Neutral Citation Number: [2016] EWCA Civ 797

Case No: C1/2015/4362

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT IN WALES
MR JUSTICE HICKINBOTTOM
[2015] EWHC 3578 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2016

Before:

Lord Justice Laws
Lady Justice King
and
Lord Justice Lindblom

- -

Between:

Seiont, Gwyrfai and Llyfni Anglers' Society	**Appellant**
- and -	
Natural Resources Wales	**Respondent**
- and -	
(1) Dwr Cymru Cyfyngedig (trading as Dwr Cymru/Welsh Water) **(2)First Hydro Company Ltd.** **(3) The Welsh Ministers**	**Interested Parties**

- -
- -

Mr David Wolfe Q.C. (instructed by **Fish Legal**) for the **Appellant**
Mr David Forsdick Q.C. and Mr Gwion Lewis (instructed by **Bircham Dyson Bell LLP**) for the **Respondent**
Mr Richard Kimblin Q.C. and Ms Nina Pindham (instructed by **Aaron and Partners LLP**) for the **First Interested Party**
The Second Interested Party did not appear and were not represented
Mr Richard Gordon Q.C. and Mr Tom Cross (instructed by **Legal Services Department, Welsh Government**) for the **Third Interested Party**

Hearing date: 25 May 2016

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Judgment Approved by the court
for handing down

Lord Justice Lindblom:

Introduction

1. This appeal requires us to consider the meaning of the concepts of "damage" and "environmental damage" in Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage ("the Environmental Liability Directive").

2. With permission granted by Treacy L.J. on 22 March 2016, the appellant, the Seiont, Gwyrfai and Llyfni Anglers' Society ("the anglers' society") appeals against the order of Hickinbottom J., dated 17 December 2015, by which he dismissed its claim for judicial review of the decision of the respondent, Natural Resources Wales ("NRW"), dated 12 December 2014, on a notification asserting that "environmental damage" had been caused to a lake in Snowdonia – Llyn Padarn. The "environmental damage" was said to have been caused by discharges from the Llanberis Sewage and Waste Water Treatment Works ("the Llanberis STW"), which is operated by the first interested party, Dwr Cymru Cyfyngedig (trading as Dwr Cymru Welsh Water) ("Dwr Cymru").

3. The anglers' society contends that NRW made its decision on the basis of an incorrect understanding of the concept of "environmental damage", and that, if it had not done so, both its decision and the remedial measures it required Dwr Cymru to take might have been different. The only relief now sought is a declaration. As an alternative to such relief, the anglers' society seek a reference to the European Court of Justice.

The decision under challenge

4. Hickinbottom J. set out the relevant facts very fully and clearly (in paragraphs 5 to 25 and 78 to 85 of his judgment), and that need not be done again here.

5. Llyn Padarn is natural lake, about 117 hectares in area, whose shape was modified by the construction of railway lines. It holds a genetically distinct population of Arctic charr (*Salvelinus alpinus*), and is a Site of Special Scientific Interest ("SSSI"). Members of the anglers' society have for many years been concerned about the effect of poor water quality in Llyn Padarn on its fish population, including the Arctic charr. On 7 February 2012 they sent a notification of "environmental damage" to NRW under regulation 29 of the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 ("the 2009 regulations"). In that notification they contended that "the loading of phosphates has grown to such an extent that this is no longer an oligotrophic or nutrient-free waterbody and is deteriorating", and that "[the] phosphate inputs have caused environmental damage to the habitat and to the fishery – including to the unique population of genetically distinct arctic char". Their main allegation was that "environmental damage" had been caused by discharges of sewage, both before and after the 2009 regulations came into effect in May 2009.

6. NRW's first decision on the notification was issued on 10 July 2013. NRW concluded that, since the coming into effect of the 2009 regulations, there had been no "environmental damage" to any relevant species or any relevant features of the SSSI, including the Arctic

charr (paragraph 15), and none affecting the "physicochemical elements" in the surface water. But there had been "environmental damage" to the "biological quality elements" – because of "a change in status in the phytoplankton quality element in the 2012 assessment … directly attributable to the algal bloom in 2009". The Llanberis STW had been "identified as the source of the nutrients that caused the bloom" (paragraph 11). Attached to the decision was a liability notice under regulation 20 of the 2009 regulations, requiring Dwr Cymru to submit proposals for measures for the remediation of the "environmental damage".

7. On 7 October 2013 the anglers' society issued a claim for judicial review of NRW's decision. Relying on the decision of the European Court of Justice in *Commission of the European Communities v United Kingdom* (2009) Case No. C-417/08, it contended that NRW had erred in considering only "environmental damage" that had occurred since 2009, rather than 2007. By a consent order dated 6 May 2014 the claim was upheld. NRW was required, in reconsidering the notification, to "take into account all environmental damage caused by an emission, event or incident taking place after 30 April 2007 if it derives from an activity which started before that date but which was not finished before then".

8. NRW therefore considered the notification afresh, on the basis of "environmental damage" that had occurred since April 2007. In its decision of 12 December 2014 – the decision under challenge in these proceedings – it came to conclusions similar to those it had reached in its previous decision: that no "environmental damage" had occurred to the relevant features of the SSSI – the Arctic charr and floating water plantain, or to any other relevant species (paragraph 67). The salient detail of its conclusions was set out by Hickinbottom J. in paragraph 88 of his judgment. In brief summary, which is enough at this stage:

> "… [The] 2014 decision document concluded that there had been environmental damage to surface water as a result of the biological quality element, phytoplankton, dropping from "good" to "moderate" as a result of the 2009 bloom (paragraph 68). However, otherwise it found that (i) was the only environmental damage found to have been caused by Llanberis STW discharges, and (ii) there was no threat of imminent environmental damage occurring as a result of nutrient enrichment because of mitigation measures which had been taken … . It found that those measures had contributed to the phytoplankton quality element returning to "good" status in the 2013 and (provisional) 2014 classifications (paragraph 69)."

A second liability notice required Dwr Cymru to submit proposals for the remediation of the "environmental damage". That notice was challenged by this claim for judicial review, which was issued on 9 March 2015.

The issues in the appeal

9. As Hickinbottom J. said in paragraph 1 of his judgment:

> "This claim raises the important issue of whether, for the purposes of the Environmental Liability Directive …, "environmental damage" includes the prevention or deceleration of recovery from an existing, already-damaged environmental state; or whether it is restricted to a deterioration from an existing state."

10. Ground 1 of the claim asserts that NRW erred in its approach to "environmental damage" under the Environmental Liability Directive, by restricting the meaning of that concept to a worsening of the environmental situation. Ground 3 contends that NRW erred in its approach to "environmental damage" to Llyn Padarn as a surface water body, again by restricting the meaning of that concept to deterioration of a relevant element. In ground 6 it is argued that the 2009 regulations failed properly to transpose the Environmental Liability Directive into domestic law in Wales, because article 5 requires "preventative measures" to be taken in respect of "environmental damage", but the 2009 regulations provide only a power to require such measures. The other three grounds of the claim were not pursued before the judge.

11. Treacy L.J. granted permission only on the grounds of appeal relating to grounds 1 and 3. He refused permission on ground 6 – Hickinbottom J. having refused permission to apply for judicial review on that ground. The anglers' society now also appeals against the judge's refusal of permission to apply for judicial review on ground 6.

Hickinbottom J.'s judgment

12. Hickinbottom J. concluded that NRW had not failed properly to address the complaints made by the anglers' society in its notification letter of 7 February 2012. He observed that "… whilst [the anglers' society's] 7 February 2012 letter notified NRW of environmental damage in the form of a deterioration – and only in that form – there is simply no evidence of any worsening of any relevant aspect or element of the environmental situation since April 2007" (paragraph 100); that "… the 2012 notification letter clearly did not rely upon a deceleration of improvement as "environmental damage", nor did the first judicial review claim" (paragraph 101); and that "… NRW did not, as a matter of law, err in not considering [a deceleration of improvement to the environmental situation] in the 2014 decision document, now challenged" (paragraph 103).

13. The judge rejected the argument put forward on behalf of the anglers' society on each of the three grounds live before him. On the anglers' society's principal argument, he concluded that "damage" as defined in article 2(2) of the Environmental Liability Directive is "restricted to a deterioration in the environmental situation, and does not in addition include … the prevention of an existing, already-damaged environmental state from achieving a level which is acceptable in environmental terms – or a deceleration in such achievement". It was "common ground that "environmental damage" is a subset of "damage"; and so ""environmental damage" necessarily has that same restriction" (paragraph 146).

The Environmental Liability Directive

14. Article 1 of the Environmental Liability Directive declares that "[the] purpose of this Directive is to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage". This purpose is amplified in the recitals, for example in recitals (2) and (18):

> "(2) The prevention and remedying of environmental damage should be implemented through the furtherance of the 'polluter pays' principle, as indicated in the

> Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.
>
> …
>
> (18) According to the 'polluter-pays' principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the costs of the necessary preventative or remedial measures. In cases where a competent authority acts, itself or through a third party, in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator. It is also appropriate that the operators should ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring."

15. The definition of "environmental damage", in article 2(1), is:

> "(a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;
>
> Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC ["the Habitats Directive"] or Article 9 of Directive 79/409/EEC ["the Birds Directive"] or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.
>
> (b) 'water damage', which is any damage that significantly adversely affects:
>
> (i) the ecological, chemical or quantitative status or the ecological potential, as defined in Directive 2000/60/EC ["the Water Framework Directive"], of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies; …
>
> …
>
> (c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms …".

"Damage" is defined in article 2(2) as "a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly". Article 2(11) defines "remedial measures" as "any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged

natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II". "Natural resource" is defined in article 2(12) as "protected species and natural habitats [whose definition is in article 2(3)], water and land", and "natural resource services" in article 2(13) as "the functions performed by a natural resource for the benefit of another natural resource or the public". The definition of "protected species and natural habitats" in article 2(3) includes "(c) where a Member State so determines, any habitat or species, not listed in [the Birds Directive] or Annexes II to IV to [the Habitats Directive] which the Member State designates for equivalent purposes as those laid down in these two Directives". Article 2(14) defines "baseline condition":

> "'baseline condition' means the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available."

Article 2(15) defines "recovery" as being "… in the case of water, protected species and natural habitats the return of damaged natural resources and/or impaired services to baseline condition …".

16. Article 4(5) provides that "[this] Directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators". Articles 5, 6, 7 and 8 provide respectively for "Preventive action", "Remedial action", "Determination of remedial measures" and "Prevention and remediation costs". I shall return to article 5 when considering ground 6 of the claim. Article 6(1) provides:

> "… Where environmental damage has occurred the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:
>
> (a) all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or prevent further environmental damage and adverse effects on human health or further impairment of services and
> (b) the necessary remedial measures, in accordance with Article 7.
>
> …".

Article 6(2)(e) provides that the competent authority may "itself take the necessary remedial measures". Article 6(3) provides that the competent authority "shall require that the remedial measures are taken by the operator", and "may take these measures itself, as a means of last resort". Article 7(1) provides that "[operators] shall identify, in accordance with Annex II, potential remedial measures and submit them to the competent authority for its approval, unless the competent authority has taken action under Article 6(2)(e) and (3)". Article 8(1) provides that "[the] operator shall bear the costs for the preventive and remedial actions taken pursuant to this Directive".

17. Article 17, "Temporal application", provides that the Environmental Liability Directive does not apply to "damage caused by an emission, event or incident that took place before the date referred to in Article 19(1) [namely, 30 April 2007]", or to "damage caused by an emission, event or incident which takes place subsequent to the date referred to in Article 19(1) when it derives from a specific activity that took place and finished before the said

date", or to "damage, if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred".

18. Annex I, "Criteria referred to in article 2(1)(a)" states:

> "The significance of any damage that has adverse effects on reaching or maintaining the favourable conservation status of habitats or species has to be assessed by reference to the conservation status at the time of the damage, the services provided by the amenities they produce and their capacity for natural regeneration. Significant adverse changes to the baseline condition should be determined by means of measurable data such as:
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> …
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> – the species' or habitat's capacity, after damage has occurred, to recover within a short time, without any intervention other than increased protection measures, to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition."

19. Annex II, "Remedying of environmental damage", provides "a common framework to be followed in order to choose the most appropriate measures to ensure the remedying of environmental damage". It identifies three forms of "remediation" – "primary", "complementary" and "compensatory":

> "1. Remediation of damage to water or protected species or natural habitats
>
> Remedying of environmental damage, in relation to water or protected species or natural habitats, is achieved through the restoration of the environment to its baseline condition by way of primary, complementary and compensatory remediation, where:
>
> (a) 'Primary' remediation is any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition …
>
> …
>
> Where primary remediation does not result in the restoration of the environment to its baseline condition, then complementary remediation will be undertaken.
>
> …
>
> …
>
> 1.1 *Remediation objectives*
>
> Purpose of primary remediation
>
> 1.1.1 The purpose of primary remediation is to restore the damaged natural resources and/or services to, or towards, baseline condition.
>
> Purpose of complementary remediation
>
> 1.1.2 Where the damaged natural resources and/or services do not return to their baseline condition, then complementary remediation will be undertaken. The purpose of complementary remediation is to provide a similar level of natural

> resources and/or services … as would have been provided if the damaged site had been returned to its baseline condition. …
>
> …
>
> 1.2 *Identification of remedial measures*
>
> Identification of primary remedial measures
>
> 1.2.1 Options comprised of actions to directly restore the natural resources and services towards baseline condition on an accelerated time frame, or through natural recovery, shall be considered.
>
> …".

The meaning of the concept of "environmental damage" in the Environmental Liability Directive – grounds 1 and 3 of the claim

20. On this, the central issue in the appeal, the argument advanced by Mr David Wolfe Q.C. on behalf of the anglers' society was essentially simple. He submitted that the Environmental Liability Directive imposes liability not only for pollution that makes the existing environmental situation worse, but also for pollution, such as continuing emissions, whose effect is to retard or prevent the natural recovery of the environment from damage previously inflicted upon it. "Environmental damage" can include the impact resulting from a continuing activity. The "baseline condition" against which "environmental damage" of this kind must be assessed is the state of the "natural resource" or "natural resource service" without that repeatedly damaging activity taking place. In this case, says Mr Wolfe, Dwr Cymru's continuing discharges into Llyn Padarn are keeping the level of dissolved oxygen below what it would otherwise be, and preventing the SSSI and the Arctic charr from reaching favourable conservation status.

21. Though developed by Mr Wolfe with some intricacy, his submissions here reduce to a small number of points, helpfully summarized in paragraph 120 of his skeleton argument. He submitted that the judge was wrong to hold: first, that, under the Environmental Liability Directive, "environmental damage" (as defined in article 2(1)) is restricted to a "deterioration from an existing state"; secondly, that "damage" (as defined in article 2(2)) is limited to "deterioration"; thirdly, that "damage to protected species and natural habitats" (in article 2(1)(a)) is limited to the "deterioration" of such species and habitats; and fourthly, that "water damage" (in article 2(1)(b)(i)) is limited to "deterioration" of "the waters concerned", despite the exception for "failure to achieve good ground water status, good ecological status, or … good ecological potential" in article 4(7) of the Water Framework Directive.

22. I cannot accept that argument. In my view Hickinbottom J. was right to conclude that the concept of "damage" in article 2(2) of the Environmental Liability Directive, properly understood in its context, means a measurable deterioration in the existing state of the "natural resource" or the "natural resource service" in question. Both a measurable "adverse change" in a "natural resource" and a measurable "impairment" of a "natural resource service" involve a measurable deterioration to that "natural resource" or "natural resource service", as the case may be, from its "baseline condition", as defined in article

2(14). Where the "impairment of a natural resource service" is concerned, this concept of "damage" applies, through the definition of "natural resource services" in article 2(13), to any "impairment" to "the functions performed by a natural resource for the benefit of another natural resource or the public". The concept of "environmental damage" in article 2(1), where it concerns "(a) damage to protected species and natural habitats …" and "(b) 'water damage'", imports and depends upon that concept of "damage". This, I believe, is the only interpretation of the concepts of "damage" and "environmental damage" compatible with the other relevant provisions of the Environmental Liability Directive.

23. It is clear from those provisions that the concepts of "measurable adverse change" in a natural resource and "measurable impairment" of a natural resource service are analogous. As the judge said, they "must … refer to conceptually similar effects; and those effects must be in the nature of a worsening or deterioration" (paragraph 139 of the judgment). In this context "adverse change" and "impairment" both signify the worsening of an existing condition, which it is the responsibility of the "operator" to prevent or remedy. This is apparent in the provisions for remediation of "environmental damage" in Annex II, which do not distinguish conceptually between the return or restoration to the relevant "baseline condition" of a "damaged" natural resource and "impaired" or "damaged" services. If the word "impairment" can bear a different meaning in different contexts, which no doubt it can, the court is nevertheless bound to seek its true meaning in the relevant context. Here, as the judge accepted, the word is apt – and perhaps, as he said, "linguistically more appropriate" than the expression "adverse change" – to describe damage to the functioning of a natural resource service in the sense only of a deterioration or worsening of that service attributable to the particular act or omission of an operator.

24. Like the judge, I see nothing to displace this understanding of the concept of "impairment" of a natural resource service in article 2(2) in the several different language versions of the Environmental Liability Directive to which Mr Wolfe referred, with the benefit of expert translators' statements: the French "deterioration", the Spanish "perjuicio", the Italian "deterioramento" and the German "Beeintrachtigung". If in those languages these words can have the wider meaning Mr Wolfe attributed to the word "impairment" in the English language version, as well as the sense of a worsening in an existing condition, one must still construe the word properly in its context, as I have sought to do. Resorting to other language versions lends no support to Mr Wolfe's argument. It does not indicate, let alone compel, the interpretation of the word "impairment" in article 2(2) that he urged us to accept.

25. I find it impossible to reconcile Mr Wolfe's submissions with the unmistakeable purpose of the Environmental Liability Directive, evident in its recitals and article 1, and with the whole scheme of its provisions for the prevention and remediation of "environmental damage", which embody the "polluter pays" principle. As Mr Richard Gordon Q.C. for the Welsh Ministers (the third interested party), Mr David Forsdick Q.C. for NRW and Mr Richard Kimblin Q.C. for Dwr Cymru all submitted, the obvious intent and effect of those provisions is to require an operator not to cause the condition of the environment to fall below the condition it would have been in at the time of, and but for, his action or failure to act – its "baseline condition". They do not require the operator to go further, by taking steps to remedy pre-existent damage to the environment – whether damage to natural resources or damage to natural resource services – or by ensuring or securing the improvement of such natural resources or natural resource services from their "baseline condition". They do not bite upon the acts or omissions of an operator the effect of which is merely to cause the

environment not to improve or improve as fast as it otherwise would, or – as Mr Wolfe said in argument – to slow its "potential" improvement.

26. Hickinbottom J. said "this would in practice often be tantamount to requiring an operator to pay, not for its own polluting activities, but earlier polluting activities possibly of entirely distinct operators, or simply paying to establish appropriate environmental status which is in the primary realm of [the Water Framework Directive]" (paragraph 137). As the judge went on to say (in the same paragraph):

> "… In practice, at a cost, Dwr Cymru may be able further to reduce discharges of [total phosphorus] into Llyn Padarn; but it is impracticable for it to stop all discharges into the lake, whilst the waters and fish in the lake recover from earlier pollution which has resulted in a lake floor from which phosphorus continues to be released and [dissolved oxygen] taken as a result of the decomposition of algae which proliferated as a result of earlier phosphorus discharges. Mr Wolfe submitted that any additional burden of [total phosphorus] in the waters of Llyn Padarn would adversely affect the recovery of the SSSI, water and charr: but Dwr Cymru has a statutory duty to treat sewage [under section 94 of the Water Industry Act 1991] and Mr Wolfe was unable to say how the treatment of sewage and waste water functions in the area could be handled in practice if there was a complete prohibition on [total phosphorus] discharges which his submission, if made good, would dictate."

27. The "baseline condition" is defined in article 2(14) in perfectly clear terms. The concept applies, explicitly, to "natural resources and services" – both natural resources and natural resource services. It means, without qualification, the "condition" of the natural resource or natural resource service "that would have existed had the environmental damage not occurred". The "baseline" is not set at some arbitrary date in the past, or at some arbitrary date in the future. Nor does it extend to some arbitrary span of time. It is deliberately fixed at the moment when the "damage" occurs, no matter what the "condition" of the "natural resource" or the "natural resource service" may be at that moment. Thus one sees in the provisions of Annex I for the assessment of the significance of "any damage with adverse effects on reaching or maintaining the favourable conservation status of habitats or species" under article 2(1)(a), the imperative of making that assessment "by reference to the conservation status at the time of the damage" (my emphasis). And in Annex II, the provisions for the remedying of "environmental damage" are consistently set by reference to the restoration of the environment to its "baseline condition".

28. I agree with Hickinbottom J.'s conclusion that, in this context, "the "baseline condition" cannot be any condition other than that current at the time of the relevant "event, act or omission" that caused the damage …" and "is not compatible with the concept of "damage" including a deceleration of progress to the optimal or some better status or condition that may or may not have pertained well before the polluting activity of the operator took place" (paragraph 134 of his judgment). I also agree with the judge that the provisions of Annex II are "… inconsistent with "damage" including a deceleration of recovery to a level higher than … that [pertaining] immediately before the worsening of environmental condition as a result of the relevant activity" (paragraph 135). I think he captured the crucial point well when he said that the Environmental Liability Directive "seeks to prevent operators from engaging in activities that will reduce the condition of the relevant environmental element to below "baseline"; and, if such reduction occurs, to require an operator which has caused the condition to fall below the baseline to pay to return the condition to the baseline" (also paragraph 135).

29. The reference in article 2(1)(a) to "damage that has significant adverse effects on reaching or maintaining the favourable conservation status" of protected species and natural habitats does not sustain the submission that such "damage" may amount to the retardation of improvement. This is clear from the clarification provided in the second sentence of article 2(1)(a): that "[the] significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I" (my emphasis). The criteria in Annex I align with the definition of the "baseline condition" in article 2(14). Annex I requires the significance of damage that has adverse effects on "reaching or maintaining the favourable conservation status of habitats or species" to be "assessed by reference to the conservation status at the time of the damage …" (again, my emphasis). These provisions leave no scope for the submission that "environmental damage" under article 2(1)(a) includes a deceleration of improvement towards "the favourable conservation status of … habitats or species". The judge rejected that submission (in paragraph 144 of his judgment). In my view he was right to do so.

30. The provisions for the "[remedying] of environmental damage" in section 1 of Annex II are directed to the "[remediation] of damage to water or protected species or natural habitats". This encompasses "environmental damage" of two kinds: both "damage to protected species and natural habitats" within the scope of article 2(1)(a), and "water damage" within the scope of article 2(1)(b). Both of these two kinds of "environmental damage" are regarded as being capable of remediation by restoring the environment to its "baseline condition". The dominant concept is "primary remediation", which is returning "the damaged natural resources and/or impaired services to, or towards, baseline condition" (section 1(a), with my emphasis), and whose purpose, defined in almost identical terms, is "to restore the damaged natural resources and/or services to, or towards, baseline condition" (section 1.1.1, again with my emphasis). As one would expect, the language of these provisions in Annex II corresponds to the definition of "recovery" in article 2(15), which, in very similar terms, refers to "the return of damaged natural resources and/or impaired services to baseline condition".

31. Before the judge, and – as I understood it – also before us, Mr Wolfe conceded that a "measurable adverse change in a natural resource", within article 2(2), will always involve a deterioration of the "natural resource" (paragraphs 110(vi) and 138 of Hickinbottom J.'s judgment). If that was conceded, it was in my view rightly conceded. But Mr Wolfe argued that a "measurable impairment of a natural resource service" – the function performed by a natural resource for the benefit of another natural resource or the public – does not necessarily involve some deterioration in that function, and can extend to the deceleration or impeding of its improvement. This submission implies an unexplained, and in my view unjustified, dichotomy within article 2(2). Why a materially different meaning should be given to the concept of "environmental damage" where it relates to a "natural resource service" rather than a "natural resource" is unclear. I can see no good reason for it. The judge described the submission as "irrational" (paragraph 138). It would be, he said, "pure chance whether an activity causes damage directly to a natural resource, or indirectly to that natural resource through another". There would have been no rational basis for creating a definition of "direct" damage more demanding in its consequences than the definition of "indirect". As Mr Forsdick submitted, the anglers' society has suggested no scientific, or other, justification for this "intuitively illogical" result of the construction it asks the court to adopt.

32. I also reject Mr Wolfe's submission that his argument finds support in the references to article 4(7) of the Water Framework Directive in the definition of "water damage" in article 2(1)(b).

33. The purpose of the Water Framework Directive, announced in its article 1(1), is "to establish a framework for the protection of inland surface waters … which … prevents further deterioration and protects and enhances the status of aquatic ecosystems …". Article 4(1) identifies two specific objectives: first, under article 4(1)(a)(i), that Member States are to implement the necessary measures to prevent deterioration of the status of all bodies of surface water; and second, under article 4(1)(a)(ii) and (iii), that Member States are to protect and restore all bodies of surface water with the aim of achieving good status by the end of 2015 at the latest. Article 4(7) provides:

> "Member States will not be in breach of this Directive when:
>
> - failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or
> - failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities …",

and a number of specified conditions are met.

34. In *Bund fur Unwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland* Case C-461/13 ("the Weser case"), the Grand Chamber of the European Court of Justice observed (in paragraph 37 of its judgment) that "the ultimate objective of [the Water Framework Directive] is to achieve, by coordinated action, 'good status' of all EU surface waters by 2015". The two objectives under article 4(1) – the obligation to prevent deterioration under article 4(1)(a)(i) and the obligation to enhance under article 4(1)(a)(ii) and (iii) – were "separate, although intrinsically linked" (paragraph 39). The court observed (in paragraph 44) that "[the] derogation regime provided for in Article 4(7) … constitutes a matter which confirms the interpretation that prevention of deterioration of the status of the bodies of water is binding in nature". On the two main issues arising for its preliminary ruling, it held (in paragraph 71):

> "1. Article 4(1)(a)(i) to (iii) of [the Water Framework Directive] must be interpreted as meaning that the Member States are required – unless a derogation is granted – to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive.
>
> 2. The concept of 'deterioration of the status' of a body of surface water in Article 4(1)(a)(i) … must be interpreted as meaning that there is deterioration as soon as the status of at least of one of the quality elements, within the meaning of Annex V to the directive, falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole. However, if the quality element concerned, within the meaning of that annex, is already in the lowest class,

> any deterioration of that element constitutes a 'deterioration of the status' of a body of surface water, within the meaning of Article 4(1)(a)(i)."

35. Hickinbottom J. observed (in paragraph 132 of his judgment) that "[preventing] environmental deterioration can properly be said to assist with … ultimate progress towards ultimately acceptable environmental positions, as appears to be reflected in [the Water Framework Directive]", but added that "the focus" of the Water Framework Directive is different from that of the Environmental Liability Directive. He went on to say (in paragraph 133) that "[the Environmental Liability Directive] is firmly focused on deterioration of the environment of bodies of water, notably the prevention of deterioration and, if such occurs, its remediation by the operator who caused it under the polluter pays principle".

36. I agree. And I do not accept that the references to the Water Framework Directive in article 2(1)(b) of the Environmental Liability Directive has the effect of modifying the concept of "water damage" for the purposes of that directive. The judgment of the Grand Chamber in the Weser case does not suggest otherwise. The twin objectives stated in article 4(1) of the Water Framework Directive do not enlarge the meaning of "damage" beyond its definition in article 2(2) of the Environmental Liability Directive, or the concept of "water damage" in article 2(1)(b), beyond a measurable deterioration from the "baseline condition". The provisions for remediation in section 1 of Annex II, which stand on the basic principle of restoring the environment to its "baseline condition", apply not only to "damage to protected species and natural habitats" within article 2(1)(a) but also to "water damage" as defined within article 2(1)(b). Thus they apply to any damage that significantly adversely affects "(i) the ecological, chemical or quantitative status or the ecological potential, as defined in [the Water Framework Directive] of the waters concerned …". And the specific exception made in article 2(1)(b)(i) for "adverse effects where Article 4(7) of [the Water Framework Directive] applies" does not generate a larger concept of "damage" than is defined in article 2(2). The breadth of the derogations in article 4(7) of the Water Framework Directive does not serve to expand the regime for the prevention and remediation of "water damage" under the Environmental Liability Directive. As Hickinbottom J. said (in paragraph 164 of his judgment) "[although] article 2(1)(b) requires [article 4(7) of the Water Framework Directive] to be read across, it can only be read across as a defence to the obligations imposed by the [Environmental Liability Directive] – it cannot dictate them".

37. Finally, I cannot see how Mr Wolfe's argument gains anything from the provisions of article 17 as to the "Temporal application" of the Environmental Liability Directive. These provisions are governed by the concept of "damage". They do not alter the meaning of that concept. They do not imply that "environmental damage" as defined in article 2(1) can arise in the absence of some deterioration in the environment caused by the activities of a particular operator, for whose remediation that operator is responsible. As Mr Forsdick submitted, the continuing impacts from preceding damage to the environment are necessarily inherent in the "baseline condition".

38. Mr Wolfe took us to the judgment of the European Court of Justice in *Raffinerie Mediterranee (ERG) SPA v Ministero Dello Sviluppo Economico and others* Case C-378/08 [2010] 3 C.M.L.R. 9, in which the court acknowledged (at paragraph 41) that the Environmental Liability Directive "applies to damage caused by an emission, event or incident which took place after [30 April 2007] where such damage derives either from activities which were carried out after that date or activities which were carried out but had

not finished before that date". The court went on to say (at paragraph 43) that "[it] is … for the referring court to ascertain on the basis of the facts … whether … the damage in respect of which environmental remedial measures were imposed by the competent national authorities falls within one of the situations referred to at [paragraph 41] above". But those passages in the court's judgment do not support the proposition that damage caused by emissions before 30 April 2007 constitutes "environmental damage" for the purposes of the Environmental Liability Directive. For "environmental damage" within the scope of article 2(1) to be caused, the emission itself must have taken place after that date. Thus, as Mr Forsdick submitted, the current manifestations or consequences of eutrophication and accelerated algal growth, including less than "good" levels of dissolved oxygen in Llyn Padarn, will not constitute "environmental damage". They are part of the "baseline condition" against which any present or potential "environmental damage" is to be assessed. It follows that the Environmental Liability Directive does not have the effect of requiring current discharges, which are themselves acceptable and do not cause a deterioration of the environment below "baseline condition", to be ceased so as to accelerate the remediation of historic damage predating the coming into force of the Environmental Liability Directive in April 2007.

39. I therefore reject Mr Wolfe's argument on the meaning and effect of the concept of "environmental damage" in article 2(2) of the Environmental Liability Directive. That argument was the foundation of the claim for judicial review, and is the basis for the declaratory relief now sought in this appeal. In my view it fails – and with it both claim and appeal.

40. I shall therefore deal shortly with the remaining submissions on which a conclusion is called for. For the rest, I would simply endorse what was said by the judge.

Regulation 29 of the 2009 regulations

41. Regulation 29(1) of the 2009 regulations permits an interested party to notify the appropriate enforcing authority of any "environmental damage" that is being, or has been, caused, or of which there is an "imminent threat". Under regulation 29(3) the enforcing authority "must consider the notification and inform the notifier as to the action, if any, that it intends to take".

42. Mr Wolfe submitted that, regardless of whether the anglers' society had raised the point in their regulation 29 notification, NRW had to grapple with the question of "the "suppression" or recovery" of the environment. The anglers' society had done everything required of them under regulation 29, notifying NRW that "environmental damage" had occurred as a result of sewage pollution of Llyn Padarn, and was continuing. The judge was wrong to hold that a notification is required to specify a particular kind of "environmental damage" arising from a particular incident to oblige the enforcing authority to consider it.

43. As Mr Wolfe recognized, this argument had become subsidiary to the main business of the appeal and was not fully argued before us. But I am not persuaded by his submission. I think Hickinbottom J. was right to conclude that, "as a matter of law, NRW was not under an obligation to consider damage that not only fell outside the scope of the notification, but was of a novel and entirely different type from that notified" (paragraph 102 of the judgment). The anglers' society's notification letter of 7 February 2012 did not, in fact, require NRW to consider "environmental damage" in the sense of – as the judge put it – "a

deceleration of improvement to the environmental situation". As he held, they did not, "as a matter of law, err in not considering it in the 2014 decision document …" (paragraph 103).

Mechanism for the causation of "environmental damage"

44. In the court below it was argued by Mr Forsdick, that even if, in its decision of December 2014, NRW had considered "a deceleration of improvement" in the environment as a possible form of "environmental damage" under the Environmental Liability Directive, the outcome would have been the same.

45. Hickinbottom J. acknowledged (in paragraph 153 of his judgment) that "matters of expert assessment are for the NRW, and not this court", and that NRW "did not consider the particular issue of whether discharges from the Llanberis STW caused a deceleration in any environmental element reaching its appropriate "good" standard". He nevertheless concluded that Mr Forsdick's submission was sound. He referred (in paragraph 157) to "the clear *findings* made by NRW in the decision document, particularly about mechanism", which included this:

> "The decision document proceeds on the basis that the mechanism relied upon by [the anglers' society] as the sole mechanism for environmental damage in this case (i.e. increased [total phosphorus] levels causing algal growth, which in turn causes reduced [dissolved oxygen] as a result of lake floor decomposition) is, indeed, the only relevant mechanism that is potentially at work (see paragraph 160). But, in any event, although the [dissolved oxygen] level is less than "good" and there is evidence that charr generally prefer well-oxygenated water, there appears to me to be no specific evidence that the lower levels of [dissolved oxygen] have, in this case, led to any slowing of the return of the charr to acceptable environmental status by (e.g.) the lack of [dissolved oxygen] in the hypolimnion restricting their summer habitat."

The judge therefore concluded that the claim for judicial review would have failed on the facts in any event (paragraphs 158, 160 and 161).

46. I am inclined to agree. But as the judge recognized (in paragraph 153), and I accept, this question does not arise unless the concept of "environmental damage" in the Environmental Liability Directive bears the wider meaning for which the anglers' society contends – which in my view it clearly does not.

The site integrity test in the 2009 regulations – ground 1

47. "Environmental damage" is defined in regulation 4(1) of the 2009 regulations as including damage to "(a) protected species or natural habitats …". Regulation 4(2) defines "[environmental] damage to protected species or natural habitats or [an SSSI]" as "damage of a kind specified in Schedule 1". Schedule 1 further defines "environmental damage" for the purposes of regulation 4. Paragraph 1 provides that "[in] the case of protected species or natural habitat (other than damage on [an SSSI] to which paragraph 4 applies) the damage must be such that it has a significant adverse effect on reaching or maintaining the favourable conservation status of the protected species or natural habitat…". Paragraph 4(1) of Schedule 1 provides that, in the case of an SSSI, the damage must be to the species or habitats notified under section 28 of the 1981 Act, or species or habitats protected under the

Habitats or Wild Birds Directives. Paragraph 4(2) provides that "[the] damage must have an adverse effect on the integrity of the site (that is, the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats or the levels of populations of the species affected)".

48. As Hickinbottom J. said in paragraph 91 of his judgment:

> "In its fully developed form, [ground 1] involves the contention that (i) in making [the 2009 regulations], the Welsh Ministers had exercised their power under article 2(3)(c) of the [Environmental Liability Directive], to determine that all SSSI's in Wales be designated as habitats for equivalent purposes as those laid down in the Habitats Directive, SSSIs enjoy the same protection as habitats protected under that Directive … ; and (ii) in respect of such sites, the site integrity test for damage found in paragraph 4(2) of Schedule 1 to the [2009 regulations] must be ignored because it runs counter to the test for protection from damage that applies to habitats protected under the Habitats Directive. In considering the environmental damage to the Llyn Padarn SSSI, NRW therefore erred by applying the site integrity test."

49. Mr Wolfe's submitted that, under article 2(3)(c) of the Environmental Liability Directive, SSSI's in Wales, including the SSSI comprised in Llyn Padarn, have been designated as "natural habitats", and the Arctic charr as a "protected species", with equivalent protection to the habitats and species listed in the annexes to the Birds Directive and the Habitats Directive. Therefore, submitted Mr Wolfe, it was not open to the Welsh Ministers to provide, as they did in regulation 4 of the 2009 regulations, for the assessment of "environmental damage" to such habitats and species by means of a "site integrity test" rather than a "favourable conservation test".

50. Before us this argument and the other parties' response to it were not developed beyond counsel's written submissions. It was dealt with by the judge in a thorough and compelling analysis (in paragraphs 113 to 128 of his judgment), which brought him to this conclusion (in paragraph 128):

> "… [In] making the [2009 regulations] to include provisions for SSSIs, the Welsh Ministers did not make a determination that all Wales SSSIs should be designated for purposes equivalent to those laid down in the Habitats Directive, such that the provisions of the [Environmental Liability Directive] that apply to protected habitats and species apply equally to SSSIs and species that inform their designation as SSSIs. The [2009 regulations], as properly construed, provide for parallel provisions for SSSIs and protected habitats and species under [the Birds Directive and the Habitats Directive]. Insofar as regulation 4(2) purports to set a standard of protection for such protected habitats and species that is less than that required by those two Directives, the lawfulness of that provision is immaterial to the issues in this claim, the Llyn Padarn SSSI not being a Special Area of Conservation under the European regime."

I agree with that conclusion and cannot usefully add to it.

Other failures of transposition alleged in ground 3

51. Again without elaboration in oral argument before us, Mr Wolfe submitted that in two further respects the 2009 regulations were flawed by failures of transposition: first, a failure

to transpose the definition of "environmental damage" in article 2(1) of the Environmental Liability Directive in that regulation 4(3) restricts the definition of "[environmental] damage to surface water" to damage such that the specified element "changes sufficiently to lower the status of the water body in accordance with [the Water Framework Directive] …"; and second, a failure to transpose article 4(7) of the Water Framework Directive in that regulation 9 refers only to an exception relating to the "deterioration from high status to good status of a body of surface water resulting from new sustainable human development activities pursuant to that Directive".

52. As Hickinbottom J. concluded (in paragraphs 165 and 166 of his judgment) those submissions flow from the anglers' society's mistaken construction of the concept of "environmental damage" in article 2(1) of the Environmental Liability Directive. They too must therefore be rejected.

Ground 6 of the claim – preventive measures

53. Article 5 (1) of the Environmental Liability Directive provides that "[where] environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures". Article 5(2) requires Member States to "provide that, where appropriate, and in any case whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the operator, operators are to inform the competent authority of all relevant aspects of the situation, as soon as possible". Article 5(3) provides that the competent authority "may, at any time … (b) require the operator to take the necessary preventive measures …". Article 5(4) states that the competent authority "shall require that the preventive measures are taken by the operator ...".

54. Regulation 13 of the 2009 regulations, "Preventing environmental damage", provides:

> "(1) An operator of an activity that causes an imminent threat of environmental damage, or an imminent threat of damage in relation to which there are reasonable grounds to believe will become environmental damage, must immediately –
>
> (a) take all practicable steps to prevent the damage …
>
> …
>
> (2) The enforcing authority may serve a notice on that operator that –
>
> (a) describes the threat;
>
> (b) specifies the measures required to prevent the damage; and
>
> (c) requires the operator to take those measures, or measures at least equivalent to them, within the period specified in the notice.
>
> (3) Failure to comply with paragraph (1) or a notice served under paragraph (2) is an offence."

55. The anglers' society's argument on this ground was that NRW unlawfully failed to require preventive measures of Dwr Cymru restraining its discharges into Llyn Padarn. Article 5 of the Environmental Liability Directive required such measures to be taken, but that requirement was not adequately transposed in regulation 13 of the 2009 regulations. Regulation 13(2) affords the enforcing authority only a discretion to serve a notice

requiring an operator to take preventive measures, rather than imposing upon it duty to do so.

56. Patterson J. saw no arguable merit in this ground when she considered the application for permission to apply for judicial review on the papers. Nor did Hickinbottom J. when it was argued before him (see paragraphs 173 and 174 of his judgment). Nor did Treacy L.J. when granting permission to appeal. I also think it untenable. It is, as Mr Forsdick submitted, based on a misreading of article 5 of the Environmental Liability Directive. Article 5 did not impose a duty on NRW to require preventive action of Dwr Cymru. The requirement in article 5(1) that the operator is to "take the necessary preventive measures" is mirrored in regulation 13(1)(a) of the 2009 regulations. The requirement in article 5(2) that the operator is to inform the competent authority "of all relevant aspects of the situation …" is mirrored in regulation 13(1)(b). Under article 5(3)(b) the competent authority "may" at any time – not "must" – require the operator "to take the necessary preventive measures" and, under article 5(4), it must require that "the preventive measures" are taken by the operator. This power and consequent requirement are mirrored in regulation 13(2). If the power under article 5(3) is exercised, the duty under article 5(4) is triggered. The reference to "the preventive measures" in article 5(4) is – and can only be – to the "necessary preventive measures" identified by the competent authority in the exercise of its discretionary power under article 5(3).

57. As Hickinbottom J. said (in paragraph 173(ii) of his judgment), the construction of article 5 proposed by Mr Wolfe "would make the power in article 5(3)(b) otiose, because it would be swept up in the obligation to do the same thing in article 5(4)". He was right to reject as unarguable the submission that the transposition of article 5 in regulation 13 of the 2009 regulations was flawed. It was not. Permission to apply for judicial review was rightly refused on this ground.

58. A further reason for refusing permission on ground 6 is that an order to quash NRW's decision is no longer sought. As Mr Forsdick submitted, what the anglers' society is now seeking on this ground is, in effect, the court's advice on the approach NRW should take to some imminent threat of "environmental damage" that might emerge in the future – or might not. Providing an "advisory opinion" is not a task for the court in a claim for judicial review (see the judgment of Munby J. in *R. (on the application of the Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), at paragraph 140).

Should a reference now be made to the European Court of Justice?

59. Mr Wolfe submitted that a reference should be made to the Court of Justice of the European Union under article 267 of the Treaty on the Functioning of the European Union.

60. I disagree. Mr Forsdick and Mr Gordon rightly reminded us of the principles emphasized by the European Court of Justice in *Srl CILFIT v Ministerio della Sanita* Case 283/81 [1982] E.C.R. 3415. With those principles in mind, I cannot accept that an argument contrary to the conclusion I have reached on the meaning of the concepts of "damage" and "environmental damage" in article 2 of the Environmental Liability Directive might be accepted either by the domestic court in any other Member State or by the European Court of Justice (see the judgment of Lord Kerr in *R. (on the application of ZO (Somalia) v Secretary of State for the Home Department* [2010] 1 W.L.R. 1948, at paragraph 51). The

> meaning of each of those two concepts is, in my view, quite clear. It was resolved by the judge, without difficulty or doubt, in his comprehensive judgment. And in my view, as Mr Forsdick, Mr Gordon and Mr Kimblin submitted, there is no realistic prospect of a different construction being adopted. This, I believe, is one of those cases in which – to adopt Lord Sumption's formulation in *R. (on the application of HS2 Action Alliance Ltd.) v Secretary of State for Transport* [2014] UKSC 3 (in paragraph 127 of his judgment) – on the relevant "[questions] of interpretation the meaning of the text is beyond reasonable dispute …".

Conclusion

61. For the reasons I have given I would dismiss the appeal on all grounds.

Lady Justice King

62. I agree.

Lord Justice Laws

63. I also agree.