PREFACE

With the exception of Chapter 1, the chapters in this book are based on papers produced for the first Kingsland Conference held at King's College, London on 17 March 2011 and organised jointly by Francis Taylor Building and the Centre of European Law at King's College. The papers have been rewritten and revised for publication. We have endeavoured to state the law correctly as at 1 September 2011 but where possible have included later developments. The title of the book is the same as that of the Conference: 'The Habitats Directive: A Developer's Obstacle Course?' Access to the Directive is widely available but a copy of the Habitats Directive is provided as an appendix in order that the reader might have convenient access to cross refer to particular provisions whilst reading the book.

I edited this book over the Christmas period of 2011 in the coastal town of Hermanus. Situated in the western province of South Africa almost 10,000 kilometres away from the Temple and King's College in London this may seem a strange location for a book about the law relating to species and habitats protection in the European Union. But distance can add perspective. Nicholas Montsarrat wrote *The Cruel Sea*, his epic tale of Second World War escort convoys of the North Atlantic, the Mediterranean and Arctic seas, here in Hermanus. Nestled between the Fynbos and the angry waves of the South Atlantic it is part of a 'Biodiversity Hotspot'[1] known as the Cape Floristic Kingdom. This kingdom is the sixth and smallest of the world's plant kingdoms, home to more than 9,000 vascular plant species, of which 69 per cent are endemic. Yet homelessness in this country is rife amongst its people and the majority of those with a home live in substandard accommodation. In 2011 the unemployment rate in South Africa was 25 per cent and the average life expectancy under 50 years. Power and water shortages in Hermanus are not unknown. The pressure for development is acute. It is thus a very appropriate place and time in which to reflect on the difficult interaction between human economic development and nature.

Biodiversity within Europe is under threat. According to the World Conservation Union, some 21 per cent of Europe's vascular plant species are classified as threatened and in a number of European countries more than two-thirds of the existing plant habitat types are endangered. One hundred and fifty-five species of Europe's 1,000 species of native mammals, birds, reptiles and amphibians

[1] A 'Biodiversity Hotpsot' is a threatened region with a large range of endemic plant species (at least 1,500) but where more than 70% of the original habitat has been lost because of human activities. Typically, the diversity of endemic vertebrates is also high.

are classified as threatened. Extinction threatens 15 per cent, or one in seven, of Europe's 228 species of mammals. Among the 35 threatened European mammals, six are marine species. Europe's five most endangered mammals are classified as 'Critically Endangered'. That status means that populations have declined drastically, or numbers are already precariously low, or the animals currently survive only in a tiny area.

Realisation in Europe about the threat to our living space came about in two stages. First, there was a growing awareness that since the 1950s new factors had been contributing to the decrease in the numbers of certain wild species. People recognised the old causes of environmental harm but they came to be aware that the direct destruction or modification of the habitats which were home to these species were also major causes of environmental destruction. Previously, conservation activities had been largely piecemeal and focused on eradicating, limiting or controlling human activities such as hunting, fishing, collecting and trade which in the past had been the direct cause of the reduction, or complete extinction, of certain species. The next stage was the public appreciation that environmental protection needed to be more than simply preserving endangered species from being injured or killed, important though that is. Habitats had to be preserved in a way which enabled them to sustain the living species which depended upon them. Discussed in Chapter 1, the 1982 Bern Convention was the first international environmental law treaty to seek the preservation of this link between species protection and their habitats on a regional scale. It used mandatory language and put in place permanent institutions tasked with ensuring its implementation among its Contracting States. Indeed, it was more than 12 years before a global treaty of even more comprehensive coverage was to emerge when the Convention on Biological Diversity (CBD) was signed at the Earth Summit in Rio in 1992. But disappointingly, as MacKenzie points out in Chapter 2, the CBD employed a much weaker form of language and enforcement system than that developed by the Bern Convention a decade earlier.

The Bern Convention's 'nudge' culture has its limits. The Convention was the model for the Habitats Directive but the resultant Directive is more robust than the Bern Convention in a number of respects. First, it is more explicit than the Bern Convention about the need for site protection and a coherent European ecological network. Secondly, the Habitats Directive set a precedent for transboundary coordination in habitat protection by establishing Natura 2000 as a key instrument. Thirdly, the Directive set out a clear timeframe for the transposition and implementation of its provisions. Furthermore, unlike the Convention, the Habitats Directive is directly enforceable within the EU setting out a strict system of protection based upon the precautionary approach. Even so, Stookes suggests in Chapter 8 that: 'There is inherent conflict within the Directive between habitat and species conservation and improvement and the pursuit of plans and projects.' This tension is not a new one. Indeed, the Second European Ministerial Conference on the Environment held in Brussels in 1976 which initiated the process leading to the Bern Convention, identified the key

issue as: how can economic development be reconciled with protection of the natural environment? There was an assumption which still broadly exists (see for example, the notion of 'sustainable development')[2] that it can be reconciled. So governments tend publicly to laud the aims of the Habitats Directive: but they fret about its application, finding it at times, both difficult and controversial. A good example of this is the recent attempt by the UK coalition government to address nature conservation and economic development. In its White Paper launched on 7 June 2011, entitled 'The Natural Choice: securing the value of nature',[3] the government stated its ambition:

> We want to improve the quality of our natural environment across England, moving to a net gain in the value of nature. We aim to arrest the decline in habitats and species and the degradation of landscapes. We will protect priority habitats and safeguard vulnerable non-renewable resources for future generations. We will support natural systems to function more effectively in town, in the country and at sea. *We will achieve this through joined-up action at local and national levels to create an ecological network which is resilient to changing pressures*. (emphasis added)

However, less than six months later, when introducing his autumn statement of November 2011,[4] the Chancellor of the Exchequer, George Osborne MP, told MPs he wanted to make sure that 'gold plating of EU rules on things like habitats' were not putting 'ridiculous costs' on firms. 'If we burden them with endless social and environmental goals—however worthy in their own right—,' he said 'then not only will we not achieve those goals, but the businesses will fail, jobs will be lost, and our country will be poorer.' The Department for the Environment, Food and Rural Affairs (Defra) then announced it would be reviewing the impact of the EU Habitats and Wild Birds Directives in England 'focusing in particular on those obligations that affect the authorisation process for proposed development, with a view to reducing the burdens on business while maintaining the integrity of the purpose of the directives.'

The government would no doubt claim that both policy statements are entirely compatible with one another. That may literally be correct, but there is a clear difference in emphasis between the two which is important when individual decisions are determined upon the fine balancing of competing factors. The resultant review by Defra was published on 22 March 2012. The report is of interest because it found that the Habitats Directive was not intended to operate as an obstacle to frustrate development, as indeed, the high court of England had already noted in *Hart District Council v Secretary of State for Communities & Local Government*,

[2] Eg the 'National Planning Policy Framework' published on 27 March 2012, available at: http://www.communities.gov.uk/documents/planningandbuilding/pdf/2116950.pdf seeks to establish the presumption in favour of sustainable development as the 'golden thread' of planning decision-making but ironically: 'The presumption in favour of sustainable development does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined.'

[3] http://www.official-documents.gov.uk/document/cm80/8082/8082.asp.

[4] http://cdn.hm-treasury.gov.uk/autumn_statement.pdf.

Luckmore Limited & Barratt Homes Limited.[5] The Defra report found that Natural England had actually objected to less than 0.5 per cent of the 26,500 consultations on development it received each year on the grounds of habitat protection and that: 'Most of these objections are successfully dealt with at the planning stage.' The review did conclude that some cases encountered delays, and that there was scope to simplify the guidance, legislation and authorisation process for developments, and to improve the way statutory bodies worked with developers. The Environment Secretary, Caroline Spelman said: 'The action we are taking will make it clearer for developers to understand how to comply with the directive.'

Given that EU law requires that the Habitats Directive must be enforced in the UK there is a limit to what the government can do. Is there in reality much 'gold plating' which Defra could scrape away? It is true, for example, that the UK has operated a broad approach in applying the protection of the Habitats Directive to candidate Special Areas of Conservation (SACs) and potential Special Protection Areas (SPAs) which may indeed go beyond its obligations under the Directive (see Jones and Westaway in Chapter 4). Furthermore there is, at least, a suspicion that its application, in particular, with regard to imperative reasons of overriding public interest (IROPI) 'is often applied more rigidly in the UK in relation to the need for projects, social or economic factors and the range of alternative solutions to be considered'.[6] As Clutten and Tafur point out in Chapter 10, even the European Commission's approach to IROPI has been mixed.

The courts in England and Wales have on occasion taken action against breaches of the Habitats Directive such as occurred in the case of the introduction of a new class of ferries for the Isle of Wight[7] (see Tromans in Chapter 5) and more recently, in *R (Cornwall Waste Forum, St Dennis Branch) v Secretary of State for Communities and Local Government, Sita Cornwall Ltd, Environment Agency and Cornwall Council*[8] concerning the overlapping competencies in respect of a decision whether to require an appropriate assessment. But the courts have generally been cautious in quashing decisions that would actually imperil major infrastructure developments, such as the decision by the House of Lords to refuse interim relief in respect of Lappel Bank discussed by Stookes in Chapter 8 and, most recently, the Supreme Court's judgment on the meaning of 'disturbance' in

[5] [2008] EWHC 1204 (Admin); [2008] 2 P & CR 16; [2009] JPL 365.

[6] Duncan Field, 'Finding scope for Habitats Review' Legal Viewpoint *Planning* 13 January 2012 at 29.

[7] *R (Akester) v Department for Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin).

[8] *R (Cornwall Waste Forum, St Dennis Branch) v Secretary of State for Communities and Local Government, Sita Cornwall Ltd, Environment Agency and Cornwall Council* [2011] EWHC 2761. The case is wrongly described in the heading of the official transcript as a judicial review claim under CPR 54. As an application made under s 288 of the Town and Country Planning Act 1990 (as amended), it should properly read *Cornwall Waste Forum, St Dennis Branch v Secretary of State for Communities and Local Government, Sita Cornwall Ltd, Environment Agency, Cornwall Council.* Collins J quashed the grant of planning permission on the basis of a breach of legitimate expectation concerning the application of the Habitats Directive. However, the Court of Appeal overturned the decision of the high court, see [2012] EWCA Civ 379.

Morge v Hampshire County Council[9] critically analysed by George and Graham in Chapter 3. Indeed, in Chapter 6 Scott sets out the case in support of his belief that '"appropriate assessment" under the Habitats Directive, as it has been interpreted in case law and applied by public authorities in the UK, is characterised on the one hand by scepticism as to its effectiveness to deliver the outcomes required by the legislation and on the other hand, by a perception that the invocation of the process can have a "nuclear" impact on sustainable development simply because of the impossibility of demonstrating a positive conclusion'.

It was Sullivan J (as he then was) who memorably suggested that the Habitats Directive was not intended to be 'a developer's obstacle course'. In so doing, Sullivan J dismissed a legal challenge to the use of Suitable Alternative Natural Greenspace (SANG) as a means of avoiding the need for 'an appropriate assessment'.[10] Nonetheless, the Habitats Directive is intended to set barriers to development, ones which the precautionary principle demands must be clearly overcome if the development is to go ahead. Ricketts and Bischoff in Chapter 7 examine the creation and use of SANGs in respect of the Thames Basin Heaths SPA as a way of meeting the pressures of housing need whilst ensuring that new residential development causes no 'likely significant effect' on the SPA. For Waite in Chapter 13, the question is one of seeking to secure a balance, or an 'environmental equilibrium' of what is absolutely necessary for environmental protection without strangling economic development; and the use of SANGs may be viewed as an application of that principle.

The Habitats Directive will continue to raise practical legal issues. This is not simply because of the inherent tension between the objectives of environmental protection and economic development. The wording of the Directive is general, so that key concepts are not defined, such as what is 'a plan or project' (see Tromans in Chapter 5) or else, unclear, as in the case of Article 6(3), which I discuss in Chapter 9. This problem is exacerbated when the Habitats Directive is applied offshore to the maritime environment. In Chapter 11 Caddell identifies maritime challenges ranging from 'an historical lack of guidance for marine biodiversity policy to the current practical difficulties experienced in gathering the requisite data to develop SACs'. However, according to Edwards in Chapter 12, the problem is actually of a wider nature. For him, it is the failure by the British courts to articulate a clear standard for the intensity of judicial review of environmental decisions generally, and those involving the application of the precautionary principle in particular, which is the underlying fundamental problem.

The Conference was dedicated to the memory of Lord Kingsland QC: 'An eminent barrister with strong academic credentials who developed expertise in

[9] *Morge v Hampshire County Council* UKSC 2; [2011] 1 WLR 268; [2011] PTSR 337; [2011] 1 All ER 744.

[10] *Hart District Council v Secretary of State for Communities & Local Government, Luckmore Ltd & Barratt Homes Ltd* [2008] EWHC 1204 (Admin); [2008] 2 P & CR 16; [2009] JPL 365.

the field of international economics.'[11] Christopher Kingsland was one of very few people able to maintain high-profile careers both at the modern bar and in politics. Had he not died it was widely expected that he would have played an important part in the current coalition government. Christopher was the MEP for Shropshire and Stafford from 1979 to 1994 during which time he came to lead the British contingent of Conservative MEPs. He was elevated to the House of Lords and became Shadow Lord Chancellor. In 2008 he became the opposition spokesman on legal affairs, a post he held at his death in 2009. Christopher also served as Vice-Chair of Justice, the all-party group set up to promote the rule of law and to assist the fair administration of legal process. As an advocate he appeared before the European Court of Justice (ECJ) in some of the leading cases of the day including acting for the whistleblower, Stanley Adams, against the European Commission in the 1980s and, in the 1990s, in high-profile European competition and free trade cases.

Christopher was an engaging and companionable member of chambers but above all he was universally acknowledged as a man of utmost courtesy and integrity. The contributors to this volume have generously agreed to donate their royalties to the Kingsland Mooting Competition, a student mooting competition set up by Francis Taylor Building in memory of Christopher, details of which can be found at http://www.ftb.eu.com/home/student-moots-and-prizes.asp. The final of the first Kingsland moot was held on 12 March 2012 at the Supreme Court judged by Christopher's very close friend Lord Simon Brown, a Justice of the Supreme Court. Appropriately enough the subject of the moot involved the Habitats Directive.

I knew Christopher when he became a leading member of the environmental law bar. He was, not surprisingly, one of the first practitioners to appreciate the impact of EU law upon this field. His standing is illustrated by the fact that he was invited to contribute the chapter on environmental law in the *Practitioners' Handbook of EC Law* published in 1998 by the Bar Council.[12] The list of contributors to the *Handbook* reads as a roll call of outstanding European lawyers from the bar and bench. Save for two, each of the 32 chapters were the work of teams of collaborators. Christopher was the sole author of the environment chapter; his chapter on environmental law was a succinct and masterly treatment of a wide-ranging area of law. He perceptibly identified that the inclination of national governments to adopt environmental protection measures in the Council of Ministers 'unfortunately … has not been matched by a corresponding propensity to implement them on their own territory'.[13] Christopher's measured but robust criticism of the

[11] *The Times*, 14 July 2009.

[12] With the passing of over a decade the time has surely come for a new edition of this excellent work.

[13] Chapter 28 on the Environment in the Bar Council's *Practitioners' Handbook of EC Law* (1998) at 28.1.2. Christopher evidenced this statement by citing, amongst other things, The Twelfth Annual Report on Monitoring the Application of Community Law 1994, COM (95) 500 final, which showed that there had been over 60 judgments by the ECJ in respect of infraction proceedings brought by

failure by the English courts to give proper effect to the Environmental Impact Assessment Directive,[14] is particularly worth re-reading as a model guide to the practitioner considering whether to challenge an established but misguided body of high court case law.[15] His views were, of course, entirely vindicated some 14 years later by the House of Lords decision in *Berkeley v Secretary of State for the Environment*[16] and reinforced then by subsequent judgments of the ECJ. More specifically, as a European polymath, Christopher was able to give this wider and chastening assessment in respect of the Habitats Directive:

> It is easy to exaggerate the importance of the Community's efforts here. Even when the European habitats network is fully in place, it will only cover a minute proportion of the total rural area which has been subject to a massive intensification in farming methods over the last 40 years. The consequent removal of hedges and coppice and the indiscriminate application of pesticides and fertilisers are the real threat to flora and fauna and, in this respect, protected sites represent tiny oases in a growing ecological desert. It must be hoped that increased designations of Environmentally Sensitive Areas[17] or bigger incentives to take part in one or more of the various schemes composed in the Agri-Environment Programme,[18] will lead to the reintroduction of farming practices which are compatible, or are in line with nature conservation.'[19]

Since then limited progress has been made. According to the European Commission's own analysis of the organic sector published in June 2010,[20] the organic sector which seeks to minimise the input of pesticides and fertilisers amounted to no more than an estimated 7.6 million hectares in 2008, that is, 4.3 per cent of EU-25[21] utilised agricultural area (UAA). In the period 2000 to 2008, the average annual rate of growth was 6.7 per cent in the EU-15 and 20.0 per cent in the EU-12. The area of Europe under organic agriculture is close to or higher than 9 per cent of the total UAA in five Member States: the Czech Republic, Estonia, Latvia, Austria (15.5 per cent) and Sweden. In 2008, it is estimated that there were about 197,000 holdings involved in organic agriculture in the EU-25, that is 1.4 per cent of all EU-25 holdings (0.6 per cent in the EU-12 and 2.9 per cent in the EU-15). The report noted that: 'Consumer food demand grows at a fast pace in the largest EU markets, yet the organic sector does not represent more than 2 per cent of total food expenses in the EU-15 in 2007.' Overall figures are to some

the European Commission concerning the failure of Member States to respect their environmental obligations.

[14] EIA Directive 85/337 EEC as amended by 97/11/EC and 2003/35/EC available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1985L0337:20090625:EN:PDF.

[15] *Practitioners' Handbook of EC Law*, above n 12, 28.7.2.10–28.7.2.14.

[16] [2001] 2 AC 603.

[17] Regulation 797/85, Art 19 [1985 OJ L93/1 and the Agriculture Act, 1986 s 18.

[18] Regulation 2078/92 [1992] OJ L215/85.

[19] *Practitioners' Handbook of EC Law*, above n 12, 28.4.5.7.

[20] http://ec.europa.eu/agriculture/analysis/markets/organic_2010_en.pdf.

[21] EU-10 refers to Member States which joined the EU in May 2004; EU-12 refers to EU-10 together with Romania and Bulgaria; EU-15 refers to Member States which joined the EU before 2004, and EU-25 refers to EU-15 together with EU-10.

extent 'improved' by the inclusion of the newer states of Eastern European whose farming systems were less intensive and 'developed'. In the EU-12 organic food consumption stands at lower levels.

The worry must be that the rate of environmental protection is outpaced by its destruction. Indeed, according to the European Environment Agency's report *Landscape fragmentation in Europe*[22] published in September 2011: 'Roads, motorways, railways, intensive agriculture and urban developments are breaking up Europe's landscapes into ever-smaller pieces, with potentially devastating consequences for flora and fauna across the continent.' The same report found that although the situation is critical, proactive planning policies for more effective protection of remaining unfragmented areas, and wildlife corridors could successfully reverse the trend of growing fragmentation. The report identified, for example, that developers could build more tunnels, passages and bridges to allow animals to move more freely and that town planners should aim to upgrade old roads instead of building new roads, and 'bundle' new infrastructure, for example, by building bypasses close to settlements or constructing road and rail routes next to each other.

Lord Kingsland's conclusions written just over a decade ago remain true of EU environmental law in general, and the Habitats Directive, in particular. They bear repeating.

> Despite these not inconsiderable frailties the [EU's] role in the environmental field is likely to grow. As pressure on the world's limited natural resources accumulate, international society will be compelled to negotiate and adhere to increasingly strict limitations of the outputs of modern industrial society. Moreover the nature of many domestic problems, most obviously in the field of air pollution, can only be tackled on an international basis.[23]

We are fortunate indeed that the Rt Hon Lord Justice Robert Carnwath CVO, a friend and former colleague of Lord Kingsland, not only chaired the final session at the Kingsland Conference but has also kindly agreed to write the forward to this book. He is now Lord Carnwath, a Justice of the Supreme Court, his appointment having been announced as I toiled away on this book in the December sun of Hermanus. I am delighted now to be able to take this opportunity to congratulate Lord Carnwath upon his richly deserved appointment.

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Maundy Thursday 2012

[22] www.eea.europa.eu/publications/landscape-fragmentation-in-europe.
[23] *Practitioners' Handbook of EC Law*, above n 12, 28.1.6.