Case No. CO/ 4943/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BETWEEN:

BLUE GREEN LONDON PLAN

Claimant

-and-

THE SECRETARY OF STATE FOR THE DEPARTMENT OF COMMUNITIES AND LOCAL GOVERNMENT

-and-

THE SECRETARY OF STATE FOR THE DEPARTMENT OF ENVIRONMENT FOOD AND RURAL AFFAIRS

Defendants

-and-

THAMES WATER UTILITIES LIMITED

Interested party

LIST OF ESSENTIAL DOCUMENTS FOR ADVANCED READING

In line with CPR on use of new technology, the list includes readily accessible links to Acts, documents and reports. The key website remains bluegreenuk.com

Ground 1

A BTKNEEC in EIA

Document 1. It is clear that a cost/benefit analysis is relevant when considering the legality of Member State's acts and omissions in fulfilling the requirements of the Water Framework Directive (2000/60/EEC as amended) and the Urban Waste Water Treatment Directive (UWWTD) 91/271/EEC of 21 May 1991. If there were a breach of either directive, this would have been a matter which the SsoS were obliged to take into account under s.104(4) of Planning Act 2008

1.1 Paragraph A of Annex 1 to the UWTTD states in respect of collecting systems:
Collecting systems shall take into account waste water treatment requirements. The design, construction and maintenance of collecting systems shall be undertaken in accordance ***with the best technical knowledge not entailing excessive costs, notably regarding:*** *— volume and characteristics of urban waste water, — prevention of leaks, — limitation of pollution of receiving waters due to storm water overflows*. [Emphasis added]
It will be argued that this is a far reaching obligation, as it is the legal mechanism for simultaneous creation of European law on publication of technical reports, if it can be held that they are statements of best technical knowledge. For example, the 5th IPCC Report on climate change is now automatically best technical knowledge. It is the equivalent of legal judgements as a mechanism for restating law by understanding its application to particular sets of information, facts and circumstances.

1.2 Footnote 1 to Paragraph A states:
Given that it is not possible in practice to construct collecting systems and treatment plants in a way such that all waste water can be treated during situations such as unusually heavy rainfall, Member States shall decide on measures to limit pollution from storm water overflows. Such measures could be based on dilution rates or capacity in relation to dry weather flow, or could specify a certain acceptable number of overflows per year.
In defining the flexibility of the design process in achieving the Directive's purpose, Subsidiarity is confined to solutions within the principles stated in EU law. There is no prohibition on combining measures which also increase efficiency of measures for other forms of pollution, such as air, noise or traffic. Member States decisions on measures must weigh the benefits of various designs to limit pollution of the environment.

Document 2. The application of the UWWTD was considered by the ECJ with specific regard to the discharge of sewage into the Thames in C-301/10 *Commission v United Kingdom* [2012] ECR I-0000, 18 October 2012 following infringement proceedings brought by the Commission.

2.1 The Judgement makes clear, in defining 'Environment' (para 48), that 'The objective pursued by Directive 91/271 goes beyond the mere protection of aquatic ecosystems and seeks to conserve man, fauna, flora, soil, water, air and landscapes from any significant adverse effects of the accelerated growth of algae and higher forms of plant life that results from discharges of urban waste water (*Commission* v *France*, paragraph 16).'

2.2 The ECJ agreed with AG Mengozzi that a failure to treat or collect waste water was permissible only where circumstances were out of the ordinary: see AG at para 34, 60, ECJ at para 54, 58-9. The ECJ emphasized at para 53 that under usual climatic conditions, and with account being taken of seasonal variations, all urban waste water had to be collected and treated.

2.3 With regards to BTKNEEC AG Mengozzi stated at para 54, 59 that the concept makes it possible to reconcile the need to ensure the effectiveness of the Directive, with the need to refrain from imposing obligations "which are impossible to meet" on the Member States. The concept operated as a safety valve which makes it possible to avoid imposing on the Member States unrealistic obligations or completely disproportionate construction costs.

2.4 Similarly, the ECJ held at para 64 that the concept enabled:

"*...compliance with the obligations of Directive 91/271 to be secured without imposing upon the Member States unachievable obligations which they might not be able to fulfil, or only at disproportionate cost...*
67 The concept of BTKNEEC must be examined by weighing the best technology and the costs envisaged against the benefits that a more effective water collection or treatment system may provide. Within this framework, the costs incurred cannot be disproportionate to the benefits obtained
68 In that context, account will have to be taken, as the United Kingdom submits, of the effects of the discharges of untreated waste water on the environment and in particular on the receiving waters. The consequences that those discharges have for the environment would thus enable examination as to whether or not the costs that must be incurred to carry out the works necessary in order for all urban waste water to be treated are proportionate to the benefit that that would yield for the environment
69 Should it prove impossible or very difficult to collect and treat all the waste water, it will be for the Member State concerned to demonstrate that the conditions for applying the concept of BTKNEEC are met.

2.5 In applying the concept, Best Technical Knowledge automatically incorporates scientific and engineering advances into law. Rationality and reason require that BTKNEEC must be current knowledge, within the bounds of para 64.

2.6 The question arrises, whether the BTKNEEC requirement can in effect impose a yardstick or measure of legality against which the SsofS's decision can be assessed so, for example, if the Cost Benefit Analysis demonstrates that the cost is disproportionate, the decision would be illegal. The answer is given in para 67 above; always return to the principles of BTKNEEC, and, by the process of reiteration, arrive at the solution with the highest benefits at proportionate cost.

2.7 It will be argued that this process was reduced and finally abandoned by both government and TWUL in the period 2000-January 2007, when the decision was unlawfully made, para 20, in misleading the ECJ that the subsidiarity powers of the UK enabled a decision to be made without an EIA or consulting London inhabitants:
20. At a meeting on 26 January 2007, representatives of the Commission and the United Kingdom discussed the two possible options for London, which had been suggested by the TTTS report, and the United Kingdom decided to opt for the single 30 km tunnel along the length of the River Thames and the separate tunnel for its tributary, the River Lee. The whole project was to be completed by 2020.

2.8. The ECJ's judgment in *Commission v UK* makes it clear BTKNEEC availability is a means by which the Member State's failure to treat discharges has been assessed – at the same time as to avoid imposing disproportionate costs on the Member State. It is a means by which a decision to carry out disproportionately expensive works can be judged. If a Member State chooses to do so under subsidiarity provisions, then it must justify the cost benefit to inhabitants bearing the cost. As they have not done so, and could not possibly do so, as no study of Blue Green BTKNEEC had been carried out beyond Black and Vietch and Prof Ashley's 'Appendix E' study of Putney. By timing their consultation after the decision had been made to study only one solution the UK is in breach of the UWWTD.

Document 3 (BTKNEEC) BLEWETT [2003] EWHC 2775 (Admin) Similarly for the public participation provisions included within the Environmental Impact Assessment (2011/92/EU) – providing for "early and effective" engagement in Art.6(4) – were breached. It is very difficult successfully to argue that an Environmental Statement is so defective as to be invalid (*Blewett* being the paradigm case on this). Here there was a Preliminary Environmental Information Report which was produced during the consultation process, and was considered by PINS. This did not include an account of the carbon footprint of the project, albeit that this obvious deficiency was made up later in the Energy and Carbon Footprint report which accompanied the application, and was thus before the ExA.

But per Sullivan at 106 on ''Best Practicable Environmental Option' (BPEO), a similar concept to BTKNEEC, reasons are given for quashing the order.

"106. For these reasons, I conclude that the defendant's approach to the status of the policies relating to BPEO in Waste Strategy 2000 was erroneous in principle because the Joint Report effectively relegated BPEO to a material consideration to be taken into account but to be given such weight as the defendant thought fit. Such an approach did not accord with Pill LJ's pre-Landfill Directive and Waste Strategy 2000 dicta in Murray. There was no recognition of the defendant's duty, post the publication of the Strategy and the implementation of the Landfill Directive, not to grant planning permission unless the proposed development was "in line with" the policies relating to BPEO in Waste Management 2000."

"107.... there are frequent references to BPEO in the Report, but merely repeating the acronym, however frequently, and whether or not accompanied by the Royal Commission's definition, is not an adequate consideration of the issues raised by BPEO. If a material consideration is to be taken into account it must first be properly understood. What matters is not the letters BPEO, but the analysis of the issues raised by the concept:"

Thus it is simply not possible to tell what members' attitudes might have been if there had been a proper analysis of the BPEO issue, including both the weight to be given to, and the content of, the policies relating to BPEO in Waste Strategy 2000... In deciding whether waste disposal activities are justified a BPEO assessment is, for the reasons set out above, a most material consideration."

It will be argued that BTKNEEC was not applied consistently for a proper analysis in designing a solution to comply with the UWWTD and is therefore in breach.

At para 48 *Commission v UK* the term 'Environment' is defined as integrating elements of the environment. Blue Green technologies are best for integrated water management. the following documents are to establish a Blue Green London Plan as BTKNEEC for the new water industry.

Document 4. leaflet included in Bundle; 'Blue Green Dream' of Prof Cedo Maksimovic. A €14million European Union project implementing Blue Green BTKNEEC. Extended at ACA08: Blue Green Dream presentation of BTKNEEC of the significant changes in the water industry, including its connection to climate change.

Document 5. CAS18: Welsh Water's RainScape Project. Another UK water utility shows the simplicity of the blue green concept and how, by following BTKNEEC principles, the UWWTD may be complied with while maximising benefits at proportionate cost. Although TWUL will say

the conditions are very different from London, the methodology and difference may be seen to distinguish the better solution readily understood in a public consultation.

Document 6. CAS19: Water blues green solutions - How we manage water in the 21st century.

Documents 7 - 9 show Philadelphia, Portland, New York, Copenhagen, Sydney as substantive examples of BTKNEEC in operation.
Document 8. CAS05: Philadelphia's Green City clean waters program
Document 9. CAS04: Portland - Community outreach for surface water management.
Many more examples may be found on bluegreenuk.com

Document 10. CAS14: Counters Creek . Shows a scheme of the Interested Party and defendants which could have been used as the basis for a Blue Green Consultation study to inform the public and give them the opportunity to understand the choice between Tunnel and Blue Green solutions.

Ground 2

B CONSULTATION

Document 11. R (on the application of Moseley (in substitution of Stirling Deceased)) (AP) (Appellant) v London Borough of Haringey (Respondent) will be argued to show TWUL'S public consultation was not a fair and proper study enabling the public to make an informed choice

The applicant has had the chance of reading the arguments of the'THAMES BLUE-GREEN ECONOMY' which predominantly argues the procedural case. The applicant will argue the substantive case in addition.

Document 12. the EIA Directive.

Article 6.4 of the EIA Directive provides:

'*The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision for the request for development consent is taken'*.

'*early and effective opportunities to participate before the decision'*

As explained above, at document 2.7 above '*At a meeting on 26 January 2007, the United Kingdom decided to opt for the single 30 km tunnel'* it was therefore impossible for the public to have been given 'early and effective opportunities' to participate in the environmental decision-making.

''Article 8 states:

'*The results of the consultations and information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure'*.

As the results were based on ignorance of the true meaning of the Environmental impact of the Tunnel, all considerations could not take into account what a public response might have been had they had access to the true impact. The public were not given a valid or fair choice. This has resulted in clear breaches of Articles 6.4 and 8.

Article 11 of the EIA Directive provides a right of challenge to a breach of the public participation requirements. Article 11 states:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned

a) *having a sufficient interest, or alternatively,*

b) *maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition:*

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive and procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive'

Document 13. It has been held in *Germeinde Altrip and others v Land Rheinland Platz (European Union) C-72/12 Altrip* that a breach of the public participation provisions of Article 11 of the EIA Directive can be relied upon to challenge a decision under the EIA Directive in the national courts The CJEU made clear in *Altrip* that the public concerned must be able to invoke any procedural defect in support of an action challenging the legality of decisions covered by the EIA Directive. 13.1 Therefore, individual members of that public have standing rights to challenge permit decisions based on the claim that there have been defects in the EIA, unless it can be clearly established from information provided by the developer and the authority that the contested decision would not have been different without the procedural defect as paragraphs 53 and 54 of the ruling below, illustrate.

'53. Therefore, the new requirements thus arising under Article 10a of that directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence

provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant

54. In the making of that assessment, it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making in accordance with the objectives of Directive 85/337'.

13.2 '*without in any way making the burden of proof fall on the applicant'*
The only response from TWUL or the government departments and their agencies during the consultation periods, beginning in September 2010, has been "if you have a better solution, you're welcome to show us" or variations to that effect. Response was simply the assertion that "the tunnel is the only solution, or the most cost effective, timely and comprehensive solution" repeated on every occasion. (see para 18, Statement of Grounds and Facts) The Chronology will chronicle the persistent refusal to consult properly or consider Blue Green BTKNEEC.

13.3'*the contested decision would not have been different'*

If the consultation had been carried out properly, with sufficient information for the public to see the different environmental impacts between the proposed Tunnel and Blue Green solutions, the decision would have been very different, as Documents 4-10 above, and extensively on bluegreenuk.com , shows.

13.4 The design of the consultation would have identified the radically different options and presented them equally as soon as the public could choose between the concept of a tunnel or blue Green solutions, as was done so successfully in Philadelphia. Consultation would have linked the environmental impact to climate change reports of the time, which need not be read now except to indicate how different the decision would have been, for example:

Document 14. RCEP(2000) Energy - The Changing Climate. 22nd report of the Royal Commission on Environmental Pollution. London TSO

Document 15. CCC(2011) the renewable energy review. Committee on Climate Change May 2011 www.theccc.org.uk/

Document 16. Pathways to Deep Decarbonization 2014 report IDDRI Available at deepdecarbonization.org A 15 country collaboration indicating design for international obligations.

Document 16a. The Global CCS Institute report *The Global Status of CCS: 2014.*
detailed descriptions of all 55 large-scale CCS projects and descriptions of around 40 lesser scale 'notable' CCS projects.
Overview of CCS policy, legal and regulatory developments, technologies and large–scale demonstration projects, authoritative analysis, insights and recommendations for accelerating the technology.

Document 17. Climate Change Act 2008 www.opsi.gov.uk/acts/acts2008/ukp-ga_20080027_en_15 The document which remains to be integrated into the EIA and be complied with.

Document 18. Intergovernmental Panel on Climate Change The IPCC reports had developed concurrently with the UK's compliance actions with the UWWTD, commencing in 1991. The latest is a summary document
Lord Nicholas Stern, a professor at the London School of Economics and author of the Stern Report, said the new IPCC report was the "most important assessment of climate change ever prepared" and that it made plain that "further delays in tackling climate change would be dangerous and profoundly irrational".

"The lowest cost route to stopping dangerous warming would be for emissions to peak by 2020 (i.e. before completion of the proposed Tunnel)– an extremely challenging goal – and then fall to zero later this century."

"Tackling climate change need only trim economic growth rates by a tiny fraction, the IPCC states, and may actually improve growth by providing other benefits, such as cutting health-damaging air pollution."

"However, the statement that "climate change is expected to lead to increases in ill-health in many regions, including greater likelihood of death" was deleted in the final report, along with criticism that politicians sometimes "engage in short-term thinking and are biased toward the status quo".

18.1 The consultation process therefore failed in not giving the public a meaningful choice of the environmental impact of the Application. Only a Blue Green London Plan can give meaning to that choice to their greatest benefit by understanding the opportunity costs of the Tunnel.

19. Documentation Generally. Examining more of the documentation from the three main participants, Thames Water, the Boroughs, and PINS who accepted Thames' application despite various complaints from the Boroughs and others about the consultative process. An obvious reason for this is that they were being consulted late in the design process, on a single, decided option without being informed of other possibilities.

19.1 There are two main aspects to this ground. The first is that the pre-application consultation process did not sufficiently cover issues such as need and alternatives to the scheme. The second is that consultation was carried out at a time too late for public participation to have meaningful consideration in the design decisions for achieving beneficial environmental impacts, defeating the purpose of public participation. Wider publicity being given to the project only after the proposals had been finalized.

19.2 The first criticism is well made in a letter from LB Hammersmith of 13 March 2013, and the second in Southwark's letter of 14 March 2013. All these criticisms were rejected by PINS when accepting the application later that month. But these decisions are in time for a potential challenge now because of the statutory freeze on judicial review until the SoS's decision emerged at the end of the process.

19.3 There was some consultation by Thames on needs and alternatives via its Phase 1 in response to the 1st Ministerial Statement and Regulatory Impact Assessment in March 2007. There had also been public consultation on the NPS in 2010/11. There are concerns that neither process sufficiently involved those whose lives were to be affected by the ultimate proposals. Thames say that they consulted on need and the tunnel in Phase 2, starting on 4 November 2011 and finishing on 10 February 2012. This may seem odd given the 2nd Ministerial Statement, and accompanying documents dated 11 November 2011, promoting the Tunnel, but Thames explain that in November 2011 there was still no NPS of March 2012, nor had the Tunnel formally become a Nationally Significant Infrastructure Project which it only did on 23 June 2012.

19.4 Any challenge to the NPS itself, and its definition of need for a Tunnel, had to be made within 6 weeks of the making of the NPS: s.13 PA 2008. Once the NPS was in place, the SoS's duties when considering the application for a DCO was to decide the application in accordance with the NPS, unless one of the exceptions in s.104(4)-(8) PA 2008 applied.

19.5 Hence, even if Thames' consultation on need etc prior to the NPS was in fact inadequate, these issues had ceased to be relevant to whether the DCO should be made by the time Thames lodged its application in February 2013. So, PINS were entitled to take the view that any lack of wider consultation of the first type did not invalidate the application. Unless PINS failed to be aware they were acting unlawfully under :

Document 20. The Planning Act 2008

s1.1.2 requires that the decision maker must decide an application for waste water infrastructure in accordance with the relevant NPS except to the extent it is satisfied that to do so would:

- lead to the UK being in breach of its international obligations, for example, under EIA, UWWT and Consultation Directives. Or continuing the breach of the UK in misleading the Commission and subsequently ECJ that the Decision for a tunnel had been made by 2007 (document 2.7 above)
- be in breach of any statutory duty that applies to the decision maker; (ground 3 below)
- be unlawful, for example; in breaching the direct effect of the EIA Directive
- result in adverse impacts from the development outweighing the benefits. As shown in, for example slides 5,6,7 and 27 of ACA08: Blue Green Dream presentation; weighing Climate Change against Tunnel compliance with UWWTD, or
- be contrary to regulations about how its decisions are to be taken, as in ground 3, below.

20.1 The second issue turns on the sequence of consultations when seen in the light of the statutory publicity required to be given under s.48 PA. A particular concern is timing. By the time of the first advertisement in the Evening Standard in July 2012, the proposals had been finalised, as Thames acknowledge in its website.

20.2 It is a given of consultation that it must be at a formative stage, and that can hardly be said if the proposals are finalised by the point at which publicity is given with a view to inviting further responses.

20.3 As Southwark pointed out, earlier rounds of consultation were aimed at statutory consultees, landowners and residents within 250m of each site, as Thames' Statement of Community Consultation had proposed. This reflects Thames's view, and a relatively narrow one it is, as to those who live in the "vicinity" of the site, as set out in s.47 PA 2008. The s.48 publicity, as the Evening Standard advertisement was intended, went to the whole readership of the paper, who may have been interested as affected locals and/or as water ratepayers.

20.4 At 3.4.20 of its Consultation Report (before PINS) Thames seek to justify this delay in the s.48 publicity process on grounds that it had made significant changes in the phase 2 proposals, including introducing new sites, from those in phase 1, and it thought it might have been pre-determining consultation feedback if the introduction of the new sites at the beginning of phase 2 coincided with publicity. It sought to rely on [65] of the then current 2009 DCLG Guidance on pre-application consultation, which in our view does not justify delaying publicity until after all material changes in the consultation proposals. Hence, taken as a whole, their justification for this lack of compliance with the publicity obligation is not very convincing and gave the impression a sense of 'Fait Accompli' was intended.

20.5 Any challenge, however, in effect has to be addressed at PINS for accepting this application in breach, we would say, of the duty of consultation and providing publicity. For PINS was not satisfied that the deficiencies in Thames' consultation processes warranted rejection of the application. It evidently bore in mind Thames' explanation of its timing in respect of publicity. It was also conscious (p.19 of 31 of its checklist) that Thames' lack of engagement with the consultation responses would be important and relevant to the SoSs' ultimate decision. Ultimately, it was a judgment PINS took to decide the significance of the breaches of the consultation and publicity rules.

20.6 Successful consultation arguments must convince that the process went badly wrong. As Ouseley J summarised it when refusing consultation challenges in the HS2 infrastructure case (http://www.bailii.org/ew/cases/EWHC/Admin/2013/481.html)
"*The Court judges on an objective basis whether the process* ***has been so unfair as to be unlawful in all the circumstances;*** *R (JL Baird) v Environment Agency [2011] EWHC 939 (Admin), Sullivan LJ. A consultation process is not unlawful because it could be improved on, let alone with the benefit of hindsight. The person undertaking the consultation process has a wide discretion as to its scope, when in the decision-making process it is carried out, so long as it is still at the formative stage, and how it should be carried out- the more so where the process is nationwide and includes issues of a general policy nature; R (Greenpeace) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin) [2007] Env LR 29, paragraph 62.* "

"*so long as it is still at the formative stage,"* the formative stage was pre 26 January 2007 , CJEU Oct 2012 (Document 2.7 above)
"whether the process ***has been so unfair as to be unlawful in all the circumstances;*** *R (JL Baird) v Environment Agency [2011] EWHC 939 (Admin),"*
Ground 4 below will argue the EIA was so completely unfair as to omit entirely the environmental impact benefits of new water industry

20.7 Facing the problem that after PINS's decision there was an in-depth consideration of the siting and impact issues during the course of the Examination. It is thus unlike most administrative decisions when the ultimate decision follows the end of the consultation period without intermediate discussions or debate. The SsoS and Thames will simply argue that any defects had

been cured by the time the ExA had finished its task. The public, on the other hand, will rightly reply “Why weren’t we told the consequences of choosing between Blue Green or the Tunnel, as Philadelphia and other world cities were and are?”

C EAI in Consultation

Document 21 (EIA) *Blewett, R (on the application of) v Derbyshire County Council [2003] EWHC 2775 (Admin) (07 November 2003)*

21.1 Again this argument about deficiencies was well put by Hammersmith in its March 2013 letter. PINS concluded in response that this was not a reason to reject the application (p.6 of 31). If on *Blewett* principles it was entitled to do that, then the question becomes a different one – did those deficiencies persist up until closing of the Examination?

“35. Part I of Schedule 4 requires the environmental statement to provide "a description of the likely significant effects on the environment ..." (paragraph 4) and "a description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment". Part II of Schedule 4 requires:
1. A description of the development comprising information on the site, design and size of the development.
2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
3. The data required to identify and assess the main effects which the development is likely to have on the environment.
4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.
5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part."

“36. Dr Wolfe referred to the speech of Lord Hoffmann in Berkeley v Secretary of State for the Environment [2001] 2 AC 603 at pages 615 to 616, which, he submitted, "emphasised the absolute nature of the requirement to produce an environmental statement in the correct form and to comply with the procedural requirements". Lord Hoffmann's speech must be considered in its context. Berkeley was a case where there had been no environmental statement. Even in such a case the House of Lords was prepared to accept that "an EIA by any other name will do as well. But it must in substance be an EIA" (see page 617). If an application for planning permission has been accompanied by a document purporting to be an environmental statement, can it be said that that document falls outside the definition of environmental statement in Regulation 2 (so that the local planning authority is unable to grant planning permission: see regulation 3(2)) because it has failed to describe a likely significant effect on the environment subsequently identified by the local planning authority, or a particular mitigation measure thought necessary by the local planning authority? The omission might have been due to an oversight on the part of those preparing the environmental statement, or to a deliberate decision because it was not considered by the author of the environmental statement that a particular environmental effect was likely, or, if likely, that it was likely to be significant, or because the author of the environmental statement was unfamiliar with the particular mitigation technique, or because he considered that mitigation was unnecessary.

In my judgment, the fact that the local planning authority's consideration of the application leads it to conclude that there has been such an omission does not mean that the document is not capable of

being regarded by the local planning authority as an environmental statement for the purposes of the Regulations.

21.2 In some respects, they did, as the Panel point out in respect of noise and the Chambers Wharf drive site issue, but not to such a degree that it should lead to the automatic rejection of the application. These deficiencies are in effect the subject of the next set of issues.

Ground 3

D SsofS and ExA DCO decision making

Document 22 - Secretaries of State Decision Letter and Statement of Reasons

22.1 The target of the judicial review here is the Planning Inspectorate's decision to accept the application, and the SsofS's decision to grant a DCO. The adequacy of the SEIA and the unlawfulness of the National Planning Statement for Waste Water ('**the NPS**') are challenged. Further, even in respect of the SsofS's decision, there are two aspects which are challenged, namely in regards to reasoning of noise pollution and site selection as bad law under the Climate Change Act; the integration of air and water pollution under the UWWTD definition of 'Environment'.

Document 23 PPL05: 'Request for a review of the National Policy Statement for Waste Water concerning the Thames Tideway Tunnel under S.6 of the Planning Act 2008'

UpjohnLJ reasons in *Padfield* *http://www.bailii.org/uk/cases/UKHL/1968/1.html* are argued and paraphrased here:
...looking at the Act and its scope and object in
conferring a discretion upon the Minister rather than by the use of adjectives.
The second sentence of this letter again only shews what I have earlier
pointed out, that the Minister has failed to understand that it may be his
duty to intervene where there is a serious complaint that the " democratic
" machinery " of the Board is producing unfairness among its members.
Those are the reasons relied upon by the Minister for refusing a reference.(a recall of the NPS)
Summing up the matter shortly, in my opinion every reason given shews that
the Minister has failed to understand the object and scope of Section 19 (BTKNEEC for the EIA in UWWTD compliance)
and of his functions and duties thereunder which he has misinterpreted and
so misdirected himself in law.
The matter, however, does not end there for in his affidavit the Minister
referred, as I have already mentioned, to Mr. Kirk's letter of 1st May 1964
without disapproval. That letter contained this paragraph :
"In considering how to exercise his discretion the Minister would,
amongst other things, address his mind to the possibility that if a
complaint were so referred and the Committee were to uphold it,
he in turn would be expected to make a statutory order to give effect
to the Committee's recommendations. It is this consideration, rather

than the formal eligibility of the complaint as a subject for investigation, that the Minister would have in mind in determining whether
your particular complaint is a suitable one for reference to the Committee. We were unable to hold out any prospect that the Minister would be prepared to regard it as suitable."
This fear of parliamentary trouble (for in my opinion this must be the
scarcely veiled meaning of this letter) if an inquiry (a Blue Green London Plan) *were ordered and its possible results is alone sufficient to vitiate the Minister's decision which,*
as I have stated earlier, can never validly turn on purely political considerations ; he must be prepared to face the music in Parliament if statute
has cast upon him an obligation in the proper exercise of a discretion
conferred upon him to order a reference to the Committee of Investigation.
My Lords, I would add only this: that without throwing any doubt upon
what are well known as the club expulsion cases, where the absence of
reasons has not proved fatal to the decision of expulsion by a club committee, a decision of the Minister stands on quite a different basis; he is
a public officer charged by Parliament with the discharge of a public
discretion affecting Her Majesty's subjects; if he does not give any reason (or reasons not complying with the overwhelming evidence)
for his decision it may be, if circumstances warrant it, that a Court may
be at liberty to come to the conclusion that he had no good reason for
reaching that conclusion and order a prerogative writ to issue accordingly.
The Minister in my opinion has not given a single valid reason for refusing
to order an inquiry (Blue Green London Plan) *into the legitimate complaint (be it well founded or not) of the South East Region* (Thamesbank, Blue Green Independent Expert Team, Lord Berkeley in the House of Lords, Environmental Law Foundation)*; all his disclosed reasons for refusing to do so are bad in law. I would allow this appeal in the terms proposed by my noble and learned friend Lord Reid.*

E `DECISION DEFICIENCIES, CHAMBERS WHARF

23.1 In considering environmental impact for one form of pollution, noise, the SsofS and ExA accept environmental impact above ground must be considered. It is defective, therefore, not to consider all the others equally, as the UWWTD requires. This reasoning resulted in an inadequate assessment of the environmental impact of the whole scheme, showing the necessity for the NPS, which produced the reasoning, to be recalled as a breach of the EIA Directive.

Noise

23.2. The SsofS and the ExA differed on the interpretation of Paragraph 4.9.9 of the NPS. Paragraph 4.9.9 states:
"The decision maker should not grant development consent unless it is satisfied that the proposals will meet the following aims:
• avoid significant adverse impacts on health and quality of life from noise;
• mitigate and minimise adverse impacts on health and quality of life from noise; and

• *where possible, contribute to improvements to health and quality of life through the effective management and control of noise."*

23.3. The ExA at Para 12.330 interpreted 4.9.9. to mean that "*consideration should first be given to avoiding (by either not creating or by designing out the noise), then seeking to mitigate that which cannot be avoided or designed out*." They stated at 12.331 that the TTT would not avoid significant adverse effect on health and quality of life from noise, and consequently that the first aim of the NPS test was not met [Para 12.334]. However, the third aim of the NPS was also met [Para 12.347]. With regards the second aim of mitigating adverse effects, this also was met [Para 12.341], albeit that there were significant uncertainties [Para 12.357].

23.4. The ExA concluded that noise and disturbance was a matter that weighed against making the DCO [Paras 12.360, 18.30]. They stated that they had had regard to the mitigation, the significant adverse impacts identified in the Environmental Statement, the likely understating of the noise and disturbance impact in the Statement, and the uncertainties regarding noise. [Para 18.30]

23.5. The SsofS agreed that impacts from the noise and disturbance weighed against granting the DCO; that the uncertainties regarding noise and disturbance in the EIA should be taken into account; and that their impact may have been understated [Paras 58-9]. The SsofS stated that they placed particular emphasis upon "*adverse noise impacts*" within the "*important and relevant matters weighing significantly in favour of not granting consent*."

23.6. However, the SsofS disagreed that the first aim of the NPS 4.9.9 had not been met, as they considered that the 4.9.9 aims should only be taken into account once the full impact of the development, including on and off site mitigation was taken into account. [Paras 69-70] While they agreed that the second and third aim were agreed, they did not agree that the residual adverse impacts would be significant, and hence the DCO could be made despite non compliance with NPS 4.9.9 (1) [Paras 74-5]. This conclusion implies complete acceptance of TWUL's environmental benefit claims, shown by independent expert's such as Prof Binnie, to be wildly inaccurate.

23.7. Both the SsofS and ExA's readings of the NPS policy statement are arguable and reasonable interpretations. If anything, the SsofS's holistic reading of the 4.9.9 test accords more with reality: any NSIP is almost by definition likely to create significant adverse effects before mitigation is taken into account, and the question for the decision maker is whether once the aim of mitigation has been achieved as far as possible the residual adverse effects are still 'significant.' The SsofS gave cogent reasons for their different interpretation. We are not therefore challenging the SsofS's decision on the basis of their approach to noise, but on the consequences of unlawfulness in the NPS.

23.8. But nor do we say that one can equate the provision of off-site mitigation automatically with compliance with the duty to avoid serious impacts under the first aim in 4.9.9. If a problem can be designed away under 4.9.9 first aim, then it should be, and the residents should not be burdened with noise insulation or re-settlement if that can be avoided.

23.9. However, even if the SsofS's interpretation of the 4.9.9 test was successfully challenged as an error of law made while acting in a quasi judicial capacity, it is not clear what such a challenge would achieve in terms of the ultimate outcome.

23.10. Both the ExA and SsofS stated that noise and disturbance was a factor that significantly weighed against the DCO (particularly at Chambers Wharf, as the SoSs concluded at [140]), and both decided that despite the noise and disturbance a DCO should be made.
23.11. Only if 4.9.9 poses an absolute test whereby, if any significant adverse impacts are caused regardless of mitigation, a DCO should not be made, would a successful challenge on the interpretation and application of 4.9.9 succeed in preventing a DCO. But this was not the approach the ExA took once it had decided that the 4.9.9(1) test was not met, because it went on to recommend making the DCO after considering mitigation and the uncertainties about the evidence. And to counter this seems unarguable, given that, as we explained this is not a merits review, but a review of the legality of the decision.

23.12. Hence, a successful challenge on this narrow point would at best result in the SsofS's decision being quashed, and the SsofS re-deciding, in all probability taking the same approach as the ExA took– even if 4.9.9(1) was not met, they should still grant the DCO, albeit placing the same 'particular emphasis' as before on noise. In reality, we doubt the decision would get that far, because a court would find that the decision would have been the same even had the SoSs approached the matter correctly.

23.13. All the reasoning of the SsofS and ExA is not therefore the basis of challenging the DCO, but of the consequencies of unlawful law-making in the NPS; a far more serious claim, as it breaches the direct effect of the EIA Directive head on.

F. Chambers Wharf /Abbey Mills as preferred drive site

23.14. The ExA adopted the correct approach in considering the issue of Chambers Whart as a (drive) site location in stating that their role was make recommendations as to whether Thames Water had justified the sites chosen in the context of the NPS and whether a different choice or use of a site could avoid or mitigate any adverse impacts [Para 17.22].

23.15. The ExA noted that the Environmental Statement acknowledged that there would be significant noise and vibration impacts at Chambers Wharf even once mitigation was taken into account [Para 17.161], and stated that the Statement had underestimated the likely effects on residential receptors at Chambers Wharf [Para 17.197].

23.16. On the basis of 4.9.9(1) of the NPS, the ExA considered the alternative drive strategy in order to review whether significant adverse impacts at Chambers Wharf could be avoided, and whether Thames Water had justified its option of using Chambers Wharf as a drive site. [Paras 17.275, 17.277].

23.17. The ExA stated that Abbey Mills appeared to be a feasible drive site, with potentially some significant advantages over Chambers Wharf as the drive site, albeit that Chambers Wharf would still be an entirely feasible and practical reception site [Paras 17.219, 17.274, 17.287]. The potential advantages of Abbey Mills were sufficient to justify a conclusion that Thames Water had not justified its design and the ruling out of Chambers Wharf as only a reception site [Para 17.293]. This was stated to be a matter that weighed against the DCO [Para 18.65].

23.18. Contrary to this, the SofSs concluded that the selection of Chambers Wharf as a drive site was justified. While they considered that the intensity and duration of impacts on residential receptors weighed significantly against making the DCO, they stated that there would be substantial

mitigation of those impacts. They repeated their conclusion that the residual impacts from noise and disturbance were less than significant, and accordingly concluded that there was "*no need to consider whether an amended scheme could achieve similar benefits but with less harm and therefore any further consideration of a revised drive strategy and alternative drive sites is unnecessary*." [Paras 108- 112]

23.19. In respect of the SofSs' disagreement with the ExA:
a. The SofSs are the decision maker, and are not obliged to follow the ExA's recommendations.
b. In any event, the ExA still recommended granting the DCO.
c. The SofSs have a broad discretion in respect of site selection: under Para 3.1.4 of the NPS and s. 104(7) they are required to '*take into account*' potential benefits, adverse impacts, and mitigation; and to consider whether adverse impacts are outweighed by the benefits.
d. The SsofSs' decision in reality was one of interpretation and application of 4.9.9 and of the exercise of 'planning judgment', rather than a finding of fact regarding the existence of significant adverse impacts per se, or a policy decision as to the consequences of any such finding.
There was no disagreement between the ExA and the SofSs as to the facts regarding Chambers Wharf.
e. Even if there was a finding of fact that there would be no significant residual adverse impacts by the SsofS, the evidence does appear to be reasonably capable of supporting such a finding, and hence neither the site selection decision could not be challenged on the basis that it could not reasonably be supported by the evidence.

23.20. We consider that the SsofS's decision that the selection of Chambers Wharf was adequately justified is unlikely to be seen as irrational, in the sense of being a decision that was outside the ranges of reasonable conclusions on the evidence it chose to consider.

23.21. For the reasons given above, the SsofS's interpretation of 4.9.9(1) 'significant adverse impacts' as "net significant adverse impacts" is likely to be preferred by a Court. If that is the case, then the SsofS's departure from the ExA's conclusions over Chambers Wharf could not be challenged on the basis of being based on a material error of fact as to the existence of 'significant adverse impacts.'

23.22. The only possible basis of a challenge to that departure would be on the basis that the SofSs gave inadequate reasoning for it. However, with regards to judicial review on the basis of inadequate reasoning, it is noted that:
a. A reason can be application of a policy – here both the overall policy that a tunnel is the preferred option, and the policy that requires consideration of residual adverse impacts only.
b. Reasons given do not have to deal with every material consideration.
c. The key factors in the assessment of the adequacy of reasoning are the intelligibility of the reasons, whether they meet the substance of the arguments, and whether they demonstrate systematic and logical analysis.
d. The standards for reasons are relatively unonerous, as laid down in cases such as *South Bucks v. Porter No 2*. [2004] 1 WLR 1953.

23.23. We have considered the point that, in the light of the arguments and positive recommendation made by the ExA, the SsofS should have gone on to consider the alternative drive direction, even if they were correct to conclude that there were no significant adverse (residual) impacts on Chambers Wharf (and their reasoning for this judgment is perfectly acceptable). Even if

there would not be significant adverse impacts at Chambers Wharf, if Abbey Mills would offer even further reduced impacts that would still potentially be a material consideration in judging whether Thames Water's site selection met the aim of 4.9.9(2), if not under 4.9.9(1). As we understand, that will be the basis of Southwark Borough's request for judicial review.

23.24.The SsofS could argue that the NPS requires them to prioritise the consideration of alternative sites only as possible mitigation for significant adverse impacts, that the ExA did not challenge the selection of Chambers Wharf as a site, only its use.

23.25. In reality, the effect of this challenge is whether the Court considers the SsofS's inadequate reasoning on drive direction infected the entire decision.

23.26. If a challenge was successful, a Court is likely to uphold the overall decision to allow the TTT (in particular given the ExA's recommendation despite its conclusion on Chambers Wharf), and quash the decision regarding the use of Chambers Wharf as a drive site. In that event, the SofSs are very likely to remake an identical decision, but with some additional reasoning as to why Chambers Wharf should still be in the main drive site. At most, the SofSs might require Thames Water to do some further investigation of Abbey Mills as an alternative to lend weight to the SofSs new decision.

23.27. Standing back, we would be by no means optimistic of the chances of success of such an argument in respect of Chambers Wharf, and it will be evident that we question its ultimate benefit given the understandably greater aspirations of most of those wishing the success of this application.

Ground 4
G HUMAN RIGHTS
`document 24, 25 ECHR, Human Rights Act 1998
24. The difficulty with such a challenge is that the Convention rights in question (Article 8 – private and family life - and Article 1 of the First Protocol – right to property) are qualified, not absolute, rights. This means that interferences with these rights, which would certainly be established by those who live near a proposed work site, can be justified if lawful, proportionate and in the public interest. It will be seen that these tests are in substance the same as that being exercised under the PA 2008 and the NPS.

25. In the relatively early days of the Human Rights Act, there were a number of challenges to various aspects of the planning system, but these were effectively ended by the decision of *Lough v. First Secretary of State* [2004] EWCA Civ 901, which included dicta describing the Article 8 protection thus: *"While it requires respect for the home, it creates no absolute right to amenities currently enjoyed. Its role though important must be seen in the context of competing rights, including rights of other landowners and of the community as a whole."*

25.1. *The "community as a whole."in this case being the EU Community and, under CC Act, the global community.*

25.2. It *is exactly for the right to life, family and property rights of the community as a whole, as against the private financial interests of TWUL shareholders, that are engaged in this case, requiring a Judicial Review.*

25.3. As long as a given planning decision involves a conscientious balancing of interferences with the public benefit of the proposals, it is unlikely to offend the requirements of the Human Rights Act. But here, it is the offense of refusing to lower environmental death rates and raise quality of life with the newly discovered BTKNEEC blue Green technologies.

25.4. *Powell and Raynor v UK (Rep) Feb 21 1990 series A No 172, 12 EHRR.355* established that 'the State was responsible for noise nuisance at airports since it regulated air traffic and built airports'. Followed in *Hatton v UK (GC) Aug 7 2003, 37 E.H.R.R 28 ECHR*; 'official decision or regulation directly provides for the contested environmental nuisance or from a failure to regulate private industry in a manner securing proper respect for individual rights.

25.5. *Lopez Ostra v Spain dec 9 1994 Series A No 303-C, 20 EHHR 277* 'The State was responsible for private plant as it had given subsidy and planning permission' shows States have positive obligations under Art 8, as a single child suffered acute bronchopulmonary infections. But 'there must be no key public interest to outweigh this' . Para 51 found 'actual damage not required... unnaturally severe environmental pollution may affect individuals well being and prevent them from enjoying their homes in such a way as to affect their private and family health adversely without, however, seriously endangering their health'.

25.6 *Greenpeace EV v Germany 18125/06 (Dec) May 12 2009* accepted the 'State take measures in respect of vehicle emissions.' but the Court was not persuaded to go further in regulating car manufacture or that the authorities had failed to strike the right balance. The key point being that Article 8 applied 'as 'reports' clearly supported the contention that particle pollution was a serious risk to health'.

25.7From this line of cases, it will be argued that the State is responsible for consequences of the Tunnel under Article 2 in knowing health benefits of Blue Green technologies for substantially reducing Particulate Matter 10 and 2.5, but failing to consent to reducing known death and maiming rates in London. Further that Article 8 and First Protocol Article I rights are engaged in that the Tunnel has been established as unnecessary by expert reports and will therefore be an unnecessary imposition of a Nationally Significant Infrastructure Project in a democratic society.

Conclusion

26.The issue of rejecting judicial review rights is current; on 27 Oct 2014 the House of Lords rejected the SofS for Justice's plans to restrict access to judicial review, as they are often "left wing" (BGIET is professionally non partisan). Lord Woolf LCJ warned of 'elective dictatorship' saying "It's dangerous to go down the line of telling the judges what they have to do". In the timing of his intervention, the SoS for Justice has brought the politics of the judiciary into its constitutional duty to review the decisions of politicians. Lord Woolf LCJ has judged the politics of judicial review. The courts are now being asked permission to judicially review an unlawful decision of the government which includes selling 8.7% of TWUL to a communist country with no democracy or Rule of Law. This cannot be considered in any way frivolous, vexatious or hopeless, whether won or lost in court.

27. The case is not hopeless, even against such large, powerful and determined defendants, who after all, are simply continuing business as usual. The case would have no chance of success if the court were biased for the same reason as the SsofS; that they did not have sufficient understanding

of best technical knowledge of the substantive reason the Application is unlawful under it's EIA for the UWWTD. With apologies for such awkwardly argued claims, under the CPR 54.4.4 discretion, the claimant therefore emphasizes the exceptional importance of the points of law pleaded, impacting directly on government and judicial acts fulfilling the UK's Climate Change obligations to beat the rapidly closing window of time available for staying below 2 degrees C rise in global temperature.

Graham Stevens IP

7 November 2014