Neutral Citation Number: [2016] EWHC 799 (Admin)

Case No: CO/1866/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2016

Before:

MR JUSTICE HOLGATE

- -

The Queen on the application of:

Timothy Charles Harris and Mrs. Angelika Harris	**Claimants**
- and -	
Broads Authority	**Defendant**

- -
- -

Gregory Jones QC and Charles Streeten (instructed by **Nabarro LLP**) for the **Claimants**
Nigel Giffin QC and Christopher Knight (instructed by **NPLaw**) for the **Defendant**

Hearing dates: 10 and 11 February 2016

- -

Approved Judgment

Mr. Justice Holgate

Introduction

1. "The Broads comprise over 300 square kilometres of wetland landscapes in east Norfolk and Suffolk. The Broads Authority [("the Authority") and the Defendant here], describes it as "the UK's largest protected wetland and boast[ing] a quarter of its rarest species. The broad, shallow lakes are man-made rather than natural. They began as pits dug for peat to provide fuel during medieval times. Over the centuries water levels rose, the peat diggings became flooded and by the 14th Century they were abandoned." The special characteristics of the Broads, as summarised from the Broads Plan 2011, are the wide, open landscape, the winding waterways, the big skies, the abundance and diversity of nature, the sense of space, tranquillity and wildness, the local character of beautiful churches, windmills and quiet villages, and the opportunities for boating and sailing." (per Cranston J at paragraph 37 of <u>Howell v Secretary of State Communities and Local Government [2014] EWHC 3627 (Admin))</u>.

2. The Claimants say this case raises an important legal issue. "Can a public body which in law is not a National Park, represent itself (and allow itself to be represented) as a National Park and thereby to enjoy the benefits of National Park status despite the fact that that authority has decided to cease to seek to become a National Park *inter alia* because it does not wish to be subject to the legal duties imposed on National Parks and National Park Authorities?" On the Claimants' renewed application permission to apply for judicial review was granted by Singh J (see his order dated 12 August 2015).

3. The Authority was constituted under the Norfolk and Suffolk Broads Act 1988 ("the 1988 Act") and has a general duty "to manage the Broads for the purposes of –

   (a) conserving and enhancing the natural beauty, wildlife and cultural heritage of the Broads;

   (b) promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public; and

   (c) protecting the interests of navigation."

   The Authority is also the local planning authority for the area and a harbour and navigation authority. However, the Broads is not a National Park designated under the National Parks and Access to the Countryside Act 1949 ("the 1949 Act"), nor is the Authority a National Park Authority under that statute. Nevertheless, for many years it has been treated as forming part of the "family" of National Parks. The claim for judicial review challenges a resolution of the Authority passed on 23 January 2015 by which the Authority decided *inter alia* "that the brand "Broads National Park" be adopted for marketing related purposes…".

4. The Claimants live within the area of the Authority. For over 7 years they have been campaigning to protect Catfield Fen within the Broads, a site of international conservation significance and of which they own a large part, against harmful effects arising from water abstraction. In paragraph 3 of his witness statement, Mr. Harris

states "my main concern is to conserve the bio-diversity and the environmental value of the Broads Area for future generations; hence my campaigning for the Defendant to either fully become a National Park or, at the very least, to confirm its application of the "Sandford Principle". If it is not doing this, then it should not hold itself out as a National Park and hence why I am seeking relief through the court in these proceedings."

5. The Sandford Principle derives from a Report of the National Park Policies Review Committee chaired by Lord Sandford and published in 1974. Paragraph 2.15 of the Report stated:-

> "The first purpose of national parks, as stated by Dower and by Parliament - the preservation and enhancement of natural beauty - seems to us to remain entirely valid and appropriate. The second purpose - the promotion of public enjoyment - however, needs to be re-interpreted and qualified because it is now evident that excessive or unsuitable use may destroy the very qualities that attract people to the parks. *We have no doubt that where the conflict between the two purposes, which has always been inherent, becomes acute, the first one must prevail in order that the beauty and ecological qualities of the national parks may be maintained.*"

6. The effect of section 11A(2) of the 1949 Act, inserted by section 62 of the Environment Act 1995 some 25 years after the Sandford Report, is that where there is a conflict between on the one hand "conserving and enhancing the natural beauty, wildlife and cultural heritage of" a National Park and on the other "promoting opportunities for the understanding and enjoyment of the special qualities of [a National Park] by the public" then greater weight must be given to the former purpose. The Claimants submit that within National Parks the conservation objective is always "uppermost". In paragraph 6 of his witness statement Mr. Harris says that "The "Sandford Principle" is the fundamental distinguishing characteristic of all National Parks and all National Park Authorities, and gives priority to the purpose of nature conservation over other purposes, such as tourism."

7. The Claimants submit that the Authority's resolution was unlawful because:-

Ground 1

(a) It was not within the scope of section 111 of the Local Government Act 1972. That provision does not grant a power to make a decision incompatible with the statutory code imposed by the 1949 Act; and/or

(b) The Authority's discretion to exercise the power granted by section 111 is not unfettered. The Authority's decision was unlawful by failing to uphold "the highest standards of public administration" or was otherwise an abuse of power; and/or

(c) The decision was irrational. It makes no sense to purport to take the benefit of re-branding as a "National Park" whilst at the same time resolving not to pursue the legal status of a National Park.

Ground 2

> The Authority had regard to an immaterial consideration, namely that "the Habitats Regulations provide a required level of protection for the bio-diversity of the Broads against damaging activities".

Ground 3

> The Authority's decision was procedurally unfair in that the consultation it undertook was misleading and/or was undertaken regarding a question that did not reflect the decision taken.

The Statutory Framework

The National Parks and Access to the Countryside Act 1949

8. The genesis of the National Parks in Britain goes back at least as far as a report by Mr. John Dower to the Minister of Town and Country Planning in April 1945 (National Parks in England and Wales - Cmd 6628). That report provided the foundation for the detailed proposals subsequently prepared by the Hobhouse Committee which reported in 1947 (Report of the National Parks Committee - Cmd 7121). Dower put forward the following definition of a national park in Great Britain:-

> "A National Park is an extensive area of beautiful and relatively wild country in which, for the nation's benefit and by appropriate national decision and action, (a) the characteristic landscape beauty is strictly preserved, (b) access and facilities for public open-air enjoyment are amply provided, (c) wildlife and buildings and places of architectural and historic interest are suitably protected, while (d) established farming use is effectively maintained."

Parliament endorsed this concept of a National Park in England and Wales in the 1949 Act". Twelve National Parks have been designated in England and Wales. A similar concept was introduced for Scotland by the National Parks (Scotland) Act 2000. Two National Parks have been statutorily designated in Scotland, first the Cairngorms and second Loch Lomond and the Trossachs.

9. Section 5(1) of the 1949 Act defines the purposes of the designation of a National Park:-

> "(1) The provisions of this Part of this Act shall have effect for the purpose –
>
> > (a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and
> >
> > (b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.

> (2) The said areas are those extensive tracts of country in England . . . as to which it appears to Natural England that by reason of -
>
> > (a) their natural beauty, and
> >
> > (b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population,
>
> it is especially desirable that the necessary measures shall be taken for the purposes mentioned in the last foregoing subsection."

Section 5(3) provides that the areas designated in accordance with section 7 are to be known as "National Parks".

10. Section 6(1) imposes an ongoing duty on Natural England to consider whether to designate additional areas as National Parks. Designation is subject to the specific statutory procedures set out in section 7 and schedule 1. Subject to *inter alia* complying with the requirement for prior consultation with authorities in whose area a National Park is to be created, Natural England may make an order designating a National Park. The order is then submitted to the Minister for consideration and a decision whether or not to confirm the order. In certain circumstances there is a requirement for a local inquiry to be held before the Minister decides whether the order should be confirmed. A confirmed order may be challenged by statutory review pursuant to paragraph 8 of schedule 1 to the 1949 Act on the grounds of invalidity or non-compliance with certain statutory requirements.

11. Section 63 of the Environment Act 1995 ("the 1995 Act") provides for the establishment of a National Park Authority for each National Park. By section 65 of the 1995 Act the functions of a National Park Authority include the purposes contained in section 5(1) of the 1949 Act. Section 67 of the 1995 Act inserted section 4A into the 1949 Act to the effect that a National Park Authority is generally the Local Planning Authority for the area of the relevant National Park.

12. Section 11A of the 1949 Act provides:-

> "(1) A National Park authority, in pursuing in relation to the National Park the purposes specified in subsection (1) of section five of this Act, shall seek to foster the economic and social well-being of local communities within the National Park … and shall for that purpose co-operate with local authorities and public bodies whose functions include the promotion of economic or social development within the area of the National Park.
>
> (2) In exercising or performing any functions in relation to, or so as to affect, land in a National Park, any relevant authority shall have regard to the purposes specified in subsection (1) of section five of this Act and, if it appears that there is a conflict

> between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park."

A "relevant authority" means any Minister of the Crown, any public body, any statutory undertaker and any person holding public office (section 11A(3) to (5)).

The Norfolk and Suffolk Broads Act 1988

13. In the Hobhouse Report of 1947 the Broads had been listed as a potential National Park, forming part of a second wave of areas for designation. Similarly, in a meeting on 3 October 1950 the Countryside Commission (the body then responsible for the designation of National Parks) decided that the Broads met the criteria for designation as a National Park. However, designation did not proceed at that stage for a variety of reasons.

14. During the 1970s there was a significant deterioration in water quality within the Broads combined with pressure from increased usage of boats in connection with tourism. There was concern that the special qualities of the area were being harmed. On 6 April 1978 the Countryside Commission resolved "that the area commonly known as the Norfolk Broads has such special environmental quality and character and is of such significance for recreation as to merit the distinction of designation as a National Park…". However, the Commission decided to defer the possible designation of the Broads as a National Park to allow steps to be taken locally to establish an Executive Committee similar in nature to the then National Park Committees. The Countryside Commission took the view that it was desirable to seek consensus locally because of the many authorities that would need to work together in order to achieve the purposes of a National Park within the Broads. Following consultation it was concluded that because of the issues concerning the waterways a standard National Park solution should not be adopted and instead a bespoke arrangement should be pursued. Initially this did take the form of a joint committee of local authorities, which included representatives not only of County and District Councils but also the Water Authority, Harbour Commissioner and other interests. Subsequently it was thought necessary for the Broads to have a special statutory status in order to put organisational arrangements on a proper footing and to secure funding. This was achieved by the 1988 Act which drew upon the statutory purposes of National Parks in the 1949 Act but contained additional provisions recognising the special navigation and waterway issues which apply within the Broads.

15. The Authority is the body responsible for the conservation and promotion of the Broads, as well as navigation and planning functions within that area. The Authority was named and constituted as a body corporate under section 1 of the 1988 Act. The members of the Authority are appointed by 8 local authorities and by the Secretary of State and in addition 2 members are co-opted from the Authority's Navigation Committee.

16. Section 2 sets out the general functions of the Authority:-

> "(1) It shall be the general duty of the Authority to manage the Broads for the purposes of –

> (a) conserving and enhancing the natural beauty, wildlife and cultural heritage of the Broads;
>
> (b) promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public; and
>
> (c) protecting the interests of navigation.
>
> …
>
> (4) In discharging its functions, the Authority shall have regard to –
>
> (a) the national importance of the Broads as an area of natural beauty and one which affords opportunities for open-air recreation;
>
> (b) the desirability of protecting the natural resources of the Broads from damage; and
>
> (c) the needs of agriculture and forestry and the economic and social interests of those who live or work in the Broads.
>
> …
>
> (7) The Authority shall have power to do anything which is necessary or expedient for the purpose of enabling it to carry out its functions, or for incidental purposes, including power –
>
> (a) …
>
> (b) …
>
> (c) to carry on any business or undertaking."

17. It is to be noted firstly, that the three purposes given by section 2(1) of the 1988 Act are the subject of a general *duty* imposed upon the Authority to manage the Broads, whereas section 5(1) of the 1949 Act sets out purposes for which part I of that Act has effect and section 11A(2) requires a relevant authority to *have regard* to the section 5(1) purposes (subject to the provision for dealing with "conflicts" between the two).

18. Secondly, section 2(1) requires the Authority to manage the Broads for three purposes without any one of those purposes having any greater statutory significance than any other. It is in that sense that some of the Authority's documents refer to the three purposes as having "equal weight". In practice, how much weight is given by the Authority to any of the statutory purposes will depend upon the particular circumstances under consideration. For example, the Authority may be dealing with a proposal which would have a substantial harmful effect upon a rare species and may

decide to give much greater weight to that factor than to matters falling within the other two statutory purposes.

19. The first two of the purposes set out in section 2(1) replicate the twin purposes of a statutorily designated National Park. But the statutory purposes of the Broads include an additional third purpose, namely "protecting the interests of navigation". Section 2(4) sets out mandatory considerations to which the Authority must have regard when exercising its functions. However, there is no provision similar to section 11A(2) of the 1949 Act ("the Sandford Principle") giving greater weight to one function or purpose as opposed to another. Section 2(5) and Part I of schedule 3 have the effect of making the Authority the sole district planning authority for the Broads.

20. Section 3(1) of the 1988 Act required the Authority to prepare and publish a plan, to be known as "the Broads Plan", "setting out its policy with regards to the exercise of its functions". Section 3(2) requires the Authority to review the Broads Plan at least once in every 5 years. Section 3(3) provides that if as a result of any such review the Authority is of the opinion that it is appropriate to vary the Broads Plan it shall do so in such manner as it sees fit. Section 3(4) requires the Authority to publish a report on the results of any such review and to set out the variations, if any, which the Authority has made following the review. But before preparing or varying the Broads Plan, section 3(5) requires the Authority (a) to publish a draft of its proposals and (b) to consult each of the authorities which appoint its members, relevant Internal Drainage Boards and "such other bodies as appear to it to represent interests likely to be concerned". Section 3(6) requires the Authority to send to the Secretary of State a copy of any plan or variation published under this section.

21. The current Broads Plan was published in May 2011. That review was informed by an Environmental Report (comprising Sustainability Appraisal and Strategic Environment Assessment). The Plan also underwent an "appropriate assessment" pursuant to the Habitats Directive. The court was informed that the current plan will be reviewed during the course of 2016 and public consultation will take place on that review and any proposals to alter the plan.

22. By section 10 of the 1988 Act the Authority has specific functions in respect of the "navigation area". Subsection (1) requires the Authority to *inter alia* "maintain the navigation area for the purposes of navigation to such standard as appears to it to be reasonably required". Section 13 permits the Authority to set and to charge tolls for vessels mooring, using or navigating on waters in the navigation area and adjacent waters.

23. Section 21 and schedule 6 to the 1988 Act apply to the Authority certain statutory provisions governing local authorities and other bodies. By the insertion of section 265A into the Local Government Act of 1972, section 111 of the 1972 Act applies to the Broads Authority. Section 111 provides:-

> "(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is

> calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

24. For certain statutory purposes the Authority is treated as being a National Park Authority, for example, for the purposes of the Derelict Land Act 1982 (paragraph 43 of schedule 3 to the 1988 Act).

25. By paragraph 31 of schedule 3 to the 1988 Act the Broads is also treated as a National Park for the purposes of the making of grants and loans under section 44 of the Wildlife and Countryside Act 1981 in connection with National Parks under the 1949 Act. In paragraph 40 of his witness statement Dr John Packman, the Chief Executive of the Broads Authority, points out that since its inception the Authority has, along with the National Park Authorities in England, been in receipt of an annual statutory grant from Defra known as the "National Park Grant". The grant provides a substantial proportion of the funding needed.

26. It is apparent from the above analysis that the area defined by the 1988 Act as "the Broads" shares many of the statutory characteristics of a National Park. Indeed, in March 2010 Defra issued a circular entitled "English National Parks and the Broads". In paragraph 3 the Department stated "whilst the National Parks and Broads are established under two separate Acts of Parliament, the similarities between them are such that this circular has been produced to apply equally to them all".

The decision on the branding of the Broads

Introduction

27. It is common ground between the parties in these proceedings that the Defendant has not sought to re-brand itself, or to describe itself as a National Park Authority. The resolution which the Claimants challenge only purported to re-brand the *area* known as "the Broads" by describing it as "The Broads National Park".

28. In his witness statement Dr Packman refers to the second of the Authority's statutory purposes namely "promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public" (paragraph 23). He states that one aspect of this is the need to market the area and that it is part of the Authority's statutory duty under section 2 to have regard to the "needs of agriculture and forestry and the economic and social interests of those who live or work in the Broads". He says that tourism is vital to the Broads. In 2013 over 7,500 jobs within the Broads were directly supported by the tourism industry, with many more indirectly supported. Tourism and local recreation are worth over £550 million a year to the Norfolk economy and the Broads has 7.5 million visitors annually (paragraph 24). However, the tourism industry and visitor numbers in the Broads have been declining significantly since the 1980s and continue to decline. To take one example, recreation on the waterways of the Broads has always been a principal attraction. But, the number of boats for hire in the Broads now stands at around 800, down from 2,300 in the 1980s and this figure continues to decline (paragraph 25). Between 1981 and 2000 the number of people visiting the Broads almost halved (paragraph 26). Although the Authority does not expect to see visitor numbers returning to the levels of the late 1970s, there is a real need to attract a new generation of visitors to the Broads, especially younger visitors, and from a wider range of backgrounds, for short

breaks and not simply for long summer holidays. Tourists from abroad need to be encouraged to visit the Broads (paragraphs 27 to 30). Dr Packman states that it has long been recognised that one of the main challenges is that the statutory name "the Broads" does not readily translate into a useable brand or name for the purposes of marketing, particularly for those unfamiliar with the area and the attractions it has to offer (paragraph 21).

29. National Parks UK is an organisation which works to promote "the family of 15 National Parks". It brings together the National Parks in England (9), Scotland (2) and Wales (3) as well as the Broads. Dr Packman explains (paragraph 31) that the phrase "Member of the National Park Family" is a term which has been applied to the Broads for a decade. In 2004 Dr Packman had discussions with the then Minister of State as to how the Authority could best brand and market the Broads. The Minister agreed that the Authority could use this phrase (paragraph 48). Mr. Nigel Giffin QC submits for the Defendant that there is no evidence of any objection being raised over the last 10 years or so to the use of the phrase "Member of the National Park Family". Mr. Gregory Jones QC for the Claimants did not contradict that submission.

30. However, Dr Packman points out that "Member of the National Park Family" is very cumbersome and unclear for use as a marketing tool. In 2014 Defra officials recognised that it was not a particularly useful phrase for branding the Broads and they accepted that it would be legitimate to use a "Broads National Park" branding if this was done without purporting to change the legal status of either the Broads or of the Authority (paragraph 52). Dr Packman explains that over the last 10 years the Authority and the wider industry had tried to use other branding concepts but none of them had been effective for marketing purposes. He says that the phrase "National Park", by contrast, has considerable resonance for many members of the public. It readily conveys the message that the Broads is an area that is special, of particular beauty and that it welcomes visitors (paragraphs 31 and 32).

The Broads Plan

31. "Sustainable development" forms part of the context for the Plan (p. 13). The document expressly relies upon the Authority's membership of the "Family of National Parks" when explaining a key role for the Broads in promoting sustainable living. For each of the policy areas addressed the Plan sets out in tabular form a set of strategic objectives and then the policy measures or means by which those objectives will be achieved. But before those policies are set out, the Plan states under the heading "National Park status":-

> "In May 2010, members of the Broads Authority discussed the draft long-term vision for the Broads and supported the objective that, by 2030, the Broads would be a national park where the public legal rights of navigation continue to be respected and embraced. Though this objective would require primary legislation, members considered this an important ambition in support of the long-term vision."

This statement lies at the heart of Ground 3 of this challenge. It should be noted that the long-term objective is dependent upon the passing of primary legislation. The statement does not suggest that the Broads could simply become a National Park

under the 1949 Act. One reason why that is undoubtedly correct is the confirmation that the Broads would "be a national park where the public legal rights of navigation continue to be respected and embraced". In other words the third of the three statutory purposes for which the Broads has been established by the 1988 Act would continue to apply. That third purpose falls outside the ambit of the twin purposes contained in section 5(1) of the 1949 Act for which a National Park may be established. In my judgment it therefore follows that the "long-term vision" in the Broads Plan 2011 cannot be taken to imply that the Authority's objective is that the Broads will become a "National Park" under the 1949 Act so that the Sandford Principle in section 11A(2) would apply. The Broads Plan contains no statement to suggest that that is the Authority's policy or even "long-term vision".

32. In paragraphs 49 to 51 of his statement Dr Packman explains the context in which this "long-term vision" came to be included in the Broads Plan. The Authority promoted a Private Bill which eventually was enacted as the Broads Authority Act 2009. The primary objective of the Bill was to address concerns about public safety by introducing a registration and inspection regime for the waterways. However, the Authority also considered that the Bill gave an opportunity to change the name of the Broads formally to the Broads National Park. However, this gave rise to some disagreement. The Bill did not propose that the Sandford Principle should also be adopted alongside the name change. There were some who lobbied for the inclusion of the Principle in the Bill. There were others who were concerned that changing the name to Broads National Park might be a first step on the way to a statutory requirement to give priority to conservation which would adversely impact on public rights of navigation. This had always been a particular concern for groups representing private boat owners. The risk of opposition to the Bill caused the Authority to remove the proposed name change.

33. The statement in the Broads Plan 2011 refers to a resolution of the Authority in May 2010. The Authority considered at that stage that the only way in which it would be able to use the name "National Park" would be by formally changing the Authority's legal status. However, the wording in the Plan was chosen so as to make it plain that navigation rights would not thereby be prejudiced. Thus, it was never the intention of the Authority that the Sandford Principle should be adopted at some time in the future (paragraph 51 of Dr Packman's statement which has not been challenged).

The consultation in 2014

34. The Chief Executive presented a report to the Authority for its meeting on 26 September 2014 entitled "Branding the Broads". The members were reminded that in July 2014 they had been given an update on the initiatives for National Park branding and corporate sponsorship at the UK level. This report looked at the implications for the Broads of this "enhanced UK activity" and in particular how the Authority could benefit from these initiatives by embracing more explicitly the "UK National Park brand". The Chief Executive explained how this provided a unique opportunity for the Broads to capitalise on its status as a member of the UK National Park Family, both to increase the public's awareness of and respect for the special qualities of the area and to enhance the economic benefits for the area. He explained that "National Park" is an internationally recognised brand which National Parks UK had been using to great effect to seek out commercial sponsors. There had also been increased activity to attract overseas tourists to the UK's National Parks, and "for the Broads

there are overseas markets which we need better to penetrate". One of the simplest ways of doing this, it was said, was to change the description of the area of the Broads, both within the UK and worldwide, to the "Broads National Park". The report asked the members to agree in principle to adopt the new name for marketing purposes and to authorise a consultation exercise upon that proposal.

35. The Members of the Authority unanimously resolved firstly, that they welcomed and supported further exploration of the use of the term "Broads National Park" to promote the area's special qualities and encourage more visitors to Norfolk and Suffolk and secondly, that the use of the new branding be confirmed after the Authority had consulted widely in order to establish the level of support for the proposed name. In view of the challenge brought under Ground 3 it is particularly important to note that on pages 5 to 6 of the minutes the following was recorded:-

> "Members noted that following a number of workshops when developing the Broads Plan in 2010, and in updating the long-term Vision for the Broads they had supported the aspiration that "by 2030 the Broads would be a National Park where the traditional rights of navigation are respected and embraced". Members had recognised that this would require primary legislation. *However, members were mindful that the Broads Plan was due to be reviewed from 2015 onwards, and therefore this aspiration could be reconsidered as part of that review. If as a result of this consultation exercise on branding the Authority decided to adopt the name "Broads National Park" for the area that would need to be taken into consideration at that time.*" (emphasis added)

36. The Consultation Document was issued in October 2014. The introduction explained that the Broads Authority was reviewing how more effective use could be made of the National Park name to raise awareness and appreciation of the special qualities of the Broads and further support the regional and local economy. The foreword to the Consultation Document proposed that the term "Broads National Park" should in future be used for marketing-related purposes in order to introduce consistency in the way in which the area is promoted so as to increase the economic value generated by tourism and local recreation. The proposal also sought to take "full advantage of the corporate sponsorship opportunities being advanced by the UK's National Parks".

> "Britain's National Parks are working together to raise awareness of their importance and to win corporate sponsorship under the banner "Britain's Breathing Spaces". If we want the Broads and its important tourism industry to capitalise on these opportunities we need to be more directly associated with the internationally recognised National Parks brand. We are now consulting widely on using the name "Broads National Park" for marketing purposes, rather than the differing and confusing names which have been applied to it. The proposal does not involve any change in the legal name or status of the area; nor will it affect any of the Broads Authority's functions and responsibilities as set out in the Norfolk and Suffolk Broads

> Act 1988 as amended. We would not formally become a National Park Authority."

37. Page 3 of the Consultation Document set out the background to the proposals in very similar terms to Dr Packman's witness statement. Page 4 explained why it is necessary to raise the regional, national and international profile of the Broads. The document explained that over the previous year the Chairs and Chief Executives from the 15 members of the National Park Family in the UK, including the Broads, had been working together to raise their collective profile and to capitalise upon the value of the "National Park" as an internationally recognised brand. National Parks UK, the umbrella body, had developed a common approach to promotion under the banner of "Britain's Breathing Spaces". Page 5 of the document explained how National Parks UK is seeking to develop corporate sponsorship. For example a company is allowed to use the National Park brand in return for providing a variety of services which help to promote the public profile of the parks and to raise money for their benefit. National Parks UK is also working with Visit Britain in order to raise awareness of the parks in overseas tourism markets. The Authority is seeking to develop opportunities to promote the Broads in Continental Europe and using the National Park brand would greatly enhance its ability to do so.

38. On page 6 of the Consultation Document under the heading "What's in a name?" it was pointed out that the 1988 Act simply refers to the "area commonly known as the Broads. Nothing in the names the Broads or the Norfolk Broads or the Norfolk and Suffolk Broads indicates the area's special status". After referring to earlier opposition to the proposal to change the name of the Broads in the Bill which led to the 2009 Act, the Consultation Document posed the question "So why is the Broads Authority revisiting this issue now in a different way … through a branding exercise?" The Authority's first answer stated:-

> "The best and most accurate label for understanding the status of the Broads, its conservation importance and its value as a national and international tourism destination is "National Park". Economic security in the Broads, especially for those who live and work here to provide services to visitors, is dependent on the "natural capital" - the environmental goods and services the Broads provides. The National Park brand will not only help strengthen and sustain this security by attracting more visitors but it will also help safeguard this special, natural resource by generating greater environmental respect among the public who know and value the National Park name. Clarity of brand, credibility of brand and a strong identity are critical for the long-term financial success of the Broads area, its population and the Authority which has responsibility for managing it".

39. The second answer supplied by the Authority was the need to introduce consistency in the way in which the area is promoted. The document referred to a number of sources which already employ the term National Park when referring to the Broads and pointed to the confusion which can arise through failing to use a consistent branding term. The document stated that the Broads is the "East of England's only National Park". It is plain on any fair reading that by this language the Authority was referring

to the national importance of the area's natural beauty, wildlife and cultural heritage. The Consultation Document stated:-

> "The Authority works closely with local tourism businesses to raise the profile of the area and, in particular, to extend the season by encouraging more visitors to come outside the summer months. To date at least five separate identities have been used to promote the area:
>
> (i) ***Norfolk Broads*** is the historically well-known reference to the area but fails to identify Suffolk's Broads and rivers and the area's status.
>
> (ii) ***Broadland***, a presumed corruption of the phrase "Land of the Broads", has been much used, mainly in the past by commercial firms and by some authors; this is also the name of just one of the seven district councils within whose area the Broads lies.
>
> (iii) ***Britain's Magical Waterland*** has been successful in co-ordinating the promotional efforts of local tourism businesses but was adopted as a marketing brand rather than as a formal name and has limited recognition outside the immediate area.
>
> (iv) ***Member of the National Park Family*** is currently used by the Authority, but it does not readily denote a clear, unambiguous name for the area. If the Broads is a member of the National Park Family what stops it being called a National Park? This leads to confusion and misunderstandings, and does not help clarity of status, strength of brand or purpose.
>
> (v) ***The Broads National Park*** name is being regularly used by some local companies and organisations such as the New Anglia LEP but does not at present reflect the way the Broads Authority, the official body which manages the Broads, styles itself.
>
> For brands to work effectively they need to be credible, recognisable and used consistently by a wide range of stakeholders so that a coherent picture and identity is presented to, and understood by, the public."

40. The third answer supplied by the Authority refers to the need to take advantage of international awareness through national campaigns and partnership. This includes collaboration between National Parks UK, Visit Britain and large corporate sponsors.

41. The Consultation Document then posed the question "What is the current status of the area?" It explained that when the Authority was established by the 1988 Act the Broads was given a status "essentially equivalent to that of a National Park. So for example, when development proposals are assessed, the policies in the Development Plan give the Broads the same level of landscape protection as a National Park". Having accepted that there are differences between the 1949 Act and the 1988 Act which set up National Parks and the Broads Authority respectively, the document went on to point out that the "two key purposes of National Parks, those of conserving and enhancing the natural beauty of the area and of promoting its enjoyment by the public are embedded in the Norfolk and Suffolk Broads Act".

42. Page 9 of the Consultation Document dealt with the issue of whether the proposed branding name had any implications for the Authority's corporate name. It was made plain that the proposal involves no change to the incorporated name of the Authority and that:-

> "The Authority would still legally be the Broads Authority but when promoting the area or talking about the work of the organisation it would simply refer to the Broads National Park. This branding initiative will involve no change in legislation, in the Authority's powers or in its planning responsibilities. However, it will assist the local economy and help the public understand the special status of the Broads."

43. The Consultation Document specifically addressed the issue "What is the legal difference between the Broads and other National Parks in the UK?" It stated:-

> "The main legal differences between the Broads Authority and National Park Authorities in the rest of the UK are the additional powers and responsibilities that relate to the management of the navigation and the balanced weight which has to be given to recreation and the interests of navigation as against conservation. *For the 14 National Parks, including the two Scottish parks which have different legislation but are also called National Parks, if there is a conflict between the first purpose of conservation of the area and the second purpose of promoting understanding and enjoyment of the Park, greater weight has to be given to the first purpose. In the Broads, equal weight is given to all its three purposes, the two National Park purposes and "protecting the interests of navigation", and this will remain the case.*" (emphasis added)

44. By the phrase "equal weight" the Authority was simply referring to the absence of any statutory weighting given to any one of the Authority's three statutory purposes (see paragraph 18 above). The Consultation Document also made it perfectly plain that the current legal position whereby the Sandford Principle does not apply within the Broads "will remain the case".

45. In response to the question "Would any interests be harmed by use of the term National Park?" the Consultation Document stated :-

> "We do not believe that using the term National Park for the Broads would be a misrepresentation or cause damage to any business or community…The UK's National Park Authorities have indicated in the past that they have no objection to the Broads calling itself a National Park. This position will be confirmed with them in November."

It is not suggested that any such objection was in fact raised by any National Park Authority.

46. The final section of the Consultation Document dealt with the "Delivery of the new branding". It explained that if the proposal to adopt the "Broads National Park" brand were to be adopted, then not all of the Broads branding would be altered immediately. The new brand would be used in "publications, signage on vehicles as they get replaced, official signs and interpretation when printed" as and when opportunities arise. The three key questions posed for consultees at the end of the document made it clear that the proposal was for the use of the term "Broads National Park" solely as a brand name.

47. The Authority sent a copy of the Consultation Document to Lord de Mauley, the Parliamentary Under Secretary of State for Natural Environment and Science. He replied on 20 November 2014 as follows:

> "You have asked for my view on your proposal to adopt the national parks brand on the Authority's promotional material. The consultation suggests that promoting the Broads as a national park will offer marketing opportunities to raise the profile of the area both nationally and internationally. The consultation on branding is a matter for the Authority and your stakeholders.
>
> …
>
> In terms of government policy, the Broads is treated as a member of the national park family although its statutory basis is quite separate and it is not legally a national park. We do not propose to change this position and it is Defra's intention that the three purposes of the Broads will remain of equal standing. "

The meeting of the Authority on 23 January 2015

48. The report by the Chief Executive and Solicitor recommended that the Authority should resolve that the use of the brand "Broads National Park" would be conducive to achieving the three general duties in section 2(1) of the 1988 Act, particularly to the enjoyment and understanding of the Broads' special qualities and that the use of the brand would have a positive effect on the factors set out in section 2(4). The officers also recommended that the proposed brand name be adopted with immediate effect relying upon section 111 of the Local Government Act 1972.

49. The Report reviewed in some detail the background to the proposal and the consultation responses which had been received. It also gave a detailed response to each of the comments made by consultees. The Report noted that concerns had been expressed about whether the Authority could call itself by another name but reiterated that there was no proposal to change the name of the Authority itself. Consultees also expressed different views about whether the Authority should maintain the long-term ambition contained in the 2011 Broads Plan to seek National Park status. Some were concerned that the proposed branding was the "thin end of the wedge" which could lead to the adoption of the Sandford Principle. The officers responded unequivocally:-

> "On this particular point, the Broads Authority has never suggested that the Sandford Principle as it applies to the National Park Authorities should apply to the Broads Authority *with or without National Park status in law*." (emphasis added)

50. No material has been put before the court by the Claimants to show that that sentence was incorrect. The officers acknowledged that although the Authority had never indicated any intention to adopt the Sandford Principle, there appeared to be a real concern about the possibility that a decision to use the phrase "Broads National Park" as a marketing tool might subsequently lead to the adoption of the Sandford Principle. Consequently the officers advised:-

> "If the Authority decided to implement the new branding, it *could* take up the suggestions from the Broads Hire Boat Federation and Norfolk and Suffolk Boating Association by indicating that it no longer intends to pursue the long-term ambition for the area to be a national park in law and, for the avoidance of doubt, also stating that it does not intend to seek the application of the Sandford Principle to its functions. It is hoped that such a change would assuage many of the concerns raised in the consultation responses…" (emphasis added)

51. Section five of the Report carefully advised members of the Authority on the statutory powers available for the adoption of a new marketing name. The Report set out how the proposal accorded with the Authority's statutory functions having regard to the considerations which it was required by the 1988 Act to take into account. No criticism has been made of that analysis.

52. Appendix C to the Report set out in some detail the responses received to the consultation exercise. The branding proposal drew clear support from the Campaign for National Parks and also from National Parks UK. Ten National Park Authorities expressed their support for the proposal. Mr Jones QC sought to draw some support for the challenge from the response of the Peak District National Park Authority which raised a question as to whether the Sandford Principle would apply. The PDNPA stated that it would be difficult for the Broads to give effect to that principle in view of its statutorily defined duties on navigation, but their overall conclusion was as follows:

> "However, given the serious risk to your viability of not being branded a national park, the quality of your conservation objectives and the high intrinsic quality of the Broads

> landscape, the benefits outweigh the risks to the brand of national parks."

53. The response from the Royal Yachting Association exemplifies the attitude of those representing boating interests. They stated:-

> "…the Broads are a vital national asset not only as a place of natural beauty but also for open air recreation and specifically for recreational boating, which has a long and proud history in the area. As the consultation paper acknowledges, the existing management and regulation of the Broads, as set out in statute, expressly recognises this by conferring on the Broads Authority particular navigation responsibilities and a specific duty to protect the interests of navigation … and this distinguishes the Broads from national parks in the UK more generally. It is vital that this special status is not altered or watered down in any way. … We note that your consultation paper clearly states that the name change proposed would respect this unique characteristic. As long as that is truly the case and, for example, it does not become and it is not used by the Broads Authority or others as a platform for legislative change … the RYA would not have any difficulty with it."

In its response the Authority stated "there is no intention by the Authority to adopt the Sandford Principle …"

54. The Royal Society for the Protection of Birds ("RSPB") supported much of the thinking in the Consultation Document for raising public understanding of the Broads. It saw the promotion of "quality wildlife watching experiences as a crucial part of the Boards tourism offer … Therefore, we wholeheartedly support changes that encourage more consistent marketing of the area…" The concern raised by the RSPB was that the Broads would become a National Park without adopting the Sandford Principle. Accordingly the RSPB urged the Authority to take the opportunity for the Broads to become a National Park in the statutory sense. The Authority responded that it had never been its intention to adopt the Sandford Principle.

55. The Authority's proposal drew support from a number of local authorities including Norfolk County Council, Suffolk County Council, North Norfolk District Council, and South Norfolk Council. The Local Economic Partnership entitled New Anglia also gave firm support for the proposal. It pointed out that the LEP Strategic Economic Plan, approved by the UK government in July 2014, refers to the Broads as a National Park. "This represented the LEP's recognition of the area's important economic contribution and environmental value and the need to manage the area in a sensitive manner befitting to the management approach of a National Park." The Norfolk Wildlife Trust said that despite its position that the Authority should adopt the Sandford Principle "in line with other National Parks", it came down in favour of the "Broads National Park" as a brand. The Trust considered that this would raise the area's profile considerably, would help to boost tourism, but would also help to raise awareness of support for the conservation and enhancement of the Broads' "unique, but fragile eco-system." The Trust suggested that it was unclear as to whether the branding proposal would affect the name of the Authority. The Authority responded

that "the proposal is about branding the area and does not involve any change in the legal name or functions of the Broads Authority". The Suffolk Wildlife Trust also supported the proposal.

56. The Broads Hire Boat Federation supported the use of the term "Broads National Park" but added that the Authority should recognise the legitimate concerns of the boating community by removing from all its policy documents the "long term ambition of achieving full National Park status" and by declaring that there would be no proposal now or in the future to seek legislation invoking the Sandford Principle. The Norfolk and Suffolk Boating Association raised a similar concern. It called upon the Authority to "expressly disavow" the previously stated long term ambitions of achieving full National Park status. The officer responded that in their report to the Authority's meeting on 23 January 2015 they were recommending that "if the Authority decides to implement the new branding, it could indicate that it no longer intends to pursue the long-term ambition for the area to be a national park in law and, for the avoidance of doubt, also state that it does not intend to seek the application of the Sandford Principle to its functions."

57. On the other side of the debate the Authority received a representation from Acle Parish Council. The Council said that they had concerns about attracting even more tourists to the area given the fragile and vulnerable nature of the Broads, that it was misleading to call the Broads a National Park when it is not and that the concept of a National Park does not support the needs of navigation. The Authority responded that the Broads has a status equivalent to that of a National Park and therefore the proposal was not misleading. By this I understand the Authority to have been referring to the similarities between the Broads and a National Park and the national importance of the characteristics of the Broads. The Authority also referred to other National Parks with important navigation functions, for example Loch Lomond and the Trossachs. The Authority correctly observed that "all National Parks are unique but have common objectives of conserving for the natural beauty while promoting its enjoyment by the public."

58. In the minutes of the meeting held on 23 January 2015 the concerns of the navigation community were acknowledged and "therefore it was proposed that if the Authority agreed to accepting the use of the brand Broads National Park, that it would no longer pursue the ambition stated within the Broads Plan for the Broads Authority to become a national park in law." The minutes record that members of the Authority considered that the reservations and concerns of a number of consultees would be met if the brand name were to be used only for marketing-related purposes. It was agreed that the Authority should maintain its commitment to each of its three statutory objectives and that "it was important not to adopt the Sandford Principle as the Authority needed to work within the mechanisms of its own policies and objectives. Therefore dropping the aspiration to become a national park in law was an important concomitant to the branding principle." In his summing up the chairman said "in reaching their decision Members had to be satisfied that the Broads National Park Brand would be adopted for marketing related purposes and that the ambition to become a National Park in law including the adoption of the Sandford Principle (which had never been part of the Authority's ambitions) would no longer be pursued. In making the decisions, Members also needed to be satisfied that the branding would be conducive to the discharge of its functions and that the Authority was acting reasonably."

59. The resolution of the Authority fell into two parts. In part one the Authority confirmed that its proposal did not involve any change in the legal name or functions of the Broads Authority. It also resolved that "the use of the brand "Broads National Park" will be conducive to the achievement of the three general duties in section 2(1)" of the 1988 Act, "particularly to the enjoyment and understanding of the Broads' special qualities and that the use of the brand will have a positive effect on the factors set out in section 2(4) of the 1988 Act." It then resolved that the brand "Broads National Park be adopted for marketing related purposes with immediate effect using the powers in section 111 of the Local Government Act 1972".

60. Part two of the resolution stated "that, in accepting the above, the Authority also resolved, in line with the suggestions from the Broads Hire Boat Federation and the Norfolk and Suffolk Boating Association, not to pursue the ambition in the Broads Plan 2011 for the Broads to become a national park in law." The resolution then continued "for the avoidance of doubt, the Authority indicates that it has no intention of seeking the application of the Sandford Principle to the Broads Authority's functions because it is of the view that the Habitats Regulations provide sufficient protection for the very special qualities of the area."

Ground 1

Whether the resolution was outwith the Authority's statutory powers and duties

61. The Claimants submit that because there is a specific and detailed statutory code for the establishment of a National Park, which includes a bespoke procedure leading to formal designation and the imposition of specific obligations on the relevant Authority, notably the Sandford Principle in section 11A(2) of the 1949 Act, a general power, such as the incidental power in section 111 of the Local Government Act 1972, could not lawfully have been used for that purpose, applying the maxim *generalia specialibus non derogant*. In my judgment, this argument is misconceived. It is plain from the Authority's Consultation Document and resolution of 23 January 2015 that it has never sought to treat the Broads as a National Park in the sense employed by the 1949 Act nor to treat itself as a statutory National Park Authority. Instead, it has merely adopted the term "Broads National Park" as a branding or marketing tool. The code contained in the 1949 Act, as supplemented by the 1995 Act, is not specifically directed to the use of a brand name for a National Park. A National Park Authority could adopt such a name for marketing purposes, but in so doing it would only be using its own *incidental* powers (e.g. section 65(5) and paragraph 6 of schedule 9 of the 1995 Act).

62. Although not contained in the Claimants' skeleton, an alternative argument was developed in oral submissions, namely that where Parliament enacts a term to describe a statutory entity or concept, that term cannot be used by anyone (*a fortiori* a public body) to describe something which does not comply with the statutory qualifications (or conditions) for that entity or concept. No authority was cited for that proposition. But it was submitted that a statutory body may not arrogate to itself statutory titles conferred on other bodies constituted by legislation, for example a county council, or the Environment Agency, or a National Park Authority. It was also submitted that similarly a body or person may not apply a title to an area of land which it owns, controls or regulates if that title is a statutory concept. Thus, it was said, the term "National Park" could not be applied to the Broads because that is a

statutory term created by the 1949 Act and only to be employed for those areas which have been designated under section 7.

63. Plainly the Claimants' argument in this case relates to a statutory body governed by public law principles. It is possible that different considerations may arise when dealing with a private individual or body, but they need not be considered here. As I indicated during the hearing Laws J (as he then was) stated in *R v Somerset County Council ex parte Fewings* [1995] 1 All ER 514, at page 524:-

> "Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose. I would say that a public body enjoys no rights properly so called."

64. Sir Thomas Bingham MR approved this passage at [1995] 1 WLR 1037, 1042 G-H. So as Mr Giffin QC accepted, if in this case the Authority had purported to act on the basis that it had the statutory status of a National Park Authority, or that the Broads had the status of a National Park under the 1949 Act, so that the functions and duties conferred or imposed by that legislation (but not the Norfolk and Suffolk Broads Act 1988) applied, it would be acting ultra vires. But that is not the case here. The Authority has simply adopted the title "Broads National Park" for marketing purposes. It has not sought to treat itself as a National Park Authority or to treat the Broads as a National Park in the statutory sense, for example by invoking provisions specific to a National Park.

65. The parties agreed that this part of the challenge under Ground 1 should be approached by answering the following three questions suggested by the court:-

(1) Disregarding the legal nature of the name chosen, would it be intra vires for the Authority to adopt and use a brand or marketing name to describe the Broads in order to promote that area for one of more of its statutory purposes?

(2) If the answer to (1) is yes, does that choice become ultra vires if the name adopted and used corresponds to language used in a statute to describe a statutory entity or concept?

(3) If the answer to (2) is no, does the Sandford Principle render the adoption or use of that name unlawful?

66. In paragraph 1 of his Reply Mr Jones QC confirmed that the Claimants agree with the Authority that the answer to Question (1) is yes. In principle, the Authority is empowered to adopt a brand name to describe the area of the Broads for marketing purposes, including steps to increase public understanding of the special qualities of the Broads, for conservation, public enjoyment and navigation.

67. I agree with Mr Giffin QC that section 144 of the Local Government Act 1972 (which is applied to the Authority and the Broads by section 265A of the same Act) empowers the Authority to encourage persons (whether by advertisement or otherwise) to visit the Broads for recreation. By section 2(7) of the 1988 Act the Authority has power to do anything necessary or expedient for enabling it to carry out its functions, or for incidental purposes. Section 111 of the Local Government Act 1972 is to like effect. Those functions and purposes include "promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public" (section 2(1)(b)). That "promotion" includes the marketing of the Broads to the public, whether in the UK or overseas. By section 2(4) that "promotion" must have regard to:-

> "(a) the national importance of the Broads as an area of natural beauty and one which affords opportunities for open-air recreation;
>
> (b) the desirability of protecting the natural resources of the Broads from damage; and
>
> (c) the needs of agriculture and forestry and the economic and social interests of those who live or work in the Broads."

The Authority's objectives in adopting the brand name, as identified for example in the 2014 Consultation Document, the officers' report to the meeting on 23 January 2015 and the minutes of that meeting, fall entirely within the ambit of these statutory provisions.

68. The parties disagree on the answers to Questions (2) and (3). There are two main issues here. The first is whether it is legally possible to separate the use of "National Park" as a brand from the legal status of a "National Park" under the 1949 Act. The Authority says it is possible whereas the Claimants say it is not. The second issue is whether, although the National Park legislation does not expressly restrain the use of the words "National Park" outside the ambit of that statutory code (e.g. as a marketing tool for an area which is not a statutory National Park), nevertheless by implication it does have that effect. The Claimants contend that the implicit effect of the National Park legislation is to prohibit the use of the words "National Park" in relation to areas which have not been designated under section 7 of the 1949 Act, even if the use of such language would otherwise be lawful.

69. I am unable to accept the Claimants' submissions on the first issue. The Claimants' case assumes that *as a matter of language* the phrase "National Park" can only refer to an area designated as such under the 1949 Act. However, a number of dictionaries confirm that the phrase has become established as an ordinary part of the English language to describe an area of countryside, usually identified as being important for its natural beauty, wildlife and recreation. Beyond that, as paragraph 1.5 of the Sandford Report recognised, the extent to which other activities, such as agriculture

and commercial uses, may take place in a national park is likely to depend upon whether the park is publicly owned (as in the United States) or not (as in the United Kingdom). The short point is that the usage of the words "national park" does not belong exclusively to the statutory code for National Parks in the UK.

70. In my judgment, the answer I have given under the first issue makes it more difficult for the Claimants to succeed under the second, the "implied prohibition" issue. Paragraph 4 of the Claimants' Reply accepts that there is a spectrum of statutory "concepts" ranging from a word or phrase which has been defined in a particular statute or instrument to, at the other end, a term the unauthorised use of which is explicitly regulated by statute (possibly linked to a statutory criminal offence or other sanction). The Authority gave some examples of terms the unauthorised use of which is explicitly prohibited or controlled by legislation, such as "university" in the title of an educational institution (section 39 of the Teaching and Higher Education Act 1998), corporate names suggesting a connection with government or a public authority (section 54 of the Companies Act 2006), "architect" (section 20 of the Architects Act 1997), "solicitor" (section 21 of the Solicitors Act 1974), and "building society" (section 107 of the Building Societies Act 1986).

71. The Claimants submit that the concept of a "national park" falls between these two ends of the spectrum (paragraph 4 of the Reply). That submission acknowledges that the mere fact that a statute defines a particular term for use within that context is insufficient to create an implied prohibition of the use of that language for other purposes. Indeed, a legal principle to the opposite effect would be startling. Instead, the Claimants contend that the 1949 Act *impliedly* prohibits the use of the term "national park" outside the ambit of that legislation, especially by a public body, because of the following specific factors:-

(a) It is the subject of a statutory definition (section 5(3) of the 1949 Act);

(b) It is the subject of a statutory scheme for designation (section 7) accompanied by Natural England's duty to consider areas for designation (section 6);

(c) The exercise of statutory functions in relation to National Parks is subject to duties (section 11A).

(d) A statutory National Park is administered by a statutory National Park Authority for that area.

72. I do not accept that these four factors relied upon by the Claimants, (or any other features of the National Park legislation) are sufficient to justify the implied prohibition for which they contend.

73. The starting point must be that the National Park legislation has no legal monopoly over the use of the term "national park", whether capitalised or not. It is a part of our ordinary language.

74. Points (1) and (2) are relatively common. Unless a statute uses language as "ordinary English words", it is normal for legislation to define the terms used. It is also not unusual for legislation to rely upon a statutory process in order to determine whether

property, or an area of land, or a person or body is to be treated as falling within a definition. What is more unusual in the present case is that that process involves consultation, and possibly the holding of a public inquiry, before Ministerial confirmation, so that the merits of a proposal to designate a National Park may be evaluated. The designation process under the 1949 Act is necessary in the case of National Parks simply because those areas were not identified in the legislation itself. The issue of whether any specific area should be subject to the regime in the 1949 Act remained to be assessed *after* the enactment of the legislation. However, when the 1988 Act was enacted Parliament itself made the assessment that the qualities of the Broads made it appropriate to impose a legal regime which included the same twin objectives as underpin the National Park code. The assessment and designation of a specific area of land was an intrinsic part of the legislative process. In my judgment the process in the 1949 Act for the identification of areas which are to be subject to that particular regime is compatible with the use of the words "national park" for marketing purposes which are not controlled by the 1949 Act, and *a fortiori* for the marketing of the Broads, given the issues which Parliament has already addressed in the 1988 Act.

75. Point (3) has no substantial weight. Section 11A(1) of the 1949 Act imposes relatively broad duties, which are largely dependent upon the value judgments made by a National Park Authority from time to time. The subsection is directed at the promotion of broad objectives and securing co-operation between public bodies within that context. Duties of that breadth do not imply a Parliamentary intention to prohibit the use of the term "National Park" outside the code based upon the 1949 Act. Section 11A(2) is similar in this respect, in that it only deals with conflicts between two objectives phrased in very broad terms.

76. Point (4) adds nothing of substance to the Claimants' argument. Functions and duties are not normally created by legislation without identifying the person or body responsible for their discharge.

77. The characteristics of the statutory code for National Parks do not justify the conclusion that Parliament intended to prohibit the use of the phrase "national park" in *any* situation falling outside the ambit of that code. Mr Jones Q.C. submits that the statutory similarities and differences between the National Parks code and the 1988 Act support the need for implying such a prohibition in order to distinguish the two and to avoid confusion. There are two flaws in this additional argument. First, its effect could not be confined to the Authority or its decision in this case. The implied prohibition would not be so confined and therefore must be properly justified on a wider basis. Secondly, where the effect of using the phrase "National Park" is not misleading or confusing, Mr Jones's argument does not justify imputing to Parliament an intention to prohibit that usage. His argument really depends upon the second part of ground 1, namely that the Authority's resolution should be quashed because it materially misleads the public and others as to the scope of its statutory functions.

Whether the Authority's resolution is misleading as to the scope of its statutory functions.

78. Mr Jones Q.C. invoked the principle that public authorities are under "a duty to act fairly and in accordance with the highest public standards". In fact those words come from the judgment of Sir Thomas Bingham MR in R v Inland Revenue Commissioners ex parte Unilever plc [1986] S.T.C. 681, 690f in which he relied upon

the Inland Revenue's acceptance that the principle applied to its handling of the tax affairs of the Claimant over a number of years. Simon Brown LJ also stated (page 695f):-

> "Public authorities in general and taxing authorities in particular are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness than would apply as between private citizens."

The Court of Appeal accepted that although the Claimant failed in its legitimate expectation argument (applying R v Inland Revenue Commissioners ex parte MFK Underwriting Agencies Ltd [1990] 1 WLR 1545) it succeeded on an alternative basis, namely that the Revenue's conduct had been so unfair as to amount to an abuse power. Simon Brown LJ added, however, that it would be rare for such a fairness challenge to succeed outside the parameters of legitimate expectation.

79. The principle in the Unilever case forms part of a line of authority which includes R v Inland Revenue Commissioners ex parte Preston [1985] AC 835, at 864 – 6. The House of Lords held that unfairness amounting to abuse of power could arise not only where a decision or action was vitiated by an improper motive (as in Padfield v Minister of Agriculture Fisheries and Food [1968] AC 997 and Laker Airways Ltd v Department of Trade [1979] QB 643 but also where a power is exercised in circumstances equivalent to a breach of contract or breach of representation on the part of the defendant.

80. In the present case the Authority accepted that a public body cannot make a statement which deliberately misleads the public about its statutory functions (paragraph 49 of skeleton). No authority has been cited to show that that principle has been accepted and applied. It differs from the "legitimate expectation" cases where a public body is *held* by the Court to a statement it has made. Here the object of the challenge is to quash a statement or decision for something akin to misrepresentation. Nevertheless I accept that the principle suggested is consistent with the line of authorities flowing from ex parte Preston.

81. In the present case the Claimants accept that the Authority has not *deliberately* misled the public about its statutory functions. But it is common ground between the parties that a public body acts unlawfully where it makes a statement or decision which has *the effect* of misleading the public about its statutory functions, although it did not deliberately seek to mislead in that way. At this point in the analysis the parties differ as to the correct approach to be taken by the court. The Claimants submit that whether the *effect* of a decision or statement is misleading or not is an objective question for the court to determine itself. Where the body has not considered that issue for itself prior to making the decision or statement, it is difficult to see why that should be incorrect. The Authority submits, however, that where, as here, the public body has considered and decided that its decision or statement would not have the effect of misleading the public about its statutory functions, then the court's role is limited to reviewing that decision on *Wednesbury* principles, certainly where that body's assessment involved questions of fact and judgment and not purely law. No authority was cited to support either submission. I do not need to decide this issue because if the Claimants fail on the basis of their approach, then they would also fail on the narrower approach put forward by the Authority. However, I would favour the

Claimants' approach that the question whether a body's statement or decision has the effect of misleading the public about its statutory functions is an objective one.

82. As I have previously noted, it is not suggested that the Authority's decision was misleading as regards the status of the Authority itself. The decision challenged does not involve the Authority holding itself out to be a National Park Authority. The only effect of the Authority's decision to use "National Park" in the branding of the Broads which is said to be misleading is the implication that the Sandford Principle applies to the area of the Broads (see paragraphs 3, 6 and 7 of the first witness statement of Mr Harris, oral submissions for the Claimants, and paragraph 16 of the Claimants' Reply.)

83. It can be seen from the passages already quoted that the 2014 Consultation Document and the officer's report to the meeting on 23 January 2015 plainly stated that the Sandford Principle would not apply if the words "National Park" were to be used for the marketing of the Broads. It is suggested in paragraph 36 of the Claimants' Reply that the responses to the consultation betray a level of confusion in the material issued by the Authority. That argument is unsustainable because the relevant passages already cited from the Consultation Document were so clear on this point as to allow no room for any justifiable confusion. Moreover, there is a contradiction between the Claimants' case that an objective test should determine whether the Authority's decision has had the effect of misleading the public as to its statutory functions, and their suggestion that the answer is supplied by examining the responses of certain consultees.

84. In my judgment the starting point is the decision itself. The resolution made it plain that the term "National Park" is only to be used when describing the Broads (and not the Authority) and even then only as a brand name for marketing purposes. The resolution did not suggest that the Authority would seek to obtain the statutory status of a National Park for the Broads. The resolution to adopt the new branding name contained nothing to suggest that the Sandford Principle would become applicable. However, simply to avoid any doubt, the second part of the resolution did go on to add that the Authority had no intention of seeking to make the Sandford Principle applicable within the Broads.

85. This issue therefore depends upon whether the mere use of the phrase "Broads National Park" in promotional literature would mislead a reasonable member of the public into thinking that the Sandford Principle is applicable within the Broads. Here the parties disagree as to what the effect of the Sandford Principle is. The Claimants submit that whenever there is a conflict between the "conservation" objective and the "public enjoyment" objective, the former prevails over the latter. The Authority submits that where there is such a conflict, section 11A(2) merely requires "greater weight" to be given to the conservation objective than would otherwise be the case (in the absence of section 11A(2)), but does not require the "conservation" objective to prevail. However, in paragraph 17 of their Reply the Claimants submit that the outcome of Ground 1 does not depend upon the Court determining which interpretation of section 11A is correct. I agree. But I should add that if the Authority's contention is correct, then in my judgment the effect of the Sandford Principle would be so subtle or nuanced that this part of ground 1 would be quite unarguable.

86. Even if the Claimants are correct in saying that section 11A(2) requires the "conservation" objective to prevail over the "public enjoyment" objective whenever there is a conflict between the two, their case that the use of the "Broads National Park" name as a marketing tool is misleading (whether or not in conjunction with the marketing of the UK's National Parks), is misconceived. The Claimants submit that conservation is "always the uppermost consideration" within a National Park (see also paragraph 6 of Mr Harris's first witness statement). But even within a National Park that is not always the case. UK National Parks, unlike national parks in some other countries, are not publicly owned. Much of the land is privately owned and used, for example, for agriculture or forestry (see paragraph 1.5 of the Sandford Report). Thus, section 11A(2) only requires a "relevant authority" to *have regard* to the twin purposes set out in section 5(1) of the 1949 Act. Moreover, those purposes are not exhaustive of all the considerations which will have to be taken into account when decisions are made on land use within a National Park, for example on farming practices or planning control decisions. The Sandford Principle in section 11A(2) only deals with the relationship between the "conservation" objective and the "public enjoyment" objective. It does not deal with all relevant considerations which may have to be taken into account in a planning decision, such as the need for development including housing and economic need.

87. The Claimants' reliance upon the Sandford Principle as (i) the key difference between National Parks in the statutory sense and the Broads and (ii) the basis for their argument that the brand name adopted by the Authority is misleading is unsustainable. Even on the Claimants' construction of section 11A(2), the limitations and subtleties of the Sandford Principle are such that no reasonable person's reaction to tourism and other promotional material would be affected by the distinctions between the precise legal regimes applicable in National Parks as compared with the Broads. In the context of branding or marketing, the term "National Park" uses ordinary language, and not a statutory concept, to evoke the nationally important qualities of the area and stimulate public enjoyment of, and potentially visits to, that area. The use of capital letters simply reflects the fact that the Broads is a proper name and does not alter the legal analysis. No reasonable member of the public would see the use of the words "Broads National Park" in promotional literature as referring to the specific legal regimes governing either the Broads or National Parks in the UK.

88. The evidence before the court also shows that the analysis is no different from an international perspective. Legal regimes vary from one country to another and the UK's statutory National Parks are not even treated as "national parks" in the IUCN classification. The effect of the Authority's marketing decision cannot be said to be misleading.

89. In paragraph 11 of his first witness statement Mr. Harris says that he has examples of members of the public who have been misled by the description of the Broads as a National Park. Only one example was produced, a print-out from the Trip Advisor website. The court is entitled to assume that this is one of the best examples that could have been produced by the Claimants. It merely expressed disappointment that the Broads had wrongly been portrayed as a National Park because the author found it to be too crowded and there were noisy groups of people. No allusion was made to anything concerning the "conservation" objective or more particularly the Sandford Principle.

90. The Claimants also rely upon extracts from the National Parks UK site as showing that the Broads has wrongly been presented as a statutory National Park and subject to the Sandford Principle. To some extent this has happened because of the way in which links have been created within the website. But the website has been produced by a separate organisation and they have been requested by the Authority to make changes. There should be no difficulty in these changes being made. In any event whether or not the Authority has power to use the Broads National Park as a marketing brand cannot depend upon errors of this kind on the website of a third party.

91. In my judgment the branding decision taken by the Authority cannot be regarded as having any misleading effect as to the statutory functions of either the Broads or the Authority and no abuse of power has occurred.

Irrationality

92. Given that the Authority's decision to use the term "National Park" for branding the Broads did not involve the Sandford Principle, it could not have been irrational for the Authority to decide at the same time not to pursue "National Park" legal status or the adoption of the Sandford Principle.

Ground 2

93. Some consultees responded to the 2014 Consultation Document by expressing a concern that the Authority had not proposed to apply the Sandford Principle within the area of the Broads (see for example the representations of the RSPB). In their report to the Authority's meeting on 23 January 2015 the officers responded that (a) the Authority had never indicated any intention to adopt the Sandford Principle and (b) the various controls contained in the Conservation of Habitats and Species Regulations 2010 (SI 2010 No 490) provide the required level of protection for the biodiversity of the Broads against damaging activities. Similar views were expressed at page 7 of the minutes for the meeting and in the formal resolution. The Claimants contend that the Authority had regard to an immaterial consideration, and/or acted irrationally, by relying upon the controls provided by the Habitats Regulations because only 25% of the area of the Broads is designated, in effect, as "European Sites", so as to attract the protection afforded by the "appropriate assessment" code in Part 6 of the 2010 Regulations. The Claimants rely upon the observation of the RSPB that the remaining 75% of the Broads has no statutory or non-statutory protection for wildlife and therefore they argue that it is necessary for the Sandford Principle to be applied. It is said that much of the remaining area ought to be treated as qualifying for notification as a Site of Special Scientific Interest.

94. The material provided to the court does not explain in any detail what controls or protections for nature conservation apply in the "remaining 75% of the Broads". However, I note that Part 3 of the 2010 Regulations, for example, provides protection for "European protected species" whether present inside or outside a European Site (see also Part 5). In addition, the conservation duties imposed upon the Authority by section 2 of the 1988 Act apply within the whole of the Broads in any event. There may also be relevant polices for nature conservation in development plans which apply throughout that area. Essentially the issue of whether there is a need to introduce the Sandford Principle in the Broads is a matter of judgment for the

Authority. That body will be well aware of all of the protections available for nature conservation across the Broads, of which the controls in Part 6 of the 2010 Regulations are likely to form only a part. Merely to say that Part 6 does not apply to the whole of the Broads whereas the Sandford Principle (if introduced) would, does not demonstrate that the Authority has had regard to an immaterial consideration or has acted irrationally. For these reasons alone ground 2 has not been substantiated and must therefore fail.

95. Second, and in any event, the decision taken by the Authority was to adopt a *brand name* which included the words "National Park". That term is only to be used for marketing purposes and the legal regime within the Broads remains unaltered. The Sandford Principle in section 11A(2) of the 1949 Act addresses only the twin purposes of a statutory National Park. It does not address, in any event, the third statutory purpose laid down in section 2(1) of the 1988 Act for the Broads, namely "protecting the interests of navigation". The Sandford Principle could not be introduced in the Broads without amending legislation. Such legislation could not be contemplated without Parliament considering whether or not the principle should be adapted so as to deal not only with the first two of the purposes of the Broads but also the third, and if so how. It is self-evident that there was no need for the Authority to form a view on legislative issues of that nature in order to consider the merits of its proposal to *market* the Broads by reference to a particular name, even one which includes the words "National Park". The consultation exercise and the subsequent decision to adopt a brand name was only concerned with how the Broads should be marketed. No matter what name is chosen *solely* for marketing purposes, that choice could not depend upon, or determine, whether legislation will, or even should, be promoted to introduce the Sandford Principle into the Broads, and if so in what form. Therefore there was no legal necessity for the Authority to form a view on whether the Sandford Principle should or should not be introduced in order to make a lawful choice about the use of the proposed brand name.

96. Third, it is perfectly plain that because of a *perception* in certain quarters that the brand name proposed might be "the thin end of a wedge" which might eventually result in legislation to introduce the Sandford Principle, the Authority decided to reiterate "for the avoidance of doubt" its previous stance against the introduction of that principle. As a matter of *substance*, the mere fact that the Authority wished to provide this reassurance for certain consultees cannot have resulted in its decision to choose a branding name becoming legally dependent upon the issue whether the Sandford Principle should form part of the legal regime for the Broads. The proposal to use "Broads National Park" as a *marketing tool* was *legally* compatible with the non-applicability of the Sandford Principle within the Broads (and with the Authority's maintenance of its policy that that should remain the case). Accordingly, whether or not the Habitats Regulations were capable of providing a rational reason against the adoption of the Sandford Principle is neither here nor there so far as this legal challenge is concerned.

97. For all these reasons, taken both individually and cumulatively, I reject ground 2.

98. In any event, it is plain from the evidence before the Court and the analysis above, that the Authority's consistent stance has been that the Sandford Principle should not be applied in the Broads, irrespective of the effect of the Habitats Regulations. Accordingly, even if the Authority had *not* taken those Regulations into account as a

reason for saying that there was no need to introduce the Sandford Principle, I am certain that the authority would still have decided to adopt "Broads National Park" as a *brand* name or *marketing* tool. Alternatively, resolution 2(vii) did not play any legally significant part in the substantive decision, which would otherwise have been the same. I would therefore refuse to grant any relief under Ground 2 (see section 31(2A) of the Senior Courts Act 1981 and R (FDA) v Secretary of State for Work and Pensions [2013] 1 WLR 444, paragraphs 67 to 68).

Ground 3

99. The Claimants contend that the decision of 23 January 2015 was vitiated by procedural unfairness in the consultation process carried out. Two points were raised. The first, that the Authority failed to consult Natural England, is no longer pursued. The second complaint is that the Authority resolved, in line with suggestions from consultees such as the Broads Hire Boat Federation and the Norfolk and Suffolk Boating Association, not to pursue the "long-term vision" in the Broads Plan 2011 for the Broads to become a national park by 2030 (see paragraph 60 above), without any prior consultation on that point.

100. The common law requirements for consultation are rooted in the duty to act fairly. The key principles, often referred to as the Sedley Principles, have been approved by the Supreme Court in R (Moseley) v Haringey London Borough Council [2014] 1 WLR 3947. Thus, the body putting forward a proposal must let those potentially interested in the subject matter know in sufficiently clear terms what the proposal is and the reasons therefor, to enable them to consider the matter and make an intelligent response thereto.

101. It is plain from the Claimants' skeleton argument and from paragraphs 19 to 22 of Mr. Harris's second witness statement, that the only prejudice which is claimed to have arisen because the Consultation Document gave no indication that the Authority might decide not to pursue the vision in the Broads Plan of the Broads becoming a statutory National Park, is that consultees did not appreciate that the consultation process might result in a decision *not to introduce the Sandford Principle*.

102. The Authority accepts that the 2014 Consultation Document itself did not mention the possibility of the Authority dropping the long-term vision in the Broads Plan, but it submits that there was no legal necessity to do so and that the issue is immaterial so far as the decision made on 23 January 2015 is concerned.

103. The starting point is what was meant by "the long-term vision" in the Broads Plan. The Claimants' argument under Ground 3 depends upon an assumption that the Broads Plan accepted that the Sandford Principle should apply if the Broads were to become a statutory National Park. If that assumption is incorrect then Ground 3 must fail. It is immaterial that consultees might have misinterpreted the Broads Plan as encouraging the eventual adoption of the Sandford Principle and therefore might have mistakenly supported the proposed brand name on the basis that the vision in the Plan would not be dropped. Any such misunderstanding as to what was meant by the long-term vision in the Broads Plan could not be relied upon to support a complaint of procedural unfairness in the Authority's consultation process.

104. It is common ground that the issue as to what was meant by the Plan is a matter of construction for the Court (Tesco Stores Ltd v Dundee City Council [2012] PTSR 983). I am firmly of the view that the Plan did not seek to promote the adoption of the Sandford Principle and therefore Ground 3 must fail. The Plan clearly stated that if the Broads were to become a national park in law then "the public legal rights of navigation" would continue to be "respected and embraced". That statement referred to the requirement to protect the interests of navigation in section 2(1) of the 1988 Act. Whatever the precise effect of the Sandford Principle, it certainly does not address that statutory duty and so the long term vision in the Broads Plan, properly construed, is incompatible with the notion that the Authority would seek to introduce the Sandford Principle in the Broads. Thus the Plan is consistent with the unchallenged evidence before the court that the Authority has never agreed to promote the adoption of the Sandford Principle.

105. Second, the minutes for the meeting of the Authority on 26 September 2014, which were publicly available, made it plain before the consultation exercise began that the Broads Plan was to be reviewed from 2015 onwards and that the long-term vision could be reconsidered in that review following on from a decision to adopt "Broads National Park" as a brand name.

106. Third, pages 2, 6 and 9 of the 2014 Consultation Document made it plain that the Sandford Principle would not apply in the Broads and that there would be no change in the legal regime. The document did not encourage anyone to think that if the proposed marketing name were to be adopted it would become to easier to promote the adoption of the Sandford Principle.

107. Fourth, the resolution complained of, namely not to pursue the long-term vision in the Broads Plan, was only passed in order to reassure those concerned about a "thin end of the wedge". The legal position is not materially different to that considered under Ground 2 (see paragraphs 95 to 96 above).

108. Fifth and in any event, the resolution complained of has not resulted in any change to the Broads Plan itself. It has no legal effect as regards the existing Plan under section 3. The "long-term vision" forming part of the Plan setting out the Authority's policies will not be altered unless and until the Authority publishes draft proposals and follows the procedure laid down by section 3. The Authority accepts that it will have to consult the public on any proposal to drop the vision of the Broads becoming a National Park in law. Therefore, the resolution complained of has caused no real prejudice or unfairness to any member of the public. Those who wish to argue that the Plan should contain a long-term vision for the Broads to become a statutory National Park within which the Sandford Principle should apply will be able to do so.

109. In these circumstances I accept the Authority's submission that the resolution not to pursue "the long-term vision" did not involve a fundamental difference from the proposals consulted upon so as to require any re-consultation (see, for example, R (Smith) v East Kent Hospital Trust [2002] EWHC 2640 (Admin) at para 45).

110. It is unnecessary for me to go further, but for completeness I would add that, for the reasons already set out, I accept the Authority's additional submission that the Claimants are unable to show that the consultation process carried out in this case went clearly and radically wrong (R (Royal Brompton and Harefield NHS Foundation

Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472 at paras 13 and 93).

111. For these reasons, individually and cumulatively, I reject Ground 3.

112. Furthermore, even if the view were to be taken that, as a matter of fairness, the Authority ought to have consulted on a proposal not to pursue "the long-term vision" in the Broads Plan, it is plain that relief should be refused under section 31(2A). The only purpose which the Claimants suggested for requiring such consultation to have taken place is that consultees could have argued for the adoption of the Sandford Principle either now or in the future. For the reasons I have already given the resolution was essentially concerned with a decision on branding which did not depend upon whether the Sandford Principle should be adopted, whether now or in the future. Moreover, any debate about whether that principle should be adopted in the longer term would be a matter for the review of the Broads Plan.

Conclusion

113. For the above reasons the claim for judicial review is dismissed.

Consequential matters

Costs

114. It is common ground that an order for costs should be made against the Claimants and that this is an Aarhus claim falling within the scope of CPR 45.43. However, the Claimants submit that they should be treated as if they were a single claimant, with the result that their joint and several liability for costs should be capped at £5,000 in total pursuant to paragraph 5.1 of CPR 45 PD. The Authority submits that even where a claim is brought by more than one claimant with an identical interest and a single set of legal representatives, the Practice Direction, as a matter of construction, does not prevent the cost cap from being applied to each claimant so that they should be able to recover costs of £10,000 in total. In addition the Authority submits that the matter is governed by the order of Singh J dated 12 August 2015 in which he ordered that:-

> "The claim be certified as an Aarhus claim pursuant to CPR 45.43 so that under Practice Direction 45 the Claimants may not be ordered to pay costs exceeding £10,000 and the Defendant may not be ordered to pay costs exceeding £35,000"

115. CPR 45.43(1) provides that:-

> "…. a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45."

Paragraph 5.1 of Practice Direction 45 provides:

> "Where a claimant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1) is –"

(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person; ….

Section 6(1) of the Interpretation Act 1978 provides:-

> "In any Act, unless the contrary intention appears,—"
>
> (a) words importing the masculine gender include the feminine;
>
> (b) words importing the feminine gender include the masculine;
>
> (c) words in the singular include the plural and words in the plural include the singular.

By section 23 of the 1978 Act, section 6(1)(c) applies not only to primary legislation but also to subordinate legislation, such as the Civil Procedure Rules.

116. I do not think that this issue can be treated as concluded, as the Claimants suggest, by section 6(c) of the Interpretation Act 1978. Where applicable that provision enables a word to be treated as including the plural, and vice versa. It is a word-saving provision which avoids the draftsman having to refer to *both* singular and plural versions of a noun. It has the effect of *enlarging* the meaning of, for example, a singular expression to *include* the plural. The same approach is taken in section 6(1)(a) and (b). On the other hand, the Claimants' argument relies upon section 6(1)(c) to bring the plural version of "party" and "claimant" within the scope of CPR 45.43(1), and then to restrict the effect of that rule so that it operates in the same way, so far as a defendant is concerned, by imposing the same cap on the total costs recoverable by a defendant irrespective of the number of claimants involved. Instead of CPR 45.43 limiting the amount which a (or each) claimant is liable to pay, which is the way in which the rule has been drafted, the effect of the Claimants' argument would be to redraft the rule so that it becomes a cap on the amount which a Defendant could recover in all Aarhus cases, irrespective of the number of Claimants and the nature of their case(s). That is not the rule which Parliament has enacted.

117. Alternatively, it is to be noted that section 6(c) applies unless the contrary intention appears. The effect of the Claimants' argument would be that no matter how many Claimants there might be "claiming only as individuals", and no matter whether they have identical or different interests, separate or joint representation, the maximum amount recoverable by a Defendant in all such cases would be limited to £5,000. The Claimant's argument would also apply to paragraph 5.2 of the Practice Direction, so that a Claimant would never be able to recover more than £35,000, no matter how many Defendants were ranged up against him. This would be so even if a successful Claimant's costs were increased because different Defendants took different approaches to the filing of evidence or legal argument. Likewise the court's ability to reflect the way in which one out of several Claimants or Defendants had conducted the litigation unreasonably would be unduly constrained. In my judgment these are sufficiently strong indicators that section 6(c) should not apply, and certainly not in the way for which the Claimants contend. In my judgment the cost-capping provisions in CPR 45.43, as a matter of language, are capable of applying to each "party", but it is a matter for the court to assess whether multiple parties should be treated as a single

party, according to the circumstances of the case and the way in which it has been conducted and argued.

118. The Claimants also rely upon paragraphs 106 – 110 of the decision of Collins J in R (Botley Parish Action Group) v Eastleigh Borough Council [2014] EWHC 4388 (Admin) to support their argument. But in fact those paragraphs simply form part of the argument on costs in that case. The Claimants fail to deal with the ruling at paragraphs 121 to 127 where Collins J rejected the construction which the Claimants seek to place upon the Practice Direction.

119. My decision here does not rest entirely on the view I have formed on the point of construction. It could be beneficial for there to be more detailed argument in another case on the issue which has now been raised. In the present case, however, there is also the order of Singh J which the Claimants have altogether ignored in their written submissions. The court has been told that the order was drawn up by counsel for the Claimants following discussion in Court with Singh J. For the reasons I have given, the *effective overall* cap in the order of £10,000 is consistent with the language of the Practice Direction. More to the point, there has been no appeal against that order, or any indication that the Claimants would seek to go behind the order of Singh J. until this judgment was sent to the parties in draft. The proceedings have been conducted on the basis that the order was not being challenged. The Claimants have not suggested any basis entitling me to depart from the Judge's exercise of discretion, whereby he accepted the draft order put forward by the Claimants, as regards the cap on the total amount recoverable by the Authority. But within the compass of that order I consider that each of the Claimants should pay only £5,000 towards the costs of the Authority (see paragraph 11 of the Authority's "Consequential Submissions"). That accords with the language and spirit of the Practice Direction as interpreted in the Botley case and above. There is no dispute that the Authority's costs greatly exceed the figure of £10,000.

The Claimants' application for permission to appeal

120. The Claimants seek permission to appeal in respect of ground 1 only. The application falls into two parts: (a) "the vires issue" (paragraphs 9 – 10 of the Claimants' application) and (b) the application of an objective test as to whether the Authority's decision was misleading (paragraphs 11 to 17).

121. The application for permission to appeal is refused because the proposed appeal has no realistic prospects of success and there are no other compelling reasons for granting permission to appeal.

The vires issue

122. The Claimants do not challenge paragraph 69 of the judgment which dealt with the first of the two issues identified in paragraph 68 (the use of the phrase "national park" as a matter of language). It is plain from paragraph 70 that I did not treat my conclusions on the second issue in paragraph 68 as *following from* my conclusion on the first issue. Consequently paragraph 9 of the Claimants' submissions do not give rise to any ground of appeal.

123. Paragraph 10 of the Claimants' submissions is misconceived. The Claimants have not challenged the rejection of their argument on "implied prohibition" in paragraphs 70-76 of the judgment. The argument in paragraph 10 continues to confuse "designation" of a National Park under the 1949 Act and the legitimate use of the phrase "National Park" as a brand name for marketing the Broads.

The "misleading effect" issue

124. Paragraphs 12 to 17 of the Claimants' application rerun their arguments and assertions in the High Court without explaining why the analysis in paragraphs 82-90 of the judgment is incorrect, and in particular paragraphs 85-87 (given the Claimants' concessions recorded in paragraph 82).

Protective costs order for an appeal

125. Because I am refusing permission to appeal this issue does not arise. But in any event it would be a matter for the Court of Appeal if the Claimants should decide to apply for permission to appeal from that Court (see CPR 52.9A and paragraph 18 of the Authority's reply).