

**IN THE PROPOSED JUDICIAL REVIEW PROCEEDINGS**

**B E T W E E N:**

**R((Stephen Akester and Marc Melanaphy] on behalf of the LYMINGTON  
RIVER ASSOCIATION)**

**Applicants/Intended Claimants**

**and**

**1) DEPARTMENT OF ENVIRONMENT FOOD AND RURAL AFFAIRS**

**2) LYMINGTON HARBOUR COMMISSIONERS**

**Defendants/Intended**

**Respondents**

**And**

**WIGHTLINK LTD (Interested Party)**

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**SKELTON ARGUMENT IN SUPPORT OF APPLICATION FOR INTERIM  
INJUNCTION**

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**Introduction**

1. This is the skeleton argument on behalf of the Applicant in relation to an application for an interim injunction to prevent a passenger ferry operated by the Interested Party sailing from/to Lymington to Yarmouth imminently despite the recent publication of a report by the Government's nature conservation advisors which indicates that the sailing will cause environmental damage. (adverse effect on an environmental area protected by .....
2. The Applicants intend to apply for judicial review of:

- a) The failure by the Department of Food Environment and Rural Affairs to enforce compliance with the Directive 92/43 on the conservation of natural habitats
  - b) The failure of the Lymington Harbour Commissioners to exercise their functions under Habitats Conservation Regulations 1994 to ensure compliance with the Directive.in accordance with their responsibilities under the Port Marine Safety Code.
3. The Defendants and Interested Party have been notified by email of this application. Assurances were sought that the ferry operated by the Interested Party would not sail this evening but those assurances have not been forthcoming.

## **Background**

### ***Legislative Background***

4. Pursuant to Directive 92/43 on the conservation of natural habitats and of flora and fauna (the Habitats Directive), any plan or project likely to have a significant effect on a site designated as worthy of protection by reason of the need to conserve wild birds or certain flora and fauna (known as Special Protection Areas (SPAs) or Special Areas of Conservation) shall be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public (article 6(3) of the Directive)
5. The UK has implemented the Directive into domestic law by the Conservation (Natural Habitats) Regulations 1994 (SI 2716). Regulation 48 provides as follows

#### **48 Assessment of implications for European site**

- (1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site in Great Britain [or a European offshore marine site] (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of the site,

shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment [or to enable them to determine whether an appropriate assessment is required].

(3) The competent authority shall for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority may specify.

(4) They shall also, if they consider it appropriate, take the opinion of the general public; and if they do so, they shall take such steps for that purpose as they consider appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site [or European offshore marine site (as the case may be)].

6. Competent authorities include a harbour authority and navigation authority (Regulation 5)
7. Pursuant to Regulation 3, any competent authority having functions relevant to marine conservation shall exercise those functions so as to secure compliance with the requirements of the Habitats Directive. The Secretary of State shall exercise their functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive.
8. A claimant in judicial review proceedings can apply for interim relief under Part 54.3(1) Civil Procedure Rules. The criteria for an interim injunction are known as the American Cyanamid principles and are as follows:
  - a) Serious issue to be tried
  - b) Inadequacy of damages

- c) Balance of convenience

### ***Factual Background***

9. In summary:

- a) The Interested Party has, for some time, been proposing to introduce new ferries on the Lymington to Yarmouth route, known as W Class ferry
- b) The Applicant consists of local residents and other users of the Lymington River.
- c) The following sites, which are protected under international, European and national nature conservation legislation, are in the local vicinity
  - i) The Hurst Castle to Lymington River Estuary SSSI
  - ii) The Solent and Southampton Water SPA/Ramsar Site
  - iii) The Solent Maritime SAC
  - iv) The New Forest SSSI
  - v) The Lymington River SSSI
- d) Natural England (the Government's statutory advisor on the natural environment) published a report dated 12 February 2009, indicating that the introduction of the ferries is likely to be environmentally detrimental to the protected sites:

*"Having considered all the evidence, Natural England continues to advise that current evidence indicates that the C class ferry has been a factor in the ongoing deterioration in the extent of the mudflats and saltmarshes at Lymington. This deterioration is over and above background changes and the influences of*

*ferries in upstream sections appears to dominate over natural influences. The introduction of the W class ferries can be expected to prolong ferry induced impacts on inter tidal habitats and consequently further losses are likely to be attributable to ferry operations even when mitigated by recent reductions in speed...*

***Natural England therefore advises that it cannot be ascertained that the introduction of the W class ferries will not have an adverse effect on the Natura 200 interest***

- e) DEFRA has accepted that it has ultimate responsibility for ensuring compliance with the Habitats Directive

*"I fully accept that ultimately it is for my Department to ensure compliance with the Habitats Directive and this is a responsibility we take very seriously" (Huw Irranca-Davies Minister for the Natural and Marine Environment Wildlife and Rural Affairs in a letter to solicitors for the Applicant dated 27 November 2008)*

- f) The Minister has also indicated that "

*"I also understand that the Lymington Harbour Commissioners are aware of their separate obligations under regulation 3(4) of the Habitats Regulations and have taken advice on how these might be fulfilled in the event that Natural England advise that operation of the new ferries will have an adverse effect on the protected sites. I believe that there are powers that could be taken by the Commissioners to impose constraints on the operation of the ferries".(letter dated 10 Dec 2008 from Huw Irranca Davies)*

- g) The Defendants and Interested Party have been notified by email of this application. Assurances were sought that the ferry operated by

the Interested Party would not sail this evening but those assurances have not been forthcoming (*email from Richard Buxton (Solicitor to the Applicant) dated 24 Feb and sent at 13.10 and response from Duncan O Connor (Bircham Dyson Bell – Solicitor to Wightlink) to be shown to the Court*)

- h) On 20 Feb 2009, Solicitors to Wightlink stated as follows in correspondence:

*"Once Wightlink has received ABPmer's final report in the light of Natural England's advice (version 3 12 February) it will decide whether the W Class Ferries would adversely affect the integrity of the European sites concerned and therefore whether any mitigation is required. As we have said before, Wightlink will not introduce the W class ferries unless and until it is satisfied that it would be lawful to do so*

- i) Despite this letter of 20 February, the email of 24 Feb from the same solicitors indicate that the Wightlink board met yesterday, reviewed all relevant environmental material and 'resolved to introduce the W class ferries". The email also states that

*It is common ground, or at worst there is very little difference, between the environmental consultants appointed by Wightlink, Natural England and the LHC that the effect of the new W-class ferries on the estuary will be very similar to the effect of the existing C-class ferries which have been in operation for many years.*

It is submitted that this assessment is not consistent with a reading of the Natural England Report. The apparently unilateral decision by the board in absence of consultation/consent from the Harbour Commissioners, New Forest District Council and Natural England marks a departure from its earlier approach to resolution of this matter (see letter dated 26 November 2008 to Richard Buxton)

- j) The Harbour Commissioners have indicated that they will attach considerable weight to the advice from Natural England in deciding how to proceed

*"It is confirmed that LHC will attach very considerable weight to that final advice in accordance with its statutory obligations*

*Having regard to LHCs overriding statutory obligations an undertaking has been sought from Wightlink that the new ferries will not operate unless and until proposals are tabled that allow Natural England to conclude that they will not have an adverse effect on the integrity of the European site" (15 Jan 2009 letter to Richard Buxton)*

### **Merits of the application for judicial review – serious issue to be tried**

10. DEFRA and the Lymington Harbour Commissions are under a statutory duty to exercise their functions so as to ensure compliance with the Habitats Directive. The Directive (and implementing Regulations) provide that plans or projects likely to have a significant effect on protected sites must be assessed before consent is given. .
11. The European Court has held that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that it will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (see, to this effect, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraphs 43 and 44).
12. The question arises as to whether sailing the ferries (as opposed to constructing berthing or other harbour facilities) amounts to a plan or project which attracts the requirements for a habitats assessment and consent. The Interested Party is understood to dispute that merely sailing the ferries

amounts to a plan or project. However the Applicant submits that (in no particular order):

- a) 'Plan and Project' is defined broadly in European Law for the purposes of the environmental impact assessment regime.
- b) The precautionary principle on which the ECJ has held that Article 6 of the Directive is based means that the 1994 Regulations should be interpreted on the side of ensuring that proposals capable of affecting the conservation objectives of a designated site are thoroughly assessed before being approved. This means adopting a broad interpretation of plan or project. The report from Natural England establishes that detrimental environmental impact from the introduction of the W Class Ferries cannot be ruled out.

***Inadequacy of damages***

13. Environmental damage from the ferries cannot be compensated by damages to the Applicant

**Balance of convenience**

14. Relevant factors include:
  - a) Clear public interest in ensuring that the protected sites are not damaged.
  - b) The Applicants understand that, following renewal of certain certificates which until now has been carried out each year, the existing C class ferries can be used until the matter is resolved so there should not be a significant impact on the Interested Party (in winter demand is not sufficient to require a larger ferry).



- c) The ferries sail every half an hour which would appear to increase the potential for environmental damage whilst this matter is resolved as compared with a ferry which sails less frequently (eg once a week).
- d) Given the relevant correspondence (eg letter from LHC dated 15 Jan 2009 and the apparent change in Wighlink's earlier policy of co-operating with the regulatory process), it appears that the Wightlink board appear to have decided to 'provoke' regulatory or other action by provocatively deciding to introduce the ferries. This may be in an effort to speed up the regulatory process but this cannot justify the potential environmental damage from the introduction of the ferries

#### **Cross Undertaking in damages**

- 15. The Applicant should not be required to provide an undertaking in damages. The Court has a discretion not to require an undertaking in damages (CPR PD 25.5.1)
- 16. See ***R v Durham County Council and Sherborn Stone Company Ltd ex parte Huddleston (CO 2880/90)***

*"There has been and it is at the root of this matter no environmental assessment. The consequences of work starting without such an environmental assessment may in my judgment be such as to make irreversible any harm that might be caused.....That wider issue is one that the Court can properly have regard to and have regard to notwithstanding the fact that the applicant is not in a position to offer any undertaking as to any financial loss....(Kay J)*

- 17. Sullivan Report on Ensuring Access to Environmental Justice in England and Wales 2008

*We recommend that the requirement to provide a cross-undertaking in damages should not apply in environmental cases falling within Aarhus where*

*the court is satisfied that an injunction is required to prevent significant environmental damage and to preserve the factual basis of the proceedings. In such cases it will be incumbent on the court and its administration to ensure that the full case is heard promptly.*

### **Protective Costs Order**

18. The Applicant applies for a protective costs order. If the Court would consider it helpful to hold an oral hearing to decide the application for a protective costs order, the Claimant requests that the Court make an interim protective costs order to cover the hearing.
  
19. The criteria for a protective costs order are set out in the judgment of the Court of Appeal in ***R(Corner House) v Trade & Industry Secretary*** [2005] 1 WLR 2600 (CA) as follows (para 74):
  - a) The issues raised are of general importance
  - b) The public interest requires that those issues be resolved
  - c) The applicant has no private interest in the outcome of the case
  - d) Having regard to the financial resources of both parties and to the amount of costs involved it is fair and just to make the order
  - e) If the order is not made the applicant will probably discontinue and will be acting reasonably in so doing

If those acting for the applicant are doing so pro bono it is likely that this will enhance the merits of the application

It is for the Court, in its discretion to decide whether it is fair and just to make the order in light of the above

### ***Issues raised are of general importance***

### ***Public interest requires that those issues are resolved***

Environmental damage to sites protected under European and national legislation. Proper application of the Habitats Directive and its implementation in domestic law

***The applicant has no private interest in the outcome of the case***

The Lymington River Association is composed of local residents and other users of the river Lymington.

***Having regard to the financial resources of both parties and to the amount of costs involved it is fair and just to make the order***

***If the PCO is not make the applicant will almost certainly discontinue and will be acting reasonably in so doing***

The action group has very little resources. In particular, there are 12 individuals who are not wealthy who are responsible for sharing the legal costs of the case.

JUSTINE THORNTON

39 Essex Street

24 February 2009