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Taking care of protected species - meeting the duty of "strict protection" in England and Wales

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Legislation: Conservation (Natural Habitats etc) Regulations 1994 (SI 1994 2716) reg.39 , reg.40 , reg.44
Directive 92/43 on the conservation of natural habitats and of wild fauna and flora
Conservation (Natural Habitats, &c.) (Amendment) Regulations 2007 (SI 2007 1843)

Case: Commission of the European Communities v United Kingdom (C-6/04) [2005] E.C.R. I-9017 (ECJ (2nd Chamber))

*J.P.L. 1547 Introduction

In 2007, the legislative regime in England and Wales relating to protected species underwent a radical alteration. The changes have far reaching and significant implications for anyone involved in or advising on development, including that for which planning permission has already been granted, which may affect protected species. The importance of correctly understanding, applying and abiding by the new legal framework is amplified by the fact that failure to do so may potentially result in a criminal charge.

This article explores some of the key impacts of the new regime and issues a warning--failure to get to grips with and comply with the new statutory requirements may result in serious consequences, not only in terms of the successful completion of a project but in respect of parties exposure to criminal liability.

The old legislative framework

The Habitats Directive 1992 (Council Directive 92/43/EEC) was first transposed into the law of England and Wales by means of the Conservation (Natural Habitats etc) Regulations 1994. The purpose of the Directive, in so far as protected species are concerned, was to “establish a system of strict protection” as stated in Art.12.

The Conservation (Natural Habitat etc) Regulations 1994 (the 1994 Regulations) created criminal offences, stipulated in reg.39, which sought to prevent deliberate harm to protected species themselves and harm to their breeding sites or resting places on a strict liability basis. There were also, however, a number of statutory defences created by the Regulations to these criminal offences.

An offence would not be committed if an animal were to be deliberately disturbed, or its breeding site/resting place damaged or destroyed, if this took place within a dwelling house (reg.40(2) of the 1994 Regulations).

Furthermore, reg.40(3) (c) of the 1994 Regulations stated that “Notwithstanding anything in regulation 39, a person should not be guilty of an offence by reason of…any act made unlawful by that regulation if he shows that the act was the incidental result of a lawful operation and could not reasonably have been avoided”.

In order to be entitled to rely on the defences in reg.40(2) or 40(3)(c) of the 1994 Regulations in relation to anything done to a bat or its roost (other than within a living area of a dwelling house), the appropriate conservation body (Natural England) had to be notified of the proposed action and ***J.P.L. 1548** given “a reasonable time to advise…whether it should be carried out and, if so, the method to be used” (reg.40(4)).

Finally, a defence was also available if a licence to carry out the works or activity had been applied for and granted pursuant to reg.44 of the 1994 Regulations. However, to be eligible for a licence it would be necessary to meet restrictive criteria--the works or activities must be carried out for the specific purposes listed in reg.44(2) of the 1994 Regulations such as: scientific or educational purposes; preserving public health or public safety; or for other reasons of overriding public interest. The licensing authority must also have been satisfied that there was no satisfactory alternative to the works proposed and that "the action would not be detrimental to the maintenance of the population …".

Due to the restrictive criteria which applied to the grant of licences (and still does in the new legislative regime), the defences in reg.40(2) and 40(3) (c) have been relied upon by planning lawyers who, for example, have sought to establish fall back positions in relation to a proposed development scheme particularly in relation to schemes involving the demolition of dwelling houses and other buildings which are used by bats as roosts.

Essentially it was possible to argue that, as the demolition would be lawful (being either (i) permitted development under the Town and Country Planning (General Permitted Development) Order 1995 or, (ii) exempted from constituting development by the Secretary of State's Direction--see Circular 10/95) no criminal offence would be committed if the breeding site/resting place were destroyed as a result. The demolition would constitute a lawful operation which could not reasonably be avoided within the meaning of reg.40(3)(c). If the building to be demolished was a dwelling house then of course reg.40(2) could be relied on. Proceeding under the banner of either of these defences avoided the need for a licence. Instead, in most cases, the works would simply proceed with no requirement to follow any notification or licensing procedure under the 1994 Regulations (except for cases involving bats, where the less onerous notification procedure could be used).

The Decision of the ECJ--Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland [2005] E.C.R. I-9017

Some 10 years after the Habitats Directive was first transposed into the law of England and Wales, the EU Commission instituted proceedings against the UK. The Commission contended that the UK had failed to fulfil its obligations under the Habitats Directive.

The Commission claimed that reg.40 of the 1994 Regulations permitted derogations from the strict protection of certain animals in circumstances not authorised by the Directive. In particular, the Commission attacked the defence stipulated in reg.40(3)(c) of the 1994 Regulations.

The European Court of Justice held that there could be no derogation from the strict protection of the species in question unless there is (i) no satisfactory alternative and (ii) the derogation is not detrimental to the maintenance of the populations of the species concerned (at a favourable conservation status in their natural range). As such, the derogations provided for by reg.40 were held to be contrary to the Directive. Dealing specifically with the defence provided for by reg.40(3), the ECJ stated that,

"The derogation at issue in the present case authorises acts which lead to the killing of protected species and to the deterioration or destruction of their breeding and resting places, where those acts are as such lawful. Therefore such a derogation, founded on the legality of the act, is contrary both to the spirit and purpose of the Habitats Directive …"

J.P.L. 1549 An attack on the clarity and precision of the 1994 Regulations was also successfully made by the Commission. The Court held that the UK legislation, "is so general that it does not give effect to the Habitats Directive with sufficient precision and clarity to satisfy fully the demands of legal certainty".

Unsurprisingly, therefore, the judgment of the European Court of Justice in this case has led to the amendment of the 1994 Regulations.

The new legislative framework--key changes and impacts

The Conservation (Natural Habitats etc) Amendment Regulations 2007 (the 2007 Regulations) came into effect on the August 21, 2007[1] and apply to England and Wales only, although broadly comparable regulations have been introduced to amend the protected species regime in both Scotland and Northern Ireland.

An explanatory memo, issued alongside the new regulations, sets out their purpose, which is said to be to “amend the species protection regime to better reflect the requirements of the Habitats Directive … [and] … provide a clear legal basis for surveillance and monitoring of European protected species”.

To achieve this purpose, the defences which were previously available under reg.40 of the 1994 Regulations relating to dwelling houses and lawful acts have been removed. The defences now available under the 2007 Regulations are restricted to activities or works carried out for the purpose of treating or tending to an injured animal and those carried out for the purposes of investigating the commission of criminal offences.

This change imposes a serious restriction upon an individual's right to proceed with an activity which would, immediately before the enactment of the 2007 Regulations, have been lawful such as implementing an extant planning permission. No framework has been established to provide recompense to those individuals whose lawful rights can no longer be exercised without either (i) obtaining a licence or (ii) resulting in the commission of a criminal offence. If found guilty of an offence under reg.39 (as amended) an individual faces the prospect of not only a fine, but also imprisonment (for a maximum term of six months).

Applying for a licence prior to undertaking any works, which would otherwise be lawful in planning terms, will now be necessary in most circumstances to ensure that criminal liability does not attach. This is particularly important to bear in mind if a breeding site/resting place of any protected species is to be damaged or destroyed, as this is a strict liability offence.

There is some room for manoeuvre if the activity or work in question deliberately disturbs wild animals of a protected species. An offence is only committed if the animals are disturbed in a way which is likely to “significantly affect” either: (i) the ability of any significant group of animals of that species to survive, breed, rear or nurture their young; or (ii) the local distribution or abundance of that species (see reg.39(1) (b) as amended).

Any development project which is able to incorporate a breeding site or resting place of a protected species, whilst protecting it from damage or destruction, is therefore likely to be less encumbered as a result of the new regulations. The elements of the offence would be relatively onerous for a prosecuting authority to prove. In the first instance given that the surveillance information regarding ***J.P.L. 1550** protected species in the UK is in its infancy it may be difficult to prove that a particular group of protected animals is “significant” or that the “local distribution or abundance” of the species will be “significantly affected”.[2]

It is, perhaps, for this reason that the 2007 Regulations create new obligations, which are imposed on the Secretary of State and the Welsh Minister, for the surveillance and monitoring of habitat types and species which are of “Community interest”. The guidance notes relating to the 2007 Regulations, issued by DEFRA and the Welsh Assembly, state that the monitoring requirements are to be undertaken and fulfilled by the Joint Conservation Committee (JCC). Indeed the guidance suggests that the new statutory provisions are simply a formalisation of existing work being carried out by the JCC, but no specific details of this work are provided.

It should also be noted that the 2007 Regulations create a new offence (under reg.5(21)) of breaching a licence condition, though this only applies to licences which were granted on or after the August 21, 2007 and, therefore, has no retrospective effect; a statutory defence is provided for if it can be demonstrated that the person authorised under the licence (i) took all reasonable precautions and exercised due diligence to avoid the commission of the offence or (ii) the commission of the offence was beyond that person's control.

Conclusion

It appears that the implications of the 2007 Regulations are still to be fully realised in the world of planning. Indeed Circular 06/2005, which deals with biodiversity and conservation, has not yet been revised or superseded and continues to provide advice based upon a legal framework which is now defunct.[3] At present, it would seem that the safest course of action is to refer directly to the 2007 Regulations for guidance and especial care should be taken when considering any developments which may involve works or activities which affect protected species.

J.P.L. 2008, 11, 1547-1550

1. With the exception of para.(21) of reg.5 which came into effect on November 21, 2007

2. Interestingly, the wording of reg.39(1) (b) (i) and (ii) results in the commission of an offence irrespective of whether the “significant affect” is adverse or not.

3. By way of example see para.106 of the Circular.