates that the requirements of section 21(2)(a) and (b) cannot be satisfied in substantial areas of Wales.

97. Section 21(2) imposes two preconditions, in paragraphs (a) and (b) respectively, to the exercise of the discretion to make an order. Both conditions relate to the particular area to be specified in the proposed order. Even assuming that the whole of Wales may be an area for the purposes of section 21, it is clear from the documents to which Pill LJ has referred that the Minister considered only whether those conditions were satisfied in relation to the proposed IAPA, and not to the whole of Wales. Indeed, the evidence indicates that she could not reasonably have been satisfied as required by either paragraph (a) or paragraph (b) of subsection (2) in relation to the whole of Wales. In fact, I think it clear that she did not decide or intend that there would be a cull in the whole country. The Order as made, however, specifies the whole of Wales as the area to which it applies: it is an order that "provides for the destruction of wild [badgers] in [Wales]". It follows that the Minister has rightly conceded that the Order cannot stand.

98. I add that I agree with paragraph 72 of Pill LJ's judgment as to the consequences of the quashing of the Order.

Ground 1: "Substantial"

99. It is common ground that "substantial" is a protean, or chameleon word, the meaning of which depends on the context. It may mean "almost complete", as in the phrase, "I am in substantial agreement". The so-called doctrine of substantial performance requires performance that approaches completion. At the other extreme, it may denote something more than insignificant, or, as Baroness Hale said in *Majorstake Ltd v Curtis*, "not little".

100. Mr Corner QC relied on the fact that the appellants identified only two meanings of "substantial", i.e., "almost complete" and "more than insignificant". I agree that in section 21 "substantial" does not mean "almost complete". If that is what Parliament intended, section 21 would have read "eliminate, or substantially eliminate, that disease". But it does not follow that the second meaning is what

Parliament intended. There is a middle way, which was the appellants' secondary argument.

101. Contrary to the judge's conclusion, in my judgment the meaning of "substantially" in section 21 is affected by the verbal context. In particular, the phrase "in order to eliminate, or substantially reduce the incidence of, that disease" must be read as a whole. A substantial reduction, viewed in the same context as elimination, is a greater reduction than one that is merely more than insignificant. The Respondents' interpretation would have the same, or virtually the same, practical effect as a requirement that the Minister was satisfied that a cull was necessary "in order to reduce the incidence of that disease". Parliament did not use this phrase. The reference to elimination shows that Parliament required a greater reduction. Moreover, it is clear from the requirement of consultation with the appropriate conservation body that the effect on the wildlife in question was considered to be an important consideration. Parliament would not have imposed this requirement if an order was to be so easily justified.

102. It is relevant to the interpretation of section 21 that it extends to protected species, such as badgers. Given the drafting of section 21(2)(b), I do not think that Parliament authorised the removal by delegated legislation of the protection it had conferred by the Protection of Badgers Act 1992, and any similar legislation applying to other species, in order to effect a reduction in disease that was only just more than insignificant or trivial.

103. It is also relevant that although the diseases specified in section 88 to which the Act applies are all serious diseases, section 88(2) confers power on the Minister to extend the definition of "disease" to "*any* other disease of animals". I cannot read this power as impliedly limited to serious diseases. Thus the power conferred by section 21 may be extended to apply to diseases that are not serious diseases comparable to bovine TB.

104. Moreover, if the contention of the Minister as to the possible extent of the area of an order made under section 21 were correct, Parliament would have authorised the making of a statutory instrument providing for the extinction of a protected species in the whole of England and Wales on account of a small reduction in the incidence of a disease. This is so unlikely and unreasonable an intention to attribute to Parliament that it cannot be right. I do not think that the importance of reducing the incidence of bovine TB affects this.

105. It is clearly wrong for this Court to seek to replace the words "substantially reduce" with a percentage. To do so would be to legislate, to introduce terms that Parliament has not used: see *Palser v Grinling* [1948] AC 291, 317. Equally, in my judgment it is unnecessary to find a synonym for "substantially" in this context. It may be appropriate for the Court to seek to explain its meaning, but not to substitute other words. I think "substantial" in this context has a meaning similar to that given by Viscount Simon in *Palser v Grinling*:

> "'Substantial' in this connexion is not the same as 'not unsubstantial,' i.e., just enough to avoid the 'de minimis' principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that

> we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence".

Viscount Simon continued:

> "Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case, …"

106. While it may be difficult to define what is meant by "substantially reduce" in the present context, I think that I can say whether a reduction of a specified extent is, or is not, a substantial reduction, although admittedly in some cases the line may be difficult to draw.

107. With these considerations in mind, I ask myself whether a reduction in the incidence of disease by 9 per cent is a substantial reduction. In my judgment it is not.

108. It does not follow from this that the Minister is unable to make an order in relation to an IAPA. Section 21 requires her to be satisfied that there will be a substantial reduction in the incidence of the disease in the area specified in the order. As I have already stated, the order in this case should have been confined to, and specified, the IAPA in which the cull was to be carried out. The fact that a cull in a defined area, i.e. an IAPA, will lead to an increase in the incidence of the disease outside the IAPA does not fall to be considered under section 21(2)(b), which is confined to "the effect of a cull in that area". It falls to be considered when she considers whether to exercise her discretion to make the order. She may conclude that the increase in the incidence of the disease outside the specified area would be so great as to obviate the benefits of a reduction in the incidence of the disease within the area, so that the order should not be made. The evidence before the Minister indicated that a cull in an IAPA would reduce the incidence of bovine tuberculosis "*in that area*" by much more than 9 per cent. Thus her error in specifying the whole of Wales in the order resulted in the requirement in paragraph (b) not being met when otherwise it might have been.

Ground 2: the balancing exercise

109. It is common ground that if the requirements of paragraphs (a) and (b) of section 21(2) are met, the Minister has a discretion whether or not to make an order. The satisfaction of the requirements of those paragraphs does not impose a duty to make an order.

110. I accept the appellants' submission that Parliament's requirement of consultation with the appropriate conservation body carries with it the implied requirement that when considering whether and how to exercise her discretion, the Minister must consider the effect of the proposed order on the wild members of the species that is to be culled, as well as, no doubt, its effect on the ecology of the area generally. I say this because it would be expected that on such a consultation a conservation body would inform the Minister of its views on the conservation of wild species in the area; and a requirement of consultation carries with it the implied requirement that the views of the consultee on relevant matters should be considered. Consideration of such matters as the effect on wildlife does not mean merely being

informed of the facts. It involves considering whether the consequences of the proposed order for the wildlife species in question and the ecology generally are justified by the anticipated benefits of the cull authorised by the proposed order. In other words, the Minister should weigh one against the other.

111. This does not mean, however, that the Minister had to have an accurate estimate of the numbers of badgers to be killed. It is obvious that a cull in the proposed IAPA is going to result in the deaths of many badgers. The requirement of a balancing exercise is easily satisfied, and I would have expected the Minister to have served evidence leading the Court to conclude that she had indeed concluded that the benefits of a cull in the IAPA outweighed the harm involved in the cull of badgers. Had she done so, this ground would have failed. But she did not. Her case is that she was not required to do so. For the reasons I have given, I would reject this contention and hold that she is bound to take account of the effect of a cull on badgers in the manner that Smith LJ and I have indicated.