Neutral Citation Number: [2021] EWHC 1870 (Admin)

Case No: CO/3029/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 July 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN	**Applicants / Claimants**
on the application of	
(1) WWF-UK **(2) ANGLING TRUST LIMITED** **(3) FISH LEGAL**	
- and -	
(1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS **(2) ENVIRONMENT AGENCY**	**Respondents / Defendants**
NATURAL ENGLAND	**Interested Party**

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David Wolfe QC instructed by **Jake White, Head of Legal WWF-UK, for the First Applicant/Claimant and Justin Neal, in-house solicitor Fish Legal, for the Second and Third Applicants/Claimants**
Richard Turney (instructed by the **Government Legal Department**) for the **First Respondent / Defendant**
Andrew Parkinson (instructed by **Legal Services**) for the **Second Respondent / Defendant**
The **Interested Party** did not appear and was not represented

Hearing date: 16 June 2021

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Approved Judgment

Mrs Justice Lang :

1. This application arises from a claim for judicial review, disposed of by way of a consent order ("the CO") at a hearing on 27 November 2015, which gave the parties liberty to apply in relation to the enforcement of the Schedule to the Order. The Claimants now apply for a declaration that the Defendants are in breach of the Schedule to the CO.

The original claim

The Claimant's case

2. In the original claim, the Claimants applied for judicial review of the Defendants' failure to comply with the obligations of Directive 2000/60/EC, known as the Water Framework Directive ("WFD"), for protected areas, in particular, by not making orders for Water Protection Zones ("WPZs").

3. Article 4(1) WFD requires Member States to implement programmes of measures, specified in river basin management plans, for surface waters, groundwater and protected areas.

4. By Article 6(1) WFD, protected areas are to be listed in a register, and they include all protected areas covered by paragraph 1(v) of Annex IV which are:

> "areas designated for the protection of habitats or species where the maintenance or improvement of the status of water is an important factor in their protection, including relevant Natura 2000 sites designated under Directive 92/43/EEC(1) *[the Habitats Directive]* and Directive 79/409/EEC(2) *[the Wild Birds Directive]*."

5. Article 2(2) of the Habitats Directive provides that:

> "Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest."

6. The Claimants submitted that the combined effect of the Habitats Directive and Article 4(1)(c) WFD was that, by 22 December 2015 (15 years after the WFD came into force), favourable conservation status was to be achieved for the water dependent features of Natura 2000 sites where the maintenance or improvement of the status of water was an important factor in their protection.

7. It was common ground that a barrier to achieving favourable conservation status in many Natura 2000 sites in England was diffuse water pollution from the activities of third parties, e.g. agriculture.

8. By Article 11(1) and (2) WFD, Member States are required to establish a programme of measures, to include basic measures and where required, supplementary measures.

Article 11(3) describes basic measures as the minimum requirements, which include, among other matters:

> "(h) for diffuse sources liable to cause pollution, measures to prevent or control the input of pollutants…."

By Article 11(8), the programme of measures was to be established no later than 9 years after the coming into force of the WFD and to be made operational no later than 12 years after that date.

9. The UK introduced river basin management plans for each river basin, pursuant to Article 13(1) WFD. These plans provided, among other matters, that voluntary measures and WPZs would be used to achieve favourable conservation status in protected areas.

10. The UK made provision for WPZs with effect from 22 December 2009 by way of an amendment to the Water Resources Act 1991 ("WRA 1991"). By section 93(5) and Schedule 11 of the WRA 1991, the Secretary of State is empowered to make an order designating an area as a WPZ and to regulate specified activities so as to prevent or control the entry of any polluting matter into controlled waters with a view to prevent or limit harm, as defined.

11. The Claimants complained that, although other measures had been deployed, the First Defendant had not designated any WPZs. A letter from the Second Defendant to the Claimants, dated 24 March 2015, referred to a report made in 2011 which stated "WPZs do have a future role but this is as a 'last resort' where other mechanisms are unlikely to deliver the required objective". The Claimants argued that the "last resort" approach was unacceptable, given the continuing failure of other measures to achieve favourable conservation status in protected areas within the 15 year deadline. The Claimants submitted that the failure to progress WPZs was unlawful, and active steps should now be taken to deploy them.

12. The Claimants relied upon extensive evidence of the threat posed by pollution to habitats and wildlife, which was not being successfully addressed by the Defendants' current measures. In October 2014, Natural England produced a spreadsheet entitled '*Extended Deadline information for Natura 2000 Protected Areas*' which showed that, of the 57 sites identified as failing in the 2009 river basin management plans, some 50 sites continued to be impacted by agricultural diffuse pollution, and time extensions were now proposed for 39 of them.

The Defendants' case

13. The Defendants' response was that a WPZ was not an off-the-shelf, ready-made "solution" to the problems presented by diffuse water pollution. It was a bespoke regulatory tool which had to be tailor-made to address the specific causes of pollution in a specific area and in a specific way, by identifying specific measures to address those causes. It required a robust evidence base in order to justify it and to be effective.

14. The Defendants explained that, together with Natural England, they were undertaking the very work which was required before any WPZs could be designed or designated,

namely, to determine what measures were required in each area. The fact that such work was not described as specific to the creation of a WPZ was irrelevant. The work may show that a WPZ is not needed in any one given area, because the identified measures will be sufficient even without the backing of a WPZ. Equally, it may show that a WPZ is in fact needed in that area. It is only by completing the work of identifying the required measures that a judgment will be able to be made as to where it may be necessary to back them with a WPZ in order to achieve the required standards for protected sites, and, if so, precisely what measures should be adopted within the context of any such WPZ.

15. The Defendants had not adopted a policy or "doctrine" whereby WPZs will not be identified as necessary (or even considered for deployment) until other measures aimed at achieving compliance have failed. The Defendants were giving specific and active consideration to the measures which need to be adopted to achieve the objectives required by the WFD. In that context, the use of a WPZ remains an available option.

16. The Claimants' submission that WPZs must be progressed and implemented without delay did not have regard to factors such as whether there was sufficient evidence to ensure it would be effective; the costs its imposition would incur; whether those costs were proportionate to any benefit which might be obtained; and whether similar benefits could be achieved by less intrusive means. The WFD does not require that Member States must make use of all available measures, regardless of whether a particular measure's use would be effective and proportionate. It is wholly acceptable to work towards the use of a particular measure over time, where it is not at present technically feasible, or it would be disproportionately expensive, to do otherwise. The deployment of WPZs remained under consideration in the context of the updated river basin management plans, but there were also a range of other measures which may be implemented to achieve the applicable standards and objectives for protected sites.

17. So far as the timing by which those objectives are met was concerned, all the necessary improvements in the status of the water bodies could not reasonably be achieved by 22 December 2015. The work completed since 2009 has shown that the scale of the improvements required can only reasonably be achieved in phases exceeding that timescale, for reasons of technical feasibility and because completing the improvements within that timescale would be disproportionately expensive. While it is true that in 2009, the river basin management plans anticipated that the objectives would be met (including by use of WPZs), matters had moved on with the benefit of considerably fuller information and understanding of the problems raised by diffuse water pollution.

18. In those circumstances, the WFD allowed the timescale for achieving the required objectives to be extended. It was not necessary to prematurely deploy poorly researched and disproportionate WPZs before an extension to the deadline was capable of being invoked under the terms of Article 4(4) WFD.

19. For these reasons, the Defendants had not acted unlawfully. Further, the Claimants' proposed order that the Defendants should take steps to investigate or progress the deployment of WPZs was inappropriate and unnecessary in any event. Whether ultimately a WPZ could or should be deployed will depend on the circumstances in relation to each individual site, and on the judgment formed in each case as to the most proportionate, effective measures which should be adopted.

The CO

20. Permission to apply for judicial review was granted on the papers by Stewart J. on 18 August 2015. The claim for judicial review was heard by Collins J. on 19 November 2015. In a short judgment, Collins J. said:

> "4. When this case was opened I had a discussion with Mr Wolfe as to what could be achieved by this litigation. I am glad to say that it was agreed, at my suggestion, that the defendants should put in, effectively, a one-page document identifying precisely the basis upon which they said they would be acting so that Mr Wolfe could attack that to the extent that he considered it necessary to do so. There has been an adjournment and the parties have, in the end, reached agreement as to what the defendant should declare they propose to do. On that basis, which will form part of the order of the court, the claim has been withdrawn."

21. The CO, which was dated 19 November 2015 but not sealed until 27 November 2015, was in the following terms:

> "**CONSENT ORDER**
>
> UPON the Defendants having set out their position in the attached Schedule
>
> IT IS ORDERED BY CONSENT:
>
> 1. The claim is withdrawn other than for the purposes of enforcing the Schedule.
>
> 2. Liberty to the parties to apply in relation to the enforcement of the Schedule.
>
> **SCHEDULE**
>
> **DEFRA/Environment Agency Position Statement**
>
> It is not true that the Secretary of State and Environment Agency do not intend to apply WPZs. As the draft RBMP (30 October 2015) states in the "Information on Mechanisms for the Water Framework Directive (WFD)" Annex, WPZs can be designated to establish additional statutory provisions to prevent water pollution where evidence shows that existing statutory or voluntary measures have not been or are unlikely to be sufficient to meet WFD objectives.
>
> The phrase "last resort" as used in the 2010 and 2011 documents to which the Claimants refer should not be understood in any other way. In particular, the Environment Agency has never decided not to pursue proposing any WPZs in the future, or that

> it would only do so if and when all other measures had been demonstrated to have failed.
>
> Instead, the evidence base that is required to be obtained before a WPZ can be applied consists of evidence of:
>
> (i) the cause of pollution in each specific site;
>
> (ii) what measures would be most effective to achieve the objectives for the site and where they should be deployed; and what mechanism is most appropriate to implement the identified measures, whether a WPZ, or General Binding Rules on Agriculture (currently being consulted on), anti-pollution works notices, cross-compliance, or any other available mechanism.
>
> The work needed before a WPZ can be proposed and deployed has been, and is being, carried out through the catchment based initiative, partnership working and ongoing investigations, monitoring and evidence gathering to support implementation of WFD requirements. The evidence that has been and is being produced as a result of this work forms the necessary evidence base to assess whether the identified measures are likely to be sufficient to meet WFD objectives for each site, including whether those measures need to be backed by a WPZ order.
>
> For the avoidance of doubt, the work described at (ii) above will involve evaluation of the potential for measures to be included in WPZ orders to achieve the protected area objectives in each Natura 2000 site and the effectiveness of delivering those measures through the WPZ mechanism. The results will be set out as soon as reasonably practicable in the Diffuse Water Pollution Plans and/or Site improvement Plans as appropriate for each site, as amended from time to time."

The Claimants' current application

22. On 26 February 2021, the Claimants filed an application notice for a declaration that "the Defendants are in breach of the Schedule to the CO dated 27 November 2015".

23. The alleged breach relates to the obligations arising from the CO, not the original grounds for judicial review. The specific obligation relied upon is the statement, in the final paragraph of the Schedule, that the results of the Defendants' evaluation of sites "will be set out as soon as reasonably practicable in the Diffuse Water Pollution Plans and/or Site Improvement Plans as appropriate for each site, as amended from time to time".

24. The Defendants' skeleton argument for the 2015 hearing described Diffuse Water Pollution Plans ("DWPPs") as follows:

> "26. …. the particular challenges of diffuse water pollution ("DWP") are widely recognised to be challenging because it derives from multiple, often intermittent, sources that individually may be relative minor but which collectively can have a significance *(sic)* impact on water quality, and because there are often many activities and influences that contribute to the problem. In 2009, Natural England and the Environment Agency started to develop DWP Plans for sites affected by this issue. They provide an iterative and adaptive approach, requiring monitoring and adjustment of the measures being deployed to ensure objectives are achieved without placing unnecessary burdens on those affected: where mechanisms such as advice and incentives fail, the reports identify and collate evidence to inform the next steps."

25. According to the witness statement of Ms Deborah Tripley, who is the First Claimant's Director of Environmental Policy and Advocacy, the Claimants' understanding of the Defendants' position in 2015 was that the evaluation of sites would be undertaken as soon as possible, and that the recommended measures would be set out in DWPPs before the end of the final six-year River Basin Management Plan cycle (2021-2027) (paragraph 18). However, the Defendants have not achieved their own targets, citing a lack of resources as the reason for the lack of progress (paragraph 19).

26. As at the date of her witness statement in February 2021, only four out of the required 37 DWPPs have been produced. 13 sites have expected completion dates in 2021 and 4 have dates in 2022 and beyond. The remaining 16 sites have no expected completion date and are either "on hold" or "under review".

27. Mr Thomas Stuart, who is the First Claimant's UK Landscapes Manager, explains in his witness statement that diffuse pollution occurs when nutrients, bacteria, chemicals and fine sediments contaminate soil, water and air environments as a result of the way agricultural land is managed, and natural processes such as rainfall. Such diffuse inputs can result in high concentrations of phosphates and nitrates, which impact aquatic wildlife and habitats (paragraphs 5 – 6).

28. Mr Stuart refers to the Second Defendant's 2019 data which showed that only 14.6% of rivers and 16.2% of water bodies in England achieved "good" or "high" ecological status in accordance with the WFD. The proportion of assessed rivers and water bodies affected by pollution from agriculture and rural areas rose from 35% in 2015 to 40% in 2019 (paragraph 8). Mr Stuart's analysis of the data relating to 12 of the 37 sites which were the subject of the CO indicated that 65% of Sites of Special Scientific Interest ("SSSI") sub-units were classified as unfavourable or destroyed, and some had deteriorated further since 2015 (paragraphs 12-19). At paragraphs 20 to 36, Mr Stuart summarises the importance of the 37 sites for birds, fish, invertebrates, plants and mammals. Mr Justin Neal, in-house solicitor at the Third Claimant, describes in his witness statement the damaging levels of river pollution in some of the DWPP sites, including some where no completion date has been identified.

29. Mr Mark Owen, who is Head of Freshwater at the Second Claimant, states in his witness statement that three out of the four DWPPs provided by the Defendants demonstrate

ongoing failings which have not been addressed, and some evidence of decline since November 2015 (paragraphs 10 – 17).

The enforceability of the CO

30. The Defendants submit that the Claimants' application is misconceived on two main grounds.

31. First, the Defendants submit that the Schedule to the CO cannot be enforced as if it were a Tomlin order in a private law dispute which establishes an essentially contractual mechanism to enforce an agreement between the parties. In a judicial review claim, the parties are not free to assume new legal obligations, and the Defendants cannot fetter the exercise of their statutory duties.

32. Second, the Defendants further submit that the CO cannot have the effect of binding the Defendants to do what the law did not require them to do in 2015, and does not require them to do now. The claim for judicial review was primarily based on the failure to designate WPZs. However, the application is now made solely in respect of the failure to prepare DWPPs. No fresh complaint of unlawfulness has been made by the Claimants, nor could there be, since DWPPs are non-statutory plans which the Defendants are not under any legal obligation to make, either under the WFD or the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017/407 ("the 2017 Regulations") which contain the relevant legal obligations, following the UK's departure from the EU. Under the 2017 Regulations, the extended date for achieving compliance with the WFD objectives for protected areas is 22 December 2021 (regulation 13(6)). The deadline is capable of being extended to 22 December 2027 (and beyond where natural conditions are such that the environmental objectives cannot be achieved by that date).

33. In my judgment, the Claimants are correct to submit that the CO was not a simple consent order which brought the claim to an end on agreed terms incorporated in an order of the Court. Instead, the Claimants correctly characterise the CO as akin to a Tomlin Order, first proposed by Tomlin J. in Practice Note [1927] W.N. 290, and now embodied in CPR 40.6(3)(b)(ii). The helpful commentary in the White Book at CPR 40.6.2 (part of which was approved in *Community Care North East v Durham CC* [2012] 1 WLR 338) analyses the authorities and draws out the key features of a Tomlin order, as follows:

    i) When terms of settlement are reached, the proceedings are stayed on agreed terms which are scheduled to the order, save for the purpose of carrying such terms into effect.

    ii) The agreed terms in the schedule are not part of the order, and cannot be directly enforced as if they were an order of the Court. In the event of an alleged breach of the agreed terms, a further application to the Court for an enforcement order is required (*Community Care North East v Durham CC* [2012] 1 WLR 338, per Ramsay J. at [23] – [26]). However, neither fresh proceedings nor an amendment to the pleadings are required (*Bostani v Pieper* [2019] 4 WLR 44, per Jacob J. at [57]).

iii) The agreed terms in the schedule are a binding contract between the parties. Applying contractual principles, the terms may be capable of rectification or may be held to be unenforceable, but generally, in the absence of express provision, they cannot be varied or set aside by the Court (*Community Care North East v Durham CC*, per Ramsay J. at [24], [28] – 36]).

iv) If the terms in the schedule are too vague, the Court may decline to enforce them (*Wilson & Whitworth Ltd v Express and Independent Newspapers Ltd* [1969] 1 WLR 197).

v) The terms in the schedule must be construed as a commercial instrument, not to probe the real intentions of the parties, but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer is to be gathered from the text and its relevant contextual scene (*Sirius Insurance Co. v FAI General Insurance* [2004] 1 WLR 3251, per Lord Steyn at [18]).

vi) Where the scheduled terms are clear, an order to give effect to them can be obtained, notwithstanding that the compromise goes beyond the ambit of the original dispute and the provision sought to be enforced is an obligation which arose for the first time under the compromise (*E.F. Philips & Sons v Clarke* [1970] Ch. 322, per Goff J. at 325F-G).

vii) As the agreed terms in the schedule are contractual in nature, a limitation period of 6 years applies from the date of breach (*Bostani v Pieper*).

34. In this case, although the order described the claim as "withdrawn other than for the purposes of enforcing the schedule", rather than "stayed", it had the features of a Tomlin order, made pursuant to CPR 40.6(3)(b)(ii). Terms were agreed but they were set out in a Schedule, not incorporated into the body of the order. The parties consented to, and made express provision for, a subsequent application to the Court in relation to the enforcement of the terms in the Schedule.

35. I do not accept that it is unlawful for a public body to enter into a binding settlement agreement. It may legitimately do so in the exercise of its statutory powers and duties. There is no reason in principle why a minister or a public body should not agree with an opposing party that they will commit to taking certain steps, as part of a settlement agreement, in the exercise of their public functions. In my experience it is commonplace for such commitments to be given, often in the form of undertakings. The terms of a settlement agreement will often differ from the relief originally sought, because it is a compromise, but that does not affect its validity. As the case law indicates, in a Tomlin order, the scheduled agreement may extend beyond the pleaded case, and give rise to new obligations (see sub-paragraphs 33(ii) and (vi) above). Such agreements are enforceable, on application to the Court, and do not require a fresh claim to be commenced.

36. Tomlin orders are less common in public law claims than in private law claims, but they are not unknown. CPR 40.6(3)(b)(ii) does not exclude judicial review claims under CPR Part 54. Clearly there are differences between a contract claim and a public law claim, but the Court has a discretion in deciding whether to approve the making of

a Tomlin order, and whether to enforce it at a later date, which will allow it to take into account the public law context, and prevent inappropriate orders being made or enforced. This order was approved by an experienced High Court Judge with knowledge of the case (the settlement occurred mid-way through the hearing), and his judgment indicates that he was satisfied that this order was appropriate in this case.

37. In my judgment, many of the terms of the agreement in the Schedule were too vague and general to be enforced. The Court may decline to enforce terms which are too vague: see *Wilson & Whitworth Ltd v Express and Independent Newspapers Ltd* [1969] 1 WLR 197. However, I am satisfied that the clause which the Claimants rely upon in the final paragraph - that the results of the Defendants' evaluation of sites "will be set out as soon as reasonably practicable in the Diffuse Water Pollution Plans …. as appropriate for each site, as amended from time to time" is sufficiently clear and specific to be enforced.

38. In reaching this conclusion, I have taken into account the clear contemporaneous evidence in this case that the Defendants fully accepted that they had entered into an agreement with the Claimants in this respect, as part of the CO. I set out some examples from the evidence below:

i) A note of a meeting between the Department for Environment Food & Rural Affairs ("Defra") and the Claimants on 26 April 2016 stated:

> "We have been working together with Natural England to look at how we can comply with the Consent Order.
>
> We have decided that the DWPPs are the best vehicle to publish the results of the analysis (SIPs are very high level and it would be difficult to capture the options/evidence within them).
>
> Over the next 3-4 years the following will need to be completed for all N2K DWPPs:
>
> A. Complete any investigations needed to fill <u>essential</u> gaps in evidence to understand the problem and the sources.
>
> B. Complete options appraisal of <u>all</u> mechanisms needed to achieve protected area objectives, including assessing their effectiveness and costs.
>
> C. Update DWPPs to include the above assessment and actions to take forwards the identified mechanisms."

ii) An internal Environment Agency paper headed "Judicial review: How we carry out the Consent Order – Situation Report February 2017" stated:

> "….In November 2015, a Consent Order was agreed that requires the Environment Agency, working with Natural England (NE) to evaluate and identify the measures necessary to achieve protected area objectives in each N2K site that is unfavourable due to diffuse water pollution. This includes:

> - An assessment of how far the existing measures and mechanisms to tackle diffuse water pollution will lead to the necessary improvements in water quality to meet the conservation objectives of these sites.
>
> - If these are adjudged to be insufficient, the appraisal of alternative measures and mechanisms, including WPZs.
>
> - The publication of the results as an appendix to the Diffuse Water Pollution Plans (DWPP), jointly owned by NE and Environment Agency …."

39. In my view, the Defendants did not need to enter into a CO in the terms in which they did – they chose to do so voluntarily. The evidence suggests to me that at that time they shared the Claimants' concern about the effective implementation of the WFD, and wanted to implement the required measures. The existence of a binding consent order was presumably seen as a way of prioritising this endeavour, among other competing demands, and securing resources for it.

40. Therefore I conclude, for the reasons set out above, that the Claimants' application is not misconceived, as the Defendants allege, and the commitment in the Schedule in respect of DWPPs is capable of being enforced.

Breach of the CO

The meaning of "reasonably practicable"

41. The Schedule provided that the results of the Defendants' evaluations "will be set out as soon as reasonably practicable in the Diffuse Water Pollution Plans ….".

42. The parties helpfully provided me with authorities on the meaning of the phrase "reasonably practicable". The phrase means more than "when convenient": see *Gaia Ventures Limited v Abbeygate* [2018] EWHC 118 (Ch). In *R (Q) v Secretary of State for the Home Department* [2004] QB 36, the Court of Appeal made it clear that the phrase did not mean "at the first opportunity", and explained that its meaning would depend upon the context in which it was used.

43. In *Walls Meat Company v Khan* [1979] ICR 52 the issue was whether it had been "reasonably practicable" for an employee to present to an industrial tribunal, within the three months required by the relevant statute, a complaint that he had been unfairly dismissed. Brandon LJ said, at 60:

> "Looking at the matter first without reference to the authorities, I should have thought that the meaning of the expression concerned, in the context in which it is used, was fairly clear. The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or

> the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

44. The Defendants submit, and I accept, that resource constraints are a factor which may reasonably "interfere with" or "inhibit" the ability to prepare DWPPs. It is well established that, as a matter of principle, a public authority is entitled to have regard to the cost to the public purse of a particular course of action. As Lord Carnwath said in *Health and Safety Executive v Wolverhampton City Council* [2012] UKSC 34 at [25]:

> "As custodian of public funds, the authority not only may, but generally must, have regard to the cost to the public of its actions, at least to the extent of considering in any case whether the cost is proportionate to the aim to be achieved, and taking into account of any more economic ways of achieving the same objective. Of course, the weight attributable to cost considerations will vary with the context".

45. In *R (Friends of the Earth) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] PTSR 529, the Court considered duties on the Secretary of State in sections 2(1) and (2) of the Warm Homes and Energy Conservation Act 2000 to prepare and publish a strategy setting out policies for reducing fuel poverty in England as far as reasonably practicable, and specifying target dates for achieving that objective. Section 2(5) required the Secretary of State to take such steps as were in his opinion necessary to implement the strategy. McCombe J. held, at [31]:

> "It is open to the Government to have regard to its overall budget and the other calls upon its resources in deciding what steps to take in implementation of the strategy, including its requirement that efforts should be made to achieve the 2010 and 2016 targets as far as reasonably practicable."

46. The Court has a limited role in reviewing the decision-maker's judgment in those circumstances. As Singh LJ said in *R (Drexler) v Leicestershire CC* [2020] EWCA Civ 502:

> "57 … the courts recognise that they are not well placed to question the judgement made by either the executive or the legislature in relation to matters of public expenditure. This is both on the ground of relative institutional competence and on the ground of democratic legitimacy. The allocation of scarce or

> finite public resources is inherently a matter which calls for political judgement. This does not mean that the courts have no role to play but it does mean that they must tread with caution, affording appropriate weight and respect to the judgement formed by the executive or the legislature.
>
> ……
>
> 80. ….this is an area in which the Respondent had to make difficult choices, in straitened financial circumstances, as to its priorities for public expenditure. It is better placed than the Court can ever be to know the needs of its local area and its residents. If cuts cannot be made to the budget in one context, they are likely to be necessary in some other context and will affect other people, who are not before the Court. Even if no cuts had to be made elsewhere, the gap in public finances would have to be filled in some other way, typically by raising taxes or borrowing, even assuming that those options are available. These methods all have consequences for other people. Sometimes this is called a "polycentric" issue, to use the word made famous by Prof. Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv. LR 353. This point goes to the relative institutional competence of the Respondent as compared with the Court…"

47. Although these cases concerned challenges to the lawfulness of the public body's actions, not the enforcement of a consent order, the question of resources may also be relevant where the "reasonably practicable" requirement is enshrined in a court order. In *Jordan v Norfolk CC* [1994] 1 WLR 1353, the defendant public authority had been ordered to replace trees, hedges and shrubs which had been destroyed or damaged in the course of laying a sewer "so far as reasonably practicable". The authority subsequently applied for an order that the claimant's scheme of reinstatement was not "reasonably practicable" on the grounds of expense. The Vice Chancellor accepted that the cost of the proposed scheme was relevant to whether it was reasonably practicable, saying at 1357:

> "In my view the phrase "so far as reasonably practicable" in paragraph 8 is sufficiently general for it to embrace matters additional to the physical feasibility of planting replacement trees of the same maturity. In this area there is very little nowadays which is not physically feasible if enough money is spent. Hence in this context the phrase is apt to include financial considerations."

The evidence

Ms Deborah Tripley

48. Ms Tripley, in her witness statement, gave an account of the action taken by the Defendants, under the heading "Engagement and Lack of Progress", as follows:

"21. In the summer of 2016, the Agency provided a prioritisation of sites based on a set of categories which would determine the phasing of the work necessary to comply with the WFD obligations. The Claimants expected, at the very least, that measures including WPZs (where appropriate) would be applied promptly for the 'category 1 sites' – where the Agency said it already had the evidence available to make decisions about effective measures. Five pilot sites were included in this category.

22. A progress report published by the Agency in September 2016 … indicated that all steps for the category 1 sites would be completed by March 2017. That report also stated that "*[o]ver the next 4 years (until March 2020) the following actions will need to be completed by Area for all 36 N2K DWPP/NMP (note that some Areas have already completed some steps):*

Step A: Complete any investigations needed to fill gaps in evidence to understand the problem and the sources.

Step B: Complete options appraisal of measures and mechanisms which could achieve protected area objectives.

Step C: Update DWPP (or NMP) to include above assessment and agreed actions to take forward the preferred option." ….

23. However, a year later, in a further document published by the Agency in August 2017 ("Diffuse Water Pollution Plan Programme Board Consent Order Review: Quality and Assurance Strategy"), the Agency admitted that "*more still needs to be done to understand sources and pathways of pollution*" for the first five pilot sites ….

24. Both the 2016 and 2017 reports by the Agency cited that a lack of resources was hindering progress. The 2016 report stated that the "*category 1 (b) sites could not be taken forward this financial year due to unavailable local resource to deliver this in the timescale. The other sites still need a lot more modelling and investigations to get to a position where they are published. We will work with areas to fill the gaps in evidence at these sites over the next 4 years*"….. The 2017 report then said "*To carry out options appraisals, as set out in the Consent Order, requires considerably more work for Area teams than can currently be resourced without impacting significantly on the business. To date, there has been no separate funding associated with this work (WFD and GiA) and Areas are having to make decisions to either not carry out this work or drop other essential priorities. There are potential cost savings to be made by a 'national once' programme, rather than each Area going through a separate procurement process.*"

> 25. For Tranche 2 of the Consent Order work (from September 2017), the 2017 report states that "*A new EA-NE director level DWPP Programme Board has been established to:*
>
> *Ensure legal compliance with the CO*
>
> *Ensure delivery of the CO in the appropriate timescales*
>
> *Obtain the resources required to deliver the work in a timely manner.*"
>
> 26. On 12 October 2017, according to the notes of a Water Directors Meeting …., no additional funding was made available for the work and it had to be prioritised along with other areas of work (such as abstraction reform). The note goes on to say that progress has therefore been slow but the work in all of the pilot sites is expected to have been completed by April 2018.
>
> 27. On 25 October 2017, the Claimants wrote to the Department to express concern about the ongoing delays by the Defendants in meeting their legal obligations (under both the WFD and the Consent Order) …. That letter referred to deadlines for steps to be taken which were set out in the Agency's August 2017 report and highlighted concerns that these deadlines would be missed.
>
> 28. On 13 November 2017 the Department wrote to the Claimants stating that "*while* [the Agency] *still aim[s] to update the Diffuse Water Pollution Plans (DWPP) as soon as practicable, the level of evidence gathering at this stage will not be sufficient to make significant changes*" …..."

49. Ms Tripley then went on to address what she described as "the policy of stop and slow":

> "30. The six-monthly 'DWPP site progress updates' provided by the Department to the Claimants categorise each site as follows: Green (denoting that work is on track or completed), Amber (denoting slowed progress), Red (denoting that activity has 'stopped' or 'slowed' or the completion date is yet to be confirmed).
>
> 31. Three of the most recent progress updates (January 2019, August 2019 and May 2020) demonstrate the continuing sliding or rolling back of deadlines for completing the Consent Order work ….. For example, in the January 2019 update, 15 of the sites were expected to be completed by the end of 2019. In the August 2019 update, that figure had reduced to 9. By the May 2020 update, 17 of the sites had no expected completion date at all (many of which simply said 'on hold') and the other sites either had lines drawn through the expected completion date or had 2020+, 2021 or beyond.

> 32. The May 2020 update showed that, of the 37 sites, 20 sites were in the red category, 9 were in the amber category, and only 8 were in the green category. The main reason cited for this 'stopped' or 'slowed' progress was resource constraints (following the theme picked up in correspondence and meetings between the parties over the many years since the Consent Order was made).
>
> 33. This culminated in a pre-action letter from the Claimants to the Defendants on 21 August 2020 setting out the basis on which the Defendants had failed to carry out the Consent Order work 'as soon as reasonably practicable' ….
>
> 34. The Defendants responded on 11 September 2020 …. At paragraph 12 of this letter, the Secretary of State accepted that "*all of the obligations under the Consent Order are to be carried out 'as soon as reasonably practicable'*". However, the Defendants disagree with the Claimants as to what this means ….
>
> 35. At paragraph 16 of the letter, the Defendants concede that "*[t]he policy of* "*stop and slow*" *is evidence not of a failure to comply with the Consent Order, but of the prioritisation undertaken by the proposed Defendants to ensure that progress continues to be made to meet the Consent Order obligations.*""

50. Ms Tripley then made an assessment of the current position, and concluded that the poor progress made by the Defendants amounted to a failure to comply:

> "38. The November 2020 updated shows a very slight improvement in progress, following the pre-action letter sent to the Defendants in August. However, the state of play remains significantly behind previous commitments made by the Defendants during the five years since the Consent Order was made and the Claimants cannot accept the new completion dates provided because the Defendants have repeatedly reneged on these dates in the past ….. and because 2021 sees the end of one six-year RBMP cycle and design/establishment of the next and final cycle…
>
> 39. We are now told that the work for four of the sites has been completed and that final published versions should be available shortly. Thirteen sites have expected completion dates in 2021 and 4 have dates in 2022 and beyond. However the remaining 16 sites are in the 'red' category with no expected completion date and are either 'on hold' or 'under review'. Given the length of time the Defendants have had to carry out this work, this extremely poor progress represents all but a wholesale failure by the Defendants to comply with the terms of the Consent Order."

Ms Janet Dixon

51. Ms Janet Dixon, Deputy Director for Water Quality at Defra, accepts that the work on DWPPs has not been delivered according to the programme anticipated in 2016, namely, to complete 37 DWPPs over 4 years to 2020. The work plan was divided between the Second Defendant and Natural England, with Defra in an oversight role (paragraphs 25, 26). However, as work progressed it became clear that the evidence requirements for DWPPs were considerably more complex than initially thought and this, coupled with initial mistakes in modelling on sites designated as Priority 1(a), meant the timelines had to be revised. These challenges were explained to the Claimants in a letter dated 30 January 2018 (paragraph 28). By April 2018, an audit of work at each of the sites was completed, which shaped the future implementation of the DWPP programme.

52. Alongside the DWPP programme, Defra has been directing resources to improving farm investment, practices and land use. The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 have set a baseline of good agricultural practice across England. The Catchment Sensitive Farming partnership is a programme of supportive measures aimed to help farmers reduce their environmental footprint which has reduced agricultural pollution. Work has continued in local areas teams to implement measures to reduce nutrient pollution at site level (paragraphs 18-21).

53. There was engagement with the Claimants in November 2018 and February 2019. By February 2019, it was clear to the Defendants that an approach which prioritised action on the ground, with review work taking place alongside, would be preferable to give effect to the priorities of all parties. By May 2019, Natural England and the Second Defendant agreed on a revised approach called Enhanced Adaptive Management, which aimed to implement immediate action on the ground, based on existing or more readily available evidence, to help generate further information, for use alongside modelling and analysis, to identify measures needed (paragraphs 32 and 33).

54. Ms Dixon identifies two major unforeseen factors which have impacted upon the capacity of the Defendants to implement the DWPP programme. First, following the referendum, Defra had to prepare for EU Exit, saving the corpus of EU-derived law into UK statute and designing and implementing successor schemes to replace the EU schemes. Second, the COVID-19 pandemic required Defra to pivot its focus and resource to provide support for the Government's emergency response and to assist the farming, water and other sectors as they were affected by the pandemic. Staff and resources were redeployed in March 2020 and then again in November 2020 (paragraphs 34 – 37). The "Consent Order Progress for Natura 2000 Sites – March/April 2021" explained that as noted in the November 2020 update, COVID-19 has impacted delivery, to some extent, at all of the 37 sites.

55. As to resources, Ms Dixon explained, at paragraph 39:

> "Defra were aware of how the range of pressures risked hampering progress on our priorities and resourcing decisions were made taking into consideration a wide range of factors and priorities needing to be delivered with limited public funds. Ultimately, DWPPs and related work must be carried out within

> budgetary constraints and it is not open to Defra, the Environment Agency or Natural England to apply to unlimited funding to these workstreams. Whilst no additional resource was made available for the express purpose of accelerating progress on DWPPs, Defra, the Environment Agency and Natural England worked hard to make progress alongside other operational priorities funded from their non-ring fenced budget lines. …"

56. Ms Dixon sets out the latest position on DWPPs as at 7 April 2021 (paragraph 45). Four have been completed and a fifth investigation into Poole Harbour that meets the requirements of the Consent Order (but is not in the form of a DWPP) has also been completed. The best estimate is that a further four DWPPs will be completed by the end of 2021, and a further 11 DWPPs will be completed by the end of 2022. Others remain "on hold" or without an estimated completion date.

Mr Kevin Austin

57. Mr Kevin Austin, Deputy Director for Agriculture, Fisheries and Natural Environment at the Second Defendant, explained in his witness statement that, with no dedicated funding for the DWPPs, the project had to be funded from within its existing core allocation from Government. The core allocation has to fund a wide range of essential activities, listed in paragraph 11. This allocation fell from £117 million to £40 million between 2011 and 2020. Moreover, much of the allocation is ring-fenced, leaving a discretionary fund of only £25 million.

58. In 2016, it became apparent that, even on the Category 1(a) pilot sites, there would be a need for further modelling (paragraph 18). In August 2017, the newly created DWPP Programme Board published the "Diffuse Water Pollution Plan Programme Board Consent Order Review: Quality and Assurance Strategy" which commented as follows:

> "Despite significant investment in these sites over the years to gather evidence, more still needs to be done to understand sources and pathways of pollution at these N2K sites.
>
> To carry out option appraisals, as set out in the Consent Order, requires considerably more work for Area teams than can currently be resourced without impacting significantly on the business. To date, there has been no separate funding associated with this work … and Areas are having to make decisions to either not carry out this work or drop other essential priorities."

59. A revised timeline was prepared in June 2017 which assumed that additional funding to deliver the programme would be found. It was estimated that resources of £1.5 million had been allocated to the CO work by the Second Defendant and Natural England. The cost of delivering the programme in its entirety would be in the region of an additional £5 million. A joint bid for a ring fence for funding for this amount was made to Defra in Autumn 2017, but was unsuccessful (paragraphs 19-22).

60. An additional pressure on the Second Defendant's resources was the preparation needed for the UK's exit from the EU (paragraph 23). Environment Agency staff were called upon to provide significant levels of support to Defra which reduced capacity for other work, including the CO work.

61. The COVID-19 pandemic has also had locally variable impacts on the speed of progress. A further bid for £2.5 million in the Government Spending Review for 2020 to expedite the CO work was also unsuccessful (paragraph 32).

62. Mr Austin summarised his conclusions in the following way:

> "44. In summary therefore it is certainly true that progress in the preparation of DWPPs has been slower than was initially anticipated in 2015/2016. That in large part has arisen due to no additional financial resource being allocated to the EA for delivery of this work at a time when our core allocation from government was continuing to decline, whilst our ongoing regulatory obligations were increasing. As outlined this was in the context of the unforeseeable development of EU Exit which meant public funding settlements have been extremely challenging and our resources have been focused towards achieving the more strategic outcomes available for the water environment during this rather unique period. In managing these demands and opportunities I am confident both that we have applied, and will continue to apply, a best endeavours approach to progressing the preparation of the DWPPs; whilst also maximising the opportunities arising from the investigations to make a real difference to the water environment."

Mr Alastair Burn

63. In his witness statement, Mr Alastair Burn, Principal Specialist for Freshwater and Pollution at Natural England, summarised the factors that had affected delivery of the DWPPs at paragraph 12:

> "A range of factors have affected delivery of the programme of work on diffuse water pollution affecting European sites. The main challenges are: scientific understanding/capability; resourcing to manage and undertake the necessary analysis and stakeholder work; and a change in approach during the course of the programme towards an adaptive management approach. This led to a focus on action on the ground alongside a business-as-usual approach to evidence gathering and development of plans."

64. The challenges which Natural England has faced in securing the staff and funding needed to undertake and complete the DWPPs are described by Mr Burn at paragraphs 14.1 – 14.6 and 16 – 25.

65. Mr Burn concludes that Ms Dixon's estimate as to the future progress of the work on DWPPs (see page 60 of Exhibit JD1 and paragraph 56 above) is feasible for the sites in which Natural England is involved (paragraph 31).

Conclusions

66. The WFD, read with the Habitats Directive, required Member States to implement programmes of measures to achieve favourable conservation status for water-dependent features of protected areas (Natura 2000 sites). Since the UK's exit from the EU, those obligations have been continued under UK domestic law. A barrier to achieving favourable conservation status in many of these sites in England is diffuse water pollution from the activities of third parties, particularly agriculture.

67. The judicial review claim, issued in 2015, alleged that the Defendants were failing to take the steps required to meet their obligations, in particular by not implementing WPZs. The claim was withdrawn on the basis of a CO, akin to a Tomlin order, in which the Defendants stated *inter alia* that the results of their evaluation of individual sites would be "set out as soon as reasonably practicable" in DWPPs. In 2016, the Second Defendants set out a programme of work, which prioritised sites by category, with the objective of completing DWPPs for 37 sites by 2020. Regrettably, the progress made has been much slower than expected, and the programme has had to be repeatedly revised. The current position is that 4 DWPPs and 1 equivalent investigation have been completed. The current estimate is that a further 5 DWPPs will be completed by the end of 2021, and a further 11 DWPPs will be completed by the end of 2022. Others remain "on hold" and/or without a completion date. This means that the measures required to address diffuse water pollution, and to achieve favourable conservation status, have not yet been identified and implemented at most of the DWPP sites.

68. In considering whether or not the Defendants are in breach of the Schedule to the CO, it is important to bear in mind that the Schedule did not contain any time limits, or even time estimates. The obligation on the Defendants was to set out the results of its site evaluations in DWPPs "as soon as reasonably practicable". The Claimants concede that their application does not turn on whether the deadlines in the WFD, or the 2017 Regulations as amended, have been breached.

69. In considering whether the Defendants have acted as soon as reasonably practicable, it is legitimate to take into account the following factors which, on the evidence, have delayed the production of DWPPs. First, the scale and complexity of the task was greater than expected. Second, additional funding was not made available for the programme, and so work on the DWPPs has to compete for resources with a wide range of other important functions which are the responsibility of the Second Defendant and Natural England. Third, there were significant reductions to the Second Defendant's budget, and there were reductions and restrictions in Natural England's budget. Fourth, following the referendum, the Defendants and Natural England were required to divert their time and resources to preparing for EU Exit. Fifth, the COVID-19 pandemic required Defra to provide support for the Government's emergency response and to assist the farming, water and other sectors affected by the pandemic.

70. The Claimants submit that, if the Defendants are permitted to rely upon the availability of resources, they could simply decide to withhold all funds from the DWPP

programme and take no steps to tackle diffuse pollution, and that is not what the CO intended or allowed. In my view, if that had occurred, the Court might well conclude that the Defendants had not complied with the "as soon as reasonably practicable" requirement. However, that is not what has happened in this case. In my judgment, the evidence demonstrates a genuine commitment on the part of individuals employed by the Defendants and Natural England to undertake the programme of work in the Schedule to the CO, including the preparation of DWPPs. In the light of the authorities on the meaning of "reasonably practicable", which I reviewed at paragraphs 42 to 47 above, I accept the Defendants' submission that the resource constraints referred to in the evidence were a factor to which they were entitled to have regard in the discharge of their obligations, and that insufficient resources were a factor that reasonably impeded the progress of the planned programme, delaying the dates at which it was reasonably practicable to undertake the DWPPs. The Defendants have had to make difficult choices between competing demands for funding and staff resources. I do not consider that the judgments that have been made by the Defendants can be characterised as outside the range of reasonable responses, or otherwise so unreasonable that they cannot be taken into account when assessing whether the Defendants have acted as soon as reasonably practicable.

71. Taking all the factors in paragraph 69 into account, I conclude that the Defendants have complied with the obligation in the Schedule to the CO to set out the results of their site evaluations in DWPPs as soon as reasonably practicable, given the circumstances. Furthermore, the evidence indicates that the Defendants intend to use their best endeavours to continue to comply with the Schedule to the CO in future.

72. For the reasons set out above, the application is dismissed.