Neutral Citation Number: [2015] EWHC 2159 (Admin)

Case No: CO/5375/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT IN BRISTOL

Bristol Civil Justice Centre,
2 Redcliff Street, Bristol, BS1 6GR

Date: 28/07/15

Before :

MR JUSTICE HICKINBOTTOM

- -

Between :

	THE QUEEN ON THE APPLICATION OF DEVON WILDLIFE TRUST	**Claimant**
	- and –	
	TEIGNBRIDGE DISTRICT COUNCIL	**Defendant**
	- and –	
	ROCKLANDS DEVELOPMENT PARTNERSHIP	**Interested Party**

- -
- -

Jenny Wigley (instructed by **Richard Buxton Environmental & Public Law**) for the **Claimant**
Michael Bedford (instructed by **The Council Solicitor**) for the **Defendant**
The **Interested Party** was not represented and did not appear

Hearing date: 10 June 2015

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Judgment

Mr Justice Hickinbottom :

Introduction

1.This claim concerns the decision of the Defendant planning authority ("the Council") of 10 October 2014 to grant the Interested Party ("the Developer") outline planning permission for up to 230 dwellings and 2,500 sq m employment space at land at Station Hill, Chudleigh, Devon ("the Site").

2.The Site covers an area of approximately 12.3 hectares, lying to the west of Chudleigh, about 900m from the town centre. To the north and west of the Site – between the Site and existing built development – two further sites have been granted permission for residential development, namely Land off Oldway (David Wilson Homes) and Coburg Fields (Bovis Homes). Between the Site and the Land off Oldway site, in a V-shaped area formed by the proposed development, there are two fields which were secured as mitigation land for the Land off Oldway development. They have been set aside in perpetuity as dedicated bat habitat and open space managed specifically for bats. That land has now been transferred to the Claimant for management.

3.The Claimant is an independent charity dedicated to caring for and protecting the natural environment in Devon. It objected to the planning application for the Site because of the adverse impact of the proposed development on the South Hams Special Area of Conservation ("SAC"), an area designated under European Council Directive 92/43/ EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora ("the Habitats Directive") as an area of recognised nature conservation importance at a European level for the protection of the greater horseshoe bat ("GHB"). SACs are subject to the protection regime of the Habitats Directive, as implemented in the United Kingdom by the Conservation of Habitats and Species Regulations 2010 (SI 2010 No 490) ("the Habitats Regulations").

4. The GHB is one of Britain's largest and rarest bats, with a total national population of 5,500 individuals of which about one-third are believed to be within the South Hams SAC. The SAC is unusual, in that it comprises five separate but interconnected nationally-designated Sites of Special Scientific Interest which include significant roosts for hibernating in the winter and summer roost sites where the females gather to give birth and rear their young. However, in addition to those specific sites within the notified SAC, GHBs use the wider countryside of South Devon for the majority of their activities including commuting, foraging, roosting and mating. Within that countryside, as well as other roosts, there are vital flyways and sustenance zones recognised as critical in the Natural England document, South Hams SAC – GHB Consultation Zone Planning Guidance (June 2010) ("the 2010 Guidance"). Natural England is an independent executive non-departmental public body, created by section 1 of the Natural Environment and Rural Communities Act 2006, which acts as an adviser to the Government on all aspects of the natural environment in England, with the role of protecting nature and landscape within the various statutory protective schemes including those set up as a response to European obligations.

5.As to flyways, GHBs require linear features in the landscape to navigate, feed and access key foraging grounds. They generally fly close to the ground up to a height of only about 2m, and mostly beneath vegetation cover. GHBs are extremely sensitive to light, and will avoid lit areas: lighting renders areas inhospitable and practically inaccessible to them. The interruption of a flyway by light disturbance has a similar effect to a physical

obstruction, and will force GHBs to find an alternative route that will at least add to the bats' energy burden and may ultimately threaten the viability of a colony and/or lead to fragmentation of GHB population and isolation from key foraging areas and roosts.

6. As to foraging areas, most feeding is concentrated within 4km of the roost – less for juveniles. The most important types of habitat for feeding are permanent pasture, hay meadows, woodlands and wetland features such as stream lines. In respect of the South Hams SAC, in the 2010 Guidance Natural England identified important strategic flyways, wide enough at 500m to offer several pathways and to provide alternative routes to accommodate variance in the weather (e.g. GHBs prefer to travel on the lee side of a hedgerow in windy conditions).

7. The Claimant is concerned that the proposed development will interfere with vital GHB flyways and foraging areas.

8. In this claim, the Claimant challenged the grant of planning permission on several grounds. On 23 December 2014, Jay J refused permission to proceed on all of the original grounds. On 12 February 2015, Patterson J allowed the Claimant to amend its grounds; and the Claimant duly amended its claim to rely upon five grounds, as follows.

Ground 1: The Habitats Directive and Habitats Regulations restrict planning permission for development likely significantly to affect an SAC. It is submitted that the Council failed properly to determine whether the proposed development would or would not adversely affect the integrity of the SAC, and thus failed to comply with the Directive and Regulations.

Ground 2: Contrary to regulation 61(3) of the Habitats Regulations, the Council failed to specify or allow a reasonable time for the responses of Natural England to the application for planning permission.

Ground 3: Contrary to regulation 61(4) of the Habitats Regulations, the Council failed to consider the appropriateness or otherwise of consulting the general public on the Habitats Directive Appropriate Assessment, and in particular consulting the Claimant on the GHB mitigation measures proposed.

Ground 4: Contrary to the European Council Directive 2011/92/EU ("the EIA Directive"), as implemented in the United Kingdom by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011 No 1824) ("the EIA Regulations"), the Council failed to undertake and publish an EIA screening opinion prior to granting planning permission.

Ground 5: Contrary to the Teignbridge Local Plan 2013-33, prior to granting planning permission, the Council failed to require a Strategic GHB Mitigation Plan and/or a Chudleigh settlement-wide bespoke GHB mitigation plan.

9. On 15 April 2014, on the papers, Patterson J granted permission on Ground 4, ordered a rolled-up hearing on Grounds 1 and 5, and refused permission in respect of Grounds 2 and 3. The Claimant has renewed its application in respect of Ground 3, but not Ground 2. Ground 3 was fully argued before me, on a rolled-up basis. I therefore have before me, in effect, the substantive application in respect of Ground 4, and an application to proceed on each of Grounds 1, 3 and 5 on a rolled-up basis.

10. At the hearing, Jenny Wigley appeared for the Claimant, and Michael Bedford for the Council; and I thank them at the outset for their respective contributions.

The Habitats Directive and the Habitats Regulations

11. Article 1 of the Habitats Directive provides, so far as material to this claim:

> "(e) 'conservation status of a natural habitat' means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species….
>
> …
>
> (i) 'conservation status of a species' means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations….
>
> The 'conservation status' will be taken as 'favourable' when:
>
> - population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
>
> - the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
>
> - there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.
>
> …
>
> (l) 'special area of conservation' means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated."

12. Article 6 provides, again so far as is material:

"2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted…".

13. The Habitats Regulations give effect to the Habitats Directive in domestic law. It is not suggested that the implementation is other than full and effective. All projects are made subject to the provisions of the Directive by regulation 61:

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

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

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

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

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

assessment is required.

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

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

(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.

(7) …".

By regulation 9(3) of the Habitats Regulations, in exercising any of its functions, a competent authority must have regard to the requirements of the Directive.

14. Therefore, under the Habitats Directive and Habitats Regulations:

i) Where plans and project might possibly have "likely significant effect" on an SAC, the competent authority must make an "appropriate assessment" ("AA") of the implications of the plan or project for the site in view of the objectives of the SAC.

ii) In making an AA, the competent authority must consult with "the appropriate nature conservation body"; and must also, if it considers it appropriate, "take the opinion of the general public".

iii) The competent authority may agree to the plan or project if, and only if, in the light of that AA, it "ascertains" or concludes that it will not adversely affect the integrity of the SAC (or if there is an overriding public interest in the plan or project proceeding, not in play in this case). These provisions are therefore focused on outcome: they primarily concern, not procedure, but the substance of whether the plan or project adversely affects the integrity of the SAC. The plan or project must be rejected if, on the available evidence, significant adverse effects on the objectives of the SAC cannot be ruled out beyond reasonable scientific doubt, including where an assessment lacks complete, precise and

definitive findings and conclusions capable of removing all such doubt (Peter Sweetman, Ireland Attorney General, Minister for the Environment, Heritage and Local Government v An Bord Pleanála (2013) Case C-258/11 and European Commission v Kingdom of Spain (2011) Case C-404/09).

15. Under the Habitats Regulations:

i) "competent authority" for these purposes includes a local planning authority, such as the Council (regulation 7);

ii) the "appropriate nature conservation body" in England is Natural England (regulation 5(1)); and

iii) the GHB is a European protected species of animal (regulation 40 and schedule 2).

The EIA Directive and the EIA Regulations

16. The EIA Directive (implemented in England, again fully and effectively, through the EIA Regulations) is designed to ensure that developments which may have a significant effect on the wider environment ("EIA developments") are subject to enhanced consultation and assessment of that effect, including the collection and assessment of "environmental information" on the environmental effects of the project (including required information from the applicant in the form of an environmental statement).

17. Some proposed developments, by their nature, attract the enhanced procedural requirements in any event ("Schedule 1 developments"). Others may attract those enhancements because they are likely to have significant effect on the environment by virtue of factors such as their nature, size or location ("Schedule 2 developments"), "likely to have" in this context connoting simply a "serious possibility" (R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157). That necessitates initial screening by the planning authority to assess whether a particular Schedule 2 development may have such effect.

18. Where a developer considers that a proposed development may be an EIA development, he is able to ask the authority for a "screening opinion" (regulation 5(1) of the EIA Regulations), i.e. "a written statement of the opinion of the relevant planning authority as to whether development is EIA development" (regulation 2(1)). An authority is required to adopt a screening opinion within three weeks of a request or such longer period as agreed in writing by the person making the request (regulation 5(5)). Where it appears to an authority that a planning application which has not been accompanied by an environmental statement is for an EIA development, then it is required to adopt a screening opinion within three weeks from the date of the application (regulation 7). Where an authority fails to adopt a screening opinion in that time, then the person requesting the opinion may request the Secretary of State to make a screening direction

as to whether the development is an EIA development.

19. These provisions are aimed at ensuring properly informed decisions are made on the basis of an environmental statement from the applicant and in appropriate cases, importantly, further information from the public gathered as a result of the publicity requirements in the EIA Directive. Article 6(1) of the Directive requires Member States to ensure that authorities with specific environmental responsibilities are given an opportunity to express their opinion on the environmental information supplied; and article 6(2) and (3) requires the public to be informed by appropriate means "early in the environmental decision-making procedures" about a variety of matters relating to the decision-making process, including the fact that the project is subject to EIA (paragraph (a)), an indication of the availability of the environmental statement (paragraph (e)) and details of arrangements for public participation (paragraph (g)). Article 6(4) and (5) provide:

> "The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in article 2(2) [which deals with EIAs] and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.
>
> The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of public enquiry) shall be determined by the Member State."

20. Consequently, the purpose of the Directive is described in the speech of Lord Hoffmann in Berkeley v Secretary of State for the Environment [2001] 2 AC 603 ("Berkeley") at page 615, thus:

> "The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure described by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues."

As Lord Hoffmann went on to emphasise, these provisions are therefore essentially of a procedural nature: they enable the citizen to have and to exercise a right to be heard. They do not determine outcome.

21. These Directive publicity obligations are now transposed into domestic English law by Parts 5 and 6 of the EIA Regulations. Regulations 16-19 require publicity for the environmental statement and other environmental information. Regulation 23 requires screening and scoping opinions (including any reasons), and the environmental

statement and other environmental information, to be placed on Part 1 of the planning register. Regulation 24 requires the decision-maker to publicise the final decision by reasonable means, but including making available for public inspection the content of the decision, main reasons and a description of any mitigating measures to offset the major adverse effects of the development.

The Local Plan

22. In respect of the Site, the relevant local plan is the Teignbridge Local Plan 2013-33 ("the Local Plan"). It was submitted for examination in June 2013, the examination hearings taking place in September 2013. Suggested modifications resulted in further consultation. The inspector's report was published on 9 April 2014, recommending twelve main modifications. The Council adopted the Local Plan, with those changes, on 6 May 2014.

23. Policy CH1 set out the strategic policy for "Land at Rocklands", i.e. the Site. It proposed delivery of "up to 175 homes with a target of 30% affordable homes", and "1.5 hectares of high quality employment land with primarily a mix of A2 and B1 uses, capable of providing 300 jobs, prior to the occupation of the 75th dwelling". The restriction on the number of homes was a result of perceived limitations on the available sewerage system.

24. Because of the cumulative effect of the various proposals for sites in and around Chudleigh, during the consultation process, the Claimant objected to this policy unless it was made subject to a 3 to 5 year study on GHB foraging requirements and that study concluded that the policy proposal was acceptable (letter from Peter Burgess (the Claimant's Conservation Manager) to the Council dated 18 December 2012). Natural England advised that a bespoke mitigation plan at settlement-level would provide a clear policy basis for developers to bring forward proposals (email to the Council dated 6 May 2014).

25. In the adopted Local Plan, Policy EN10 concerned "European Wildlife Sites", including the South Hams SAC. It said that an AA had been undertaken on the policies within the Local Plan to ensure there would not be any adverse impact on any such site; and, additionally, it emphasised that it is a requirement under the Habitats Regulations "that any development proposals which may impact on a European Site are subject to further assessment in order to avoid harm to those sites". Paragraph 5.29 of the accompanying text said this:

> "… The Council in collaboration with the other planning authorities with responsibilities for the South Hams SAC, will prepare and publish, as a supplementary planning document ('SPD'), a [GHB] Mitigation Strategy. This will eventually replace the [2010 Guidance]. The proposed Mitigation Strategy SPD will identify the requirements for and provision of measures necessary to mitigate the likely effects of all types of developments (both alone and in combination with other projects) in all areas where there could be adverse effect on the integrity of

> the South Hams SAC. Bespoke litigation plans will be produced at the settlement-level for Chudleigh… to provide a clear policy basis for developers who bring forward development in these locations, in order to ensure the South Hams SAC is protected with respect to in-combination impacts from development proposed in the Plan."

26. The adopted Policy CH1 provided for housing and employment on the Site, as I have already described. It said, as additional policy requirements:

> "(e) protection and positive enhancement of biodiversity habitats, including the identified [GHB] flyways;
>
> …
>
> (g) a bespoke [GHB] mitigation plan for Land at Rocklands must be submitted to and approved before planning permission will be granted.
>
> The plan must demonstrate how the site will be developed in order to sustain an adequate area of non-developed land as a functional part of the foraging area within the SAC sustenance zone and as part of a strategic flyway used by commuting [GHBs] associated with the South Hams SAC. The plan must demonstrate that there will be no adverse effect of the SAC alone or in combination with other plans or projects."

27. Abbotskerswell Parish Council, supported by evidence from the Claimant, applied to this court to quash the Local Plan on the basis that it had been adopted in breach of the Habitats Directive and Regulations, in that it failed to ensure strategic level protection for the South Hams SAC.

28. Lang J refused the application ([2014] EWHC 4166 (Admin)). She emphasised that, as recommended by the AA and approved by Natural England, the Local Plan provided for mandatory site-specific bespoke mitigation plans to be approved before planning permission is granted (see [72]-[75]). In respect of the last sentence in paragraph 5.29 and settlement-level mitigation plans, she said this (at [77]):

> "Neither Natural England nor the Council considered it was necessary for this provision to be incorporated into the policies (as opposed to the accompanying text) nor that the settlement plans had to be completed before the Local Plan could be adopted. Natural England recommended that the settlement plans needed to be in place before any development took place whereas the Council did not commit to this. These were judgments for the Council to make; in my view, they do not render the Local Plan unlawful. In this context, it is significant that the [AA] did not recommend settlement plans, in addition to site-specific bespoke mitigation plans. The Council was justified in concluding that, pending completion of the settlement plans, the mandatory

> obligation to approve a bespoke GHB mitigation plan for each site, which would have to be compliant with the general GHB policies, including consideration of 'in-combination' effects of other development, would meet the requirements of the Habitats Directive and Regulations."

She said (at [80]) that the GHB Mitigation Strategy was clearly intended to be a SPD to be published after the Local Plan, "eventually" to replace the 2010 Guidance; in the meantime, the 2010 Guidance was to remain in place.

29. Natural England did not consider that the further detailed long-term study of GHB foraging requirements – proposed by the Claimant – was necessary; nor, on the basis of the evidence before her, did Lang J. Overall, she concluded that (at [81]):

> "In my judgment, the Council's approach was a legitimate exercise of judgment by the Council which was not unlawful. Importantly, it was approved by Natural England, the statutory consultee."

30. No application for permission to appeal was made to Lang J; but such an application was made to the Court of Appeal and refused both on the papers and, after renewal, at an oral hearing ([2015] EWCA Civ 608). In the latter, in dealing with this point, Underhill LJ said (at [9]-[11]):

> "9. … It is necessary to consider separately the settlement-level plans and the landscape mitigation strategy.
>
> 10. So far as the settlement-level plans are concerned, the absence of a specific requirement in the Plan that these should be completed before any planning application is determined does not compromise the protection of the site. It remains a requirement of the grant of planning permission that the developer can demonstrate that there will be no adverse effect on the site either as a result of his own development or (importantly) 'in combination with other plans or projects'…. If he is unable to do so because that is impossible without a settlement-level plan of the type recommended in the supplementary report, then permission must be refused.
>
> 11. As for the landscape-level strategy, it is clear that the assessment itself did not anticipate that it would be in place before any permission could be granted in accordance with the allocations in the Plan...".

The Planning Application

31. The Developer first contacted the Council about the possible development for the Site in 2008. There followed substantial pre-application discussions between the Developer, the Council and Natural England, about the need to protect the SAC. During these, the

Council was represented in the main by Ian Perry (a Principal Planning Officer) sometimes accompanied by his line manager Nick Davies (the Council's Business Manager – Strategic Place Service (Development Management Section)); and Stephen Carroll (one of its Biodiversity Officers). The meetings included on-site meetings, at which there were discussions about (e.g.) key GHB flyways.

32. The Developer submitted an outline planning permission application on 11 April 2013. The number of dwellings was "up to 230", on the basis that the Developer considered that it could overcome the limitations of the sewerage system. The Council publicised the application on its website, and in the local press. Furthermore, relevant consultees were identified. These included Natural England (a statutory consultee), but not the Claimant. The Council retained an ecological consultancy (Kestrel Consultants), who had advised the Council and other relevant local authorities on the implementation of the South Hams SAC Planning Guidance, to advise on the application. Mr Perry, under the supervision of Mr Davies, was the planning case officer. Mr Carroll was responsible for the ecology aspects of the application.

33. As part of the application process, the Council was of course required to consider whether the Habitats Regulations and/or the EIA Regulations applied to the proposal; and, if so, what was required to be done to satisfy the Council's regulatory obligations.

34. On 23 April 2013, Mr Perry screened the proposed development under the EIA Regulations. He concluded that the Schedule 2 threshold criteria were met. In respect of whether the proposal was likely to have significant effect on the environment, he completed a checklist of characteristics. Two are of particular note.

i) By the side heading "Absorption capacity of the natural environment", it was noted that the site lies close to the South Hams SAC and the ecological information provided with the application would need full consideration. In respect of likely significant effect, he concluded:

> "Possible – The impact upon the [SAC] is not likely to be through intrusion by new occupiers but rather the impact of the development upon commuting routes and foraging opportunities for the [GHBs]. On site GI is shown on the indicative plan and discussions have suggested alternative off-site mitigation land may be available. Discussions have taken place pre-application in respect of using the site as a possible candidate for Biodiversity Offsetting."

ii) By the side heading "Cumulation with other development", he said:

> "There is an argument that you could look at the developed site at Oldway (built out by David Wilson Homes) and the development of Coburg Fields which has received a resolution to grant permission for 47 dwellings.
>
> However, both of these sites have been considered in terms

> of their impact upon the SAC and the mitigation provided by David Wilson Homes and the scheme proposed by Bovis are not impacted upon by this development which would allow for the mitigation to remain as already approved.
>
> Furthermore the application will go through its own Assessment of Likely Significant Effect and [AA] under the Habitats Regulations. It will be necessary to consider the provision of mitigation following these processes."

He concluded that the proposals would not result in any significant cumulative effect; and "it may be possible through mitigation of the site specific issues to provide a net biodiversity gain".

35. In terms of whether an environmental statement from the Developer was required – because there was a likely significant effect – Mr Perry concluded:

> "Maybe? Sch 2 development but effects not clear at this stage – file to be reviewed at a later stage."

36. The focus thereafter turned to the Habitats Regulations and their requirements.

37. The Claimant responded to the planning application on 17 May 2013, by way of a letter from Mr Burgess. It referred to the requirements of the Habitats Directive, but did not suggest that the application was or might be an EIA development. It objected to the application on the same basis as it had objected to Policy CH1 in the Local Plan (not yet then, of course, adopted), as follows:

> "A major consideration is, therefore, whether the mitigation measures put forward by the [Developer] will ensure that the bat population is maintained at a favourable conservation status.
>
> According to Natural England [European Protected Species: Mitigation Licensing: How to get a Licence (December 2012)], conservation status is assessed as favourable when –
>
> - the species is maintaining itself on a long-term basis as a viable component of its natural habitats
> - the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future
> - there is, or will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.
>
> We have previously submitted comments [on draft Policy CH1 of the Local Plan]. [The Claimant] has objected to the allocation of this site for development unless there is a long term detailed study (3 to 5 years) on GHB foraging requirements and that study concludes that the allocation is acceptable. This is due to the

> cumulative effect of the proposals that could result in unacceptable impacts on GHB populations.
>
> We consider that the planning application, now submitted, together with the mitigation measures proposed, will similarly be unacceptable. We do not believe that the mitigation measures put forward by the [Developer] will ensure that the bat population is maintained at a favourable conservation status, as defined above. In fact, GHB populations are only considered to be at a level that can persist long term in the environment when numbers exceed 500. Long term population viability is significantly linked to survival rates of juvenile bats. Such bats are reliant on foraging habitat within a 1km radius of the maternity roost. The nearby sustenance zones and flyways urgently need protection rather than further encroachment by development.
>
> As such, [the Claimant] objects to this proposed development on the grounds that any encroachment within such close proximity to the roost will have a negative impact on the future viability of this population."

38. In the meantime, Mr Carroll prepared a draft screening document under the Habitats Regulations in respect of the likely significant effect on the SAC, which was sent to Natural England for comment. In the draft, there was a lengthy section on "in-combination impacts"; and the document concluded that the proposal would have a likely significant impact "alone on the [GHB] interest associated with the South Hams SAC and in combination with the following plans and projects…". There were then set out two specific projects (at the Land off Oldway and Coburg Fields sites), as well as the Local Plan allocations and the Chudleigh Community Masterplan 2011, which would be (it said) affected through a number of identified ways, including:

> "Cumulative impacts on local SAC bat features in-combination with recent developments on adjacent and near-by sites….
>
> In-combination impacts, on mitigation features secured for previous development adjacent to the application site, and with other development allocations in and around Chudleigh, and in the wider South Hams SAC area."

39. On 11 December 2013, Natural England responded. They returned a version with suggested changes tracked. Notes were placed on the draft that a number of the matters listed as "in-combination impacts" were not in fact in-combination; and, by the conclusion, there is a note:

> "It is not possible to determine that impacts are alone and in-combination. If there are impacts alone, the [AA] needs to look at alone as a starting point. If there are residual impacts (after mitigation measures have been incorporated), these can be looked at in-combination as part of the AA."

The references to in-combination impacts in the conclusion were track deleted.

40. In the covering email dated 11 December 2013, Julian Sclater (the Natural England Land Use Team Legal Adviser) added this:

> "Thank you for your consultation. I attach tracked comments version of the draft HRA you provided for comment.
>
> At this point, I would advise that the proposals are *likely to have a significant effect <u>alone</u>* on the [GHB] interest associated with the South Hams SAC. Further, on the basis of the information that has been submitted, the proposals are likely to have an adverse effect upon the integrity of the South Hams SAC. I will further expand on this aspect in letter to you and Ian Perry that I intend to send by end of tomorrow." (all emphasis in the original).

41. As a result of the changes suggested by Natural England, the conclusion to the Habitats Regulations screening document (dated November 2013, but apparently signed off by Mr Carroll in December 2013) was changed to read, finally, as follows:

> "[The Council] concludes that this proposal will have
>
> **A Likely Significant Effect** – alone on the [GHB] interest associated with the South Hams SAC.
>
> through
>
> 1. On-site impacts on identified key hedge flyways, directly on hedges and through added constrictions of flyways forming pinch points. No scope to provide contingency alternative flyway features in case existing flyways fail.
>
> 2. Indirect impacts on local SAC bat features associated with recent developments on adjacent and nearby sites; introduction of new impacts on mitigation land and features required and provided as mitigation for those recent developments' in-fill development of land which currently provides only remaining undeveloped commuting route connections to foraging grounds to the north from the roost site.
>
> 3. Permanent loss of undeveloped grassland in the 4km sustenance zone, in extremely close proximity to the SAC bat roost site, situated in a central, and so significantly and potentially important foraging location component (within 1km juvenile flight range zone) within the roost sustenance zone."

The substantive part of Natural England's email of 11 December was set out in this document as its comment on screening for likely significant effect.

42. In line with his email of the previous day, Mr Sclater wrote to the Council on 12

December 2013, formally objecting to the proposal and setting out the following concerns:

i) The lack of detail, definition and certainty in respect of the impacts and potential mitigation.

ii) The pressure that the increase in dwelling from a maximum of 175 to a maximum of 230 would place on on-site mitigation measures.

iii) The creation of pinch-points and loss of foraging capacity.

iv) The failure to assess the potential impacts on the mitigation land put forward as part of the Land off Oldway development.

43. The Council continued to meet Natural England during the course of the application, with a view to allaying Natural England's expressed concerns with regard to biodiversity issues. Given the conclusion of the screening exercise, the Council also proceeded to prepare an AA under the Habitats Regulations. On 4 September 2014, the draft AA (version 13), which referenced 51 relevant supporting surveys reports and other documents, was sent by the Council to Natural England for its comments. On 9 October, Natural England requested the full AA be put onto the Council's website, although it was not put onto the website until after planning permission had been granted.

44. Natural England was a Habitats Regulations statutory consultee. The Claimant was not. In paragraphs 18-19 of his statement dated 21 May 2015, Mr Davies explains why the Claimant, as part of the public, was not given access to the AA or asked for comments on it:

> "18. … I was aware that the public had already been consulted on the planning application itself as part of the normal planning consultation processes, and that the public (including the Claimant) had expressed views on the application, and these views were included in the assessment in the Committee Report. I accept that once I had the completed [AA] available to me I did not expressly or in a formal decision-making sense go through a distinct process of considering the appropriateness of consulting the general public about it contents. I was aware that on 9 October 2014 Natural England had requested… that the full "Habitats Regulations assessment" should be placed on the Council's website to allow 'third parties' to view the document, and I had decided that this would not be done until after all of the documentation was complete and the planning permission had been issued. The implication of this was that I did not consider it was necessary to seek any views from 'third parties' as part of the decision-making process. There was nothing in the [AA] or in the proposed mitigation measures to cause me to consider that this was a case where it was appropriate to seek the opinion of the

general public on those matters.

> 19. However in retrospect I can say that I would not have felt it necessary to obtain the public's views on the [AA] in order to conclude that the development would not adversely affect the integrity of the SAC. I say this because I already had the advice of my Biodiversity Officer [i.e. Mr Carroll] and Natural England, so would not have felt it necessary to seek the opinion of the public on what was a specialised area of technical expertise. If the expert opinions available to me were inconclusive I may have considered it appropriate to seek additional advice; however the conclusions of my Biodiversity Officer and Natural England were unequivocal."

45. The AA summarised the "key questions" in paragraph 11 of Section 2. These included under the heading "Indirect impacts":

> "Impacts on flyways and sustenance zone foraging area within the Chudleigh sustenance zone in combination with other allocated developments in the Local Plan, plus any individual applications."
>
> "Impacts on previous mitigation land (two x dedicated 'bat fields') secured as part of HRA for previous development Land off Oldway: development now encloses these fields which formerly were at the edge of the Chudleigh settlement in open countryside; lighting impacts enclosing bat fields from east, south and west sides; additional recreational use of the two bat fields by residents of the new houses in addition to the original Land off Oldway residents; further increased by proposed increase of 55 units/31% scale."

Paragraph 13.6 was to similar effect.

46. The final conclusion of the AA was:

> "The [AA] conclusion is that with the mitigation measures referred to above (under 13. Mitigation measures discussion, and 14. Planning conditions/legal agreements required) in place, with the addition of further measures proposed by the planning authority, it can be ascertained that the plan or project **will not** adversely affect the integrity of the European site at outline stage." (emphasis in the original).

47. With regard to the "Planning conditions/legal agreements" in paragraph 14, these were expressly subject to the following caveat: "Final wording to be formulated by [the Council] planning officers with Natural England".

48. On 17 September 2014, an addendum to the AA was sent to Natural England, with

further information relating to mitigation measures coming mainly from the Developer.

49. Progress was made – but no final resolution reached – by 23 September 2014, when the Council's Planning Committee considered the application. Mr Perry (in paragraph 14 of his statement of 21 May 2015) explains why he was anxious that the application should be considered at that September 2013 meeting:

> "The reasons for reporting the application to the Planning Committee when the biodiversity issue was still outstanding were that it had been agreed between [the Developer] and Council Officers that the scheme was viable with 20% Affordable Housing. Had the application not been considered at the Planning Committee on 23 September 2014 then the application would have had to have been considered at the 21 October 2014 at the earliest. As the Council was to implement the Community Infrastructure Levy (CIL) on the 13 October 2014 it was agreed between [the Developer] and Council Officers that the scheme would be unable to deliver a significant Affordable Housing contribution under a CIL charging regime; Committee Members were advised of this issue during the Committee hearing by Nick Davies, the Council's Business Manager – Strategic Place (my line manager). Accordingly, to provide the best prospect of being able to achieve the maximum level of affordable housing, it was decided that the application should be reported to members before the CIL regime was introduced with a recommendation that officers be authorised to grant planning permission but once the ecological issues had been satisfactorily resolved. This would provide an opportunity for the ecological issues to be finally resolved in the period between the Committee meeting on 23 September 2014 and the introduction of CIL on 13 October 2014. Obviously, there was no guarantee that there would be a successful outcome to this process before CIL took effect but from the indications I had received about the progress being made on the ecological issues, there seemed to be at least a reasonable chance that this would be possible…".

50. On 29 August 2014, through Mr Davies, Mr Perry submitted a report for the Planning Committee meeting. He was of course aware that the mitigating measures for the purposes of the Habitats Regulations AA had not yet been agreed with Natural England. That was made clear in his report. However, he also said:

> "The process is close to completion with a bespoke mitigation strategy being one of the elements which would be agreed with Natural England when they sign off the Assessment."

51. With regard to the EIA Regulations requirements, Mr Perry said this in paragraph 20 of his statement of 21 May 2015:

> "… I considered that the development did not require an Environmental Statement because the impacts upon the SAC

were able to be effectively dealt with through the [AA] process.

I was therefore confident that matters were moving to a conclusion and that since no planning permission would be granted unless the [AA] was concluded to Natural England's satisfaction, I did not consider there would be any risk to the SAC. Since it was only the SAC which in my view had the potential to give rise to environmental issues that would justify requiring EIA, and this was going to be addressed through the [AA], I formed the opinion that there was no need for EIA to be undertaken. I did not, however, complete an updated screening form to record my updated assessment that there was no need for EIA until the decision had been issued. I did not at that stage re-read the screening opinion and I had forgotten that it was inconclusive. Whilst this might seem surprising, it has to be understood that I was not at that time dealing with the application and was immersed in what was by then my current caseload. I would accept that I am not always the most organised of people and do not recall everything that perhaps I should…".

I accept that frank evidence.

52. Natural England was still maintaining its objection to the proposal. On 22 September 2014 – the day before the Planning Committee meeting – Mr Sclater wrote to Mr Perry reiterating the objection, and saying that, contrary to Mr Perry's report for the meeting, Natural England had not had an opportunity to comment on the bespoke mitigation strategy and was not responsible for signing off the AA which was the Council's responsibility. It indicated that, in Natural England's view, conditioning an AA did not conform to the requirement on the Council under regulation 61 of the Habitats Regulations to assess the implications of the proposal for the SAC before permitting the development to take place. The letter specifically requested that Natural England's letter, together with its consultation response of 12 December 2013, be provided to the Planning Committee for the meeting. That request was repeated in Mr Sclater's covering email.

53. However, those documents were not provided to the Committee. The Officer's Report (drafted by Mr Perry, but presented by Mr Davies) simply said this:

"3.25 Extensive discussions have taken place between the applicant, Natural England and the [Council] both at the pre-application stage and since submission of the application. The process is close to completion with a bespoke mitigation strategy being one of the elements which would be agreed by Natural England when they sign off the [AA].

3.26 Members will be provided with a full update for the Committee in respect of all ecology matters but in the meantime the recommendation is subject to the [AA] being completed and agreed by Natural England."

54. At the meeting, the minutes record that Committee Members raised issues including:

> "[B]iodiversity objection; negative impact on the [GHB] raised by Natural England;… premature application when comments from Natural England are awaited; the proposal does not meet the requirements of CH1; is there a masterplan for this site; and what are the details of the [AA]?"

55. The minutes record Mr Perry's response to the meeting as follows:

> "… [The AA] is required to be satisfied and has been worked on for some six years; the bat survey alone has taken two years; the application would not be approved without the approval of Natural England; the proposal would also be subject to a reserved matters application; it is not prudent to discuss the [AA] with Members until it has been agreed by Natural England."

56. In the event, subject to the approval of the AA and agreement on biodiversity mitigation by Natural England, the application was approved by the meeting, by nine votes to seven with one abstention. The outstanding matters and thus the final decision on the outline application were delegated to officers – effectively, to Mr Davies.

57. After the event, on 30 September 2014, Natural England wrote to the Council expressing disappointment at how its consultation response had been represented in the Officers' Report for the Committee meeting. Mr Perry responded the same day by email, saying that he considered the report adequately set out the position: it made clear that Natural England had not approved the AA and there were ecology matters outstanding, and that was repeated at the meeting.

58. For the reasons Mr Perry gave, he was anxious to finalise agreement with Natural England on the outstanding biodiversity mitigation matters and grant the planning permission before 13 October 2014, if possible. On 8 and 9 October, Mr Sclater sent a further letter and email setting out the grounds of Natural England's continuing objections; and further correspondence ensued. The Council sent Natural England a very large amount of data over those few days.

59. On 10 October 2014, Natural England required some small changes to the AA, namely:

i) changing the flyway commuting corridor buffers from 10m to 15-20m; and

ii) clarifying and correcting the labelling of features on the mitigation map, to make them consistent with the AA.

60. Mr Davies agreed that the changes would be made (paragraph 16 of his statement of 21 May 2015). However, Mr Carroll was responsible for physically taking in those changes into the draft. He works part-time. 10 October 2014 was a Friday. His next working

day was Wednesday 15 October, when he took in those changes (see paragraphs 15-16 of his statement of 21 May 2015).

61. On the afternoon of 10 October, Natural England withdrew its objection, in a letter from Denise Ramsey (Natural England's Team Leader, Sustainable Development), in the following terms:

> "In principle the mitigation/avoidance measures proposed in the [AA] appear to be sufficient to protect the interest of South Hams SAC. These are the 28 measures listed in Section 14 of the [AA] (v13) to be attached to the decision notice, and identified in condition (22) of the decision notice, and include measures to address loss of foraging habitat, on-site hedgerow loss, key flyways, phasing, on-site mitigation areas, traffic and lighting, construction impacts, long-term habitat management and monitoring.
>
> Our advice is that there remain some risks to the deliverability of these measures and it appears to us that there is some inconsistency and duplication in the conditions, which may add to these risks. We have no means of assessing the certainty of delivery that these will provide within the timeframes in which you have requested a response. However, we recognise that there will be opportunities to tie these down through the s106 agreement and reserved matters.
>
> We have received a great deal of information only very recently. Yesterday we received the methodology for delivering mitigation measures, draft decision notice and from your ecologist the mitigation map. Today we received the masterplan, outline CEMP, outline LEMP, EcIA, and revised draft decision notice. As a matter of record it has not been possible to review the 15MB of other information referenced in the [AA] today.
>
> Thus in advising your authority on this application, we are strongly reliant on the planning officer's assurances as to deliverability and enforceability of the measures proposed in the [AA]. We have been assured by your planning officers that the s106 agreement will make certain the delivery of these measures. On this basis, with the amended mitigation plan attached to the [AA], and with reference to the draft decision notice version 3 received today and attached, we withdraw our objection and agree with your authority's conclusion of no adverse effect on integrity under the Habitats Regulations."

62. Condition 22 provided that no material operation could be undertaken under the permission – the works on the ground could not begin – without a section 106 agreement having been approved by the Council, to secure the ecological mitigation measures set out in the final version of the AA.

63. As, in his view, the requirements of the Planning Committee resolution of 23 September 2014 had been met, late on the afternoon of 10 October and under his delegated powers, Mr Davies granted outline planning permission in accordance with that resolution. It is, of course, that grant that the Claimant now challenges.

64. Two relevant events occurred after the grant.

65. First, on 9 December 2014, the Council's Solicitor asked Mr Perry for a copy of the EIA screening opinion. He initially provided the 23 April 2013 document, but was told that this was not acceptable as it was inconclusive. He therefore completed an updated screening opinion of 15 December 2014, which was generally in similar terms to that of 23 April 2013. However, the narrative by the side heading "Absorption capacity of the natural environment" under the cross-heading "Is this likely to result in a Significant effect? Yes/No – Mitigated?" was changed to the following:

> "Yes, but mitigated – The impact upon the [SAC] is not likely to be through intrusion by new occupiers but rather the impact of the development upon commuting routes and foraging opportunities for the [GHBs]. On site GI is shown on the indicative plan and discussions have suggested alternative off-site mitigation land may be available. Discussions have taken place pre-application in respect of using the site as a possible candidate for Biodiversity Offsetting. The application has been assessed under the Habitats Regulations and the [AA] has identified that suitable mitigation can be secured.
>
> This mitigation will be ensured via planning conditions and a planning obligation."

And, in terms of whether an environmental statement was required, the conclusion was changed to:

> "No. Sch 2 development – not likely to have significant effects on the environment. This conclusion supercedes the interim conclusion when the application was being processed and reflects the planning conditions and the requirement for a planning obligation that have been secured."

66. Mr Perry explains how this new screening opinion came about in his statement of 21 May 2015. Having been told that the 23 April 2013 opinion was unacceptable, he says:

> "22. I therefore completed an updated screening opinion on 15 December 2014 and passed to Nick Davies on 6 January 2015 for comment. This negative screening opinion was uploaded to the Council's website on 12 January 2015 and is dated accordingly. In compiling this screening opinion I was able to take into account the [AA] that had been completed in October 2014 and the planning conditions attached to the Outline Planning Permission, including condition (22) which required a planning

> obligation to be provided to secure the mitigation measures set out in the [AA].
>
> 23. I was satisfied when completing the negative screening opinion that the development, if carried out in accordance with conditions and in conjunction with the required mitigation, was not likely to have any significant effects on either the SAC or any other aspect of the wider environment. I was therefore able to conclude that it was not development that required to be assessed by EIA."

67. On 8 January 2015, the Claimant's solicitors wrote to the Council asking for a copy of the EIA screening opinion, which was not then on the Council's website. The solicitors sent a chasing letter, and the Council responded on 22 January 2015 explaining that a "preliminary screening opinion" had been issued on 23 April 2013, accepting that no proper screening opinion was issued before the grant of permission on 10 October 2014 and explaining that a "finalised screening opinion" had been issued on 12 January 2015, more or less in the circumstances described by Mr Perry in his statement.

68. Miss Wigley submitted that the 12 January 2015 EIA screening opinion was not only too late to meet the requirements of the EIA Directive and Regulations (and thus unlawful), it was also "plainly unreliable ex post facto justification, it having been drafted only following receipt of the letter from the Claimant's solicitors dated 8 January 2015 requesting a copy of the screening opinion" (paragraph 109 of her Skeleton Argument). However:

i) I accept Mr Perry's evidence as to what happened, and the timing of it: he had drafted the screening opinion before the 8 January 2015 letter was received (although I accept that receipt of that letter might have prompted his superiors to get on and post that opinion on the website).

ii) As indicated in paragraph 51 above, I accept Mr Perry's evidence that he had decided in late August 2013 that an EIA screening opinion would not be required because the issues – the only issues – that such an assessment would have to address would be addressed in the Habitats Regulations AA. That assessment (he considered) would determine whether the proposed development would or would not have likely significant effects on the SAC.

69. The second event was that, on 26 May 2015, a section 106 agreement was executed by the Council and the Developer. In respect of specific obligations, the key flyway corridors CR1 and CR2 are required to have a minimum buffer area width of 15m, in accordance with Natural England's requirements indicated in October 2014 (see paragraphs 59-60 above). Light levels against key mitigation features have to be limited to 0.5 lux. The mitigation measures are to be provided in perpetuity through a management scheme. The effectiveness of the mitigation measures has to be monitored within the development.

70. However, in addition to these specifics, there are also important overarching obligations in the agreement. Appendix 2 comprises the GHB Mitigation Summary, which sets out the requirements for the installation and management of mitigation measures as agreed by Natural England. Under paragraph 2 of the Third Schedule to this agreement, no reserved matters applications can be submitted until an updated Landscape and Ecology Management Plan ("LEMP"), in compliance with the GHB Mitigation Summary, has been submitted and approved by the Council and Natural England. All reserved matters applications are to be in accordance with the LEMP.

71. Mr Davies states that he is satisfied that the section 106 agreement secures all the measures required by condition 22 of the planning permission and all of those matters required by Natural England as a condition of the withdrawal of its objection to the proposal (paragraph 3 of his statement of 26 May 2015). As I understand it, that is uncontroversial.

The Grounds of Challenge

72. I now turn to the four remaining grounds of challenge.

Ground 1

73. Miss Wigley submitted that the Council failed to comply with the Habitats Directive and Regulations in that it failed properly to ascertain whether the proposed development would or would not adversely affect the integrity of the SAC. Patterson J directed that this ground be heard on a rolled-up basis. On this ground, I grant permission to proceed.

74. Under this umbrella, Miss Wigley developed somewhat diverse strands of argument, but focused on alleged inadequacies of the information given to the Planning Committee in the Officers' Report as supplemented by the officers' input at the September Committee meeting. The core complaint is that the Committee Members did not have sufficient information to make the decision that the Committee did make, namely to approve the application conditionally upon agreement between the Council and Natural England in respect of the AA including biodiversity mitigation measures, those outstanding matters being delegated to officers.

75. The law in relation to officers' reports is well-trodden. I recently considered it in R (TRASHorfield Limited) v Bristol City Council [2014] EWHC 757 (Admin) at [13], where I set out the following propositions.

i) A local authority planning committee acts on the basis of information provided to it, in practice by case officers primarily in the form of a report which usually also includes a recommendation as to how the application should be dealt with. In the absence of contrary evidence, it is a reasonable inference that, where a recommendation is adopted, members of the planning committee follow the reasoning of the report. The officers' report is therefore often a crucial document. It has to be sufficiently clear and full to enable councillors to understand the

important issues and the material considerations that bear upon them; and decide those issues within the limits of planning judgment that the law allows them. However, whilst the report must be sufficient for those purposes, the courts have stressed the need for reports to be concise and focused, and the dangers of reports being too long, elaborate or defensive:

> "… [T]he courts should not impose too high a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves." (R (Morge) v Hampshire County Council [2011] UKSC 2 at [36], per Baroness Hale).

> "The court should focus on the substance of a report by officers given in the present sort of context, to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotation of materials, which may have a tendency to undermine the willingness and ability of busy council members to read and digest them effectively." (R (Maxwell) v Wiltshire Council [2011] EWHC 1840 (Admin) at [43], per Sales J (as he then was)).

ii) The assessment of how much and what information should go into a report to enable it to perform its function is itself a matter for the officers, exercising their own expert judgment (R v Mendip District Council ex parte Fabre (2000) 80 P&CR 500 ("Fabre") at page 509)

iii) Of course, if the material included is insufficient to enable the planning committee to perform its function, or if it is misleading, the decision taken by the committee on the basis of a report may be challengeable. However:

> "[A]n application for judicial review based on criticisms of the planning officers' report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106106 ("Oxton Farms"), per Judge LJ).

iv) Furthermore, when challenged, officers' reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole (R (Zurich Assurance Limited trading as Threadneedle Property Investments) v North Lincolnshire Council

[2012] EWHC 3708 (Admin) at [15]).

v) In construing reports, it also has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge" (Fabre at page 509, per Sullivan J as he then was). That background knowledge includes "a working knowledge of the statutory test" for determination of a planning application (Oxton Farms, per Pill LJ). Furthermore, in deciding whether they have got sufficient information to make a properly informed decision or request further information or analysis, again that involves the exercise of judgment on the part of the Planning Committee Members. Given that their experience and expertise is coupled with the fact that they are democratically elected, the judicial approach to challenges to their decisions should be marked by particular prudence and caution (see Bishops Stortford Civic Federation v East Hertfordshire District Council [2014] EWHC 348 (Admin) at [40]-[41] per Cranston J).

76. Within Ground 1, I have grouped together the strands of argument under four heads.

77. First, Miss Wigley submitted that the Planning Committee was provided with inadequate and misleading information in the Officers' Report as supplemented by officers (Mr Davies and Mr Perry) at 23 September 2014 Committee meeting. Natural England's objections were not provided to the Committee, despite Natural England expressly requesting that they be provided and despite an assurance in the Officers' Report that "members will be provided with a full update… in respect of all ecology matters" at the meeting. Instead, submitted Miss Wigley, "the existence, extent and depth of Natural England's objections" were kept from the Committee. In the circumstances, the Committee decision conditionally to approve the application was flawed as it failed to take into account a material consideration, namely the consultation response of Natural England, despite the obligation to take all material considerations into account (Section 70(2) of the Town and Country Planning Act 1990) – but notably consultation responses (R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities [1986] 1 All ER 164) – and, indeed, to place substantial weight on the advice of statutory consultees (R (Shadwell Estates Limited v Breckland District Council [2013] EWHC 12 (Admin) at [72] per Beatson J (as he then was), and the authorities there referred to). Here, Miss Wigley submitted, Natural England had specifically advised that its objections should be provided to the Committee. That advice was ignored. Furthermore, the mitigation measures in the AA were never considered by the Committee, at the time of its resolution or at any time before permission was issued. Committee Members were simply told that it would not be "prudent" to discuss mitigation measures with them prior to those measures being agreed by Natural England. The Committee was thus not in a position to make a properly and lawfully informed decision as to (i) conditional approval of the application, or (ii) the delegation of matters for approval and grant to Mr Davies.

78. However:

i) Mr Bedford submitted that, insofar as the challenge is to the Committee's

decision to delegate the decision to grant permission to officers, that is free-standing decision. If the delegation was unlawful, any decision of Mr Davies on the planning application was inevitably unlawful and of no effect, the rights of the relevant parties in the application were not in issue after 23 September 2014: they were definitively determined by the unlawful decision to delegate (see Younger Homes (Northern) Limited v First Secretary of State [2003] EWHC 3058 at [84] per Ouseley J). The challenge is therefore not to the decision on planning permission, which it was in cases such as R (Burkett) v Hammersmith & Fulham London Borough Council [2002] UKHL 23 and R (Catt) v Brighton and Hove City Council [2007] EWCA 298 (where, due to alleged defects in the EIA process, the alleged unlawfulness was the grant of permission without adequate EIA which arose only when planning permission was granted). The challenge to the decision to delegate ought to have been made within six weeks of 23 September 2014. It is too late.

ii) Those submissions are compelling: but (i) Miss Wigley's Ground 1 was not restricted to a challenge to the decision to delegate, and (ii) in my judgment, the challenge to the decision to delegate fails on its merits. It is therefore neither necessary nor appropriate for me to refuse this ground on the basis of delay alone.

iii) The Planning Committee clearly had the power to delegate the discharge of its functions under the Habitats Regulations (including discharging those functions having regard to the views of Natural England). Article 8.7 of the Council's Constitution gives the Planning Committee power to "delegate functions to officers if it so chooses"; and, in the Planning Committee's own Delegation Scheme, all functions fall to be determined by officers, except for identified categories into which functions under the Habitats Regulations do not fall.

iv) It is true that the Planning Committee was not provided with the detailed objections made by Natural England, nor the detailed mitigation measures as they were proposed as at 23 September 2014. However, three things were clear from the Officers' Report as emphasised by Mr Perry at the meeting, namely:

a) The Committee had not been given, and did not have, the AA.

b) Natural England had not approved the mitigation measures proposed by the AA; it did not consider that, even with the mitigation measures then proposed, there would be no adverse effect on the integrity of the SAC; and it was objecting to the proposed development on that basis.

c) No planning permission would be granted unless and until appropriate mitigation measures had been approved by Natural England, i.e. it approved the AA on the basis that it was satisfied that, with the mitigation measures, there would be no adverse effect on the integrity of the SAC.

v) All of that was clear. Although of course more information could have been

provided, it was a matter for the officers (and, ultimately, the Committee Members themselves) to determine the information that was necessary and appropriate to put before the Committee – subject, of course, to the Committee Members having the power to call for more, if it considered that necessary. None made any such request. As Mr Bedford submitted, the information that was provided, which I have briefly set out, was, as a matter of law, an entirely adequate foundation upon which to make a decision to delegate the resolution of these issues to officers, on the basis that permission could not be granted unless Natural England withdrew its objection and confirmed that the mitigation measures in the AA (as were finally agreed by it) would mean the proposed development would not affect the integrity of the SAC.

vi) The biodiversity issues in relation to the SAC were highly technical and had occupied the Council's officers (notably, Mr Carroll) and Natural England for several years. Although a matter for the Committee, it is understandable that they were content to delegate the finalisation and agreement on those issues to the officers, subject to Natural England approval.

vii) Nor was the information provided to the Committee misleading: the Committee Members knew that Natural England did not approve the application (i.e. it was currently objecting to the proposed development on ecological grounds), and they knew that the mitigation measures within the AA had not been settled: they could have asked for more information on either or both, had they considered it necessary to enable them to make the decision which the Committee was required to make.

viii) There is nothing in the point that, at the time of the meeting (23 September 2014), Natural England requested and advised the Council's officers to provide the Committee Members with their objection letters. Whilst, of course, in relation to the matters in which it is expert, Natural England's opinion should properly be given particular weight, the determination of the material that the Committee required to enable it to determine the application was a matter for the Council Officers and (ultimately) for the Committee Members themselves. I accept that "prudent" was perhaps not the best word for Mr Perry to have used; but, clearly, he advised the Committee that, in the light of the technical nature of the issues, it was in his view unnecessary and possibly unwise for the Committee Members to immerse themselves in the relevant material. That was a planning judgement he was entitled to take. Of course, it was still open to the Committee Members to demand to be provided with the AA, the Natural England objection letters or any other documents, if they considered that necessary or appropriate. But none did so. They considered that they were able to make the decision on the material that they had. That too was a planning judgment that they were entitled to make.

79. Second, Miss Wigley submitted that Natural England was hurried into withdrawing its objection. That withdrawal "was not a considered response [to the AA] made on the basis of full information and reasonable time (as required by regulation 61(3) [of the Habitats Regulations]" (Miss Wigley's Skeleton Argument, paragraph 91), "full

information" of course including the large amount of information that had been sent to it very shortly before 10 October 2014. In the circumstances, she submitted that the Council in the form of Mr Davies was also wrong (i.e. Wednesbury unreasonable) to rely upon that withdrawal.

80. Of course, Natural England did not have a much time to consider the data that were sent to it; but this ground is essentially the Claimant's Ground 2, permission for which was refused by Patterson J on the papers, and which has not been renewed. In any event, this ground has no force. Natural England had been engaged with these issues for several years; it is the statutory consultee with a statutory role to ensure that SACs are properly protected; and the correspondence and other documents clearly display the conscientious manner in which it approached its obligations in this case. I do not accept the proposition that Natural England withdrew its opposition to this development – and confirmed that, in its view, with the mitigation measures finally proposed and agreed by it, the proposed development would not affect the integrity of the SAC – in anything other than a properly considered and lawful way. It is my firm view that Natural England would not have indicated that it was satisfied in relation to those matters unless it was fully satisfied: had it required further time to make its decision, it would have said so and taken that time. There is simply no evidence to suggest otherwise. Indeed, as I have already indicated, the evidence points strongly to Natural England taking its responsibilities in this matter very seriously.

81. The argument that the Council was legally irrational to rely on the withdrawal of its objection by Natural England is equally empty. The Council – in the form of its Planning Committee and/or Mr Davies to whom the final decision was delegated – cannot possibly be described as acting perversely in accepting the opinion of its own experienced Biodiversity Officer and Natural England. For the reasons I have given, the time constraints within which Natural England acted do not undermine the reliability or rationality of its opinion.

82. Third – but closely associated with the submissions with which I have just dealt – Miss Wigley submitted that the grant of planning permission subject to a condition which required the subsequent completion of a section 106 agreement to secure the mitigation was in breach of an obligation on the Council to secure mitigation "at the earliest opportunity". Natural England's withdrawal of its objection was heavily qualified, especially as to delivery; and leaving matters to be brought forward in a planning obligation was too late and too uncertain. Indeed, it was exactly the opposite of assessing and securing mitigation "at the earliest possible stage".

83. However, I accept Mr Bedford's submission: there was no such obligation on the Council to secure mitigation "at the earliest opportunity".

84. Miss Wigley relied upon the opinion of Advocate General Kokott in Commission v United Kingdom [2005] ECR I-9017; but, with respect, that does not support her contentions any more than it supported those of the claimant/appellant in the more helpful case of No Adastral New Town Limited v Suffolk Coastal District Council [2015] EWCA Civ 88. That case concerned a local plan, but the general principles are equally applicable here, in respect of a development project application. Richards LJ,

having considered Commission v United Kingdom, said (at [72]):

> "In my judgment, the important question in a case such as this is not whether mitigation measures were considered at the stage of [the Core Strategy] in as much as the available information permitted, but whether there was sufficient information at that stage to enable the Council to be duly satisfied that the proposed mitigation could be achieved in practice. The mitigation formed an integral part of the assessment that the allocation of 2,000 dwellings on Area 4 would have no adverse effect on the integrity of the [Special Protection Area]. The Council therefore needed to be satisfied as to the achievability of the mitigation in order to be satisfied that the proposed development would have no such adverse effect. As Sullivan J expressed the point in R (Hart District Council) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin) at [76], "the competent authority is required to consider whether the project, as a whole, including [mitigation] measures, if they are part of the project, is likely to have a significant effect on the [Special Protection Area]'."

85. Therefore, in a multi-stage process, so long as there is sufficient information at any particular stage to enable the authority to be satisfied that the proposed mitigation can be achieved in practice it is not necessary for all matters concerning mitigation to be fully resolved before a decision-maker is able to conclude that a development will satisfy the requirements of regulation 61 of the Habitats Regulations (see also Feeney v Secretary of State for Transport [2103] EWHC 1238 (Admin) at [43]-[47] and [56]).

86. Commission v UK was not concerned with the grant of development consent (such as a planning permission) but with the question of whether strategic plans (such as a local plan) had to themselves undergo appropriate assessment. The European Court held that strategic plans did need to be assessed as well as later development consent decisions, to ensure that the objectives of the Directive are not defeated by the pre-emption of later decisions. Although all of these cases are focused on the practicalities of ensuring that the Directive's objectives are met, the context of Commission v United Kingdom is therefore very different from the case before me.

87. The permission in this case is outline, and therefore is part of a multi-stage consent process. As at 23 September 2014, the Committee did have sufficient information to enable it to be satisfied that outline planning permission would not be granted under delegated powers unless and until the delegated officer was satisfied that the mitigation could be achieved in practice. As at 10 October 2014, Mr Davies (as the officer to whom the decision had been duly delegated) was so satisfied: he considered that he had sufficient information to enable him to be satisfied that the proposed mitigation could be achieved in practice (see paragraph 16 of his statement of 21 May 2015). Until all reserved matters applications were approved, the development could not begin on the ground; and there was thus no possibility of the SAC (or the objectives of the Habitats

Directive) being compromised by the outline decision made. Exercising their planning judgment, both the Committee and Mr Davies were entitled to come to those conclusions and decisions. Neither of those decisions in any way jeopardised later decisions which could (and, in practice, would) ensure that the integrity of the SCA was maintained. Of course, now, a section 106 agreement has been entered into ensuring the appropriate mitigation measures are performed.

88. Fourth, Miss Wigley submitted that the 10 October 2014 permission was flawed because it failed to include details of all the mitigation measures expressly requested and required by Natural England on 10 October (see paragraph 59 above), those amendments being incorporated on 15 October in a manner that could not retrospectively affect the permission as earlier granted. The permission as granted therefore lacked enforceable measures considered by Natural England to avoid adverse effects on the SAC, such as 15-20m flyway corridor buffers.

89. Mr Bedford referred to this as a "sterile point" (Skeleton Argument, paragraph 23). I agree: there is no force in this argument. As I have explained, the Habitats Directive and Regulations are concerned with outcome, rather than procedure; and regulation 61 does not set out any prescribed form for an AA or require it to be "written up" at any particular point in time. The substantive obligation of the decision-maker is to undertake the AA before giving approval to the project. In this case, that was done (see paragraph 60 above; and paragraphs 16-17 of Mr Davies' statement of 21 May 2015).

90. Fifth and finally, Miss Wigley submitted that measures required to address any increased management burdens on the two fields currently managed by the Claimant as a bat mitigation area were not included in the package of mitigation measures approved by Natural England and now put into effect.

91. However, Mr Bedford submitted that they were; and I agree, for the reasons he put forward. There can be no doubt that the two fields were well in the mind of both the Council and Natural England's (see, e.g., paragraphs 42 and 45 above). The requirements in the planning obligation incorporate the GHB Mitigation Areas Revised Summary and the Ecology Plan showing defined mitigation areas and measures, which must be included in the Updated Outline LEMP which itself must be approved by both the Council and Natural England. These matters are drawn widely enough to include any measures needed to address any increased management burdens on the land currently managed by the Claimant, should those burdens be found to be increased once the detailed submission is worked up. Therefore, there is a mechanism for resolving those matters too, before the consent process is completed, ensuring that there is no prospect of any development taking place which might have an adverse effect on the SAC.

92. It seems to me that those five heads include all of the main strands of Miss Wigley's submissions in respect of Ground 1. I have however considered carefully all of her submissions; and I do not consider any others have more force than those which I have specifically identified and dealt with above.

93. For the reasons I have given, having given permission to proceed, I do not consider that Ground 1, in any of its strands and formulations, is made good.

Ground 3

94. Miss Wigley submitted that, contrary to regulation 61(4) of the Habitats Regulations, the Council failed to consider the appropriateness or otherwise of consulting the Claimant on the AA, and in particular on the GHB mitigation measures proposed. There is no evidence that the Council considered the appropriateness of consulting the Claimant.

95. Patterson J refused permission to proceed on this ground. I too consider it is unarguable, on three bases.

96. First, I do not consider that, as a matter of construction, regulation 61(4), even if triggered, obliges an authority to consult with the public on – or give the public access to – an AA.

97. Regulation 61 is set out in paragraph 13 above. Regulation 61(3) imposes an obligation on a competent authority such as the Council to consult the appropriate nature conservation body – in this case, Natural England – "for the purposes of the assessment [i.e. the AA]". Regulation 61(4) imposes an additional obligation on such an authority – but only "if they consider it appropriate" – to "take the opinion of the general public".

98. Thus, it is clear that there is no statutory obligation to *consult* the general public, only an obligation to "take the opinion of the general public" if the authority considers it appropriate. In her skeleton argument (at paragraph 105), Miss Wigley suggested that there might have been a duty to consult the public – or, at least, the Claimant – arising outside the statutory scheme; but she did not pursue that argument in her oral submissions. She was right not to do so. There is no common law duty to consult (R (BAPIO Action Limited) v Secretary of State for the Home Department [2007] EWCA Civ 1139 at [43]-[47] per Sedley LJ, R (Plantagenet Alliance Limited) v Secretary of State for Justice and Others [2014] EWHC 1662 (Admin) at [83]-[98] per Hallett LJ and R (Moseley) v Haringey London Borough Council [2014] UKSC 56 at [23] and following per Lord Wilson JSC and, especially, the judgment of Lord Reed JSC at [34]-[41] with which Baroness Hale DPSC and Lord Clarke JSC expressly agreed at [44]); and there is nothing in this case to give rise to an obligation to consult arising out of the common law duty of fairness.

99. Mr Bedford submitted that, as a matter of construction, where the duty under regulation 61(4) is triggered, that does not in any event impose any obligation specifically to take the opinion of the public on the AA as opposed to the relevant plan or project. There is no prescribed form for an AA, the way in which an authority undertakes an AA being a matter for the relevant authority's own judgment. It is a broad discretion. He submitted that regulation 61(3) supported his submission: the obligation to consult the appropriate conservation body under regulation 61(3) is an obligation to consult "*for the purposes of* the assessment", not "*on* the assessment": thus, there is no requirement to consult on the AA itself, i.e. send out a draft AA to a statutory consultee for comment – although no

doubt, as in this case, an authority may consider that an appropriate, convenient and/or wise course. It would be incongruous if the obligation to take the public's opinion was, in this respect, wider. He submitted that article 6(3) of the Habitats Directive (quoted at paragraph 12 above) also supported his contention. It provides:

> "In the light of the conclusions of the assessment of the implications for the site…, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

That (he submitted) suggests that the opinion of the public has to be obtained, if appropriate, on the plan or project prior to approval, rather than on the AA.

100. Those submissions in relation to the construction of regulation 61(4) are very powerful, and went largely unanswered by Miss Wigley. Whilst I do not consider it is necessary to determine the question of construction for the purposes of determining this claim – because I consider that each of the other two bases of Mr Bedford's objection to this ground is made good – if I were required to decide the issue, I would do so in favour of Mr Bedford for the reasons he gave. Even where regulation 61(4) is triggered, there is in my judgment no obligation on the authority specifically to circulate the AA to the public (or any relevant part of the public) for its opinion. Whether it is appropriate to circulate the AA to the public is a matter of judgment for the relevant authority in the circumstances of a particular case.

101. Second, whilst Mr Davies accepts that he did not bring his mind to bear specifically upon the question of whether to seek the opinion of the Claimant as part of "the public", when he considered Natural England's 9 October 2014 request for the AA to be placed on the Council's website, he decided that, given that he had the expert views of his own Biodiversity Officer and Natural England, it was neither necessary nor appropriate to seek any views from the public on the AA or the proposed mitigation measures (see paragraph 44 above). Therefore, it is clear that, if he had considered the question earlier, he would have concluded that taking the opinion of the public on the AA would not have been necessary or appropriate. His failure to consider the matter earlier was therefore not material.

102. Third, any breach of regulation 61(4) was in any event immaterial. As I have described, the Habitats Directive and Regulations concern outcome, and not procedure. The Claimant's complaints about how the Council went about satisfying its obligations under the habitats regime are essentially procedural. The Claimant had the opportunity to comment on the project as proposed, and it gave a comprehensive response setting out the matters which it (as an informed member of the public) wished to make. Crucially, although the AA has been available to the Claimant for several months, it has not identified any factual or technical information concerning bat mitigation which it would or might have brought to the attention of the Council if it had had the opportunity to do so at an earlier stage, and certainly has not identified any such information which might have resulted in a different AA outcome.

103. For those reasons, I refuse permission to proceed in relation to Ground 3.

Ground 4

104. Miss Wigley submitted that, contrary to the EIA Directive and the EIA Regulations, the Council failed to undertake and publish an EIA screening opinion prior to granting planning permission. Under the EIA regime, the Council was required to produce a screening opinion within three weeks of the date of the application (see paragraph 18 above); and, if it had conducted a screening exercise at that stage, it could not properly have excluded the real possibility of this proposed development causing significant effects on the environment; and so this development (which satisfied the other criteria for a Schedule 2 development) would have been the subject of the enhanced consultation and assessment requirements of the EIA Directive and Regulations. The Council would have been required to obtain and publish, at an early stage, the environmental statement and other environmental information, including the AA and the AA addendum. By failing to comply with its EIA obligations, the Council had shut out the Claimant from engagement with that process – had denied the Claimant's right to be heard on the relevant issues – which is at the heart of the EIA regime (see paragraphs 16-21 above).

105. It is no answer (Miss Wigley submitted) to say that the issues of likely significant effect would be determined through the habitats regime: the Council could not avoid the EIA obligations of enhanced consultation and assessment by pointing to the fact that the relevant environmental information would be sufficiently available and considered as part of the habitats regime – because the very purpose of the EIA screening opinion is to determine whether the more rigorous consultation and assessment required by the EIA regime is in fact required.

106. In support of this submission, Miss Wigley relied upon R (Lebus) v South Cambridgeshire District Council [2002] EWHC 2009, which concerned a proposed egg production facility near to Mr Lebus's home. The planning authority did not seek an environmental statement, because it expected to obtain all relevant environmental information without formally requesting such a statement from the developer. Sullivan J (as he then was) held that this was a Schedule 2 development for which the authority had an obligation under the EIA Directive and Regulations to produce a screening opinion. It failed to do so. The authority had proceeded on the false premise that it is unnecessary to obtain a formal environmental statement if it is expected that the information that would be included would be received in any event. That proposition of Sullivan J focuses on the purpose of the EIA regime of engaging with the public, and giving them an opportunity to be heard in respect of the relevant environmental issues, as described by Lord Hoffmann in Berkeley (see paragraph 20 above).

107. However, in Sullivan J's view, there was another ground on which the authority erred. The statutory question – as to whether the proposed development would result in any significant adverse environmental impact – had been addressed on the basis that planning conditions would be imposed. Therefore, he said (at [41]):

> "The question was not asked whether the development as described in the application would have significant

> environmental effects, but rather whether the development as described in the application subject to certain mitigation measures would have significant environmental effects."

After referring to the judgment of Elias J (as he then was) in BT plc and Bloomsbury Land Investments v Gloucester City Council [2004] EWHC 1001 (Admin) and the requirement of the EIA Regulations that environmental statements must include a description of mitigation measures (now found paragraph 2 of Part 2 of Schedule 4), Sullivan J continued:

> "45. Whilst each case will no doubt turn upon its own particular facts, and whilst it may well be perfectly reasonable to envisage the operation of standard conditions and a reasonably managed development, the underlying purpose of the [EIA] Regulations in implementing the Directive is that the potentially significant impacts of a development are described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Thus the public is engaged in the process of assessing the efficacy of any mitigation measures.
>
> 46. It is not appropriate for a person charged with making a screening opinion to start from the premise that, although there may be significant impacts, these can be reduced to insignificance as a result of the implementation of conditions of various kinds. The appropriate course in such a case is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance.
>
> …
>
> 50. It must have been obvious that with a proposal of this kind there would need to be a number of non-standard planning conditions and enforceable obligations under section 106. It is precisely those sorts of controls which should have been identified in a publicly-accessible way in an environmental statement prepared under the [EIA] Regulations."

108. It is thus important that, at the outline planning permission stage, the authority considers whether the development might result in significant adverse effects on the environment; and does not leave that to a later stage. As Sullivan J explained in R v Rochdale Metropolitan Borough Council ex parte Tew [1999] 3 PLR 74 at page 97:

> "Once outline planning permission has been granted, the principle of the development is established. Even if significant adverse impacts are identified at the reserved matter stage, and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development

from proceeding."

109. Lebus has been relied on in a number of case to which Miss Wigley also referred, including R (Younger Homes (Northern) Limited v First Secretary of State [2003] EWHC 3058 (Admin) at [60] (Ouseley J), R (Cooperative Group Limited) v Northumberland County Council [2010] EWHC 373 (Admin) at [8] (His Honour Judge Pelling QC), and R (Plant) v Pembrokeshire County Council [2014] EWHC 1040 (Admin) at [49] (me); but those cases do not add substantively to Sullivan J's propositions.

110. In this case, as I have indicated, Miss Wigley submits that the failure of the Council to engage the proper EIA procedure resulted in real prejudice to the Claimant: if it had had available the environmental statement and other information that would have been available through that process, it would have had an opportunity to comment upon it and provide input into that process. It is not necessary for the Claimant to demonstrate that the decision may have been different had the Council complied with its EIA obligations (Gemeinde Altrip v Land Rheinland-Pfalz [2014] PTSR 311, R (Joicey) v Northumberland County Council [2014] EWHC 3656 (Admin) and Kendall v Rochford District Council [2014] EWHC 3866 (Admin)), and in any event (she submitted) it is by no means inevitable that the public participation that would have followed would have made no difference to the outcome, particularly given the Claimant's especial expertise in GHB, its management role in the affected adjacent land and its concerns about in-combination effects.

111. These submissions were powerful; but, having considered them with particular care, I am unpersuaded by them.

112. Let me deal with Lebus first. Lebus does not hold that, in considering whether a development may have significant adverse effects on the environment – thus requiring a publicised environmental statement – an authority must, as a matter of law, leave out of account measures to mitigate the potentially significant impacts of a development, that might form part of section 106 conditions. As Sullivan J indicated, each case will turn upon its own particular facts – that is clear (see, e.g., R (Catt) v Brighton & Hove City Council [2009] EWHC 1639 (Admin) at [18] per Sir Thayne Forbes).

113. Lebus has to be read through the prism of the later authorities. There are many. I will restrict myself to five.

114. First, in Bellway Urban Renewal Southern v Gillespie [2003] EWCA Civ 400 at [26], Pill LJ (with whom Arden LJ agreed) considered that whether an EIA was required or not could not turn on whether a proposed condition was "standard" or not. He continued (at [34]):

> "34. In his judgment in the present case, Richards J underlined, at paragraph 75, and in my view correctly underlined, Sullivan J's statement that each case will turn upon its own particular facts and that 'it may well be perfectly reasonable to envisage the

operation of standard conditions and a reasonably managed development'….

35. I also find persuasive the submissions on behalf of the Secretary of State to Richards J in the present case, though their relevance to the test actually applied by the Secretary of State will need to be considered. As summarised by the judge (paragraph 61), they were:

> 'On the information before him the Secretary of State was entitled to form the judgment that a development carried out in accordance with the stated remediation strategy was unlikely to give rise to significant effects. He was entitled to take the view that the outstanding details of the remediation works and the elements of uncertainty were not such as to affect the judgment or to create a likelihood of significant effects. In other words this was a case where the Secretary of State was reasonably satisfied that the boundary would not be crossed.'

...

37. The Secretary of State has to make a practical judgment as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature and complexity of such measures, will vary enormously but the Secretary of State is not as a matter of law required to ignore proposals for remedial measures included in the proposals before him when making his screening decision. In some cases the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of the proposed remedial measures, it would be likely to have such effects. His decision is not in my judgment pre-determined either by the complexity of the project or by whether remedial measures are controversial though in making the decision, the complexity of the project and of the proposed remedial measures may be important factors for consideration.

...

39. It follows that I do not accept the submission of Mr Wolfe, for the respondent, that proposed mitigating measures are to be ignored when a screening decision is made or his submission that the 'proposed development' for the purposes of regulation 2 is the proposal shorn of remedial measures incorporated into it. That would be to ignore the 'actual characteristics' of some projects. He is, however, correct in his submission that devising a condition which is capable of bringing

the development below the relevant threshold does not necessarily lead to a decision that an EIA is unnecessary. The test stated in [World Wildlife Fund v Autonome Provinz Bozen (1999) Case C-435/97] requires a fuller scrutiny of the likely effects of the development project.... All aspects of the development project must be considered; the relevant considerations may be different in a case where the central problem is the eventual effect of the development upon the environment and a case such as the present where the central problem arises from the current condition of the land.

…

41. When making the screening decision, these contingencies must be considered and it cannot be assumed that at each stage a favourable and satisfactory result will be achieved. There will be cases in which the uncertainties are such that, on the material available, a decision that a project is unlikely to have significant effects on the environment could not properly be reached."

115. Second, in R (Jones) v Mansfield District Council [2003] EWCA Civ 1408, Dyson LJ (as he then was) said (at [38]-[39]):

"38. ... It is clear that a planning authority cannot rely on conditions and undertakings as a surrogate for the EIA process. It cannot conclude that a development is unlikely to have significant effects on the environment simply because all such effects are likely to be eliminated by measures that will be carried out by the developer pursuant to conditions and/or undertakings. But the question whether a project is likely to have significant effect on the environment is one of degree which calls for the exercise of judgment. Thus, remedial measures contemplated by conditions and/or undertakings can be taken into account to a certain extent (see Gillespie). The effect on the environment must be 'significant'. Significance in this context is not a hard-edged concept: as I have said, the assessment of what is significant involves the exercise of judgment.

39. I accept that the authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment. But this does not mean that all uncertainties have to be resolved or that a decision that an EIA is not required can only be made after a detailed and comprehensive assessment has been made of every aspect of the matter. As the judge said, the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken.

> Everything depends on the circumstances of the individual case." (emphasis in the original).

116. Third, in R (Catt) v Brighton and Hove City Council [2007] EWCA Civ 298, Pill LJ said (at [33]-[34]):

> "33. … There will be cases,… where the uncertainties present, whether inherent or sought to be resolved by conditions, are such that their favourable implementation cannot be assumed when the screening opinion is formed.
>
> 34. On the other hand, there will be cases where the likely effectiveness of conditions or proposed remedial or ameliorative measures can be predicted with confidence. There may also be cases where the nature, size and location of the development are such that the likely effectiveness of such measures is not crucial to forming the opinion. It is not sufficient for a party to point to an uncertainty arising from the implementation of the development, or the need for a planning condition, and conclude that an EIA is necessarily required. An assessment, which almost inevitably involves a degree of prediction, is required as to the effect of the particular proposal on the environment, and a planning judgment made…".

117. Fourth, in R (Loader) v Secretary of State for Communities and Local Government [2012] EWCA Civ 869, Pill LJ said (at [43]):

> "What emerges is that the test to be applied is: 'Is this project likely to have significant effects on the environment?' That is clear from European and national authority, including the Commission Guidance at B3.4.1. The criteria to be applied are set out in the Regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case. The Commission Guidance recognises the value of national guidance and planning authorities have a degree of freedom in appraising whether or not a particular project must be made subject to an assessment. Only if there is a manifest error of assessment will the ECJ intervene: Commission v UK. The decision-maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision-maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision-maker."

118. Fifth, in Hargreaves v Secretary of State for Communities and Local Government [2012] EWCA Civ 241, in refusing permission to appeal, Longmore LJ (having referred to

Lebus) said (at [5]):

> "However, since then the matter has been considered by the Court of Appeal in a case called [Catt]. That decided that taking remedial measures into account when coming to a screening decision, and concluding that no EIA was needed, was not only not unlawful, but would be to ignore the actual characteristics of many projects such as the present. One can see that, for example, from paragraph 37 of the decision. That should be contrasted, said this court, with particular cases where the uncertainties relating to potential ameliorative measures and conditions, as for example in the case of land infill sites which might be polluted, was such that their favourable implementation could not be assumed. Here, by contrast, the provision of alternative feeding grounds protected from dogs can be easily evaluated, especially since in this case both Natural England and the RSPB have expressed themselves entirely satisfied with the proposed measures."

119. From these cases, the following propositions can be drawn:

i) In considering whether a project would be likely to have significant effects on the environment, the relevant authority has to exercise its planning judgment taking into account all material factors.

ii) In making that practical judgment, the authority is not as a matter of law required to ignore proposals for remedial or mitigation measures: indeed, relevant remedial or mitigation measures may be a material factor which it is required to take into account.

iii) The authority must decide whether, on the information available to it, the proposal (including any remedial or mitigation measures) is likely to have significant effects on the environment, having regard to the precautionary principle and to the degree of uncertainty with regard to the measures at the date of the decision. In some cases, there will be such uncertainties that the proper implementation of the measures cannot be assumed. However, in other cases, the effectiveness of conditions or proposed remedial or ameliorative measures will not be crucial to the opinion; or, alternatively, at the time of consideration that effectiveness can be predicted with confidence. In those cases, the authority may properly decide that, looking at the project as a whole (including such measures), there is no serious possibility of significant effect on the environment. An important factor in that prediction may be the approval of the measures by a body, such as Natural England, which has the role of ensuring that nature and landscape is appropriately protected.

iv) Whether the authority has sufficient information to make a decision that there will likely be no significant effects on the environment – and, if it has such information, the screening decision itself – are matters of planning judgment, in

respect of which the authority has a wide discretion.

120. In this case, the Council concedes that the 23 April 2013 screening by Mr Perry (see paragraphs 34-35 above) was not a screening opinion for the purposes of the EIA Directive and Regulations; and, although Mr Perry considered whether an EIA was necessary in this case prior to the grant of planning permission (deciding it was not: see paragraph 52 above), he did not set down that opinion in writing until after the grant of permission. A screening opinion must be in writing (regulation 2(1) of the EIA Regulations). The Council therefore accepts that it breached the EIA Regulations by not adopting and properly publishing a screening decision in a timely way, before the grant. The Claimant is entitled to a declaration to that effect.

121. However, Mr Bedford submitted that a breach of the EIA procedure does not result in automatic quashing of the relevant decision; and, in the circumstances of this case, the court should exercise its discretion not to quash the 10 October 2014 grant of outline planning permission.

122. It is now well-established that the quashing of a subsequent, dependent planning decision does not automatically follow from a failure of an authority to comply with the EIA Directive and Regulations. In Walton v The Scottish Ministers [2012] UKSC 44 ("Walton"), which concerned the parallel Council Directive 2001/42/EC (the Strategic Environmental Assessment Directive), Lord Carnwath JSC (with whom Lord Hope DPSC, and Lords Kerr and Dyson JJSC agreed), having considered Berkeley and other relevant domestic and European authorities, confirmed that the traditional reluctance of this court to quash a challenged decision because the breach of obligation was immaterial (i.e. the administrative decision would undoubtedly have been the same, even if the breach had not occurred) applies equally to cases in which the relevant obligation derives from European law. He said (at [138]-[139]):

> "138. It would be a mistake in my view to read these cases as requiring automatic 'nullification' or quashing of any schemes or orders adopted under the 1984 Act where there has been some shortfall in the SEA procedure at an earlier stage, regardless of whether it has caused any prejudice to anyone in practice, and regardless of the consequences for wider public interests. As [R (Wells) v Secretary of State for Transport, Local Government and the Regions (2004) ECR I-723] makes clear, the basic requirement of European law is that the remedies should be 'effective' and 'not less favourable' than those governing similar domestic situations. Effectiveness means no more than that the exercise of the rights granted by the Directive should not be rendered 'impossible in practice or excessively difficult'. Proportionality is also an important principle of European law.
>
> 139. Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the

> courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source."

See also Walton at [156] per Lord Hope; Burridge v Breckland District Council [2013] EWCA Civ 228 at [89] per Davis LJ and at [116] per Warren J; and R (Catt) v Brighton & Hove City Council [2013] EWHC 977 (Admin) at [142] per Lindblom J).

123. Miss Wigley, rightly, accepts that, despite dicta in Berkeley suggesting otherwise (with which Lord Carnwath dealt at [124] and following of his judgment in Walton), these observations apply equally to a breach of the EIA Directive and Regulations: where an authority has failed to comply with the EIA regime, the court still has a discretion not to quash an ensuing decision to grant planning permission for that project. This court deals with matters in the real world, and should be slow to grant relief where the challenged decision would inevitably have been the same but for the breach of obligation, neither the claimant nor anyone else has suffered any real prejudice, and there is no other good ground for relief being granted.

124. In my judgment, this is a case in which to exercise the court's discretion in favour of not quashing the grant of permission. In coming to that view, I have particularly taken into account the following.

125. If Miss Wigley were right – and an authority cannot take into account a Habitats Regulations AA in considering whether a proposed development requires an EIA – that has apparently odd consequences where, in respect of a project, the only potential likely significant environmental effect is in respect of matters protected by the habitats regime. That regime is outcome driven. It does not require taking the opinion of the public – or publicising relevant environmental information to the public – in every case. However, if, in considering whether an EIA is required, an authority cannot take into account the fact that likely significant effect will be dealt with under the habitats regime, it will or might require the authority to publicise the environmental information and receive and take account of any input from the public. There would be an uncomfortable tension between the two regimes in this respect.

126. In my view, Miss Wigley's submission probably went too far. As the post-Lebus cases show, in determining whether a project is likely to have significant adverse effects for EIA purposes, it is open to an authority to take into account mitigation measures, which might be part of an AA. It is, at least, strongly arguable that Mr Perry was right to consider the question of whether there will be likely significant effects for EIA purposes (which are procedural) in the light of the habitats regime which requires consideration of that same question (but on an outcome basis). The more particular outcome-driven habitats regime might, in that sense, have priority over the more general, procedurally focused EIA regime.

127. However, that issue was not fully debated before me; and it is unnecessary for me to determine it. In my judgment, this ground fails in any event for the following reasons.

128. Miss Wigley (drawing on Berkeley) submitted that a breach of the EIA Directive and Regulations was not merely a technical breach but a serious procedural defect that deprived the public of their right to participate in the procedure. In this case, a decision to quash would enable the Claimant and others to have a full opportunity to make representations on the environmental information that is now publicly available, including that which was not shared with the public prior to the grant of planning permission.

129. However, as Lord Carnwath emphasised in Walton, although a breach of the EIA regime might materially rob the public of a right to put forward their views on the environmental impact of a particular proposed development, whether it does so in a particular case depends upon the facts and circumstances.

130. In this case, Mr Perry did undertake a screening exercise in the process of writing his report for the 23 September 2014 Planning Committee meeting (see paragraph 52 above), deciding that, given the only possible adverse environmental impacts of the proposed development would be on the SAC – and the adverse impacts in relation to the SAC would be considered as part of the Habitats Regulations AA, and any issues would be dealt with by mitigating measures as part of that assessment – there was no need for an EIA to be undertaken. As I have indicated, in my view, as matters then stood, it was open to Mr Perry to have confidence that the development would not likely have a significant adverse environmental effect, because it would not proceed unless the AA confirmed that it did not have any such effect. The habitats regime did not require any consultation or other involvement of the public; and, for the reasons I have given, the Council did not err in not involving them in this case. In the event, Mr Perry completed a (written) screening opinion after the grant of permission, published on the Council's website on 12 January 2015, which set out in writing the reasons upon which he had decided, before the grant, that an EIA was not required in this case. Miss Wigley does not seek to challenge the content of that opinion, only its timing.

131. But in any event, if I am wrong in concluding that Mr Perry erred in having the confidence that he did have that the development would not likely have a significant adverse environmental effect – and he ought to have given a positive screening, triggering the publication of the environmental statement and other environmental information – that would not have made any difference in this case. The Claimant (and other parties interested in the application) had an opportunity to make representations on the application in this case, which it did. It has not suggested any information or representations it would or might have provided in respect of the AA and mitigation measures if it had had an informed opportunity to do so earlier, that would or might have resulted in a decision different from the decision in fact made. Natural England has of course approved the AA and mitigation measures; and, despite some misgivings about delivery, it approved the approach to delivery and it specifically concluded that the proposed development would not adversely affect the integrity of the protected site at outline stage. Therefore, any breach was immaterial. Furthermore, if the matter were to revert to the Council, the Claimant has not suggested any new evidence it (or anyone else) would bring forward; and a decision by the Council that the proposed development would likely not substantially adversely affect the SAC (and thus an EIA would not be necessary or appropriate) would, on the basis of the opinion of its own Biodiversity Officer and Natural England to that effect, be inevitable and unimpugnable. Therefore,

to quash the decision and remit the application to the Council would be empty. Although that is not determinative, it is a very powerful factor in favour of not quashing the challenged decision.

132. In terms of disbenefit, the quashing of the decision would inevitably give rise to delay in the development proceeding, in circumstances in which it is inevitable that it will proceed. Delay in proceeding with development that an authority considers is for the public benefit is necessarily a public disbenefit. Furthermore, as the Council submits, the introduction of the CIL in the meantime will mean that, if the application has to be redecided, then the CIL will have to be paid which will make the development unviable without a reduction in the amount of affordable housing provided as part of it. The precise amount of that diminution is in dispute; but it seems clear that there will inevitably be some reduction in the affordable housing element. That is why the 10 October 2014 grant was granted when it was – to avoid that impact. Although I do not put any great weight on this factor – and no determinative weight – it seems to me that the authority is entitled to consider the additional affordable housing that will be provided on the basis of the current grant will be a greater public benefit in its area than the appropriate CIL contribution.

133. For those reasons, I consider the balance to be firmly in favour of not quashing the decision to grant outline planning permission.

134. Consequently, in respect of Ground 4, I shall allow the judicial review, and make a declaration that the Council were in breach of the EIA Regulations in not adopting and publishing an EIA screening opinion as it was required to do – but the relief will be limited to such a declaration.

Ground 5

135. Finally, Miss Wigley submitted that, contrary to the Teignbridge Local Plan 2013-33, prior to granting planning permission, the Council failed to require a Strategic GHB Mitigation Plan and/or a Chudleigh settlement-wide bespoke GHB mitigation plan.

136. There is no force in this ground. As found in the claim challenging the Local Plan, the adopted Plan does not require the provision of either a Strategic GHB Mitigation Plan or a settlement-level mitigation plan to be in place prior to the grant of planning permissions for an individual development. The Local Plan policies simply do not impose any such condition. Policy CH1 had its own criterion that a "bespoke [GHB] mitigation plan for [the Site] must be submitted and approved before planning permission will be granted" (as criterion (g): see paragraph 26 above). That requirement for a site specific mitigation plan was satisfied by way of the application and AA (including the section 106 obligations secured through the AA).

137. For the sake of completeness, I should say a word about in-combination effects, to which Miss Wigley referred under this ground. Indeed, by the close of her submissions on this ground, this formed the real core. She submitted that the Council and Natural England

simply failed to consider in-combination effects.

138. I do not consider that that has any proper foundation. The application submitted that the in-combination effects were neutral at local level. It is apparent, from (e.g.) the draft AA and Natural England's comments on it, that both the Council and Natural England were sensitive to in-combination effects: it cannot be suggested that they were not aware of the obligation to consider in-combination effects. They each eventually concluded that the proposed development, in the context of the other developments which had been granted consent, would have no adverse effect on the SAC. Any future applications will have to be considered in the context of the Local Plan and all of the grants already given. In that consideration, the Council will have to consider whether likely significant effects will be caused by the further proposed development, in the context of what has already been granted. This submission therefore fails on the same basis as the similar submission failed in Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174 in which Sales LJ rejected the argument in elegant and comprehensive terms (see [98]-[100]).

139. This ground is unarguable, and I refuse permission to proceed in respect of it.

Conclusion

140. For the reasons I have given, this claim fails. In respect of the formal order:

i) Ground 1: I grant permission to proceed, but refuse the substantive application for judicial review.

ii) Ground 3: I refuse the renewed application for permission to proceed.

iii) Ground 4: I allow the substantive application for judicial review, and shall declare that the Council breached the EIA Regulations in not adopting and publishing an EIA screening opinion as required by those Regulations.

iv) Ground 5: I refuse permission to proceed.