Neutral Citation Number: [2019] EWHC 1362 (Admin)

Case No: CO/4749/2018

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 31st May 2019

Before :

HIS HONOUR JUDGE EYRE QC

- -

Between:

THE QUEEN ON THE APPLICATION OF CHRISTOPHER PRESTON	**Claimant**
- and -	
CUMBRIA COUNTY COUNCIL	**Defendant**
-and-	
UNITED UTILITIES WATER LIMITED	

- -

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John Hunter and Constanze Bell (instructed by **Fish Legal**) for the **Claimant**
John Barrett and Piers Riley-Smith (instructed by **Nicola Watson, Legal Department of United Utilities**) for the **Interested Party**

Hearing dates: 7th May 2019

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JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HH JUDGE EYRE QC:

Introduction.

1. The Claimant is a trustee of the Kent (Westmoreland) Angling Association. That is an unincorporated association with exclusive fishing rights on a stretch of the River Kent in Cumbria. The Claimant has applied on his own behalf and on behalf of the other members of that association for judicial review of the Defendant's decision of 17th October 2018. By that decision granting permission to the Interested Party the Defendant had varied a condition attached to an earlier grant of planning permission which had permitted the installation of a temporary outfall from the Interested Party's Kendal Wastewater Treatment Works ("the Plant") into the River Kent. The effect of the permission of October 2018 was to extend for a further period the time for which that development was permitted.

2. The Claimant says that the decision was unlawful in two regards. First, in that there had not been a "screening opinion" for the purposes of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations"). Second, in that there had not been an "appropriate assessment" for the purposes of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations").

3. Although it initially took a different view the Defendant has now accepted that the decision was unlawful on both grounds. At one stage the Defendant indicated that it was proposing to revoke the permission under section 97 of the Town and Country Planning Act 1990 ("the TCPA"). However, it no longer intends to take that course. Instead it would consent to the quashing of the permission granted. Save for the provision of a position statement the Defendant has taken no part in these proceedings.

4. Permission for this claim was given by Mrs. Justice Andrews on 8th February 2019.

5. The Interested Party has resisted the claim. It says that the Defendant's decision was lawful. It says that the development for which permission was given in October 2018 was outside the scope of the EIA Regulations meaning that no screening opinion was required. It also says that in the circumstances here the Habitats Regulations did not require there to be an appropriate assessment.

The History and Factual Background.

6. The relevant parts of the River Kent are within a Special Area of Conservation which is a European Site for the purposes of the Habitats Regulations. They are also of national note as part of the River Kent and Tributaries Site of Special Scientific Interest. This is primarily because of the presence of white-clawed crayfish supplemented by the presence of freshwater pearl mussels and bullhead.

7. There has been a wastewater treatment plant at the site of the Plant since 1898. The Plant is operated by the Interested Party and discharges treated sewage and trade effluent into the River Kent. That discharge is governed by an

environmental permit granted by the Environment Agency pursuant to the regulatory regime provided for by the Water Act 2014 and the Environmental Permitting (England and Wales) Regulations 2016 and their predecessors. At all times the discharge both actual and contemplated has been of treated material and in accordance with the terms of the Environment Agency's permit which sets out detailed controls on the contents of the material being discharged and on the monitoring of the discharge.

8. Until December 2015 the discharge had been through a pipe running by means of a syphon across the river bed adjacent to the Plant to the opposite bank and then overland to discharge into the river a little way downstream from the plant. In December 2015 Storm Desmond hit Cumbria and the damage caused by that storm included substantial damage to the pipe running under the river.

9. A new outfall had to be installed and this was installed so as to discharge into the river at a point almost immediately adjacent to the Plant. This point is approximately 1km upstream from the previous point of discharge. The Claimant says that this involves a discharge into the Angling Association's prime salmon beat and at a point where the river is slower flowing than it is at the point of the previous outfall.

10. The Interested Party had sought permission for the new outfall by an application of May 2016. This said that a "temporary new outfall" was required for a period of up to twelve months while the existing outfall was reinstated. The temporary outfall had been installed a few days before the application was made having replaced emergency works which had been installed in the immediate aftermath of the storm. The application stated that there was a reasonable likelihood of adverse effects on protected and priority species and designated sites, important habitats, and other biodiversity features "on land adjacent to or near the proposed development".

11. The Interested Party had provided an Assessment of Likely Significant Effect ("the ALSE"). The stated purpose of this was to determine whether the proposed activities were considered to have a significant effect for the purpose of the Habitats Regulations. In the portion of the ALSE addressing "changed water chemistry" in relation to the vegetation of the water course it stated that the ALSE related "to the construction of the temporary outfall structure only and does not include the potential impact from the discharge itself". The document explained that the construction would have "no significant effect" on sundry matters relating to the habitat. In the section addressing the potential impact on the white-clawed crayfish and the bullhead there was a further passage also addressing "changed water chemistry". The document repeated there the point that it was not addressing the discharge. It said "the location of the temporary outfall is approximately 1km upstream of the original outfall … therefore approximately 1km of river which was previously unaffected is now being affected by the discharge." It explained that there was currently no choice but to discharge into the river at that point and then said "despite this it is felt that under typical flow conditions and when the discharge is being maintained at 'normal' levels dilution is sufficient for there to be no significant effect on the species. The quality of the discharge itself is to be addressed in a separate HRA

submission." Despite that last sentence there was in fact no separate submission addressing the quality or effects of the discharge.

12. The Defendant consulted Natural England and by a letter of 16th June 2016 that body advised the Defendant to have regard under the Habitats Regulations to any potential impacts that there might be. It said that it assumed that the Defendant was adopting the ALSE as its assessment under the Habitats Regulations. Natural England said that the ALSE contained "adequate mitigation to protect the River Kent … from the adverse effects of construction activities associated with the proposal." It was also satisfied that carrying out of the development in accordance with the details of the application would not damage or destroy any features for which the site was notified as a Site of Special Scientific Interest.

13. The report of the Defendant's planning officer said that the Defendant had adopted the assessment in the ALSE and that this had concluded that there was no significant effect from the development on the interest features of the river. It said that Natural England concurred with this conclusion. The report made no reference to the fact that the ALSE was confined to consideration of the effects of the construction of the outfall. The report also said that the development would have "no unacceptable quantitative or qualitative adverse effects on the water environment." That comment was, however, made in the context of comparing the proposed outfall with the emergency works which had been installed in the immediate aftermath of Storm Desmond.

14. Permission was given on 5th July 2016 subject to a condition that the development should be limited to a period of twelve months from the date of that permission.

15. On 5th June 2017 the Defendant gave permission under section 73 of TCPA providing for the period for which the development should be limited to be extended to 31st October 2018. That permission was not preceded by any screening opinion under the EIA Regulations nor by any appropriate assessment under the Habitats Regulations other than the ALSE.

16. The decision under challenge was made in response to the Interested Party's application of 18th July 2018. This described the proposal as being for a "temporary outfall for up to 12 months while existing one is reinstated". It stated that the development in question had been completed on 29th April 2016. It said that there had been unforeseen complications in attempting to reinstate the previous outfall and that the Interested Party was assessing the feasibility of making the temporary outfall permanent.

17. The Defendant's delegated decision report explained that Natural England had been consulted and had no comment to make. It confirmed that the Environment Agency had no objection and noted that that Agency had commented that it had allowed the permitted discharge to be continued until 1st October 2019. The report expressed the view that the criteria of the relevant policy for cases where "there are no adverse environmental or landscape impacts or other impacts on sensitive land uses" had been met. It also stated that the application accorded

with the relevant biodiversity and geodiversity policy and that there were no additional adverse effects on the Special Area of Conservation.

18. Permission was given on 17th October 2018 invoking section 73 of TCPA; varying the condition of the earlier planning permission; and providing instead that the development was to be limited to the period to 31st October 2019.

19. It follows that the process leading up to the permission of 17th October 2018 did not include any screening opinion under the EIA Regulations and that the ALSE was the only potential appropriate assessment for the purposes of the Habitats Regulations. The Claimant says that the ALSE was not an appropriate assessment for those purposes and that the absence of such an assessment and of a screening opinion rendered the decision unlawful. Initially the Defendant resisted this contention saying in correspondence that "the quality of the discharge is subject to an environmental permit issued by the Environment Agency. The [Defendant] is entitled to rely on the competence of that organisation to regulate the permit". However, as already explained the Defendant now accepts that its decision was unlawful and that both grounds of challenge to its decision are well-founded.

The Provision under which the Defendant gave Permission.

20. For the Claimant Mr. Hunter contended that the decision should be regarded as having given retrospective permission under section 73A of TCPA rather than permission under section 73. This line of argument appears to have been raised for the first time in Mr. Hunter's skeleton argument.

21. The relevant parts of section 73 provide that:

> "(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—
>
> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application."

22. An application under section 73 is an application for planning permission and a permission granted under that section is a fresh permission with the effect that the applicant has a choice of proceeding under the earlier permission or relying upon the new permission (see *Pye v Secretary of State for the Environment & North Cornwall DC* [1999] PCLR 28 at 44A – G).

23. By way of contrast the relevant provisions of section 73A are:

> "(1) On an application made to a local planning authority, the planning permission which may be granted includes planning permission for development carried out before the date of the application.
> (2) Subsection (1) applies to development carried out—
> (a) without planning permission;
> (b) in accordance with planning permission granted for a limited period; or
> (c) without complying with some condition subject to which planning permission was
> granted.
> (3) Planning permission for such development may be granted so as to have effect from—
> (a) the date on which the development was carried out; or
> (b) if it was carried out in accordance with planning permission granted for a limited period,
> the end of that period."

24. The Interested Party's application was on a form identifying it as an application for the removal or variation of a condition following the grant of planning permission. That is patently language apt to invoke the Defendant's powers under section 73 reflecting as it does the heading of that section rather than the powers under section 73A to give planning permission for development already carried out before the date of the application. Moreover, the Defendant's decision was avowedly made by reference to section 73 and no other provision as appears from the Notice of Planning Permission and the Delegated Decision Report. It is also of note that the Claimant's Statement of Facts and Grounds describes the application as having been made under section 73.

25. Mr. Hunter cited the decision of the Court of Appeal in *Lawson Builders Ltd v Secretary of State for Communities and Local Government* [2015] EWCA Civ 122. Mr. Hunter said that decision was authority for the proposition that on an application made under section 73 permission can be given for development already carried out by reference to the power conferred by section 73A. In my judgment that proposition is an elaboration of the actual effect of the *Lawson Builders* decision. Rather the effect of the judgment of Pitchford LJ at [36] is that it is open to a planning authority considering an application under section 73 to make a grant of retrospective planning permission under section 73A. That does not mean that a decision under section 73 can be made using the section 73A powers nor does it mean that a decision under section 73 is to be interpreted as a grant of retrospective planning permission. The decision is simply to the effect that faced with a section 73 application a planning authority may instead make a grant under section 73A.

26. As a matter of principle if a planning authority is choosing to exercise the power identified in *Lawson Builders* then it must do so expressly and the consequent decision must be identified as having been made under section 73A rather than section 73. That was not done here. The Defendant was being asked to exercise its section 73 powers and it purported to do so. There simply is no basis for approaching the decision as having in fact been an exercise of the section 73A powers.

27. Mr. Hunter's attempt to characterise the permission as having been granted under section 73A was made with a view to countering the Interested Party's arguments based on the EIA's definition of "Schedule 2 development" and on the European Court of Justice decision in *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* [2011] Env L R 26. Those arguments will, however, have to addressed on their merits and on the footing that the permission which is being challenged was granted under section 73.

The Environmental Impact Assessment Regime.

28. The EIA Regulations give effect to Council Directive 2011/92/EU ("the EIA Directive"). That provides, at Article 2, for member states to adopt all measures necessary to ensure that projects likely to have significant effects on the environment are made subject to development consent and to an assessment with regard to their effects. Article 1 (2)(a) of the Directive defines "project" as

> "- the execution of construction works or of other installations or schemes
>
> - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources."

29. Mr. Barrett said account was to be taken of that definition in the interpretation of the EIA Regulations. In particular he prayed it in aid in support of his contention that the EIA Regulations and the requirements under them were to be interpreted as requiring the Defendant to consider the effects of the construction of the outfall and as not requiring consideration of the discharge which was to flow through and from it. Thus he said that it was the construction and maintenance in place of the outfall which were to be considered and that the EIA Regulations did not require consideration of the effects of the discharge. Mr. Barrett bolstered that argument by reference to the decision in *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* (supra). The issue in that case was whether a predecessor to the EIA Directive required an environmental impact assessment to be carried out before a permit was given for the continued operation of Brussels airport. The European Court of Justice held that an assessment was not needed because the term "project" was limited to works or physical interventions and "construction" was limited to the carrying out of works not previously existing and to physical alterations to existing installations.

30. I find that neither that decision nor the EIA Directive's definition of "project" assist me in my interpretation of the EIA Regulations. Those Regulations do not use the term "project" to define the matters falling within their scope. Rather they refer to "development". Regulation 2 (2) and (3) are of note in this regard. Regulation 2(2) provides that expressions used both in the Regulations and the TCPA are to have the same meaning for the purposes of the Regulations as they do for the TCPA. That is subject to 2(3) which provides that expressions used both in the Regulations and the Directive are to have the same meaning for the purposes of the Regulations as they do for the Directive. As I have just said the EIA Regulations use the term "development" but not "project". Conversely the EIA Directive uses and defines the term "project" but does not use

"development" as a defined term and only uses that word as part of phrase "development consent" which is defined as a decision entitling a developer to proceed with a project. "Development" is a defined term for the purposes of the TCPA. Accordingly, it is that definition which is to govern the meaning of the term in the EIA Regulations. I will in due course have regard to the definition in section 55 of the TCPA. In addition it is common ground that the EIA Regulations potentially go beyond the scope of the EIA Directive in that Schedule 2 development for the purposes of the former can be read as including matters which are not "projects likely to have significant effects on the environment" for the purposes of Article 2 (1) of the latter. The decision in the *Brussels* case is to the effect that the continuation without physical change of an existing operation is neither a project nor a work of construction for the purpose of the Directive. It provides no material assistance in respect of the questions which I will have to address later of whether the EIA Regulations require consideration only of the consequences of the construction of the outfall and not of the effects of the discharge through it and of the application of the Regulations to the permission which was given under section 73.

31. The effect of Regulations 6 and 8 is that where there is an application for Schedule 1 or Schedule 2 development which is not accompanied by an environmental statement within the meaning of the Regulations and in respect of which there has not been a screening opinion then the relevant planning authority must adopt a screening opinion which is a written statement of the authority's opinion of whether the development in question is a EIA development. EIA development is development falling within the scope of Schedule 1 of the Regulations or falling within the scope of Schedule 2 and being "likely to have significant effects on the environment by virtue of factors such as its nature, size, or location."

32. Regulation 3 prohibits the granting of planning permission for EIA development unless an environmental impact assessment has been carried out in respect of the development. Indeed, any failure to comply with the requirements of the Regulations will lead to a permission being quashed on the ground of illegality. As Moore-Bick LJ explained in *R (ex p Bateman) v South Cambridgeshire DC & another* [2011] EWCA Civ 157 at [31] any failure to comply with the requirements of the EIA Regulations, such as a failure to obtain a screening opinion where one was required, would be a legal flaw tainting the entire process leading to a grant of planning permission and necessitating the quashing of the permission in question.

33. The provisions governing what an environmental impact consists of are contained in Regulation 4. Regulation 4 (1) explains that the process is to include the preparation of an environmental statement; any consultation, publication, notification required by the Regulations or any other enactment; and the steps required under Regulation 26 which include consideration of the environmental information; assessment of the significant effects of the proposed development; and consideration of whether monitoring measures are needed. Of relevance for current purposes are Regulation 4 (2) and (3) which provide that:

> (2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors—
> (a) …;
>
> (b) biodiversity, with particular attention to species and habitats protected under Directive
> 92/43/EEC**1** and Directive 2009/147/EC**2** ;
>
> (c) land, soil, water, air and climate;
>
> (d) …
>
> (e) the interaction between the factors referred to in sub-paragraphs (a) to (d).
>
> (3) The effects referred to in paragraph (2) on the factors set out in that paragraph must include the operational effects of the proposed development, where the proposed development will have operational effects.

34. The core dispute here is whether the development was Schedule 2 development.

35. The relevant terms are defined in Regulation 2 and Schedule 2 as follows;

> '"European site" means a site within the meaning of regulation 8 of the Conservation of Habitats and Species Regulations 2017 [there is no dispute that the River Kent is such a site]
>
> "Schedule 2 development" means development, other than exempt development, of a description mentioned in column 1 of the table in Schedule 2 where—
> (a) any part of that development is to be carried out in a sensitive area; or
> (b) any applicable threshold or criterion in the corresponding part of column 2 of that table is respectively exceeded or met in relation to that development'
>
> A "sensitive area " is defined as including a European site.
>
> Schedule 2 paragraph 13 (b) relates to changes to developments of a kind which includes wastewater treatment plants of the size of the Plant and the relevant threshold is set out in column 2 as being that "the development as changed or extended may have significant adverse effects on the environment".

Was the Permitted Development Schedule 2 Development?

36. The Defendant did not adopt a screening opinion in respect of the application. The Interested Party accepts that if the development permitted by the permission was Schedule 2 development for the purposes of the EIA Regulations then there should have been such a screening opinion and its absence would render the grant of permission unlawful. However, the Interested Party says that the development was not Schedule 2 development and that a screening opinion was, accordingly, not required.

37. The first question in this regard is whether the permission was for development any part of which "is to be carried out in a sensitive area" and which, therefore, falls within the first limb of the definition of Schedule 2 development.

38. There was no dispute as to the presence of the sensitive area but there was dispute as to the interpretation of the first part of that provision. The Interested Party says that the language of this part of the definition is clear. Mr. Barrett placed considerable emphasis on the use of the future tense in the words "is to be carried out". He said that the permission which was sought and granted was not for development which was to be carried out. The Plant has been in place for many years and at the time of the July 2018 application the temporary outfall was already in place. Mr. Barrett says that there was no development which was to be carried out in a sensitive area.

39. For the Claimant Mr. Hunter sought to counter that argument by saying that the permission was for development within the first limb of the definition because it was to be seen as having been retrospective permission given under section 73A. As I have explained above I reject this interpretation of the permission. The permission was given under section 73 and its legality is to be determined on that footing.

40. However, approaching the matter on that footing Mr. Barrett's argument is nonetheless unpersuasive. In my judgment it fails to take proper account of the operation of section 73 and the effect of permission given under that section. A permission given under section 73 is a fresh permission which can be relied on in its own right and in substitution for the earlier position (see [22] above). An application under section 73 has to be an application "for planning permission for the development of land" (section 73 (1)). It follows that the Interested Party's July 2018 application and the permission granted in response to it had to be an application for permission for the development of land and the grant of such permission. Unless they were that they would not fall within section 73. Mr. Barrett countered this point by contending that the relevant development was the maintenance of the temporary outfall in place and so was not work which was to be carried out. I reject this contention as contrary to the definition of "development" in section 55 (1) of the TCPA which governs the meaning of development for the purposes of the EIA Regulations. That section defines development as:

> "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

41. Mr. Barrett was compelled to argue that the maintenance in place of the existing temporary outfall was a building operation. He did not suggest that such an interpretation was supported by authority but said that it followed as a matter of first principle from interpretation of the language used. I do not accept that the maintenance in place of an existing structure can properly be said to be a building operation.

42. If the relevant development for the purposes of the July 2018 application and subsequent permission was not the maintenance of the temporary outfall in place what was it? Having regard to the effect of section 73 it is to be seen as the construction and operation of the temporary outfall. It is only that which could be regarded as development in this context and it was that for which permission was being sought and given. If a permission is being given under

section 73 which operates as a fresh permission and which can be relied upon in substitution for the earlier permission then the question of whether development "is to be carried out" is to be answered by contrasting the position if permission is not given (in which case nothing more can be done in respect of the outfall) with that if permission is given (in which case the outfall can be operated). The permission under challenge here was a permission for the installation and operation of the temporary outfall for a period to 31st October 2019. That assessment of the permission is supported by Regulation 4 (3) of the EIA Regulations with its requirement that the effects of a proposed development must include its operational effects. Mr. Barrett's argument gives insufficient weight to that provision which in my judgment must pervade the interpretation of those Regulations. If a planning authority is to have regard to the operational effects of a proposed development when undertaking the environmental impact assessment process then those effects must be relevant when considering whether a screening opinion is necessary and that is the purpose for which it is necessary to decide whether a development is or is not a Schedule 2 development.

43. Moreover, even if Mr. Barrett's argument as to the nature of the relevant development were to be accepted it would still be caught by the first limb of the definition. If Mr. Barrett is right to say that the maintenance in place of the temporary outfall is to be seen as a building operation then that is development for which permission is being sought and given. In considering the definition in the EIA Regulations one then has to ask whether there is development which is to be carried out in a sensitive area. The answer then is that there is such development here because, on the basis of Mr. Barrett's approach, the maintenance in place of the outfall is development and that is to be carried out pursuant to the permission.

44. It follows that I am satisfied that the permission gave permission for development which was Schedule 2 development within the meaning of limb (a) of the definition.

45. However, even if I am wrong in that regard I am satisfied that the development fell within limb (b) of that definition. The Plant is of a type identified at column 1 paragraph 11 (c). The temporary outfall is a change of the kind identified in column 1 paragraph 13 (b). Accordingly, the relevant threshold is that at column 2 (13) (b) (i) namely whether the Plant as changed or extended by the introduction of the temporary outfall "may have significant adverse effects on the environment". This is a low threshold because the context in which it operates is that of the process of triggering the need for a screening opinion which in turn is the material forming the basis for a decision as to whether there is to be an environmental statement. Putting it rather more shortly the threshold is a low one because its application is the start not the end of the process and is the trigger for determining that fuller investigation is needed rather than the determinant of the outcome of such investigation.

46. As I noted at [29] above Mr. Barrett contended for the Interested Party that the EIA Regulations are to be interpreted such that the only effects of the outfall which are to be considered are those resulting from its construction but that no regard was to be had to the effect of the discharge from it. He said that this

meant that there was no prospect of significant adverse effects because the construction of the outfall without more would not have such effects. I have already explained why I derive no assistance from the EIA Directive or the *Brussels* case in determining that question of interpretation. I do, however, derive considerable assistance from the wording of the EIA Regulations and that wording makes it clear beyond peradventure that the assessments undertaken pursuant to those Regulations are to have regard to the effects of the use of a permitted structure and not just its construction. It would suffice for these purposes to refer solely to Regulation 4 (3) which explains that when the effects of a proposed development on various factors are being considered those effects are to include "the operational effects of the proposed development".

47. The position is made even clearer by the provisions of Regulation 5 (4) and Schedule 3 and Regulation 18 (3) and Schedule 4. The former provides that when determining whether a Schedule 2 development is EIA development the relevant planning authority is to take account of such of the criteria as are set out in Schedule 3 as are relevant. Schedule 3 paragraph 1 describes the relevant characteristics of the development in the following terms which clearly have regard to the effects of the use and operation of the development and not just of its construction thus:

> The characteristics of development must be considered with particular regard to—
> (a) the size and design of the whole development;
> (b) cumulation with other existing development and/or approved development;
> (c) the use of natural resources, in particular land, soil, water and biodiversity;
> (d) the production of waste;
> (e) pollution and nuisances;
> (f) the risk of major accidents and/or disasters relevant to the development concerned, including those caused by climate change, in accordance with scientific knowledge;
> (g) the risks to human health (for example, due to water contamination or air pollution).

48. Regulation 18 (3) sets out the information which must be contained in an environmental statement inter alia by reference to Schedule 4 and it suffices for present purposes to note that paragraph 1 (c) of that Schedule requires the description of the development to include:

> "a description of the main characteristics of the operational phase of the development (in particular any production process), for instance, energy demand and energy used, nature and quantity of the materials and natural resources (including water, land, soil and biodiversity) used"

49. The operational effects of the outfall are its use to discharge treated sewage and trade effluent into the River Kent at a particular point. It follows that in considering whether the temporary outfall may have significant adverse effects on the environment regard is to be had not just to the consequences of the physical installation of the outfall but also to the consequences of the discharge through it at that point.

50. In support of his argument that the rôle of the Defendant under the EIA Regulations was to have regard only to the physical effects of the construction works Mr. Barrett placed considerable emphasis on the statutory position of the Environment Agency as the body charged with regulating discharges into watercourses. He said that the existence of such a body indicated that a local planning authority exercising its planning jurisdiction was to concern itself only with the physical effects of the construction works. This was because such a planning authority should proceed on the footing that the Environment Agency was carrying out its duties properly and that there was no prospect of the Environment Agency countenancing actions which would have significant adverse effects on the environment. Moreover, it would in Mr. Barrett's submission be irrational for a planning authority to impose more onerous restrictions than those imposed by the Environment Agency which was the body which had the requisite expertise in this field. These considerations may have relevance to the question of whether the low threshold has been crossed and I will shortly to their relevance in that regard. However, they cannot prevail against the clear wording of the EIA Regulations in answering the question of whether the Defendant was concerned under those Regulations solely with the physical effects of the construction of the outfall or also with the effects of the discharge flowing through the outfall. The wording of the Regulations compels the latter interpretation and so the Defendant was to have regard to the effects of the discharge as well as to the effects of the construction of the outfall.

51. The Interested Party says that even if there is to be consideration of the effects of the discharge from the outfall it was not open to the Defendant to conclude that the discharge might have significant adverse effects and that the threshold was accordingly not crossed. In this regard Mr. Barrett again placed emphasis on the position of the Environment Agency and the contention that the position of that agency meant that the Defendant should proceed on the basis that the discharge would not have an adverse effect. Mr. Barrett developed that argument most fully in relation to the question of whether there should have been an appropriate assessment for the purposes of the Habitats Regulations. Accordingly, I will address the argument and set out the reasons for my conclusions in relation to it in that context more fully below. Those reasons and conclusions also apply to the application of the argument to the EIA Regulations. However, the decision in *R (Champion) v North Norfolk D C & another* [2015] UKSC 52, [2015] 1 WLR 3710 is of particular note with regard to the EIA Regulations. There the Supreme Court addressed the then current EIA Regulations. At [48] – [53] Lord Carnwath JSC addressed the relevance of mitigation measures including the imposition of conditions of various kinds on developments. It is of note that the approach of Sullivan J in *R (Lebus) v South Cambridgeshire D C* [2003] Env L R 366 was expressly approved. The tenor of the approach laid down by Lord Carnwath, particularly when seen in context, was that although mitigation measures could be taken into account in the screening opinion the more appropriate course would normally be for them to figure in the environmental statement which followed a screening opinion which had concluded that there might be significant impacts. The decision does not provide authority for the proposition that the rôle of the Environment Agency meant that the Defendant was bound to conclude that there would be no adverse effects and so removed the need for a screening opinion. Rather it is

strongly suggestive that the involvement of the agency along with other potential mitigation measures was to be taken into account at the earliest as part of a screening opinion.

52. In my judgment the rôle of the Environment Agency would be a relevant consideration potentially for the purposes of any screening opinion and also more clearly as part of the environment impact assessment process following upon a screening opinion. However, the existence and powers of that agency did not remove from the Defendant the obligation to have regard to the effects of the discharge nor did it mean that in considering those effects the only rational course was for the Defendant to conclude that the discharge could not have significant adverse effects such that the threshold for a screening opinion was not required.

53. It follows that regard was to be had to the effects of the discharge with a view to considering whether it met the low threshold requirement that it "may have significant adverse effects". Not only was there no such consideration but it was not suggested by the Interested Party that the threshold was not crossed subject to the contentions as to the effect of the rôle of the Environment Agency which I have rejected. It follows that the second limb of the definition of Schedule 2 development was also satisfied and that the application fell to be treated as a Schedule 2 application on that basis as well.

The Effect of the Conclusion as to the Permitted Development's Nature.

54. My conclusion that the permission sought and given was permission for Schedule 2 development for the purpose of the EIA Regulations is determinative of the matter. The Interested Party correctly accepts that if the development was Schedule 2 development (or more precisely that if the application was a Schedule 2 application) then there should have been a screening opinion and that the absence of such an opinion was a fundamental flaw in the process with the consequence that the permission was not granted lawfully.

55. Although that conclusion is determinative of the application the position under the Habitats Regulations was fully argued and I will set out the conclusions I have reached in that regard.

The Conservation of Habitats and Species Regime.

56. Regulation 9 (1) of the Habitats Regulations required the Defendant to exercise such of its functions as were relevant to nature conservation so as to secure compliance with the requirements of Council Directive 92/43/EEC ("the Habitats Directive"). Regulations 61 (1) and 70 (1) (a) have the effect that the assessment provisions in Regulation 63 apply to applications such as that made under section 73 by the Interested Party. The relevant parts of Regulation 63 itself provide that:

> " (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 of the plan or project 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 it 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 specifies.

(4) …

(5) In the light of the conclusions of the assessment, and subject to regulation 64, 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 competent 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 it proposes that the consent, permission or other authorisation should be given.

(7) …"

57. The effect of the relevant authorities was summarised and an explanation of the approach to be taken given by Peter Jackson LJ in *R (Mynydd & Gwynt Ltd) v Secretary of State for Business, Energy, & Industrial Strategy* [2018] EWCA Civ 231, [2018] PTSR 1274 at [8 – 9] thus:

"8. The proper approach to the Habitats Directive has been considered in a number of cases at European and domestic level, which establish the following propositions:

(1) The environmental protection mechanism in Article 6(3) is triggered where the plan or project is likely to have a significant effect on the site's conservation objectives: Landelijke: Vereniging tot Behoud van de Waddenzee v Staatsscretaris van Lanbouw (Case C-127/02) [2005] All ER (EC) 353 at [42] ("*Waddenzee*").

(2) In the light of the precautionary principle, a project is "likely to have a significant effect" so as to require an appropriate assessment if the risk cannot be excluded on the basis of objective information: *Waddenzee* at [44].

(3) As to the appropriate assessment, "appropriate" indicates no more than that the assessment should be appropriate to the task in hand, that task being to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned. It requires a high standard of investigation, but the issue ultimately rests on the judgement of the authority: R (Champion) v North Norfolk District Council [2015] UKSC 52; [2015] 1 WLR 3710, Lord Carnwath at [41] (*"Champion"*).

(4) The question for the authority carrying out the assessment is: *"What will happen to the site if this plan or project goes ahead; and is that consistent with maintaining or restoring the favourable conservation status of the habitat or species concerned?"*: Sweetman v An Bord Pleanàla (Case C-258/11); [2014] PTSR 1092, Advocate General at [50].

(5) Following assessment, the project in question may only be approved if the authority is convinced that it will not adversely affect the integrity of the site concerned. Where doubt remains, authorisation will have to be refused: *Waddenzee* at [56-57].

(6) Absolute certainty is not required. If no certainty can be established, having exhausted all scientific means and sources it will be necessary to work with probabilities and estimates, which must be identified and reasoned: *Waddenzee*, Advocate General at [107] and [97], endorsed in *Champion* at [41] and by Sales LJ in Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174 at [78] ("*Smyth"*).

(7) The decision-maker must consider secured mitigation and evidence about its effectiveness: Commission v Germany (Case C-142/16) at [38].

(8) It would require some cogent explanation if the decision-maker had chosen not to give considerable weight to the views of the appropriate nature conservation body: R (Hart District Council) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin) at [49].

(9) The relevant standard of review by the court is the *Wednesbury* rationality standard, and not a more intensive standard of review: *Smyth* at [80].

9. Drawing matters together, the task of the decision-maker is first to consider whether the risk of the project having a significant effect on the site's conservation objectives can be excluded. If it cannot, an assessment must be undertaken to ascertain the impact of the project and identify whether it is consistent with maintaining the site's conservation status. Mitigation measures must be taken into account and considerable weight should be attached to the views of the nature conservation body. Once the assessment has been carried out, approval can only be given if the authority is convinced that the project will not adversely affect the integrity of the site concerned. Absolute certainty is not required, and where it cannot be achieved after all scientific efforts, the decision-maker must work with reasoned probabilities and estimates; but where doubt remains, authorisation will be refused."

Was an Appropriate Assessment required Here?

58. The ALSE was expressly confined to considering the potential effects of the construction of the temporary outfall and did not consider the potential impact from the discharge. It said that the quality of the discharge would be addressed in a separate submission under the Habitats Regulations but there was, in fact, no such submission. Similarly, the assessment by Natural England that the ALSE contained adequate mitigation measures was expressly related to mitigation of the adverse effects of the construction activities.

59. The crucial question is whether there should have been a further appropriate assessment addressing the potential effects of the discharge through the outfall.

60. The Interested Party says that there was no need for such an assessment because the discharge would be regulated by the Environment Agency and the Defendant should have proceeded on the basis that such regulation would be effective and would preclude any discharge which would have an adverse effect. Mr. Barrett's argument was that the Defendant was entitled and, indeed, bound to assume that the discharge would be properly controlled by the Environment Agency with the consequence that there was simply no prospect of any adverse effects resulting from the discharge. The Interested Party's argument was that even though the Defendant appears not expressly to have addressed its mind to the potential consequences of the discharge or to the question of whether to rely on the control to be exercised by the Environment Agency it would have been irrational for the Defendant to have come to any conclusion other than that an appropriate assessment was not required. The Interested Party contends that in considering the matter the Defendant was bound to have regard to the rôle of the Environment Agency and that if that had been done the only rational conclusion would have been that there was no risk of any adverse effects.

61. At first sight those contentions would appear to conflict with the approach laid down in *Mynydd & Gwynt Ltd*. The approach indicated there was that the initial question should be whether a significant effect was likely and if that could not be excluded then an appropriate assessment would be needed. The potential for mitigation measures and the views of the relevant regulatory and nature conservancy bodies would come into play in the course of the appropriate assessment as part of the high standard of investigation required but would not preclude or remove the need for an appropriate assessment unless the risk of significant effect could be excluded on the basis of objective information. Do the authorities on which Mr. Barrett relied indicate that Peter Jackson LJ's propositions are to be read in some different way or that the approach indicated there is not applicable in cases such as the present?

62. Before I turn to the cases on which Mr. Barrett relied it is to be noted that they all predated Peter Jackson LJ's analysis of the law and moreover that analysis made reference to *Champion* and to *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, [2015] PTSR 1417 on both of which Mr. Barrett relied. It is also of note that in a judgment given two months after that in *Mynydd & Gwynt Ltd* the European Court of Justice considered the stage at which mitigation measures should be taken into account for the purposes of the Habitats Directive. Thus in *People over Wind & Sweetman v Coillte Teoranta* [2018] PTSR 1668 the court echoed the approach which I have deduced from Peter Jackson LJ's propositions and said at [36] that:

> "a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment."

63. This approach is also supported by the wording of Regulation 63. Regulation 63 (1) provides that the trigger for making an appropriate assessment is that the relevant plan or project "is likely to have a significant effect on a European site". Regulation 63 (3) envisages consultation with the appropriate nature conservation body taking place at the stage of the appropriate assessment and accordingly after the initial view that there is likely to be significant effect has

been formed. The conclusion as to whether the integrity of the relevant site will be adversely affected is to be made "in the light of the conclusions of the assessment" (Regulation 63 (5)) and it is at that stage that regard is to be had to the manner in which the project is to be carried out and to the conditions or restrictions which the authority is minded to impose (Regulation 63 (6)). The effect of restrictions imposed by other regulatory bodies is most aptly seen as an aspect of the manner in which the project is to be carried out and so falling for consideration under Regulation 63 (6) at the end of the assessment process rather than as removing the need for an appropriate assessment.

64. I turn to the authorities on which Mr. Barrett relies to see if they require any reinterpretation or recasting of that approach.

65. The effect of the decision of the Court of Appeal in *Gateshead MBC v Secretary of State for the Environment* [1995] Env L R 37 is that the existence of a regime for controlling the impact of harmful emissions or other harmful effects of a development is a relevant planning consideration. In that case the Secretary of State was entitled to have regard to the powers of HM Inspectorate of Pollution (whose powers have now passed to the Environment Agency) and to conclude that those powers were sufficient to address the concerns about emissions which had been expressed in that case. It does not, however, provide authority for the proposition that a planning authority is bound to conclude that the powers of a particular regulatory body will be sufficient to address concerns in a different case. Still less is it authority for saying that a planning authority should have no regard to such concerns. Rather it indicated that the rational approach was for the relevant body to consider the concerns and then to consider whether the powers of the relevant body were sufficient to address those concerns with the conclusion that the powers were sufficient being one which it was open to the relevant body to reach in an appropriate case.

66. In *Champion* the Supreme Court drew a distinction between the triggering of an appropriate assessment under the Habitats Regulations and the need for a screening opinion under the EIA Regulations. The former was regarded as being a markedly less formal process than the latter. I do not read the decision as indicating that there can be no need for an appropriate assessment under the Habitats Regulations in cases where the activity which has the potential to affect the relevant site is subject to controls by a statutory body of some form. It is of note that Peter Jackson LJ clearly had the decision in *Champion* well in mind when setting out his analysis of the relevant law. He referred to it twice in his list of propositions and noted the high standard of investigation to which Lord Carnwath adverted as being required in an appropriate assessment.

67. Mr. Barrett said that the relevant leading case was *R (Morge) v Hampshire CC* [2011] UKSC 2, [2011] 1 WLR 268. The Supreme Court there held that regard was to be had to the views of Natural England as the body responsible for enforcing compliance with the Habitats Directive. The planning authority was entitled to take account of Natural England's view that a particular development would not contravene the Directive. It is clear that the Supreme Court was holding that a planning authority was entitled to assume that satisfaction expressed by a relevant regulatory body was sufficient indication that there would be compliance. It was not, however, saying that a planning authority was

bound to do so. This is apparent from the language used by Lord Brown at [30] and by Baroness Hale at [45]. Indeed referring to the relevant bat survey Baroness Hale concluded [45] by saying "the planning authority could perhaps have reached a different conclusion from Natural England but they were not required to make their own independent assessment." I do not read the decision as removing the need for an appropriate assessment where such an assessment would otherwise be required under the Habitats Regulations but as indicating the entitlement which a planning authority has to take account of the views of a relevant regulatory body in the course of that assessment. In the current case Natural England's expression of satisfaction was with regard to the ALSE which was confined to the physical effects of the construction of the outfall. There is no indication of a view from Natural England as to the effects of the discharge. Mr. Barrett sought to read across from the references to Natural England in *Morge* to the position of the Environment Agency in this case. He said that as the agency was the body responsible for the control of discharges then if that body was satisfied with what was proposed then there was no scope for an appropriate assessment because it would not be open to the Defendant to conclude that there would be any harmful effect from the discharges. In my judgment that proposition does not follow from the decision of the Supreme Court and the words of Baroness Hale quoted above indicate a markedly different reading of the decision.

68. There was more force in Mr. Barrett's invocation of the judgment of Sales LJ in *Smyth v Secretary of State for Communities and Local Government* at [85] where he said:

> "Moreover, the authorities confirm that in a context such as this a relevant competent authority is entitled to place considerable weight on the opinion of Natural England, as the expert national agency with responsibility for oversight of nature conservation, and ought to do so (absent good reason why not) …"

69. Mr. Barrett relied on the last part of that passage. That was in reality the high point of the support he could derive from the authorities. However, even that does not provide authority for the proposition that the existence or views of a relevant regulatory body obviate the need for an appropriate assessment. Account has to be taken of those views but Sales LJ does not say that such views must prevail. Read strictly the passage is indicating that if it had a good reason to do so a relevant authority could choose not to place weight on the views of an expert national agency. That might be too strict a reading but even if what was meant was that a relevant authority should adopt the views of an expert national agency unless it has a good reason not to do so it is not being said that a relevant authority is bound by such views but rather that they should only be rejected if there is a good reason for so doing. It follows that the relevant authority has still to exercise its own judgement albeit giving due weight to the views of a body such as the Environment Agency.

70. It follows that the authorities relied upon by the Interested Party do not cause any change in my interpretation of the propositions expounded by Peter Jackson LJ nor do they indicate that the approach they envisage is not applicable to the circumstances of this case.

71. Accordingly, the Defendant was to consider whether the discharge through the outfall had the potential for a significant effect upon the site. If there was such potential then an appropriate assessment was required. The views of Natural England and the rôle of the Environment Agency would have had great significance in that exercise but they did not remove the need for it. The position and powers of the Environment Agency did not remove the need for the Defendant to engage in an appropriate assessment unless the Defendant was enabled to say that any risk of a significant effect was excluded on "objective information" (see proposition 2 per Peter Jackson LJ). The existence and powers of the Environment Agency cannot without more be regarded as having necessarily been objective information for that purpose.

72. As something of a fallback position for the Interested Party Mr. Barrett contended that there had been consideration by the Defendant with the conclusion having been reached that because of the views of Natural England and the Environment Agency there was no risk of significant effects. The material on which Mr. Barrett sought to construct that argument was markedly limited. The Delegated Decision Report of 9th October 2018 noted that Natural England had made no comment. It noted that the Environment Agency had no objection and noted that the agency had extended the permit for the outfall to 1st October 2019. The planning assessment expresses the view that there were no adverse environmental or landscape impacts or any other impacts on sensitive land uses. It is also said that there had been compliance with the Biodiversity and Geodiversity policy "as there are no alternatives and there are no additional adverse effects on the SAC". There is, however, no indication of any actual consideration of the potential impact of the discharge from the outfall. I remind myself of need to avoid an unduly narrow reading of such reports and that they are not necessarily a place for detailed reasoning. The 2018 report is to be seen in the light of the 2016 report which dealt with matters at a little greater length and whose terms I have summarised at [13] above. The Defendant had responded to the initial correspondence from the Claimant by saying that "the quality of the discharge is subject to an environmental permit issued by the Environment Agency. The [Defendant] is entitled to rely on the competence of that organisation to regulate the permit". It is apparent that the Defendant did not in fact have regard to the question of the effects of the discharge through the outfall. The ALSE did not address those effects but said that there would be a separate assessment in that regard. The approval of Natural England was given by reference to the ALSE and was addressing the effects of the construction of the outfall rather than the effects of the discharge. Although reference was made to the permit given by the Environment Agency this was a passing reference. It was not stated that consideration had been given to the effects of the discharge and that the conclusion had been reached that the rôle of the Environment Agency enabled the Defendant to be satisfied that there was no risk of a significant effect resulting. It is of particular note that the Defendant accepts that both grounds of challenge are made out including the contention that it failed to carry out its obligations under the Habitats Directive. It is open to the Interested Party to argue that notwithstanding this admission the material shows that there was engagement with those obligations. However, that argument depends on the interpretation being placed on the thin material here and the Defendant's view of what it did or did not do is of assistance in that

exercise. In my judgment there is no scope for a conclusion that there was any consideration by the Defendant of the question of whether the discharge from the outfall would be likely to have a significant effect within the meaning of the Habitats Regulations.

The Effect of the Absence of an Appropriate Assessment.

73. If the potential effects of the discharge had been considered it might have been a rational decision (in the sense of one that could not be challenged on the ground of *Wednesbury* irrationality) for the Defendant to conclude that by reason of the involvement of the Environment Agency there was no need for an appropriate assessment. It is questionable whether the Defendant could properly have reached that conclusion in the light of the absence of any detailed information from the Environment Agency and in the light of the reference in the ALSE to the fact that a further assessment directed to the effects of the discharge was to be forthcoming. However, that would certainly not have been the only permissible or rational conclusion. It follows that it cannot be said that even if the matter had been expressly considered by the Defendant the conclusion must have been that there was no need for an appropriate assessment.

74. It follows that there was a failure to comply with the requirements of the Habitats Regulations and the second ground of challenge is made out.

Conclusion.

75. Both grounds of challenge having been established the grant of permission was unlawful and the Claimant is entitled to the relief sought by way of quashing of the permission subject to such submissions as the parties make on handing down as to the appropriate form of order.