W. BIRTLES & R. CARNWATH, "U.K. case law on 6.3 Habitat directive"

England and Wales High Court (Administrative Court) Decisions

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Case No: CO/1834/2009

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

Royal Courts of Justice
Strand, London, WC2A 2LL
16th February 2010

B e f o r e :

MR JUSTICE OWEN

Between:

The Queen on the application of STEPHEN AKESTER and MARC MELANAPHY (on behalf of the Lymington River Association) — **Claimant**

-and –

(1) DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS
(2) WIGHTLINK LIMITED — **Defendants**

-and-

(1)LYMINGTON HARBOUR COMMISSIONERS
(2)NATURAL ENGLAND
(3)NEW FOREST DISTRICT COUNCIL — **Interested Parties**

William Norris QC & Justine Thornton (instructed by Richard Buxton) for the Claimants

Stephen Tromans QC & Colin Thomann (instructed by DEFRA Litigation & Prosecution Department) for the 1st Defendant.
Richard Drabble QC & Stephen Morgan (instructed by Bircham Dyson Bell LLP) for the 2nd Defendants.
Gregory Jones (instructed by Lester Aldridge LLP) for the 1st Interested Party.
Gordon Nardell (instructed by Grainne O'Rourke, Head of Legal and Democratic Services) for the 3rd Interested Party.
Hearing dates: 14th & 15th December 2009

HTML VERSION OF JUDGMENT

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Mr Justice Owen:

1. The claim concerns the legality of a decision made by the second defendant, Wightlink Ltd (Wightlink) which operates ferries on three routes between the mainland and the Isle of Wight, to introduce a new class of ferry, the W class, on the route between Lymington and Yarmouth, a decision implemented on 25 February 2009. The claimants, who bring the claim on behalf of the Lymington River Association (LRA), seek to challenge the decision on the basis that it was made and implemented in breach of Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora (the Habitats Directive), and the Conservation (Natural Habitats &c) Regulations 1994, by which the Habitats Directive was implemented (the Habitats Regulations). They further contend that the first defendant, the Department for Environment, Food and Rural Affairs (DEFRA) has failed properly to implement Article 6(2) of the Habitats Directive, in that there would appear to be no, or no adequate, regulatory powers available to prevent Wightlink from introducing the W class ferries.

The Interlocutory proceedings

2. On 24 February 2009, the day before the introduction of the W class ferries, the claimants sought an injunction ex parte to restrain Wightlink from operating them on the Lymington to Yarmouth route. Beatson J refused the application, but ordered that it be brought before the court on notice as a matter requiring immediate attention. He further granted the claimants protection from the costs of the defendants and the proposed interested parties up to and including the end of the oral hearing for interim relief. On 25 February the claimants served the claim on DEFRA and Wightlink, and on the three interested parties, Lymington Harbour Commissioners, Natural England, and the New Forest District Council. On 26 February Beatson J ordered that the application for interim relief be listed as soon as possible, and on 12 March HHJ Birtles, sitting as a Deputy High Court Judge, ordered inter alia that the application for interim relief be dismissed, that with the consent of the parties that there be a 'rolled up' hearing of the permission application, and that the protective costs order be extended to 27 March.

3. On 24 April Christopher Symons QC, sitting as a Deputy High Court Judge, ordered inter alia that the protective costs order be extended until judgment in the substantive hearing, but be amended with effect from 4 pm on 27 April 2009 by the defendants' liability to the claimants being capped at a total of £120,000 inclusive of the costs incurred to date, and by the claimants' liability being capped at a total of £15,000.

The Parties

4. The LRA, on whose behalf the claim is brought, is an association, now incorporated, of local residents and users of the Lymington river, formed to

> *"ensure greater awareness of the Environmental and Safety impacts and Regulatory facts relating to the proposed new much bigger ferries".*

DEFRA is the central government department responsible for ensuring that the UK's obligations under the Habitats Directive are fulfilled.

5. Wightlink is a private company, and is the owner of and statutory harbour authority for the ferry terminal

comprising Lymington Pier.

6. The Lymington Harbour Commissioners are the statutory harbour authority for the Lymington river and harbour under the Harbours Act 1964, and manage the river and harbour in accordance with the Lymington Harbour Orders of 1951-2002.

7. Natural England is the statutory nature conservation body for England. Its role, inter alia, is to provide advice to 'competent authorities' on the scope of 'appropriate assessments' required under the Habitats Directive regime. Natural England did not appear and was not represented at the hearing, but set out its position in a letter from its solicitors, Browne Jacobson, dated 11 December 2009.

8. The New Forest District Council is the local planning authority in relation to the Lymington Pier ferry terminal operated by Wightlink.

The Issues

9. The claim is summarised in the amended grounds in the following terms:

> *"5) The decision by Wightlink to introduce a new type of ferry into service on the Lymington to Yarmouth route, which passes through internationally designated nature conservation sites, is unlawful because:*
>
> > *a) It is in breach of the UK Habitats Regulations; the EC Habitats Directive and perverse.*
> >
> > *b) In unilaterally introducing the ferries, despite the environmental concerns expressed by DEFRA, Natural England and the Lymington Harbour Commissioners, Wightlink has acted in breach of its statutory nature conservation duties.*
> >
> > *c) Wightlink appears to have sought to evade proper compliance with the Habitats legislative regime by narrowing the scope of its initial project to exclude physical development associated with the introduction of the ferries.*
>
> *6) The UK has failed to properly implement Article 6 (2) of the Habitats Directive. There appears to be no regulatory power available to prevent Wightlink from introducing the ferries despite the fact that the ferries are likely to have significant environmental effects on internationally designated nature conservation sites.*
>
> *7) To the extent that the Court considers it has no choice but to interpret Regulations 48 and 49 of the Habitats Directive as only applying to plans or projects which require authorisation or consent, the UK has failed to properly implement Article 6 (3) of the Habitats Directive.*
>
> *8) The UK has failed to properly implement Directive 85/337/EEC on ("the EIA Directive") in that the introduction of ferries weighing more than 1350 tonnes, which are considered likely to have significant environmental effects, escape the requirements of an environmental assessment because they do not constitute physical development or require regulatory consent. The Claimants rely on the direct effect of the Directives in seeking a declaration that the introduction of the ferries, in the absence of an environmental assessment, was unlawful."*

10. The claimants no longer seek injunctive relief. In a supplementary written submission, forshadowed by a letter to the defendant dated 29 October 2009 and a letter to the court from his instructing solicitors dated 16 November 2009, Mr William Norris QC, who appeared for the claimants, indicated that the claimants now invite the court to declare that:

> *" a. The Ferry Service is and was a 'plan or project'*
>
> > *b. The responsibility for deciding whether there should be an Appropriate*

Assessment and, in the light of that decision, was one for the relevant competent authority which, in the circumstances of this case, was DEFRA or a governmental body answerable to Defra and not for Wightlink

c. There was no such AA or anything which qualified as such before the new service commenced

d. As in February 2009 Wightlink acted unlawfully in commencing the new ferry service

e. As in February 2009 DEFRA/the UK Government had not effectively transposed the Habitats Directive into domestic law

f. The Defendants should pay the cost of the proceedings should any of those declarations be granted"

11. Both defendants dispute the claim, and furthermore both invite me to refuse permission on the basis that the application has become academic, a point to which I shall return. But in addressing the question of whether Wightlink acted unlawfully in resolving to introduce the W class ferries on the Lymington route, it is necessary to consider the following issues:

    1. Was the proposal to introduce the W class ferries a plan or project within the meaning of the Habitats Directive? If so

    2. Was there a competent authority within the meaning of the Habitats Directive? If so

    3. Was there an appropriate assessment of the effect of the introduction of the W class ferries on the protected sites?

So far as DEFRA is concerned, the issue that the claimants seek permission to argue is whether the Habitats Directive was effectively transposed into domestic law as at 25 February 2009.

The Legal Framework

The Habitats Directive

12. The Habitats Directive was adopted in 1992. Its aim is to protect the most seriously threatened habitats and species across Europe, and it complements the EC Directive on Wild Birds (79/409/EEC) (the 'Birds Directive') adopted in 1979. The Birds Directive and the Habitats Directive established the European framework for the conservation of wild birds, and of natural habitats and flora and fauna respectively, and together provide the regulatory framework for what is known as the 'Natura 2000' network of protected sites.

13. Sites designated under the Habitats Directive are labelled Special Areas of Conservation (SAC's). Article 6 both imposes general obligations with regard to the conservation of, and avoidance of deterioration to SACs, and provides a form of development regime, stipulating when and on what basis 'plans and projects' with negative effects on the site may or may not be permitted by a 'competent authority'. It is central to the issues to which this application gives rise, and is in the following terms:

    "6.1 For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated with other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

    6.2 Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats as well as disturbances 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 this Directive.

6.3 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 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.

6.4 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.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

14. Article 6 was the subject of the decision of the European Court in Case C- 127/02, *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Waddenzee)* [2004] ECR-7405. The following paragraphs in which the court addressed the interpretation and application of Article 6(3), are of particular relevance to the issues to which this application gives rise.

"23. The Habitats Directive does not define the terms 'plan' and 'project'.

24. By contrast Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (PJ 1985 L 175, p40), the sixth recital in the preamble to which states that development consents for projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out, defines 'project' as follows in Article 1 (2)

'- the execution of construction works or other installations or schemes

- other interventions in the natural surroundings and landscape including those involving extraction of mineral resources'

25. An activity such as mechanical cockle fishing is within the concept of 'project' as defined in the second indent of Article 1 (2) of Directive 85/337.

26. Such a definition of 'project' is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, as is clear from the foregoing, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of the impact on the environment.

...

39. According to the first sentence of Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but which could have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

40. The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.

41. Therefore, the triggering of the environmental protection mechanism provided for in

> *Article 6(3) of the Habitats Directive does not presume – as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled 'Managing Natura 2000 Sites: The provisions of Article 6 of the "Habitats" Directive (92/43/E EC)' - that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project*
>
> ...
>
> *43. It follows that the first sentence of Article 6 (3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.*
>
> *44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned ... Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.*
>
> *45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.*
>
> *53. Nevertheless according to the wording of that provision (Article 6(3)), an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.*
>
> *56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.*
>
> *57. So, where doubt remains as to the absence of adverse effect on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.*
>
> *58. In this respect, it is clear that the authorisation criteria laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle ... and makes it possible effectively to prevent adverse effect on the integrity of protected sites as the result of the plans or project being considered. A less stringent authorisation criteria than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision."*

15. The following propositions can be drawn from the directive as clarified by *Waddenzee;*

> 1. The Habitats Directive must be interpreted and applied by reference to the precautionary principle, which reflects the high level of protection pursued by Community policy on the environment – see Waddenzee paras 44 and 58;

2. A competent national authority may only authorise a plan or project after having determined that it will not adversely affect the integrity of the protected site in question – Article 6(3) and Waddenzee paras 56 and 57;

3. Unless the risk of significant adverse effects on the site in question can be excluded by the competent authority on the basis of objective information, the plan or project must be the subject of an appropriate assessment of its implications for the site;

4. If, following an appropriate assessment, doubt remains as to whether or not there will be significant adverse effects on the integrity of the site, the competent authority must refuse authorisation of the plan or project, unless Article 6(4) applies.

5. 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 be carried out for imperative reasons overriding public interest (including those of a social or economic nature), the competent national authorities must

"take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected",

and notify the Commission of such measures. (Article 6(4)).

The Habitats Regulations

16. The Habitats Regulations are the principal regulations by which the Habitats Directive is implemented in Great Britain. Regulation 3 imposes the following general obligations:

> "*3(2) The Secretary of State and nature conservation bodies shall exercise their functions under the enactments relating to nature conservation so as to secure compliance with the Habitats Directive…*
>
> *3(3) In relation to marine areas any competent marine authority having functions relevant to marine conservation shall exercise those functions so as to secure compliance with the requirements of the Habitats Directive…*
>
> *3(4) Without prejudice to the preceding provisions, every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.*"

Regulation 48 '*Assessment of implications for European site*' provides as

follows:-

> "*1. A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which;*
>
> *(a) is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects) and*
>
> *(b) is not directly connected with or necessary to the managèment of the site;*
>
> *shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives*
>
> *2. A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment.*
>
> *3. The competent authority shall for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by*

that body within such reasonable time as the authority may specify.

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

5. In the light of the conclusions of the assessment, and subject to Regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site

6. In considering whether a plan or project will adversely affect the integrity of the site, the authority shall 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."

Competent Authorities

17. The term "competent authority" is not defined by the Directive; but the Commission has interpreted it to encompass not only authorities within the central administration, but also regional, provincial or municipal authorities (see *Managing Natura 2000 Sites, The Provisions of the Habitats Directive 92/43/EEC (2000) at page 38)*. Regulation 6 of the Habitats Regulations does provide a definition. Competent authorities are said to include:

"any Minister, government department, public or statutory undertaker, public body of any description or person holding public office. The expression also includes any person exercising any function of a competent authority in the United Kingdom."

18. As is clear from regulation 48 a competent authority in this context means an authority that has the power to give any consent, permission or other authorisation for a plan or project within the meaning of the Habitats Directive, and includes an authority that itself undertakes such a plan or project. It is common ground that there may be more than one competent authority depending on the nature and/location of the activity in question.

19. The discharge of its duties under the Habitats Directive and the Habitats Regulations by a competent authority is a two stage process. First the authority must consider whether there is a risk of significant adverse effects on a protected site. It is only if satisfied that there is no such risk that it need take no further steps. But if there is such a risk, then the requirement for a appropriate assessment is triggered; and the authority must not give consent to or authorisation of the plan or project unless satisfied that the risk of significant adverse effects can be excluded (subject only to the provisions of Article 6(4) in circumstances in which the plan or project must be carried out for imperative reasons overriding the public interest). For the purposes of the appropriate assessment the competent authority shall consult the appropriate nature conservation body, in this case Natural England, and shall have regard to any representations made by it, see regulation 48(4).

Special Nature Conservation Orders

20. Regulations 22 to 27 (and Schedule 1) set out a regulatory regime under which the Secretary of State has power, inter alia, to make special conservation orders. As originally worded, regulation 22 provided (emphasis added):

"22 (1) The Secretary of State may, after consultation with the appropriate nature conservation body, make ***in respect of*** *any* ***land within a European site*** *an order (a "special nature conservation order") specifying operations which appear to him to be likely to destroy or damage the flora, fauna, or geological or physiographical features by reason of which the land is a European site.*

(2) A special nature conservation order may be amended or revoked by a further order."

The Conservation (Natural Habitats) (Amendment) (No 2) Regulations amended regulation 22(1) with effect from 1 October 2009 so as to extend its application to a wider range of operations. In its amended form it provides (emphasis added):

> *"The Secretary of State may, after consultation with the appropriate nature conservation body, make in respect of any land within a European site an order (a "special nature conservation order") specifying operations* ***(whether on land specified in that order or elsewhere and whether or not within the European site) which appear to the Secretary of State to be of a kind which, if carried out in certain circumstances or in a particular manner, would be*** *likely to destroy or damage the flora, fauna, or geological or physiographical features by reason of which the land is a European site."*

Regulation 23 was correspondingly amended to widen the provision for service of notices restricting the carrying out of operations, so as to include operations not carried out on land, and operations carried out outside a European site.

Planning control

21. Under the Town and Country Planning Act 1990 operational development on or over land (including land covered by water) in a local planning authority's area must be authorised either by a grant of planning permission or by permitted development rights. Part 17 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 confers certain permitted development rights on statutory undertakers; and Class B of Part 17 permits

> *"development on operational land by statutory undertakers...in respect of dock, pier, harbour...undertakings, required...(b) in connection with the embarking, disembarking. Loading, discharging or transport of passengers".*

22. The effect of regulation 48 of the Habitats Regulations in the planning context is that where planning permission is sought for a development that constitutes a plan or project which is likely to have a significant effect on a European site, the local planning authority cannot grant permission unless and until it has made an appropriate assessment of the implications of the development for the site and has ascertained that the development will not adversely affect the integrity of the site.

23. Similarly by regulation 60(1) where a proposed development under permitted development rights is likely to have such an effect, the right is subject to a condition that the development must not be begun until the developer has received written notification of the local planning authority's approval under regulation 62. By regulation 62(4) – (6) a local planning authority may not give approval until it has made an appropriate assessment and ascertained that the development will not affect the integrity of the site, and must have regard to the views of an appropriate nature conservation body.

24. Finally section 48A of the Harbours Act 1964 provides that -

> *"It shall be the duty of a harbour authority in formulating or considering any proposals relating to its functions under any enactment to have regard to –*
>
> *(a) the conservation of the natural beauty of the countryside and of flora, fauna and geological or physiographical features of special interest:*
>
> *and to take into account any effect which the proposals may have on the natural beauty of the countryside, flora, fauna or any such feature or facility."*

25. Although not relevant to the issues to which this application gives rise, it is to be noted that subsequent legislation has altered the statutory framework summarised above. Chapter 1 of Part 5 of the Marine and Coastal Access Act (sections 116 to 145), which received the Royal Assent on 12 November 2009, specifically provides for the designation of sites as falling within Marine Conservation Zones. Section 126 provides for an assessment process in respect of any proposed acts capable of affecting such zones, and by section 131 byelaws, including emergency byelaws, may be passed for their protection. These provisions will apply to Natura 2000 sites, see schedule 11, paragraph 4.

The factual background

26. The summary that follows is intended to include a factual account of events of particular relevance to the issues to which this application gives rise. It is not intended to be a comprehensive account of events from the point at which Wightlink first indicated its intention to replace the C class ferries.

27. There has been a regular ferry service between Lymington and Yarmouth since about 1830. The route is the shortest crossing between the mainland and the Isle of Wight. The ferries depart from Lymington pier on the east bank of the river, travel down the river to its mouth, a distance of about 1.4 nautical miles, and across the western Solent to Yarmouth, a total distance of 3.4 nautical miles.

28. The service runs 24 hours a day, 365 days a year; and at peak times of the year is operated by three vessels offering a departure every 30 minutes. At off-peak times, the service is operated by two vessels offering a departure every 45 minutes. In 2008 there were a total of 21,942 trips. In a full year approximately 1,400,000 passengers, 375,000 cars and 46,000 coaches and commercial vehicles use the route.

29. For many years the ferries were owned by what became the British Railways Board. Ownership passed to Sealink UK Ltd, whose ferry service was operated by its subsidiary, Sealink British Ferries; and in 1984 when Sealink was de-nationalised, Sealink British Ferries was bought by a Bermudan-based company, Sea Containers Ltd. In 1990 the Stena line bought Sealink British Ferries; but the Isle of Wight ferries remained in the ownership of Sea Containers, and the company operating them was re-named Wightlink. Lymington Pier, and the statutory functions relating to it, were duly transferred to Wightlink by the Sealink (Transfer of Lymington Pier) Harbour Revision Order 1991. The explanatory note to the Order states that –

> "*This Order transfers the harbour undertaking at Lymington Pier from Sealink Harbours Limited to Wightlink Limited and provides that, on and after the day of transfer, the latter shall exercise jurisdiction as harbour authority and its piermaster may exercise his powers, within a small water area adjacent to the pier but subject to the overriding jurisdiction of the Lymington Harbour Commissioners and their harbour master.*"

30. In 1995 Wightlink was the subject of a management 'buy-out', and in 2005 was acquired by the Macquarie European Infrastructure Fund.

31. The river, and in consequence the ferries, pass through internationally designated conservation areas. The salt marshes and mudflats at the Lymington estuary are both part of the Solent and Southampton Water 'Special Protected Area' for birds, designated under the Birds Directive, and part of the Solent Maritime Special Area of Conservation designated under the Habitats Directive. The salt marshes and mudflats have also been designated as part of a wetland of international importance under the International Convention on Wetlands (the Ramsar Convention); and the river runs through three Sites of Special Scientific Interest (SSSIs), the Hurst Castle to Lymington River Estuary SSSI, the New Forest SSSI and the Lymington River SSSI.

32. Between 1973 and 25 February 2009 the ferry service between Lymington and Yarmouth was operated using three C class vessels which had entered service between 1973 and 1974. Planning for the introduction of a new class of ferry began soon after the sale of Wightlink to Macquarie in 2005. Wightlink contends that it had no reasonable alternative but to introduce the W class, as the C class vessels were at the end of their operative life. It is submitted on behalf of the claimants that that is difficult to reconcile with the report to Wightlink from Hart Fenton made in 2005 to the effect that the C class was fit for service until 2023. But be that as it may, a need to replace the C class was not in itself a reason to replace it with vessels the size of the W class.

33. In 2006 the specification of the proposed W class vessels was put out to tender. By December 2006 Brodogradliste Kraljevica in Croatia had been selected as the preferred bidder; and on 20 March 2007, contracts were entered into for the construction of three W class vessels. Wightlink then advertised the C class vessels for sale.

34. The W class ferries are substantially larger and more powerful than those of the C class. The very considerable difference in size was clearly illustrated in the photograph and diagrams at pages 1 and 2 of the Core Bundle. According to a report to Wightlink from ABPmer, its marine environmental consultants, the new ferries displace 1489 metric tonnes, whereas the C class displaced 868 metric tonnes. The W class have a deadweight capability of 330 tonnes as against 156 tonnes for the C class. They are 62.4 metres in length as against 55.5 metres for the C class, and have a beam of 16 metres as against 15.2 for the C class; although the difference in beam at the water level is 3 metres. Unlike ordinary vessels, neither the W class nor the C class ferries have conventional propellers and a rudder, but are controlled by Voith Schneider systems. In the case of the W class, propulsion and steering derives from, and is entirely controlled by two thrusters, fitted on the centre line, 20 cms clear of the keel-line and 1.7m below the waterline. In the earlier version of the Voith Schneider system fitted to the

C class ferries, propulsion and steering were controlled by offset thrusters, on each quarter fore and aft, about 1m above the keel-line and 1.3m below the waterline. The combined horsepower of the C class thrusters was 800 hp; the combined horsepower of those fitted to the W class is 1360 hp (67% greater), see Table 1 ABPmer's report to Wightlink of May 2008.

35. In about October 2006 it had become public knowledge that Wightlink was planning to replace the C class vessels, and in January 2007 it gave presentations of its plans to the Lymington Harbour Commission and to the Royal Lymington Yacht Club (RLYC). There was a further presentation to the RLYC on 17 September 2007; and on 10 November there was a public meeting hosted by the Lymington Society and attended by Wightlink. On 14 November 2007, and again on 3 and 13 March 2008 questions as to the introduction of the new ferries were raised in the House of Commons by the local MP, Desmond Swayne.

36. Meanwhile in June 2007 Wightlink intimated to the New Forest District Council that it intended to carry out works to its Lymington Pier terminal (the 'shore works') –

> *"... to facilitate berthing of the new vessels which Wightlink have ordered for the Lymington/Yarmouth route.*
>
> *The works consist of the replacement of fendering and modifications to the linkspan bridge within the main ferry berth and the installation of new fender piles to provide additional standby berthing for the new vessels.*
>
> *The works constitute essential modifications to existing structures to enable the ferry service to be maintained and such is believed to be covered by Wightlink's permitted development rights."*

37. The works required consent under the Food and Environmental Protection Act 1985 (FEPA) and the Coast Protection Act 1949 (CPA). Wightlink therefore applied to DEFRA's Marine Consents and Environment Unit in July 2007, for a licence under the FEPA and consent under the CPA. Prior to submitting the applications, Wightlink consulted Natural England, which on 21 May 2007 advised that the proposed introduction of the W class ferries might be a 'plan' or 'project' within the meaning of the Habitats Directive, and might therefore trigger the requirement for an appropriate assessment under the Habitats Regulations.

38. The Marine Consents and Environment Unit also referred Wightlink's applications to Natural England. By letter dated 24 September 2007 Natural England informed the Unit that it objected to the proposed shore-side works principally on the basis of the likely effects of the W class ferries, and advised that an appropriate assessment of the effects of the W class ferries on the mudflats and salt marshes in the Lymington estuary should be carried out before the FEPA and CPA applications were determined.

39. The New Forest District Council was satisfied that the proposed shore-side works could be carried out pursuant to Wightlink's permitted development rights. But in the light of Natural England's advice that the works were *"likely to have a significant effect on a European protected site"*, the council formed the view that its approval under regulation 62 of the Habitats Regulations was required. It set out its position to Wightlink's contractors, Mayhew Cullum Ltd, in a letter dated 30 November 2007 explaining in essence that the development of the Lymington terminal was a plan or project within the meaning of the Habitats Regulations, and that, applying the relevant European and domestic guidance, the ferry operations themselves, and therefore their effect on the relevant protected habitats, were to be regarded as consequences of the plan or project for the purposes of the regulations. Wightlink's proposals for the shore-side works therefore proceeded as an application for regulation 62 approval.

40. On 29 January 2008 Wightlink commissioned an expert report from ABPmer on the environmental impact of the proposed introduction of the new ferries. The first W class ferry arrived in the UK on 1 September 2008, and sea trials in the river were undertaken in the autumn.

41. On 21 September 2008 solicitors acting for the claimants wrote to the Parliamentary Under-Secretary of State within DEFRA expressing a high level of concern as to the manner in which Wightlink's proposals for the introduction of the new ferries was being dealt with, inviting intervention under regulation 4(8) of the 1999 Regulations by which Directive 85/337/EEC was implemented, and seeking advice as to *"where exactly the regulatory process has got to"*. The minister replied on 27 November 2008 saying that the Marine and Fisheries Agency was responsible for undertaking an appropriate

assessment in relation to the application for a licence under the FEPA and consent under the CPA, that the New Forest District Council was obliged to undertake an assessment in relation to the shoreside works, and that

> *"two Competent Authorities are currently in the process of producing a joint assessment which will primarily focus on the impact of the larger ferries on the nearby protected European sites."*

The letter went on to assert that -

> *"We are not aware that the introduction of the larger ferries requires the approval of the MFA (Marine and Fisheries Agency), the local planning authority or, as we understand, any other competent authority. In our view therefore, the relevant provisions of the Habitats Directive and regulations are not engaged and an appropriate assessment is not required. Consequently we can see no grounds for taking action, for example by means of an injunction, to prevent the ferries from operating in advance of an assessment being completed. Furthermore, our view is that, for the purposes of operating a ferry service, Wightlink cannot be regarded as a Statutory Undertaker and thus responsible for carrying out an appropriate assessment before the new ferries are introduced.*
>
> *Nevertheless, as I indicated in my recent statement in the House, Defra officials will explore with DfT and other regulators, including Natural England and the Harbour Commissioners, the implications of Wightlink's proposed actions. We will also consider very carefully any regulatory powers that exist and that might need to be exercised, in order to fulfil the UK's obligations under the Habitats Directive."*

42. The claimant's solicitors replied seeking an explanation of the apparent contradiction that the letter of 27 November contained as to whether the Habitats Directive was engaged. The minister replied on 10 December referring again to the two competent authorities that he had identified in the letter of 27 November, in addition pointing to the Lymington Harbour Commissioners as having obligations under regulation 3(4) of the Habitats Regulations, and concluding –

> *"I fully accept that ultimately it is for my Department to ensure compliance with the Habitats Directive and this is a responsibility we take very seriously. However, initially, it is for the MFA, New Forest District Council and the Harbour Commissioners to examine, and if necessary take action on, the advice from Natural England. Until then it would be inappropriate to speculate on what other measures might need to be taken to secure compliance with the Directive."*

43. At this stage Wightlink's application for approval under regulation 62 was still before the New Forest District Council; but the Marine and Fisheries Agency had decided that it did not require an environmental statement under the Marine Works Regulations. It is also to be noted that neither in his letter of 27 November nor in that of 10 December did the minister suggest that Wightlink was the relevant competent authority.

44. But in the meantime on 17 November 2008 Wightlink informed the Lymington Harbour Commission that it intended to introduce the W class ferries into service in December, and that it no longer considered it to be necessary to modify the pier/loading arrangements before introducing the new ferries. It did not therefore need to await a decision by the New Forest District Council on its regulation 62 application, a decision that was subject to an appropriate assessment by the council. On 19 November the question of the introduction of the new ferries was again raised in Parliament by Desmond Swayne MP for New Forest West, who pointed out to the minister that in the light of the decision by Wightlink to introduce the new ferries without carrying out the proposed shore-side works, the requirement for an appropriate assessment

> *"seems to have disappeared" (Hansard 19 November 2008 column 336) and inviting him to "initiate a full environmental impact assessment".*

45. In early December Wightlink and the Lymington Harbour Commission provisionally agreed an Interim Safe Operating Profile (ISOP) to regulate the operation of the new ferries so as to ensure safe navigation, and on 11 December Wightlink wrote to Natural England asking for its comments on the ISOP, and in particular seeking its view as to the effect that operating under the ISOP might have on

the European conservation sites in the Lymington estuary. On 22 December Natural England issued its preliminary advice to Wightlink stating that

> "...*it cannot be ascertained that the introduction of the W class ferries will not have an adverse effect on the Natura 2000 interest".*

46. On 16 January the Lymington Harbour Commissioners wrote to DEFRA having seen a copy of the minister's letter to the claimants' solicitors of 10 December seeking clarification of DEFRA's understanding of the regulatory powers available to them. On the same day they also wrote to Wightlink's solicitors seeking an undertaking that Wightlink would not introduce the new ferries until such time as Natural England had confirmed that their introduction would not have an adverse effect on the Natura 2000 interest. Wightlink' solicitors replied on 28 January stating that -

> "*Wightlink confirms that it will not start to operate the W-class ferries until it is satisfied that it has had due regard to the matters set out in paragraphs 2 and 3 above (namely that it and the Commissioners had identical duties with regard to the environment under section 48A of the Harbours Act 1964, and that they were both competent authorities for the purposes of the Habitats Regulations) and until it has provided evidence of its consideration of impact and mitigation to LHC".*

47. In a report dated 27 January 2009 Natural England received advice from its expert, HR Wallingford ('HRW 09') in which it was noted (page iv) that it was apparently

> "*agreed by all parties that the W Class ferry will produce greater under-keel turbulence, backflow, return currents and thrust jet speeds".*

This (per paragraph 4.6) "*will result in an enhanced loss of mudflat at MLW*" particularly at certain points in the river. As they erode (per paragraph 7), the "*role of wind waves will become increasingly more important*" and accelerate the process of erosion.

48. On 31 January 2009 DEFRA notified Desmond Swayne MP that Natural England was not satisfied with mitigation proposals that had been put forward by Wightlink, and on 1 February wrote to the Lymington Harbour Commissioners suggesting the new bye-laws or a Harbour Revision Order might furnish the means of imposing the necessary environmental controls.

49. On 12 February 2009 Natural England gave formal advice to Wightlink, Lymington Harbour Commissioners, the New Forest District Council and the Marine and Fisheries Agency on the "*effects of Wightlink's proposed W class ferry on the Natura 2000 sites in the Lymington river*", based on the report from HR Wallingford. The summary that prefaced the advice contained the following paragraphs (emphasis as in the original):

> "*Having considered all the evidence Natural England continues to advise that current evidence suggests that the 'C' class ferry has been a factor in the ongoing deterioration in the extent of mud flats and saltmarshes at Lymington. This deterioration is over and above background changes and the influences of ferries in upstream sections appears to dominate over natural influences. The introduction of the 'W class' ferries can be expected to prolong ferry-induced impacts on inter-tidal habitats and consequently further losses are likely to be attributable to ferry operations, even when mitigated by recent reductions in speed.*
>
> *The ferry-related effects from the C class vessels since 1998 and the introduction of the W class vessels are estimated to be of the order of 0.4 ha loss of habitat per decade from the inter-tidal at Chart Datum and a detrimental habitat change affecting 1.3 ha per decade. These effects are predicted to continue, albeit at reducing rates, for tens of years.*
>
> *During the period of ongoing effects of the ferry operation along the navigation channel, the wider designated site will continue to suffer rapid coastal squeeze habitat losses from vegetation die-back and outer wind-wave erosion of around 5-6 ha a year. These effects will substantially change the nature of the estuary over the next 40-100 years.*
>
> *While habitat losses to the wider designated site are dominated by coastal squeeze*

rather than the ferries, it has nevertheless been shown that the previous effect of the C class ferry together with predicted effects of the W class ferry would have a further anthropogenic detrimental effect. Consequently it must be concluded that the conservation objectives for the Natura 2000 sites cannot be secured.

Natural England therefore advises that it cannot be ascertained that the introduction of the' W class' ferries will not have an adverse effect on the Natura 2000 interest."

50. The advice noted that although questioning the findings of the report from H R Wallingford, Wightlink was then in 'without prejudice' discussion with Natural England and the Lymington Harbour Commissioners with regard to mitigation of the adverse effects that H R Wallingford had identified.

51. In the light of that advice, the Lymington River Association, Lymington Harbour Commissioners, the Lymington Society and other interested groups urged Wightlink not to introduce the ferries precipitately .

52. On 20 February 2009 Wightlink's solicitors wrote to the claimant's solicitors saying that Wightlink was working closely with Natural England and the Harbour Commissioner, and their respective environmental consultants, regarding the effects of the W-class ferries, and in the final paragraph of the letter that:

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

53. On 23 February 2009 counsel and solicitors advised Wightlink that the introduction of the W class ferries did not amount to a plan or project within the terms of the Habitats Regulations; but that given Wightlink's general obligations under S48 A of the Harbours Act 1964 and regulation 3(4) of the Habitats Regulations, it was advisable for the company to carry out an environmental assessment of the effect of introducing the new ferries. Wightlink were also advised that;

> *"That assessment should be equivalent in form and scope to the appropriate assessment process that would otherwise have been required had the introduction of the ferries constituted a plan or project. As part of that process, Wightlink should consult Natural England and have regard to any representations it makes. Having done so, Wightlink should only decide to introduce new ferries if it has ascertained that the ferries will not adversely affect the integrity of the Natura 2000 site."*

54. At a meeting held on the same day, 23 February the Wightlink board resolved to introduce the ferries into service two days later on 25th February. It had before it a report from ABPmer "*Replacement of Lymington to Yarmouth Ferries: Updated Information for Appropriate Assessment*" February 2009. The minutes of the board meeting record inter alia:

> *"4 Business of the Meeting*
>
> *4.1 The Chairman reported that, further to the meeting held by the Board on 23 January 2009, the meeting had been convened to consider whether to introduce the W - class ferries into service on an interim basis pending the determination of the applications relating to the proposed shore works at Lymington Pier...*
>
> *...*
>
> *5 Environmental Obligations*
>
> *5.1 The Chairman noted that the Company is a Harbour authority in respect of Lymington Pier and therefore has environmental duties under section 48 A of the Harbours Act 1964...*

5.2 The Chairman noted that, whilst the ferry service is not operated pursuant to the Company's statutory functions, the proposals to operate the W - class ferries on an interim basis could be regarded as being related to its functions for the purposes of section 48A…

5.3 The Chairman noted that the Company is also a 'competent authority' for the purposes of the Conservation (Natural Habitats etc) Regulations 1994. Regulation 3 (4) of which requires that every competent authority in the exercise of any of their functions shall have regard to the requirements Habitats Directives have as they may be affected by the exercise of those functions…

6. Environmental Assessment

*6.1 After due consideration of the legal advice note, **IT WAS RESOLVED** that the introduction of the W - class ferries did not constitute a plan or project for the purposes of the Regulations and, therefore, did not trigger the requirement for an appropriate assessment under regulation 48.*

*6.2 Notwithstanding this decision, **IT WAS RESOLVED** that the Company should have regard (to) the environmental assessment that had been carried out by ABPmer in an equivalent way to an appropriate assessment under regulation 48, and should agree to introduce the W - class ferries only if it is satisfied in the light of that assessment that they would have no adverse effect on the integrity of the designated sites.*

***6.3 IT WAS FURTHER RESOLVED** that by carrying out a process that was equivalent to an appropriate assessment under regulation 48, the Company would have satisfied its environmental obligations under section 48 A of the Harbours Act 1964 and regulation 3 (4) of the Conservation (Natural Habitats etc) Regulations 1994.*

…

7 ABPmer Report

*7.2 After due consideration of ABPmer's report, and having had regard to Natural England's advice, the Board assessed the impact of the new ferries. Having done so, **IT WAS RESOLVED** that the interim operation of the W class ferries would not have an adverse affect on the integrity of the inter--tidal mud and salt marsh which were either designated features, or supporting features for the SPA and Ramsar birds.*

***IT WAS FURTHER RESOLVED** that there was no reason to believe that the interim operation of the W class ferries would give rise to any disturbance or damage that was significant in the context of the Habitats Directive to any natural habitats or wild fauna or flora.*

9 Introduction of W Class Ferries

*9.1 After due and careful consideration, **IT WAS RESOLVED** that the W class ferries should be introduced into service with effect from Wednesday 25 February 2009, pending the carrying out of the shore works at Lymington Pier."*

55. Wightlink then issued a press release in which it made public the legal advice that it had received, and saying inter alia:

"Consultation and various detailed studies on the operation and impact of the new ferries are either not complete or nearing completion including independent trials and environmental assessments. Following the extensive research and receipt of expert scientific advice, and in compliance with its statutory obligations, Wightlink is satisfied that the new ferries are safe to operate and have no discernible impact on the environment or the surrounding habitats in the Lymington estuary.

Wightlink acknowledges that concerns have been raised regarding the new ferries and

> *their potential effect on the protected mud and salt marsh habitats at Lymington. Environmental consultants ABPmer have undertaken extensive studies of the effects of the ferries and have engaged in detailed discussions on environmental issues with Natural England, their consultants – HR Wallingford, Lymington Harbour Commissioners and their consultants, Black & Veatch.*
>
> *All parties have recognised that an assessment of the past and likely future environmental effects of the ferries, both old and new, is unusually difficult. It is particular hard to isolate the effects of the ferries from the natural forces that have been and continue to act upon the mud and salt marshes. Despite this difficulty, all parties have gone to great lengths to try and reach an agreement as to the most reliable data regarding the historical rates and causes of erosion of the protected sites.*
>
> *Natural England has advised Wightlink that it cannot be ascertained that the new ferries will not have an adverse effect on the protected sites. ABPmer disagrees with HR Wallingford's approach to the data and the conclusions that Natural England has drawn from it, suggesting that insufficient consideration has been given by HR Wallingford to the prospective causes of erosion, other than the ferries. On the basis of clear advice from ABPmer, Wightlink is confident that the new ferries will not have an adverse effect on the integrity of the mud and salt marshes in the Lymington estuary."*

56. On 24 February, the Chairman of the Lymington Harbour Commissioners issued an "*Update to Stakeholders*" which contained the following passages:

> "*Wightlink have defied the will of all the regulators in deciding to introduce their new ferries before the necessary safety trials are complete and the environmental concerns have been resolved.*
>
> *They have taken this action despite repeated requests from the LHC and their previous undertaking not to do so. They claim that they are justified because of the needs of the Isle of Wight, but the real problem that has led to the situation is Wightlink's determination to design and build ferries in advance of meaningful consultations with all the regulators. As a result, all subsequent consultations have taken place against the commercial necessity on the part of Wightlink to introduce ferries that had already been paid for.*
>
> *We have once again requested Wightlink to desist from this action, and are contacting all the relevant Government Departments for support in preventing it...*"

57. It was also on 24 February that the claimants sought an injunction to restrain Wightlink from introducing the W class ferries on the following day, see paragraph 2 above.

58. On 25 February 2009 Wightlink discontinued the use of the C class ferries and introduced the W class, with which they have since operated the Lymington to Yarmouth service. On 31 March 2009 the three C class vessels were sold to an organisation in Denmark for breaking.

59. On 8 April 2009 the New Forest District Council's Planning Development Control Committee met to determine Wightlink's application under regulation 62 for approval of the use of its permitted development rights to carry out works at Lymington Pier. The Committee was informed by an Officer's Report which recommended that the Council adopt an appropriate assessment based on Natural England's advice, and refuse the application on the basis that it cannot be ascertained that the proposed works, and in particular the operation of the new ferries, will not adversely affect the integrity of the European site. Wightlink had written to the Committee on 6 April seeking to persuade it to defer determination of the application until the resolution of these proceedings, arguing that it "*could not properly determine Wightlink's application on the basis of an 'appropriate assessment' which effectively pre-empts the court's decision, and is based on disputed evidence and advice*". The Committee rejected that submission, undertook an appropriate assessment concluding in accordance with the advice of Natural England, that it could not be ascertained that the introduction of the W class ferries including the proposed physical works would not have an adverse affect on the Natura 2000 interest, and therefore refused the application for approval under regulation 62.

60. On 8 April DEFRA wrote to Natural England requesting confirmation as to whether environmental damage had already occurred, or whether there was any imminent threat of environmental damage by

reason of the operation of the ferries, as it wished to consider the exercise of powers under the Environmental Damage (Prevention and Remediation) Regulations 2009. By its response dated 15 April, Natural England confirmed that there was no likely threat to the integrity of the site or measurable environmental damage over the coming months.

61. On 20 April 2009 DEFRA filed its Grounds of Resistance to the claim, in which it acknowledged, contrary to the position that it had taken in November 2008, that the introduction of the ferries was a 'project' under the Habitats regime, and furthermore asserted that Wightlink was the relevant competent authority.

62. In June 2009 DEFRA initiated a consultation on changes to the Habitats Regulations. The consultation document contained the following passage

> *"In our view this (Regulation 23(1) in its original form) means an order cannot be use to restrict or prohibit operations being carried out on water that are likely to damage a European site. Nor could the power be used to prohibit operations undertaken outside the European site, but which have a damaging effect on it. However, the Habitats Directive, which these regulations are designed to implement, does not restrict the obligation to prevent damage to sites to operations which take place on land, or within the sites themselves. We are therefore proposing minor changes to the Habitats Regulations to address these issues."*

63. The regulations were duly amended with effect from 1 October 2009, see paragraph 20 above.

64. Discussions have continued between Wightlink and Natural England. On 12 November 2009 Natural England wrote to the claimants' solicitors stating inter alia:

> *"Natural England and Wightlink are working together to agree mitigation measures which can be taken by Wightlink to avoid the impact which Natural England considers is likely to be caused to the protected sites by the operation of the W class ferries. Such agreement is not yet in place.*
>
> *It is important to note that in so far as any agreement is reached, it will not be an agreement within the context of an Appropriate Assessment under the Habitats Regulations. Wightlink, as the competent authority, considers that there is no likely significant effect of the operation of the W class ferries and accordingly has not conducted an Appropriate Assessment. However, any agreement which is entered into will (subject to such consents as required being obtained) secure the execution of mitigation works which Natural England consider will avoid the impact which it considers are likely to be caused to the protected sites by the operation of the W class ferries. Furthermore, Natural England consider that the works which are likely to be the subject of any agreement could, if an Appropriate Assessment was ever required in the future, properly be categorised as 'mitigation' measures within the scope of Article 6.3 (as opposed to 'compensation' measures within the scope of Article 6.4).*

65. No such agreement has yet been arrived at, although I was informed in the course of the hearing that Wightlink and Natural England are close to agreement; and a Proposed Protocol for Mitigating the Effects of the W-class Ferries dated December 2009 is included in the documents put before the court. It was prepared by ABPmer, and sets out detailed mitigating and monitoring measures proposed for the operation of the ferry service. I also note that the claimants take issue as to whether the proposed measures are properly to be characterised as 'mitigation' within the scope of Article 6.3, or ought to be characterised as 'compensation' measures under Article 6.4. But that is not an issue that I have to resolve.

66. On 18 November 2009 DEFRA wrote to Natural England asking for formal advice on two issues namely –

> *"(a) whether any measurable harm or damage that would constitute an adverse effect on the integrity of the protected sites did occur in the period between 25 February and 31 October 2009; and*
>
> *(b) whether any measurable harm or damage that would constitute an adverse effect on*

the integrity of the protected sites is likely to arise in the period between 25 February 2009 and the date when, in your current estimation, works to mitigate any adverse effect are likely to commence (which we understand will be in the spring of 2011)."

67. Natural England replied on 25 November 2009 advising in relation to the first question that "*no such harm or damage has taken place*", and in relation to the second that "*any impacts…to the extent that they may occur, will be insignificant and not likely to result in any such harm or damage*", adding that

> *"…we anticipate that Wightlink's delivery of appropriate mitigation measures from the spring of 2011 onwards will avoid any adverse effect on the integrity of the protected sites that would otherwise be likely to occur due to cumulative ferry impacts over the longer term."*

Issue 1

68. Was the proposal to introduce the W class ferries a plan or project within the meaning of the Habitats Directive?

69. There is now a large measure of agreement between the parties. It is submitted on behalf of the claimants that the introduction of the W class was plainly a 'plan' or 'project' within the meaning of the directive. The Lymington Harbour Commissioners and Natural England take the same view; and DEFRA now accepts that on the specific facts a 'plan' or 'project' is involved. But Wightlink continue to maintain that the introduction of the W class ferries did not amount to a 'plan' or 'project' within the meaning of the directive.

70. Neither 'plan' nor 'project' is defined in the Habitats Directive; but the interpretation and application of the terms were considered in the *Waddenzee* case. It concerned mechanical fishing for cockles by means of trawls or dredges in the form of metal cages dragged over the seabed by a vessel. The leading edge of the cage consisted of a metal plate, 1m in width which served to scrape the upper 4-5 cms of the seabed into the cage. The metal plate was fitted with a nozzle from which a powerful jet of water emerged, and which pulverised the seabed so that a mixture of water, sand, cockles and other organisms entered the cage, the sieved contents of the cage then being sucked on board hydraulically. The court held that mechanical cockle fishing was an activity "*within the concept of 'project' as defined in the second indent of Article 1(2) of Directive 85/337*", namely an intervention in the natural surroundings and landscape, and that such a definition of project was relevant to defining the concept of plan or project as provide for in the Habitats Directive (see paragraph 26 of the judgment of the court).

71. Mr Richard Drabble QC, who appeared for Wightlink, argued that *Waddenzee* was decided on its own facts, and that the decision offers no general conclusion as to how the term 'project' is to be interpreted. I accept that the question is inevitably fact sensitive, but nevertheless consider that *Waddenzee* is of assistance in three respects. First it provides confirmation as to the breadth of approach to be adopted in interpreting Article 6(3), secondly it provides guidance as to the test to be applied in determining whether a proposal amounts to a 'plan' or 'project within the meaning of the directive; and thirdly the decision is based on an analogous factual situation.

72. As to the first, recitals in the preamble to an EC measure may be used to confirm the interpretation to be given to an operative provision, see *Case 107/80 Adorno v Commission* [1981] ECR 1469 at 1484-1485; and the 10th recital to the directive make it clear that the terms 'plan or project' should be given a wide interpretation in that it states that:

> "*… an appropriate assessment must be made of any plan or program likely to have a significant effect on the conservation objectives of a site which has been designated.*"

That is also reflected in the guidance given by the Commission in *Managing Natura 2000 Sites* at paragraph 4.3:

> "*In as much as Directive 92/43/EEC does not define 'plan' or 'project', due consideration must be given to general principles of interpretation, in particular the principle that an individual provision of Community law must be interpreted on the basis of its wording and of its purpose and the context in which it occurs*".

73. The guidance continues with the advice (at paragraphs 4.3.1, 4.3.2) that both the words 'project' and 'plan' should be given a "*very broad*" definition and meaning.

74. In *Waddenzee* the court made it clear that Article 6(3) should be interpreted in the light of its broad objective, namely a high level of protection of the environment, and in particular that the authorisation criteria laid down in its second sentence "*integrates the precautionary principle*", which it described as being one of the foundations of the high level of protection pursued by Community policy (see in particular paragraphs 44 and 58).

75. As to the second, *Waddenzee* provides guidance as to the test to be applied to determine whether a proposal amounts to a 'plan' or 'project' within the meaning of the directive. A plan or project will be caught by Article 6(3), in the sense that it will trigger the requirement for an appropriate assessment of its environmental impact, if it *"is likely to have a significant effect"* on the site. The test by reference to which the requirement of an appropriate assessment will be invoked, is expressed in a variety of ways in *Waddenzee*. The phrase used at paragraph 40 is "*being likely to have a significant effect on the site*"; at paragraph 41, and by reference to the Commission guidance *Managing Natura 2000 Sites*, *"mere probability that such an effect attaches to that plan or project"*; at paragraph 43 "*a probability or a risk that the latter* ...the plan or project*) will have significant effects on the site concerned*"; and at paragraph 45 *"if it cannot be excluded ... that it will have a significant effect on that site"*. But I am satisfied, bearing in mind the requirement to interpret Article 6(3) by reference to the precautionary principle, that the proper approach is that the requirement for an appropriate assessment is triggered unless the risk of significant adverse effects can be excluded.

76. Mr Drabble submitted that it would be an incorrect approach to Article 6(3) to conclude that just because an action could potentially have an impact on the environment or on a European site, then it should be considered to be to be a 'plan or project'. But in my judgment that it precisely the effect of Article 6(3), an interpretation supported by the decision in *Waddenzee*.

77. As to the third I am satisfied that the facts in *Waddenzee* provide a very close parallel. In *Waddenzee* the intervention with the natural surroundings was the effect of the dredging operation on the seabed, both by the plate at the leading edge scraping the top 4 – 5 cms into the cage, and by the disturbance of the seabed by the powerful jet of water from the nozzle attached to the leading edge. Similarly the operation of the W class has the potential to interfere with the natural surroundings in that by their size and displacement, means of propulsion and steering, and the fact that they operate in narrow channels and at certain states of the tide in very shallow water, the vessels may disturb the bed and banks of the river and cause erosion to the mudflats and salt-marshes within the protected sites. Mr Drabble argued that *Waddenzee* is to be distinguished on the basis that the intervention in the natural surroundings was a direct effect of the dredging operations, whereas any effect of the use of the ferries is indirect. But in my judgment that is not a distinction of significance. The question is whether the activity gives rise to a risk of adverse effects on the protected sites, whether directly or indirectly.

78. In his written advice to Wightlink to which I have referred at paragraph 53 above, Mr Drabble further argued that if the claimants' contention that the introduction of the W class is a plan or project within the ambit of the Habitats Directive is accepted, then that "*would mean that every time a shipping line employed different or larger vessels in any port, there would be a requirement to consider whether an appropriate assessment had first to be carried out*". But that argument is flawed in that it is not the introduction of the vessels that triggers the requirement to consider whether an appropriate assessment has to be carried out, but rather the possible effect of the operation of such vessels on the protected sites.

79. Mr Drabble also sought to place reliance upon the decision of the House of Lords in *Edwards v Environmenl Agency* [2008] 1 WLR 1587, which concerned a proposal to burn waste tyres as a partial substitute for the use of conventional fuel at a cement works in Rugby. He relied in particular on the following paragraphs in the speech of Lord Hoffmann:

> *"50. Mr Wolfe submitted that the adoption of tyres as a fuel fell within one or other of these paragraphs. The application was to burn 10 tonnes of tyres an hour, which indicated that the plant had a capacity exceeding 100 tonnes a day.*
>
> *51. Like my noble and learned friend Lord Hope of Craighead, whose speech I have had the opportunity of reading in draft, I have very considerable doubt as to whether this can be right. The first indent of the definition of "project"- "the execution of construction works or of other installations or schemes"- appears to contemplate the creation of something*

new and not merely a change in the way existing works are operated. The German version — "die Errichtung von baulichen oder sonstigen Anlagen" — makes this even clearer. "Errichtung" means erection or construction and "Anlage" means an installation or plant. (The French version is "la réalisation de travaux de construction ou d'autres installations ou ouvrages".)

52. The second indent -"other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources"- clearly applies to activities, such as mining or quarrying, or dragging for cockles (Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Case C-127/02) [2004] ECR-7405) which alter or destroy the natural environment. But this concept cannot easily be applied to changing the fuel in an existing installation."

80. In support of his argument that the introduction of a new type of boat onto an existing ferry route could not amount to a plan or project within the meaning of the directive, Mr Drabble argued it was comparable to the change of fuel at the cement works the subject of *Edwards*. But again it was not the simple introduction of a new type of boat that triggered the requirement for a environmental assessment. It was the risk of significant adverse effects on the protected sites. Furthermore the passage cited above has to be treated with considerable caution. The observations made by Lord Hoffmann were obiter. As he said at paragraph 58, "*If…a decision on the point was necessary for the determination of the appeal. I would propose a reference to the Court of Justice"*. Secondly although the point seemed to him to be clear, he was not confident that the Court of Justice would hold the same opinion. Lord Walker agreed with Lord Hoffman. Lord Hope simply observed that he very much doubted whether the proposal to use shredded tyres as a fuel constituted a project within Annex I of the EIA Directive. Lord Mance took a different view saying that he "*would have regarded it as probable the change to tyre burning constituted a project within Annex I*"; and Lord Brown said that he inclined rather to the Lord Mance view.

81. I am entirely satisfied that the introduction of the W class ferries on the Lymington to Yarmouth route was a project within the ambit of Article 6(3). On 12 February 2009 Natural England gave formal advice to Wightlink, Lymington Harbour Commissioners, New Forest District Council and the Marine and Fisheries Agency (see paragraph 49 above) in which it advised in terms that "*cannot be ascertained that the introduction of the 'W class' ferries will not have an adverse effect on the Natura 2000 Interest.*" In my judgment a decision maker considering at that point whether the proposed introduction of the W class ferries was a plan or project within the meaning of the Habitats Directive and the Habitats Regulations would have been bound to conclude that the risk of significant adverse effects on the protected sites could not be excluded, and that in consequence the requirement for an appropriate assessment was triggered.

82. In this context Mr Drabble sought to fall back on the argument that if Wightlink and its advisers were wrong in their view that the introduction of the W class ferries was not a project, then that was an error that could not be said to have been Wednesbury unreasonable. But if wrong in law, as I hold it to have been, the question of whether it was a reasonable error to have made is irrelevant. The challenge to the decision that the introduction of the ferries was not a project falling within the ambit of the Habitats Direction is not that it was Wednesbury unreasonable, but that it was based on an error of law.

<u>Issue 2</u>

Was there a competent authority within the meaning of the Habitats Directive?

83. As I have already observed, see paragraph 18 above, it is common ground that there may be more than one competent authority, in that the implementation of a plan or project may be subject to authorisation or control by a number of authorities whose 'jurisdictions' overlap; and it is necessary to consider the positions of Wightlink, DEFRA, the Lymington Harbour Commissioners and the New Forest District Council.

84. Wightlink has always accepted that if, contrary to its principal submission, the introduction of the ferries was a plan or project, then it was a competent authority. That was expressly acknowledged by its board at the meeting on 23 February 2009 at which the decision to introduce the new ferries was taken. DEFRA has changed its position with regard to Wightlink. On 27 November 2008 the minister wrote to the claimant's solicitors (see paragraph 41), saying inter alia that Wightlink could not be regarded as a statutory undertaker and therefore responsible for carrying out an appropriate assessment before introducing the new ferries. But in its Grounds of Resistance of 20 April 2009

DEFRA asserted that Wightlink was the relevant competent authority, a position it maintained at the hearing. The claimants' case, per paragraph 38 of their amended grounds, is that as the statutory harbour authority for Lymington pier, Wightlink has environmental duties under section 48A of the Harbours Act 1964, and is a competent authority for the purposes of the Habitats Directive, but only in respect of the pier and a small area of water adjacent to it.

85. Mr Norris appeared at one point to argue that Wightlink could not be a competent authority in relation to the introduction of the class W ferries in that it is a private company responsible to its shareholders, the pursuit of whose commercial interests might conflict with the exercise of a public duty as a competent authority. But neither the Habitats Directive nor the Habitats Regulations preclude a non-governmental body from being a competent authority. As Mr Norris accepted in his reply, the fact that it is a private company does not in my judgment disqualify it from discharging its public duties as statutory harbour authority. The discharge of its public duties must override commercial considerations. If it fails in that regard, then the exercise, or failure to exercise its public functions, will be subject to supervision by the court by judicial review.

86. I am satisfied that in the discharge of its functions as statutory harbour authority for Lymington pier and ferry terminal, Wightlink was not only obliged by section 48A of the Harbours Act to have regard to conservation objectives, but was also a competent authority under an obligation under regulation 3(4) of the Habitats Regulations to have regard to the requirements of the Habitats Directive so far as they might be affected by the exercise of those functions. As harbour authority for the pier and ferry terminal, Wightlink was in a position to authorise and control the use of the W class ferries on the Lymington to Yarmouth route, and in consequence their effect on the designated sites. Its decision to introduce and operate the new ferries was a decision made in discharge of its functions as harbour authority, and had therefore to be made in compliance with its obligations under the Habitats Directive and Habitats Regulations. Its jurisdiction as harbour authority may be limited to the pier and "*a small water area adjacent to the pier*", see the terms of the Sealink (Transfer of Lymington Pier) Harbour Revision Order 1991 (paragraph 29 above), but, as in this case, a decision made in the exercise of its statutory functions in relation to the pier, may affect a much wider area. I therefore reject the submission made on behalf of the claimants that the geographical limitation to its role as harbour authority has the consequence that it is not a competent authority with regard to the introduction of the W class ferries.

87. The New Forest District Council was a competent authority with regard to Wightlink's application for approval of the proposed works at the Lymington pier ferry terminal under regulation 62, and as such carried out the appropriate assessment upon which its decision on 8 April 2009 to refuse approval was based. But its statutory functions were limited to the proposed shore-side works. Had the introduction of the new ferries been dependant upon completion of such works, it would in effect have been subject to the council's approval. But as a result of its decision to introduce the new ferries without carrying out the shore-side works, Wightlink avoided that constraint.

88. The Lymington Harbour Commissioners are the harbour authority for the Lymington River, and as such have authority to control navigation on the river, hence its agreement with Wightlink in early December 2008 as to an Interim Safe Operating Profile (ISOP) to regulate the operation of the new ferries so as to ensure safe navigation. It is also accepted that in addition to its duties under s. 48A of the Harbours Act, it is a competent authority for the purposes of the Habitats Regulations. But it is not accepted that it was a competent authority with regard to the introduction of the W class ferries for the reasons set out in letters from its solicitors to the solicitors acting for the claimants dated 15 January 2009 and to DEFRA dated 16 January 2009, and repeated in its written submissions filed pursuant to the order made by HHJ Birtles on 12 March 2009, namely that Wightlink had not made any application to the Commissioners for a consent, permission or other authorisation in relation to their introduction, and that in any event they do not have power to give any such consent, permission or other authorisation. That analysis is consistent with the content of DEFRA's letter to the Commissioners of 1 February 2009 suggesting the new bye-laws or a Harbour Revision Order might furnish the means of imposing the necessary environmental controls. But in any event neither the claimants, nor any other party seek a ruling that the Harbour Commissioners were a competent authority for the purposes of the introduction of the ferries. I did not hear full argument on the point; and I do not therefore propose to rule on it.

89. It is accepted on behalf of DEFRA that it carries ultimate responsibility for implementing and applying the Habitats Directive. But it is submitted that it was not a competent authority with regard to the introduction of the new ferries, and secondly that the proper implementation and application of the directive did not require that it should be.

90. Wightlink, in its private capacity, was not obliged to seek the consent, permission or other authorisation

of DEFRA to introduce the W-class ferries. DEFRA has the power under regulation 22 of the Habitats Regulations to make a special nature conservation order (see paragraph 20 above). But in the original form of regulation 22, that power was limited to activities carried out on land, and could not have been exercised to prevent or control the introduction of the W-class ferries. That is of course the basis of the claimants' contention that DEFRA failed properly to transpose the Directive in the Habitats Regulations, an issue to which I shall return. But as at the date when the decision to introduce the ferries was made, DEFRA had no power to intervene, and accordingly was not in my judgment a competent authority.

91. As to the second argument, namely that the proper implementation of the Habitats Directive required that DEFRA should be a competent authority, it is submitted on behalf of the claimants that there was an obligation on the part of DEFRA to reserve to itself the power to intervene in circumstances in which a statutory authority is acting irrationally or irresponsibly or by an inadequate process. It is further submitted that this case exemplifies the requirement for the reservation of such a power, and that without it the Habitats Directive has not been effectively transposed into domestic law.

92. In my judgment that submission is misconceived for a number of reasons. First no support for such a proposition is to be found within the directive or the guidance issued at either the European or domestic level. As Mr Stephen Tromans QC observed on behalf of DEFRA, the directive does not impose an obligation to provide for such a second tier of decision making. In this context he directed my attention to the "*Commission Guidance on Assessment of Plans and Projects*" (2001) which states that under the principle of subsidiarity it is for the individual Member States to determine the procedural requirements deriving from the Directive, guidance confirmed by the decision of the European Court in Case C-201/02 *Delena Wells*, in which the court said at paragraph 65:

> "*It is for the competent authorities of a Member State to take, within their sphere of competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are subject to an impact assessment*".

The decision related to Directive 85/337 and the requirement for an environmental impact assessment, but as Mr Tromans submitted, it would appear to apply equally to appropriate assessments under the Habitats Directive.

93. Secondly regulation 22 gives the Secretary of State power to intervene by a special nature conservation order where it is necessary to do so to protect the integrity of designated sites. Thirdly as a matter of policy the imposition of such a supervisory function over the decisions of all competent authorities would be extremely onerous. Fourthly the discharge of its functions by a competent authority will be subject to the supervisory jurisdiction of the High Court.

94. It follows that the only competent authority at the material time, namely the point at which Wightlink decided to introduce the new ferries, was Wightlink itself.

95. The question then arises as to whether, in the proper discharge of its public duties as competent authority, Wightlink's decision to introduce the W class ferries was lawful. That involves consideration of whether there was an appropriate assessment of the effects of their introduction on the protected sites.

Issue 3

Was there an appropriate assessment of the effects of the introduction of the W class ferries on the protected sites?

96. The first point to be made is that there is no prescribed form for an appropriate assessment. As the European Court said in *Waddenzee*;

> "*52. As to the concept of "appropriate assessment" within the meaning of Art. 6(3) of the directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.*
>
> *Nonetheless, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.*

> *Such an assessment, therefore, implied that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field..."*

97. Secondly it is the competent authority that must make the appropriate assessment. Accordingly the question is not whether the report from ABPmer considered at the board meeting on 23 February amounted to an appropriate assessment, but whether Wightlink, in the proper discharge of its duties as a competent authority, made such an assessment at the meeting.

98. Before addressing that issue it is convenient to set the decision made by the board in its factual context. On 22 December 2008 Natural England gave preliminary advice concluding that "... *it cannot be ascertained that the introduction of the W class ferries will not have an adverse effect on the Natura 2000 interest."* There were then technical discussions between ABPmer and HR Wallingford, but as Andrew Willson, chief executive of Wightlink, said in his witness statement dated 16 April 2009 "... *by early February it was becoming clear that a consensus could not be reached as to the data regarding the historical effects of the C-class vessels and the predicted effects of the W-class ferries*" (para 59).

99. On 12 February Natural England issued its formal advice, see paragraph 49 above, in which it adhered to the conclusion at which it had arrived in its preliminary advice. On 20 February Wightlink's solicitors wrote to the claimants' solicitors saying that:

> *"Once Wightlink has received ABPmer's final report in the light of Natural England's revised advice, it will decide whether the W-class ferries would adversely affect the integrity of the European sides concerned and, therefore, whether any mitigation is required".*

100. The final report from ABPmer was signed off by Colin Scott, its Head of Environment, on the 20 February, and was apparently put before the board at its meeting on 23 February, although it is to be noted that in his witness statement dated 17 April 2009, Mr Scott asserts at paragraph 12 that "...*we produced a final 'Updated Information for Appropriate Assessment on 24 February*." Appendix D to the report contained its author's view as to why ABPmer's conclusions differed from those of HR Wallingford.

101. When the Wightlink board met on 23 February, it also had before it the advice from leading counsel and solicitors summarised at paragraph 53 above, in which they advised that although in their opinion the requirement for an appropriate assessment was not triggered as the introduction of the new ferries did not amount to a plan or project within the regulations, it would be advisable to carry out such an assessment.

102. The relevant sections of the minutes of the meeting are set out at paragraph 54 above. It is to be noted that paragraph 6.2 set out the test to be applied by the board in making its environmental assessment, namely that it

> *"...should have regard to the environmental assessment that had been carried out by ABPmer...and should agree to introduce the W-class ferries only if it is satisfied in the light of that assessment that they would have no adverse effect on the integrity of the designated sites."*

Secondly the board resolved that

> *"... the interim operation of the W-class ferries would not have an adverse affect on the integrity of the inter-tidal mud and salt marsh which were either designated features, or supporting features for the SBA and Ramsar birds."*

and that ...

> *"there was no reason to believe that the interim operation of the W-class ferries would give rise to any disturbance or damage that was significant in the context of the Habitats Directive to any natural habitats or wild fauna or flora."*

Thirdly the minutes record that the board had regard to Natural England's advice.

103. It is submitted on behalf of Wightlink that it carried out an exercise equivalent to an appropriate assessment, and that in compliance with regulation 48 of the Habitats Regulations, it both sought the advice of Natural England and had regard to such advice, albeit rejecting its conclusions in favour of those at which ABPmer had arrived. The claimants contend that Wightlink neither carried out an appropriate assessment nor an equivalent exercise, a contention that is supported by the Lymington Harbour Commissioners and by Natural England.

104. It is submitted on behalf of the claimants that an appropriate assessment, or what purports to be an appropriate assessment, will be open to challenge if -

> *a. it arrives at a conclusion that is Wednesbury unreasonable,*
>
> *b. its conclusion is based on a partial (in both senses of the word) assessment of the evidence,*
>
> *c. the process is unfair in the sense that the decision maker has evidenced bias or a commercial incentive (a fortiori imperative) to reach a particular conclusion,*
>
> *d. no adequate account is taken of conflicting views, whether they be offered by the Government's statutory nature conservation adviser (Natural England) or members of the general public,*
>
> *e. there is no adequate consultation of the general public.*

The defendants do not, and could not, take issue with those propositions. The question is whether, as the claimants contend, the exercise that Wightlink undertook was flawed in each or any of those respects.

105. But before addressing that question it is illuminating to consider the views of Natural England expressed in its letter to Simon Hopkinson, of DEFRA's International Protected Area Team dated 12 April 2009. Mr Hopkinson had asked Natural England whether it considered that Wightlink had produced an appropriate assessment complying with the requirements of the Habitats Directive and Regulations, or alternatively whether Wightlink had produced a document equivalent in 'form and scope' to an appropriate assessment. After referring to the relevant parts of the directive and the regulations, Natural England replied in the following terms –

> *"Natural England does not accept that the various reports produced by ABPmer on behalf of Wightlink amounts to an Appropriate Assessment because Natural England does not consider that the various reports produced by ABPmer properly assess the implications for the site of the project in view of the site's conservation objectives, and conclude no adverse effect also without proper reference to this site's conservation objectives.*
>
> *ABPmer's final report from February 2009 sets out the site's conservation objectives at page 8 in section 3 within table 2. All of the conservation objectives there listed basically require no change to each of the features, 'subject to natural change'.*
>
> *Natural England therefore considers that a proper and lawful Appropriate Assessment for this site should assess the anthropogenic implications of this project on the site. Such implications should be properly separated from any natural changes which might occur in the same period and assessed. The assessment of adverse effect should also be assessed in the light of the conservation objectives.*
>
> *In this case, Natural England considers that this means that the decision about whether or not an adverse effect is caused should be taken without reference to the natural processes of the site (which are specifically referred to in the conservation objectives) i.e. does the project adversely affect the site notwithstanding that this is a dynamic natural site.*
>
> *ABPmer themselves seem to accept this broad principle and state at page 47 in section 8.4 of their February 2009 report, 'The judgement about the effects of a project on site integrity needs to be taken in the light of the conservation objectives for the site'. However ABP then go on ... to conclude that:*

i. "there is no evidence that the current 'C' class ferry operation is having an adverse effect in the context of natural changes"

ii. "based on the predicted changes that are expected from the new vessels it is the conclusion of this assessment that the new 'W' class ferries can be operated in a manner that ensures that they have no greater impact on the designated site compared to the existing 'C' class ferries."

ABPmer are therefore effectively concluding that the current 'C' class ferries cannot be said to have an adverse effect on the site in the context of natural changes, and that as the 'W' class ferries will (in their judgement) have no greater impact than the' C' class ferries, no adverse effect can be said to be occurring.

In Natural England's view this approach is unlawful as it disregards the site's conservation objectives which require no change to the site "subject to natural change". Essentially, the objective is for the site to be allowed to evolve naturally, but to avoid acceleration or changes to that evolution as a result of man's interventions. By ignoring this aspect of the site's conservation objectives, and assessing the impact on the site in light of the ongoing natural change (essentially arguing that compared to the natural change the ferries impact will not be noticeable) ABPmer on behalf of Wightlink have been able to conclude that there are no adverse effects."

Whilst Natural England's views are not determinative of the issues between the parties, they assist as to the nature and extent of the differences of opinion between Natural England and Wightlink's experts.

106. On 23 April 2009 Natural England, by then an interested party, wrote to the court confirming the views set out in the letter of 15 April as to the legality of the appropriate assessment purportedly carried out by Wightlink, and added that:

"If the court is minded to conclude, notwithstanding the views of Natural England, that the assessment undertaken by ABPmer on behalf of Wightlink amounts to an Appropriate Assessment in law, Natural England would like the court to be aware that it maintains its view that the Assessment does not reach a scientifically sound conclusion on the question whether the operation of the ferries will have an adverse effect on the European Site... Natural England's view has not changed following publication of ABPmer's final report, or following consideration of the evidence submitted by ABPmer in this case "

107. I turn then to consider whether, as the claimants contend, the process undertaken by the board was so flawed as to render the decision to introduce the W class ferries unlawful.

108. In essence three arguments are advanced in support of the contention that the decision was fatally flawed. First it is submitted that Wightlink could not reasonably have arrived at the decisions that it did in the face of the formal advice from Natural England, the Wednesbury reasonableness argument; secondly that the decision was driven by a commercial imperative that overrode Wightlink's duties as competent authority, and thirdly that Wightlink failed to carry out an adequate public consultation.

109. As to the first Mr Norris submits that Wightlink could not reasonably have arrived at the conclusion that the introduction of the new ferries would not adversely affect the integrity of the designated sites. The advice given by Natural England must, at the very least, have given rise to a doubt as to whether or not there would be significant adverse effects, and accordingly Wightlink, as a competent authority, were obliged to refuse to authorise their introduction. As he puts it, no reasonable and properly informed competent authority could reasonably have been satisfied (beyond reasonable scientific doubt) on the information then available, and bearing in mind the high level of protection implicit in the protectionary principle, that there would not be any significant adverse effects.

110. In response Mr Drabble argues that the report from ABPmer before the board contained an analysis of the differences between its conclusions and those at which HR Wallingford had arrived and a reasoned explanation of why it rejected the latter. He submits that the decision was therefore based on cogent and robust material. Secondly he submits that Wightlink was entitled to give greater weight to the advice from ABPmer, provided that it took account of the views of Natural England, and was not obliged to follow the views of Natural England as the appropriate national conservation body.

111. The issue is whether a reasonable harbour authority, in the proper discharge of its public duty as a competent authority, could have concluded that no doubt remained as to whether or not there would be significant adverse effects on the integrity of the site by the introduction of the new ferries. When it met on 23 February, the Wightlink board had before it conflicting advice from Natural England and from its own experts, ABPmer. Natural England had arrived at its final conclusions after discussion between ABPmer and HR Wallingford, as a consequence of which it had modified its views to some extent. But the experts remained at odds on the critical issue. It is not necessary for present purposes to embark upon a detailed analysis of the differences between them; but the disagreement had at its root a fundamental difference in approach to the interplay between natural changes to the environment, the historical effect of the use of the C class ferries and the possible effects of the introduction of the W class ferries. That can be seen from the letter from Natural England to DEFRA of 12 April 2009, see paragraph 105 above, and appendices C and D to ABPmer's report of February 2009.

112. It is submitted on behalf of the claimants that Wightlink could not reasonably have concluded that no doubt remained as to adverse effects given the formal advice given by Natural England. The fact that Natural England had given contrary advice does not of itself render the decision Wednesbury unreasonable. In making its appropriate assessment Wightlink was not obliged to follow the advice given by Natural England; its duty was to have regard to it. But given Natural England's role as the appropriate national conservation body, Wightlink was in my judgment bound to accord considerable weight to its advice, and there had to be cogent and compelling reasons for departing from it. Unless Wightlink was to come to the conclusion that the conclusion at which Natural England had arrived was simply wrong, it is difficult to see how it could come to the conclusion that no doubt remained as to whether there would be significant adverse effects on the protected sites.

113. In this context Mr Gregory Jones, who appeared for the Lymington Harbour Commissioners, argues that the findings of the assessment were not recorded or properly reasoned contrary to the European Commission's guidance in Managing Natura 2000 Sites, guidance that is in the following terms –

> "*In the first place, an assessment should be recorded. A corollary of the argument that the assessment should be recorded is the argument that it should be reasoned. Article 6 (3) and (4) requires decision-makers to take decisions in the light of particular information relating to the environment. If the record of the assessment does not disclose the reasoned basis for subsequent decision (i.e. if the record is a simple unreasoned positive or negative view of a plan or project), the assessment does not fulfil its purpose and cannot be considered 'appropriate'.*" *(paragraph 4.5.1)*

113. Compliance with the guidance required a reasoned record of Wightlink's appropriate assessment. Such a requirement ensures that the assessment is made on proper objective grounds, which is of particular importance where, as in this case, there was a potential conflict or at the least a tension, between Wightlink's discharge of its public duty as a competent authority, and its duties to its shareholders as a commercial concern.

114. Wightlink argues that its reasons for rejecting the advice from Natural England are to be found in the report from ABPmer, and that in effect it adopted the report as its appropriate assessment. But it is necessary to test that argument by reference to the terms of the resolutions made by its board on 23 February. At paragraph 7.2 of the minutes of the meeting, the relevant resolution is recorded in the briefest terms namely that "*after due consideration of ABPmer's report and having had regard to Natural England's advice*", "*the interim operation of the W class ferries would not have an adverse effect…*". The board did not say that it was adopting ABPmer's report as its appropriate assessment. It simply gave it 'due consideration' in carrying out its own assessment. Secondly no reasons were given as to why the board was rejecting the advice given by Natural England; and in particular there was nothing to indicate that the board engaged with the issue of the difference between the experts as to the appropriate methodology.

115. In the absence of a reasoned decision by the board, I cannot be satisfied that it gave the formal advice from Natural England the weight that it deserved, and in consequence that it could properly have come to the conclusion that no doubt remained as to whether the introduction of the new ferries would have adverse effects on the protected sites. In his witness statement dated 16 April 2009 Mr Willson, Wightlink's chief executive, asserts that on the basis of ABPmer's analysis, the board was satisfied that Natural England's conclusions were misconceived. But in *R (Young) v Oxford City Council* [2002] PLR 86 at para 20 Pill LJ identified the "*dangers in permitting a planning authority, whether by its committee chairman or a planning officer, providing an explanatory statement. The danger is that, even if acting in good faith, the witness may attempt to rationalise a decision in such a way as to meet a question which has arisen upon the effect of the decision. Moreover it will usually be impossible to assess the*

reasoning process of individual members and there are obvious dangers in speculating about them. It is therefore important that the decision-making process is made clear in the recorded decisions of the committee, together with the officers' report to committee and any record of the committee's decisions. Decisions recorded in the minutes should speak for themselves." The position of the board as competent authority was in an analogous position to a planning authority. It was important that the decision making process by which the board arrived at what it relies upon as amounting to its appropriate assessment, should have been made clear in the record of its decision. It was not.

116. Furthermore the board appears to have misled itself as to the test that it was obliged to apply as a competent authority. At paragraph 6.2 it resolved that it should have regard to the environmental assessment carried out by ABPmer and "*should agree to introduce the W – class ferries only if it is satisfied in the light of that assessment that they would have no adverse effect on the integrity of the designated sites*". In articulating the test in those terms, the board appears to have failed to recognise that it was for it to carry out the appropriate assessment, and that the question was not simply whether it was satisfied in the light of the report from ABPmer that the introduction of the new ferries would not have an adverse effect on the integrity of the sites.

117. In his oral submissions Mr Drabble also advanced what amounted to a de minimis argument, namely that the differences between Natural England and ABPmer as to adverse effects were minimal. But that was not advanced by the board as a reason for rejecting the advice of Natural England, and given the high level of protection for the environment afforded by Article 6(3) (see paragraph 73 above), is not an argument that would of itself have carried sufficient weight to remove any doubt as to a possible adverse effect.

118. But the Wednesbury challenge does not stand alone. The decision of the board has to be considered in context; and the argument advanced by Mr Norris in support of the second ground of challenge to the decision, namely that it was driven by a commercial imperative, is relevant to the Wednesbury challenge, in that if well founded, it reveals the true reason for the decision to introduce the new ferries on 25 February 2009, or at the least that the decision was tainted by the board having been influenced by factors that in the discharge of its public duty as competent authority, it ought to have disregarded.

119. Mr Norris argues that it is clear from the evidence that the decision was driven by the commercial imperative to bring the new ferries into operation, and that that in reality that overrode Wightlink's duties as a competent authority. He submits that that is a conclusion that is inevitably to be drawn from the evidence that Wightlink had committed itself to buying the ferries in early 2007, that it did not commission a report on the environmental impact of their introduction until the end of January 2008 and did not receive it till May 2008. He submits that Wightlink had long ago made it clear that it was only a question of when, rather than whether, the new ferries would be introduced. He seeks to reinforce the argument by reference to the fact that on 17 November 2008 Wightlink informed the Lymington Harbour Commissioners that it intended to introduce the ferries into service in December, and that it no longer considered it to be necessary to modify the pier and berthing arrangements. He also relies upon the evidence that by February 2009 the old ferries were on the point of being sold and the certificates of the two remaining vessels were due to expire on 13th March 2009. As Wightlink's chief executive said in paragraph 42 of his witness statement of 16 April 2009 "*...It was neither practicable nor commercially viable to renew those certificates*" and at paragraph 82 "*...beyond the expiry of the PC's on 13 March 2009, the ferries would become a substantial liability to Wightlink.*" He also stated that in the 6 months up to February 2009, the C class ferries had experienced several instances of mechanical failure which were indicative of their age and resulted in disruption to the ferry service (paragraph 43), and that Wightlink had submitted a request to the MCA to extend the current certificates for a period of 3 months, but the response from MCA was that it would only consider such extensions following an extensive in-water survey, and that in any event a 3 month extension would have resulted in the introduction of the new ferries in June 2009, the worst time in the operational cycle to make such a change. Mr Norris submits that Wightlink evidently made a commercial judgment not to bring the old vessels up to the necessary specification to enable them to continue in service, a judgment made on the basis that the new ferries would be brought into operation before 13 March.

120. In my judgment the argument is compelling. The reality of the situation was that by early 2009 Wightlink was caught in a very difficult situation, albeit of its own making. Certificates on one of the C class vessels expired in January 2009, those on the remaining two vessels were to expire on 13 March. The only way in which Wightlink was going to be able to continue to run the ferry service between Lymington and Yarmouth was by introducing the new ferries. To have decided, as competent authority, not to permit their introduction would have had the most serious adverse consequences for the company. I am satisfied that the sequence of events compels the conclusion that the decision to bring the new ferries into operation had already been made, and that commercial considerations

overrode, or at the very least influenced the discharge by Wightlink of its public duties as competent authority. I am reinforced in that conclusion by the fact that by its decision in November 2008 to introduce the W class ferries without undertaking the shore-side works to the ferry terminal at Lymington, Wightlink freed itself from the constraint imposed by the requirement of approval of the New Forest District Council, an approval that it knew to be dependant upon an appropriate assessment by the council, in relation to which the council was obliged to have regard to the views of Natural England.

121. The conclusion that the decision was influenced by commercial considerations adds further weight to my conclusion that the decision was Wednesbury unreasonable.

122. The third argument advanced by Mr Norris, an argument that also has the support of the Lymington Harbour Commissioners, is that Wightlink failed in its duty to subject the proposal to introduce the new ferries to public consultation. Article 6(3) of the Habitats Directive provides that a competent authority shall agree a plan of project only after having ascertained that it will not adversely affect the integrity of the site and "*if appropriate, after having obtained the opinion of the general public*". In his written submissions, Mr Gregory Jones, who appeared for the Harbour Commissioners, drew attention to the relevant European Commission Guidance to be found in Managing Natura 2000 Sites –

> "*4.6.2 When is it appropriate to obtain the opinion of the general public?*
>
> *Directive 92/43/EEC does not indicate when it is appropriate to obtain the opinion of the general public. However, consultation of the public is an essential feature of Directive 85/337/EEC. Clearly therefore, where the assessment required by Article 6(3) takes the form of an assessment and the Directive 85/337/EEC, public consultation is necessary.*
>
> *In this context, it is worth mentioning the possible longer-term implications of the Aarhus Convention which emphasises the importance of public consultation in relation to environmental decision-making.*"

123. Mr Jones submits that there has been a complete failure on Wightlink's part to carry out the requisite consultation exercise. In response to this argument Mr Drabble observes that neither the Habitats Directive nor the Regulations require the competent authority to consult the general public in all circumstances. He referred to Regulation 48(4), which provides that a competent authority shall take the opinion of the general public if they consider it appropriate to do so, and if they do, shall take such steps for that purpose as they consider appropriate. He points out that the evidence demonstrates that the proposals were widely publicised, and that there were extensive discussions with stakeholders, as detailed in the witness statement filed by Wightlink's chief executive, Mr Wilson. He submits that in those circumstances it cannot be said that Wightlink failed to discharge its duty to obtain the opinion of the general public. I agree, and reject the contention that the decision was flawed in this respect.

124. But it follows from the conclusions set out at paragraphs 114 - 117 that the decision made by Wightlink as competent authority on 23 February 2009, the decision that allowed the company to introduce the W class ferries two days later, was fatally flawed and in consequence unlawful.

<u>The transposition of the Habitats Directive into domestic law</u>

125. I turn then finally to the position of DEFRA, and to the issue of whether the Habitats Directive was properly transposed by the Habitats Regulations. I have already addressed one aspect of the argument, namely that DEFRA ought to have reserved to itself the power to intervene in a case in which a competent authority is acting irrationally or irresponsibly, or by and inadequate process, see paragraphs 91-3 above. But there remains the issue of the inadequacy of regulation 22 in its original form.

126. In June 2009 DEFRA issued a "*A consultation on proposed minor amendments to the Conservation (Natural Habitats etc) Regulations 1994*". The introductory summary contained the following paragraph –

> "*Defra is considering making amendments to regulations 22 – 27 and Schedule 1 of the Habitats Regulations (special nature conservation orders – SNCO) to make clear that these provisions can be used to restrict operations taking place on water as well as on land, in order to protect European sites…*"

The consultation exercise was followed by a letter dated 14 September 2009 from DEFRA to consultees containing the following paragraphs –

> *"Powers to make special nature conservation orders have existed in legislation for many years. While it is accepted that extended powers to cover operations on water, and operations taking place outside the protected site, have the potential to be significant, (and it is impossible to forecast the future with any certainty), there is no evidence to suggest that the extended powers will result in large numbers of new SNCOs or the introduction of significant new controls. SNCO powers are ones of last resort, and as a result are used infrequently…*
>
> *On the other hand, a decision not to bolster the transposition of Articles 6(2) and 6(3) of the Habitats Directive, which requires us to take appropriate steps to avoid, inter alia, the deterioration of natural habitats in protected areas, would make it very difficult for us to argue that we have fully and properly transposed the obligations arising under these Articles. This could have very serious implications in the future."*

127. There can be no doubt that it was this case that exposed the lacuna in the regulations, and resulted in the amendment that followed the consultation exercise. Furthermore in the letter dated 14 September, DEFRA expressly acknowledged the difficulty that it would have in arguing that the obligations under the Habitats Directive had been fully and properly transposed in the Habitats Regulations in their original form. I have no hesitation in finding that the Habitats Directive was not fully and properly transposed. Whilst I recognise, as was urged upon me by Mr Tromans, that all eventualities may not be foreseen when regulations are drafted, the fact remains that had consideration been given to the possible adverse effects of marine operations on protected sites, many of which are coastal, there would not have been the deficiency in the regulations that this case brought to light.

128. Thus if the directive had originally been fully and properly transposed, DEFRA would have had the power to make a special nature conservation order to protect the sites from the risk of significant adverse effects, if satisfied that there was such a risk. However it is reasonable to assume that had it then had the power to intervene, and bearing in mind that discussions were continuing between Wightlink and Natural England as to mitigating measures, it would have sought the advice of Natural England in broadly the same terms as its letter dated 8 April in which it requested confirmation as to whether environmental damage had already occurred, or whether there was any imminent threat of environmental damage by reason of the operation of the ferries. Natural England would no doubt have responded in the same terms as in its reply of 15 April, in which Natural England confirmed that there was no likely threat to the integrity of the site or measurable environmental damage over the coming months. Thus it cannot be assumed that if DEFRA had then had the powers conferred by the amendment to the regulations, it would have exercised them so as to prevent the introduction of the new ferries on 25 February 2009.

Conclusions

129. As I noted at paragraph 11 above, it was submitted on behalf of both defendants that permission to apply for judicial review should not be granted as the challenge is academic. So far as Wightlink is concerned, I recognise that the claimants no longer seek injunctive relief, and that the Lymington to Yarmouth ferry service will continue to be operated with the W class ferries, subject to agreement as to the mitigation measures currently the subject of negotiation between the company and Natural England. But the resolution of the issues of whether the introduction of the new ferries was a plan or project within the meaning of Article 6(3), and whether Wightlink acted unlawfully in introducing them on 25 February, was not in my judgment an academic exercise. The claimants were justified in pursuing their claim so as to establish where responsibility for carrying out an appropriate assessment lay, and secondly whether there had been the appropriate assessment required by law. As to DEFRA, the amendment that took effect on 1 October 2009 rectified the lacuna in the regulations. But that was not an end to the transposition challenge in that the claimants submitted that DEFRA ought to have reserved to itself the power to intervene in circumstances in which a statutory authority is acting irrationally or irresponsibly, or by an inadequate process. If successful, the argument would have resulted in a declaration that notwithstanding the amendment, there remained a failure effectively to transpose the Habitats Directive. Although I rejected that submission, it was plainly arguable. Thus in relation to both defendants the permission threshold was crossed; and permission to apply for judicial review is granted.

130. The claimants are therefore entitled to declarations that -

1. the decision taken by Wightlink to introduce the W class ferries on 25 February 2009 was unlawful, being in breach of its duties as competent authority under Article 6(3) of the Habitats Directive and the Habitats Regulations,

2. the Habitats Directive was not fully and properly transposed into domestic law by the Habitats Regulations in its original form.

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W. BIRTLES & R. CARNWATH, "Art. 6.3. Habitat directive: U.K. case law"

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CO/7623/2007

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

Royal Courts of Justice
Strand, London WC2A 2LL
1st May 2008

Before:

MR JUSTICE SULLIVAN

Between:

THE QUEEN ON THE APPLICATION OF HART DISTRICT COUNCIL	**Claimant**
v	
(1) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT (2) LUCKMORE LIMITED (3) BARRATT HOMES LIMITED	**Defendants**
and	
(1) TAYOR WIMPEY DEVELOPMENTS LIMITED (2) NATURAL ENGLAND	**Interested Parties**

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(Official Shorthand Writers to the Court)

Mr S Hockman QC and Miss A Williams (instructed by Sharpe Pritchard) appeared on behalf of the Claimant
Mr J Maurici and Mr R Turney (instructed by the Treasury Solicitor) appeared on behalf of the First Defendant
Miss M Cook and Mr A Ranatunga (instructed by Boyes Turner) appeared on behalf of the Second and Third Defendants
Mr K Lindholm QC and Mr C Howell-Williams (instructed by Addlesham Goddard) appeared on behalf of the First Interested Party
Mr R Drabble QC and Mr G Machin (instructed by Browne Jacobson) appeared on behalf of the Second Interested Party

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HTML VERSION OF JUDGMENT

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1. MR JUSTICE SULLIVAN:

   Introduction

2. This is an application under Section 288 of the Town and Country Planning Act 1990 ("the Act") to quash the decision of the first defendant to allow four appeals made by the second and third defendants under Section 78 of the Act. The first defendant's decision is contained in a decision letter dated 24th July 2007 ("the decision letter").

3. The first defendant appointed an inspector to hold a public inquiry into the four appeals. The Inspector held an inquiry between 12th and 15th December 2006 and on 19th December 2006, and reported to the first defendant on 23rd January 2007. In her report, the Inspector recommended that all four appeals should be dismissed.

4. The Inspector said that the appeal proposals were "in effect a package of proposals to achieve the residential development of land off Dilly Lane." (Paragraph 1). Dilly Lane is on the southern edge of Hartley Wintney, which is one of the larger villages in Hart District. The four appeals were referred to as Appeal A, Appeal G, Appeal E and Appeal F in both the Inspector's Report and the decision letter.

5. As amended, Appeal A related to an application for outline planning permission for 170 dwellings, with an affordable housing content of 40 per cent on the "main appeal site" to the south of Dilly Lane.

6. Appeal G related to a detailed application for planning permission for 170 dwellings, including 68 affordable dwellings on the main appeal site.

7. Appeal E related to proposals to widen and surface footpath 18A King John's Ride, to upgrade it to a 2.5 metre wide footpath and cycle path, and to create two links from the upgraded path into the northern and southern parts of the main appeal site. King John's Ride runs to the west of the main appeal site, between it and existing housing in Wier Road, and then runs in a southwesterly direction and joins the B3016 Road, which leads to Winchfield Station, some 1.6 kilometres to the south.

8. Appeal F related to an application to change the use of the field ("the field site") to the east of and adjoining the main appeal site from agricultural use to informal recreational space to serve the proposed residential development and for use by the local community. In total, 9.52 hectares of new open space was included in the package of proposals, 3.36 hectares as buffer zone in the main appeal site, and 6.16 hectares in the field site. Other mitigation measures that form a part of the package are listed in paragraph 4.9 of the Inspector's Report.

9. On 9th March 2005, the Thames Basin Heaths were classified as a special protection area (SPA)

under Article 4 of EC Directive 79/407/EEC on the conservation of wild birds ("the Birds Directive") for three species listed in Annex 1 to the Directive: the nightjar, the woodlark and the Dartford warbler, because the SPA is regularly used by 1 per cent or more of Great Britain's population of those bird species.

10. Since the adoption of the Habitats Directive 92/43/EEC ("the Habitats Directive"), and as a result of Article 7 of that Directive, SPAs classified under the Birds Directive are protected by the obligations contained in Articles 6(2) and (3) of the Habitats Directive. Articles 6(2) and (3) of that Directive impose the following obligations:

> "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 this 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 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."

11. These provisions are transposed into domestic law by Regulation 48 of the Conservation (Natural Habitats, &c.) Regulations 1984 ("the Regulations"). So far as relevant, Regulation 48 provides:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> (a) is likely to have a significant effect on a European site in Great Britain... either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of the site,
>
> shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.
>
> (2) A person applying for any such consent, permission or other authorisation shall provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 49, the authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site...
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the authority shall 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."

12. The main appeal site lies about 1.5 kilometres south of the nearest point of Hazeley Heath, which is on the north side of Hartley Wintney. Hazeley Heath is a heathland site of Special Scientific Interest (SSSI), and a component of the Thames Basin Heaths SPA. Bramshill SSSI, Castle Bottom to Yateley and Hawley Commons SSSI are also components of the SPA, within 5 kilometres of the appeals site (paragraph 2.3 of the Inspector's Report).

Factual background: The effect on the SPA

13. The planning history of the four appeals is lengthy and complicated. For present purposes, it may be

summarised as follows. Having considered the potential for increased visitor pressure on the healthlands within the SPA as a result of permitting residential development some distance away from the SPA, English Nature, now Natural England (NE), indicated in January 2004 that competent authorities should undertake appropriate assessments for proposed residential developments up to 5 kilometres from the (then proposed) SPA.

14. The outline application, which was the subject of Appeal A, was made on 29th July 2004. In a letter dated 12th August 2004, NE stated that the Dilly Lane site was too far from the SPA for there to be an effect on the Annex 1 bird species, and that the proposals were not likely to cause significant damage to Hazeley Heath SSSI. NE, therefore, did not object to the outline application, which subsequently became Appeal A.

15. Mr Colebourn, the ecological consultant instructed by the second and third defendants, explained in his proof of evidence at the inquiry how NE had altered its stance when the detailed application (Appeal G) was made on 1st March 2006:

> "2.12 Towards the end of 2005, Natural England reconsidered its policy and 'decided to take a stronger line' in relation to the 'in-combination' effect of multiple residential schemes on the ecological function of the... SPA. In particular, NE's letter to HDC [Hart District Council] dated 25 October 2005 drew attention to further research on heathlands, especially the work of Liley, Clarke, and others, in Dorset; and, in particular, on the mechanisms by which recreational impacts including dog-walking, might affect bird breeding success, and thus be considered a deleterious effect on the habitat.
>
> 2.13 Natural England then considered that although it might potentially be possible to mitigate such effects through each site providing appropriate alternative recreational facilities, the present Dilly lane application did not provide such Alternative Greenspace, and therefore, in NE's view must fail the Regulation 48 tests.
>
> 2.14 On that basis, Natural England advised HDC that it objected to the Full Planning Application for Dilly Lane."

16. Although Appeal G was made on the basis of the claimant's failure to determine the detailed application within the prescribed period, the claimant subsequently considered the application and its second deemed reason for refusal was as follows:

> "The LPA has insufficient information to allow it to make an Appropriate Assessment under the Conservation (Natural Habitats &c) Regulations 1994. As such it can not be satisfied that the proposed development (on its own and/or in combination with other plans and projects), will not have an adverse impact on the integrity of the Thames Basin Heaths Special Protection Area. Therefore the proposal is contrary to [a number of policies in the development plan]..."

17. In his proof of evidence, Mr Colebourn described the assessments that had been carried out by his company, Ecological Planning and Research Ltd (EPR), and by consultants appointed by the claimant, Jonathan Cox Associates, the latter as part of the claimant's consideration of the first alteration to the plan. It has never been contended that, considered individually, the development of the main appeal site for 170 dwellings would be likely to have a significant effect on the SPA. The issue was whether, in combination with other proposed residential developments in the area, it would be likely to have such an effect.

18. The results of Mr Colebourn's final assessment were contained in a report dated November 2006: "Land at Dilly Lane Hartley Wintney, Measures to Avoid Effects on the Thames Basin Heaths SPA" ("the EPR Report"). The EPR Report described the surveys that had been undertaken by EPR: visitor surveys of the origins of visitors to Hazeley Heath, Bramshill, Warren Heath and Yateley Common; visitor surveys of the users of the common land within Hartley Wintney, and a door-to-door survey of residents of the south-western part of Hartley Wintney. A draft of the EPR Report was sent to NE. NE's questions about the research, and EPR's interpretation of the results, were answered in a technical note from EPR, which was, in substance, incorporated into the final version of the EPR Report.

19. On 20th October 2006, NE wrote to the claimant:

"Further to our response of 18th August to EPR, who are working for Luckmore Ltd on the above proposals, Natural England has received further information on the mitigation offered. We have also had sight of a draft S106 agreement designed to, amongst other matters, secure the mitigation identified.

I therefore write to clarify the position of Natural England ahead of the deadline for Proofs of Evidence for the Inquiry into the proposals.

The outstanding matters on the mitigation offer related to whether the site was adequate, in terms of its size and quality, to fully mitigate for the development. This is specifically in terms of whether the space offers the length of walks and varied nature provided by the SPA sites, to ensure that it provides a real alternative for those new residents which may also choose to use the SPA.

On the 12th September EPR provided maps illustrating footpaths in and around the village of Hartley Wintney which may be linked to the mitigation space to provide for longer walks of up to 4 km.

After a great deal of consideration, it has been concluded that on balance a competent authority, in view of the additional information provided on links to the local footpath network, would probably be in a position to conclude that the effects on the SPA arising from this development would be avoided, if the proposals are put in place.

It should be noted that the need for other larger sites, as would be provided by a strategic suite of SANGs [Suitable Alternative Natural Greenspace], to be co-ordinated by the local authority is not a new idea. It is consistently applied through the Delivery Plan and acceptance of mitigation packages prior to the Plan being put in place is on the basis that they are considered in light of highly local circumstances."

The remainder of the letter dealt with the proposed Section 106 agreement and other matters that are not relevant for present purposes.

20. Mr Colebourn wrote to NE suggesting that its advice as the statutory nature conservation adviser was not entirely clear. He suggested that it would be helpful if a Statement of Common Ground could be agreed between NE and EPR. The Statement of Common Ground is dated 2nd November 2006. So far as relevant, it said:

"1. For the purposes of this Inquiry, the appellants accept that, consistent with the provisions of the Thames Basin Heaths Delivery Plan, a package of mitigation measures sufficient to avoid a likely significant effect on the Thames Basin Heaths SPA is required.

2. The package of measures offered by the developer, to ensure that the proposed development and associated mitigation and avoidance measures at Dilly Lane does not have an adverse effect on the integrity of the Thames Basin Heaths SPA or any component SSSI, is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be significant effect on the Thames Basin Heaths SPA, and that no appropriate assessment under the Habitat Regulations is necessary.

3. The package of measures is set out in the following documents:"

Those documents include the EPR Report.

21. On 10th November 2006 NE wrote to the claimant. The letter referred to the provisions in the draft Section 106 agreement and concluded:

"Therefore, we are satisfied that the S 106 agreement draft of 10 November 2006, as attached, has been improved through the recent amendments and is now a suitable means to secure the impact avoidance measures.

With reference to the Statement of Common Ground of 2 November 2006 (also attached), we accept this as it is clear that the appellant accepts that the avoidance

measures are necessary. We interpret this as an indication of their acceptance of Natural England's opinion; that should the measures not be put in place, and were the development still to go ahead, an adverse effect on the integrity of the SPA may arise.

Given this progress, our concerns have been resolved and we are able to withdraw our objections to the proposals in relation to the Thames Basin Heaths SPA. For this reason it is our expectation that it would not be necessary or helpful for us to attend the inquiry."

The claimant's reply on 14th November 2006 said:

"As you are aware, Hart District Council has relied on evidence from Natural England in relation to the mitigation package. Given the uncertainty surrounding these issues, and hence, whether adequate mitigation can be secured, we must assume and strongly request that Natural England submit evidence to the Inquiry and give evidence on these matters."

22. NE replied on 17th November 2006, reaffirming its position as to the adequacy of the Section 106 agreement and saying:

"The applicants have accepted that without the measures secured by the s106 agreement there is likely to be a likely significant effect on the SPA. This can be inferred clearly from the statement of common ground. This leaves a clear position. That is, with those measures secured, Natural England's objection is resolved.

If for some reason the Inspector was to conclude that the measures would not reliably secured, then given the accepted possibility of an adverse effect, we believe the Inspector would have no choice but to dismiss the appeal. Given this position, and in particular the indication given by the statement of common ground that the appellants will not dispute the possibility of impact, it does not appear necessary for Natural England to submit evidence to the inquiry."

That was the position when the inquiry opened on 12th December 2006. NE did not give evidence at the inquiry. The Inspector said in paragraph 1.2 of her report:

"The second deemed reason for refusal in Appeal G concerns the Thames Basin Heaths Special Protection Area... Subsequently in November 2006 Natural England withdrew its objections on the basis of the proposed package of measures and the controls on their implementation and retention achieved through planning obligations. In view of the advice from Natural England the Council no longer raises any objections to the proposed mitigation plan. The deemed reason for refusal on Appeal F, on the need to secure a management plan for the long term maintenance of the open space, has also been overcome by a planning obligation."

23. The claimant did not challenge Mr Colebourn's evidence at the inquiry. The only reference to the SPA in the claimant's closing submissions to the Inspector was in these terms:

"HDC does not raise any objections to the technical mitigation plan proposed. Nor does HDC seek to introduce a fresh reason for refusal. However HDC does consider it right to draw the Inspector's attention [to] the fact that [NE's] Draft Delivery Plan is the subject of scrutiny at the South East Plan proceedings."

24. The Inspector reached the following conclusions as to the effect of the proposals on the SPA:

"12.5 The Appellants have accepted that, because there is not enough current data to confirm otherwise, the Dilly Lane development may, without mitigation and in combination with other developments, contribute to a significant effect on the SPA. Therefore their approach has been to develop a package of mitigation measures to ensure avoidance of any contribution to such adverse in combination effects. The Appellants are confident that the proposals are able to proceed independently of the Natural England Delivery Plan and its application within Hart. Natural England has advised that the package is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be a significant effect on the SPA. In Natural England's opinion no appropriate assessment

under the Habitats Regulations is necessary.

12.6 The JCA Assessment and the evidence of EPR suggest that the most likely in combination pressures to be placed on the SPA would be through increased recreational pressure and more particularly disturbance by people and dogs. The HWAG [Hartley Wintney Action Group] highlighted the threat of fire. However, the evidence suggests that heathland fires are most likely to be started by children and young people. The distance between the site and Hazeley Heath is such as to discourage easy access by unaccompanied youngsters from the development.

12.7 The Appellants, through EPR, have developed the mitigation package over a period of several years. The proposals have been informed by the specifications in the Draft Delivery Plan and by research into human behaviour with regard to informal recreation. The specific local research and survey work undertaken by EPR came later in June/July 2006 in response to comments by Natural England. Therefore rather than informing and guiding the proposals for the SANGS this later work was undertaken with the purpose of establishing likely levels of its future use.

12.8 As explained by the Appellants at the inquiry the objective has not been to provide replacement heathland but to provide alternative green space that would be equally attractive for some of the purposes people visit the heaths. The field site has been designed to be attractive to walkers and more particularly dog walkers, although able to accommodate other informal recreation activity. I consider the informal recreation area would be of a reasonable size, fenced off from the road, with defined footpaths and open areas to allow dogs to be let off the lead. The hay meadow and areas of additional planting would reinforce local landscape character. However, it would have a quite different character to the heaths, being more enclosed and within a farmland and village setting. It would therefore be more akin to some of the commons and open spaces within the village and to the footpaths through the farmland nearby. The links to the informal amenity areas on the housing site and to the surrounding footpath network would offer opportunities for walks of varying length. Again these walks would not generally replicate the openness and semi-wild character of the heathlands.

12.9 A fundamental conclusion of the Appellants, supported they say by 2006 EPR survey work, is that the measures will avoid any net effect of recreational activity on the SPA. My understanding is that reliance is placed on the SANGS drawing existing users away from the Heath to compensate for the new residents using the Heath on occasion. I have serious doubts about these conclusions. In my view an equally valid conclusion from the EPR survey is that the SANGS, because of its convenience and character, would act as an alternative to the use of the Hartley Wintney commons and green spaces for dog walking and walking by existing residents in the locality of the site. There is little I can see to suggest that it would be successful in diverting existing trips by these residents away from the Heath. Taking a wider view, the residents living closest to Hazeley Heath and who form the greater proportion of visitors, are unlikely to be attracted to the SANGS. It would offer nothing significant over and above the Heath, while being less convenient and with less opportunity for longer walks with dogs off a lead. For new residents the SANGS may well provide opportunities for shorter walks close to home but Hazeley Heath and other components of the SPA remain a convenient and unique destination to satisfy a wider range of recreation needs.

12.10 The timescales associated with providing the informal recreation area on the field site are also relevant to the ability to avoid any net effect of recreational activity on the SPA. The intention is to carry out the planting and associated works to create this key component of the SANGS before occupation of the first dwelling. The Appellants' expert witness on ecology outlined the timescales for establishing the areas of grass, scrub and trees. In his opinion the spaces would have quite a natural appearance after about 3 or 4 years, although the benefits to biodiversity would take a longer period ranging over 5 to 15 years. I consider the less attractive, newly formed appearance of the open space in its early years will not encourage existing residents to take advantage of the SANGS rather than visiting the more attractive Heath, with its particular landscape qualities. The attractiveness for new residents would also be less. Consequently the likelihood of achieving a net positive effect would be reduced in the short term.

12.11 The proposals also include the provision of information about alternative recreation

sites and on the SPA. Whilst a positive measure there is little specific evidence to support the view that the provision of the information would be effective in significantly reducing the number of trips to the SPA. The impression I have gained through all the representations is that local residents are very aware of their surroundings and their particular attributes.

12.12 The Natural England Draft Delivery Plan points out that research has indicated that altering the existing recreational patterns by promoting or providing alternatives is harder to achieve than establishing new use patterns amongst new residents. Bearing this in mind, I do not share the confidence of the Appellants that existing residents will be enticed away from the Heath in any significant numbers. In my opinion, because of the character of the SANGS, it will probably be only successful in attracting existing residents who would otherwise use the local commons and green spaces in the village. Whilst I agree new residents will be likely to use the SANGS to fulfil recreation requirements for convenient walks and exercising the dog, the SPA is not far away and has the advantages of its unique character and opportunities for a wider range of recreations. I do not accept that the measures will avoid any net effect of recreational activity on the SPA.

12.13 The JCA Assessment anticipated that measures would be taken to develop access management plans for the component SSSI in the SPA and to ensure appropriate habitat management across the SPA. These measures were envisaged to be in addition to mitigation directly linked with any planning application. Evidence at the inquiry confirmed that such strategic measures have not been put in place. In my view this consideration would be relevant after carrying out an appropriate assessment rather than in an initial appraisal to establish if the proposal would be likely to have a significant effect on the SPA.

12.14 The SPA is of international importance to nature conservation. It enjoys a high level of protection, consistent with the aim of ensuring biodiversity through conservation of natural habitats, fauna and flora. Accordingly, a precautionary approach is to be taken in assessment. Having regard to the conservation objectives for the SPA I am unable to conclude that the proposed package of measures could lead to a judgement of no likely significant effect on the SPA. The probability of the proposals having a significant effect on the SPA in combination with other plans or projects cannot be discounted. It follows that an appropriate assessment should be carried out in order to ascertain if the proposal would adversely affect the integrity of the site.

12.15 However, there is inadequate information available at this time to enable an appropriate assessment to be carried out. Furthermore, there are alternative sites on which dwellings could be built in the Country or South East region which would have a lesser effect or avoid an adverse effect on the integrity of the SPA. Given these circumstances and the uncertainties over the effect of the proposals on the SPA it follows that the development would not be compliant with the Habitats Regulations. To permit the scheme without formal appropriate assessment would be contrary to LP Policy CON 1 and national policy in PPS9. In the light of these conclusions it is not necessary or appropriate to address the criticism raised by the HWAG on the assessment approach used by Natural England."

25. HWAG's criticism of NE's approach to appropriate assessment was summarised by the Inspector in paragraph 9.12 of her report:

"9.12 The Appellants have agreed a mitigation package with Natural England but the package is not environmentally acceptable and sustainable. Firstly, the approach used by Natural England in assessing significant effect on Hazeley Heath is flawed. Account was taken of the package of mitigation and avoidance measures in concluding that they will succeed in avoiding a net adverse effect on the SPA and therefore pass the Preliminary Stage Assessment. Referring to the opinion by Robin Purchas QC, consideration should not be given to possible mitigation at that stage (*Document 69*)."

For completeness I should also refer to paragraph 9.13 of the Inspector's Report, where the Inspector summarised HWAG's case that:

"9.13 Hazeley Heath has an inherent attraction that draws people to it, as indicated by a

recent survey (*Document 14 p. 3, Document 64*). The SANGS will not provide the attributes of biodiversity, peacefulness, wilderness, safety, openness, beauty or freedom to roam over a wide area. Even though the SANGS will offer additional recreation land it would be small in comparison to the Heath and be mainly used by dog owners. The field will take some 10 years to take on a natural appearance and the surrounding farmland and woodland has not the same landscape quality as the SPA. The SANGS would not have the same attractiveness and residents will still wish to visit Hazeley Heath. The extra numbers of people will add pressure, primarily through disturbance and the increased risk of fire."

26. The response of the second and third defendants to HWAG's submissions is recorded by the Inspector in paragraph 8.7 of her report:

"8.7 In the later stages of the inquiry the HWAG introduced a new point and suggested that the approach of Natural England, one accepted by the Council and endorsed by EPR, is fundamentally flawed. Reliance was based on an opinion of Robin Purchas QC, who concluded that when considering whether an appropriate assessment is necessary one should disregard any mitigation or the manner in which the proposals are intended to be carried out (*Document 69*). However, there is no reason why the Secretary of State should take a different approach to that used by her statutory consultee and which was applied in the Franklands Drive case. In any event whichever way the issue is approached the answer remains the same. Granting permission for the current proposals is not likely to have a significant effect on the SPA either alone or in combination with other plans or projects. Compatibility with the Directive and Habitats Regulations is secured. The net effect will be beneficial in that the likelihood of the Dilly Lane residents (some 400) to use the SPA for recreation will be more than offset by the likelihood of the population in the immediate locality (some 800) to use the proposed open space as part of their recreation. The proposed leaflets and information boards will be the first active steps aimed at educating the public and thus better managing the SPA."

27. In a letter dated 4th April 2007, the first defendant stated that she was minded to disagree with the Inspector's conclusions and recommendations, and was minded to allow the appeals and grant planning permission, subject to conditions and to Section 106 planning obligations, but that before reaching a final decision she required further evidence clarifying the housing supply position within Hart District ("the minded to grant letter"). Paragraphs 13-15 of the minded to grant letter dealt with the effect on the SPA:

"13. The appeal site is located within 2km of Hazeley Heath, which forms a part of the Thames Basin Heaths Special Protection Area (SPA). The Thames Basin Heaths SPA is protected by the Conservation (Natural Habitats &c.) Regulations 1994, commonly referred to as the Habitats Regulations. These require the consideration of effects of plans or projects on the SPA, which are not directly connected with, or necessary to, its management. Those that are likely to have a significant effect on the European site, either alone or in combination with other plans or projects, must be subject to an appropriate assessment of the implications in view of the European site's conservation objectives.

14. The Secretary of State has therefore taken account of the possible impact that allowing these proposals may have on the features of the Special Protection Area that are of conservation interest, namely nightjar, woodlark and Dartford Warbler. In considering this matter she has taken into account the fact that Natural England has withdrawn its objections to the proposed development and has confirmed (IR8.5) it is satisfied that the package of measures offered by the appellant is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be significant effect on the SPA, and that no appropriate assessment under the Habitats Regulations is necessary. These measures will provide 'suitable alternative natural green space' (SANGS) to serve the residential development and for use by the local community (IR4.8). The Secretary of State gives great weight to Natural England's views as the appropriate nature conservation body in relation to the application of the Conservation (Natural Habitats &c) Regulations 1994. She is therefore satisfied she can proceed to grant planning permission without having to undertake an Appropriate Assessment. Accordingly, the Secretary of State has concluded that there is no need to consider further the Inspector's deliberations in IR12.5-IR12.15 on the effect of the current proposals on the integrity of the habitat. She has gone on to assess the proposals against

the other issues identified in paragraph 12 of this letter.

15. The Secretary of State is aware that the report of the Assessor on the Thames Basin Heaths Special Protection Area and Natural England's draft Delivery Plan was made available in February to the Panel conducting the Examination in Public into the South East plan. She gives the report little weight at this stage, however, given its purpose in informing the SEP Panel, who will in turn report to her. She is therefore not currently in a position to rely upon the Assessor's conclusions and recommendations."

28. Although the Secretary of State had not invited further representations about the effect of the proposals on the SPA, the claimant, in addition to making lengthy representations as to the housing supply and position within its district (see below), also made representations in respect of the SPA:

"With regard to the SPA there are two issues of particular concern that are explored in further detail in this section of the Council's Statement: i) the SoS's view that there is no requirement for an appropriate assessment in association with the Appeal proposals and that planning permission can be granted in the absence of such an assessment; and

ii) the SoS's failure to consider the conclusions of her Inspector relevant to the impact of development on the SPA."

29. Having referred to the Inspector's conclusions, and to another appeal decision in which the Secretary of State had allowed residential development on appeal on the basis that an appropriate assessment ("AA") was not required, the claimant's representations said that:

"3.5... Since that time, matters relevant to the SPA have moved on significantly having regard to the availability of new information and the better level of understanding relevant to the requirements of Article 6 (3) of the Habitats Directive.

3.6 In terms of the availability of additional information, the primary development relates to the consideration of a significant body of evidence on the SPA by Peter Burley, a Senior Planning Inspector (the Technical Assessor) between November 2006 and February 2007 as part of the South East Plan Examination in Public. Mr Burley considered all submissions and concluded in his report entitled 'The Thames Basin Heaths Special Protection Area & Natural England's Draft Delivery Plan' published in February 2007 (supported by a clarification note produced in March 2007 and a more recent Addendum issued on the 13 April 2007), that Natural England's approach to the requirements of Article 6(3), namely that the provision of SANGS absolved a Competent Authority from carrying out an AA for a development that would otherwise be considered likely to have a significant effect, was incorrect in law. This conclusion was based on the fact that there was no objective evidence to show that the provision of SANGS would be sufficient to ensure that residential development would be unlikely to have a significant effect on the SPA, and therefore a Competent Authority could not avoid carrying out an AA. This is effectively the position also reached by the Inspector at the Dilly Lane Inquiry.

3.7 The second change since the Franklands Drive decision relates to the increased level of understanding of the procedures required to comply with the requirements of the Article 6(3) of the Habitats Regulations. To this end there have been a number of eminent legal opinions produced as follows:"

Those were opinions by Mr Elvin QC, Mr Griffiths QC, Mr Purchas QC and Mr Drabble QC. The claimant's representations continued:

"3.8 These opinions come to different conclusions relevant to the need to undertake an AA in circumstances where an unmitigated development would have a likely significant effect on the SPA. However in considering these opinions, the Technical Assessor came to the view that,

*'in order to comply with the **Waddenzee** test it will be necessary for the time being at least, for all larger residential developments, which aim to provide SANGS, to be subject to an appropriate assessment'...*"

The representations referred to the Technical Assessor's response to Mr Drabble's opinion and said:

> "3.10 In the light of this additional information and the clarification in terms of the application of Article 6(3), HDC considers that the appeal proposals require an AA as a matter of law...
>
> 3.11 For these reasons, HDC is of the view that the SoS's conclusion in terms of the need, or lack thereof, for an AA is flawed and that by failing to carryout an AA, the SoS has acted outside the limits of her discretion as set by... both the EU and UK legislative regime."

30. The claimant then contended, in its representations, that the first defendant had failed to consider the Inspector's conclusions and had instead been guilty of "an unacceptable delegation of her authority" to NE:

> "... the significant and overriding weight given by the SoS to the views of Natural England... led her to take the view, without challenge or further consideration, that she need not consider her own Inspector's conclusions (which notably conflicted with Natural England's but which have subsequently been supported by the Technical Assessor), or to come to a conclusion herself on the matter..."

31. Mr Purchas in his opinion dated 8th December 2006, and the Technical Assessor in his report published in February 2007, were both considering the Draft Delivery Plan published by NE's predecessor, English Nature, on 26th May 2006, in the context of the examination in public into the regional spatial strategy for the South East ("the South East Plan"). In his opinion, Mr Purchas said that Regulation 48 (above) should be approached in three distinct and sequential stages. In the first stage, the question was whether the project (either alone or in combination with other plans or projects) was likely to have a significant effect on the SPA.

32. In paragraph 17 of his opinion, Mr Purchas said:

> "Consideration should not be given at this stage to possible mitigation. This is made clear by the European Commission Environment DG publication *Assessment of plans and projects significantly affecting Natura 2000 sites* which states at 2.6 that 'it is important to recognise that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site. ... Effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported."

33. Paragraph 1.1 of the document ("the Methodological Guidance") explains the nature of the document referred to by Mr Purchas:

> "This document has been produced to provide non-mandatory methodological help to carry out or review the assessments required under Article 6(3) and (4) of the habitats directive...
>
> This guidance must always be read in conjunction with the directives and national legislation, and within the context of the advice set out in the Commission services' interpretation document 'Managing Natura 2000 sites: The provisions of Article 6 of the "Habitats" Directive... (referred to in this guidance as MN2000). MN2000 is the starting point for the interpretation of the key terms and phrases contained in the habitats directive and nothing in this guidance document should be seen as overriding or replacing the interpretations provided in MN2000. Furthermore, this guidance should not be read as imposing or suggesting any procedural requirements for the implementation of the habitats directive. Its use is optional and flexible since, under the principle of subsidiarity, it is for individual Member States to determine the procedural requirements deriving from the directive."

The reasons given in paragraph 2.6 of the document for the proposition that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of the project or plan, and are designed to avoid or reduce the impact of a project or plan on the Natura 2000

site, are as follows:

> "The proponents' notion of effective levels of mitigation may vary from that of the competent authority and other stakeholders. To ensure the assessment is as objective as possible, the competent authority must first consider the project or plan in the absence of mitigation measures that are designed into a project. Effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported. It will then be for the competent authority, on the basis of consultation, to determine what type and level of mitigation are appropriate."

34. The Draft Delivery Plan (or to give the document its formal title: The Thames Basin Heaths SPA: Draft Mitigation Standards for Residential Development) sets out a strategic approach to the provisions of SANGS. For example, in Zone A (within 400 metres of the SPA) no effective avoidance or mitigation is possible; in Zone B (between 400 metres and 2 kilometres away from the SPA) 16 hectares of SANGS per 1,000 of new population is required, with further requirements as to the minimum size of the SANGS and their maximum distance from the proposed development; in Zone C (between 2 and 5 kilometres from the SPA) the standard of provision required reduces to 8 hectares of SANGS per 1,000 of the new population, with further stipulations as to minimum size and maximum distance from the proposed development.

35. The Draft Delivery Plan does not prevent individual assessments of particular proposals. Under the subheading "Individual Assessments", paragraph 2.2.9 says:

> "The Delivery Plan **does not** preclude the local authority deciding to assess a particular individual residential application separately under the Habitats Regulations. Equally, when making an application, a developer could ask the authority to assess the application separately from the Delivery Plan, whether or not mitigation is included. Given the likelihood of significant effect on the SPA, without mitigation, the application would need to be subject to an appropriate assessment, unless for good reasons, the authority is satisfied it would not be likely to have a significant effect on the SPA... Such a conclusion should be recorded, with reasons, by the planning authority and should have regard to the advice in Circular 06/2005 and to the findings of the European Court of Justice referred to in paragraph 13 of the Circular." (Emphasis as in the original).

36. Circular 06/2005 provides administrative guidance on the application of the law relating to planning and nature conservation. For present purposes, paragraphs 13 and 14 of the Circular, which deal with the issue or "likely significant effect", are relevant:

> "13. If the proposed development is not directly connected with or necessary to site management, the decision-taker must determine whether the proposal is likely to have a significant effect on a European site. The decision on whether an appropriate assessment is necessary should be made on a precautionary basis. An appropriate assessment is required where there is a probability or a risk that the plan or project will have significant effects on a site. This is in line with the ruling of the European Court of Justice in Case C-127/02 (the Waddenzee Judgment) which said *'any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects'.*
>
> 14. The decision-taker should consider whether the effect of the proposal on the site, either individually or in combination with other projects, is likely to be significant in terms of the conservation objectives for which the site was classified. The European Commission has also issued guidance, which local planning authorities may wish to consider."

A footnote to the final sentence in paragraph 14 refers to managing the Natura 2000, but not to the Methodological Guidance referred to in the opinion of Mr Purchas.

37. The Technical Assessor considered four main criticisms of the Draft Delivery Plan ("DDP"). They were:

> "... firstly that NE is wrong to hold that developments which provide SANGs of appropriate

size and quality would avoid any likely significant effect and therefore not require an appropriate assessment; secondly that its operation of the 'in combination' requirement is unreasonably rigorous; thirdly that its application of the 'precautionary principle' is not proportionate; and finally that the failure to set clear conservation objectives makes it impossible to accurately apply the requirements..."

38. Under the subheading "Avoidance or mitigation" the Technical Assessor said:

> "4.1.11 It is argued, most forcibly by Runnymede Borough Council, that NE's approach to avoidance and mitigation is wrong in principle. In particular, it is contended that to maintain that the provision of SANGs would avoid any likely significant effect subverts the intention of the legislation since it means that an appropriate assessment is thereby avoided. It is also suggested that NE has confused avoidance and mitigation.
>
> 4.1.12 It is clear from the wording of the DDP and what was said at the technical meetings by NE that the primary reason it adopted its approach was in an attempt to provide greater certainty for the house building industry and to make the process of complying with the requirements of the legislation easier. I have no reason to doubt that this was a genuine attempt by NE to facilitate the delivery of housing, albeit that it has largely had the opposite effect...
>
> 4.1.14 Whether or not appropriate assessment is more complicated or allows for more flexibility is not the issue. The question is whether the approach adopted by the DDP complies with the legislation. In this regard, I have some doubts that it does. While I accept that in some circumstances steps can be taken to avoid a likely significant effect, for instance by re-siting a proposed development, I am not satisfied that it has been demonstrated on an objective basis that the provision of SANGs would in principle avoid any likely significant effect on the SPA."

39. On this issue, the Technical Assessor concluded in paragraph 4.1.17:

> "It seems to me therefore that, until there is a clearer objective basis for concluding that the provision of SANGs would avoid any likely significant effect, the correct approach would be to undertake an appropriate assessment. It may well be that at that stage the provision of alternative open space either individually or in combination with other measures could be demonstrated to provide sufficient mitigation to avoid any adverse affect on the SPA. However taking into account the precautionary principle I am not satisfied that it can be shown at the initial screening stage that such provision would avoid any possibility of there being a likely significant effect."

In his overall conclusions in paragraph 4.1.43 the Technical Assessor said:

> "I find that the DPP fails to correctly interpret the requirements of the relevant European and UK legislation in a number of respects. In my view its indication that the provision of SANGs will avoid the need for an appropriate assessment is incorrect and its application of the 'in combination' requirement unduly rigorous. More worryingly its application of the precautionary principle would not appear to comply with the advice of the European Commission in terms of proportionality and consistency."

40. As part of its response to the Technical Assessor's report, NE asked Mr Drabble and Mr Machin to provide an opinion. Their joint opinion dated 21st March 2007 said, so far as relevant:

> "... we do not consider that NE are wrongly conflating avoidance and mitigation. Although both words are commonly used, and used in context are helpful, it must be remembered that neither appear in Article 6 itself. If a proposal includes as an integral part of the development a measure which will avoid any significant effect, then in our opinion the competent authority is entitled to so hold at the significant effect stage. If a development was proposed with a wall that could in practice be guaranteed to prevent anybody from reaching the SPA, then it would clearly be right to hold that there was no likely significant effect. The people, put simply, would not reach the site. The example is of course improbable, but it does illuminate the legal principle; and the same principle applies to the provision of SANGs if the ecological assumption that SANGs is effective is accepted."

41. The Technical Assessor's response in an Addendum Report dated 13th April 2007 included the following:

> "7. The comments made under issue 1 of the opinion imply that I concluded that the provision of SANGS could never avoid the need for assessment. This is a misreading of my original report. I accept that in principle the need for such an assessment could be avoided in certain circumstances. However, such an approach would only accord with the principles of ***Waddenzee*** if objective evidence existed to demonstrate that the provision of SANGS, either on their own or together with other measures, would be sufficient to ensure that new residential development of significant scale would be unlikely to have a significant effect on the SPA. It is clear from the ecological evidence presented to me at the technical meetings that no such objective evidence exists at present.
>
> 8. Consequently, I hold to the view that in order to comply with the ***Waddenzee*** test it will be necessary for the time being at least, for all larger residential developments, which aim to provide SANGS, to be subject to an appropriate assessment. If objective evidence is subsequently forthcoming, which confirms that a specific level and quantity of SANGS per head of population would avoid any likely effect on the SPA, then clearly there would be no need for an appropriate assessment to be undertaken, if the requisite SANGS is to be provided as part of the development...
>
> 10. I accept that the lack of objective evidence of the efficacy of SANGS, as a principle, will make it more difficult for any scheme, which seeks to provide SANGS as mitigation, to demonstrate that there will be no significant adverse effect on the SPA at the appropriate assessment stage. Nevertheless, if one is looking at the circumstances of a specific scheme in detail, rather than at the general principle, it seems to me that it may well be possible to find sufficient objective evidence to demonstrate that a package of mitigation measures, which might include the provision of SANGS, would avoid an adverse effect on the SPA. In the circumstances, I do not share the view of the opinion that it would not be possible to conclude through an appropriate assessment that the test in ***Waddenzee*** was met."

42. The Technical Assessor's reference to the **Waddenzee** test is a reference to the decision of the European Court of Justice in Case C-127/02 **Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staassecretaris van Landbouw, Natuurbeheer en Visserij**, [2004] Env LR 14.

43. The ECJ dealt with the meaning of the words "likely to have a significant effect" on a protected site under the Habitats Directive in paragraphs 40-45 of its judgment:

> "40. The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.
>
> 41. Therefore, the triggering of the environmental protection mechanism provided for in Art.6(3) of the Habitats Directive does not presume——as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled "Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive(92/43/EEC)"——that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.
>
> 42. As regards Art.2(1) of Directive 85/337, the text of which, essentially similar to Art.6(3) of the Habitats Directive, provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment...are made subject to an assessment with regard to their effects', the Court has held that these are projects which are likely to have significant effects on the environment (see to that effect Case C-117/02 *Commission v Portugal* [2004] E.C.R. I-0000, [85]).
>
> 43. It follows that the first sentence of Art.6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.

44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Art.174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, *inter alia* Case C-180/96 *United Kingdom v Commission* [1998] E.C.R. I-2265, paras 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Art.2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.

45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Art.6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects."

44. On 11th June 2007, NE responded to the claimant's representations to the first defendant, saying:

"Natural England considers that it is perfectly reasonable for the Secretary of State to conclude, on the evidence, and despite the Inspector's recommendations, that the development would not be likely to have a significant effect on the SPA. We understand that, on the basis of our carefully considered advice to the Council and the Inspector, the Secretary of State has concluded that the suitable alternative natural green space (SANGS) offered by the appellants would avoid any net increase in recreational visits to the SPA heathlands (thereby avoiding any increased disturbance to the Annex 1 bird species). We believe that on that basis it is not only appropriate, but legally correct to conclude no likelihood of a significant effect in terms of Regulation 48(1) of the Conservation (Natural Habitats &c) Regulations 1994. No appropriate assessment is necessary and permission can lawfully be granted in respect of these Regulations and the Habitats and Birds Directives."

45. NE's representations then refer to Mr Drabble's opinion and continue:

"The Secretary of State's letter indicates that she has not considered it necessary to consider the Inspector's deliberations in IR12.5 to IR12.15 on the integrity of the habitat. We assume that this is intended to indicate that having considered the Inspector's conclusions, as to the effects on the SPA, she has preferred the advice of Natural England as the appropriate nature conservation body, and therefore there is no need to consider the effects on the integrity of the site, because there is no need to undertake an appropriate assessment...

Natural England supports the Secretary of State's application of the Habitats Regulations in this case and her conclusion that, in view of the adequacy of SANGS provided, there is no need to undertake an appropriate assessment in light of there being no likelihood of a significant effect on the SPA."

46. The first defendant responded to the claimant's representations, following the minded to grant letter, in paragraphs 9-11 of her decision letter dated 24th July 2007, under the heading "Effect on the SPA":

"9. For the reasons given in paragraphs 13-15 of her 'minded' letter of 4 April, the Secretary of State was satisfied she could proceed to grant planning permission without having to undertake an Appropriate Assessment. Accordingly, she did not consider further the Inspector's deliberations in IR12.5-IR12.15 on the effect of the current proposals on the integrity of the habitat.

10. Although not a matter on which the Secretary of State sought further representations, Hart District Council took issue with the Secretary of State's approach in their response of 14 May. In particular, it stated that matters relevant to the Special Protection Area (SPA) have moved on significantly, having regard to the availability of new information, and better understanding relevant to the requirements of Article 6(3) of the Habitats Directive. The primary development cited in terms of new information is the report of the Assessor on the Thames Basin Heaths SPA and Natural England's Draft Delivery Plan. In fact, this document was specifically mentioned by the Secretary of State in her 'minded' letter of 4 April. She gave the report little weight, given its purpose in informing the South East Plan Panel, who will in turn report to her. She concluded that she was therefore not currently in a position to rely upon the assessor's conclusions and recommendations. She considers that that remains the position.

11. The Secretary of State continues to give great weight to the views of Natural England as the appropriate nature conservation body in relation to the application of the Conservation (Natural Habitats &c) Regulations 1994. That body has withdrawn its objections to the proposed development and has confirmed (IR8.5) it is satisfied that the package of measures offered by the appellant is sufficient in scale and detail to allow a competent authority to conclude that there is not likely to be a significant effect on the SPA, and that no appropriate assessment under the Habitats Regulations is necessary. The Secretary of State therefore retains the position set out in her 'minded' letter."

The claimant's challenge to the decision letter

47. In its claim form the claimant contended that the defendant's decision was unlawful on a number of grounds. In the claimant's skeleton argument those grounds were grouped under three headings: Ground 1 related to the manner in which the first defendant had dealt with the effect of the proposed development on the SPA; Ground 2 related to the manner in which the first defendant dealt with the issue of housing land supply in Hart District; Ground 3 alleged the first defendant had failed to impose an appropriate condition to secure the works to upgrade King John's Ride. The principal ground of challenge was Ground 1. I will deal with the subsidiary Grounds 2 and 3 below (see paragraphs 85-93 and 94-99 respectively).

48. In respect of Ground 1, the claim form contended that:

(a) NE, and the first defendant in agreeing with NE, erred in considering the mitigation proposed by the second and third defendants as part of the package at the first, or "screening" stage when deciding whether the proposed development was likely to have a significant effect on the SPA;

(b) the first defendant had erroneously failed to find that an appropriate assessment should be carried out as required by Regulation 48(1);

(c) the first defendant failed to have regard a number of material considerations, namely

(i) paragraphs 12.5-12.15 of the Inspector's Report,

(ii)the claimant's representations following the minded to grant letter on the Technical Assessor's report which, it was said, cast "severe doubts" as to whether NE's approach in the Draft Delivery Plan, as adopted by the first defendant in the decision letter, was "correct in law";

(d) the first defendant had given "undue weight" to the views of NE that the package of proposals, including SANGS, would not have a significant effect on the SPA, and therefore that an appropriate assessment was unnecessary.

49. It was not suggested that the complaint in subparagraph (b) (above) added anything of substance to the complaints in paragraphs (a), (c) and (d), which explained why it was being said that the first defendant had erred in concluding that an appropriate assessment was not necessary. The complaint in subparagraph (d) (above) was not pursued in the claimant's skeleton argument or in the oral submissions of Mr Hockman QC on behalf of the claimant. Mr Hockman rightly accepted that the weight to be given to the views of NE was a matter of planning judgment for the first defendant. Since

NE is the "appropriate nature conservation body", as defined by Regulation 4 of the Regulations, the first defendant was entitled to give "great weight" to its views if she chose to do so. Indeed it would have required some cogent explanation in the decision letter if the first defendant had chosen not to give considerable weight to the views of NE.

50. In the claimant's skeleton argument it was submitted that, as a matter of law, mitigation measures had to be disregarded at the screening stage. At the commencement of the hearing this appeared to be the claimant's principal submission (see subparagraph (a) above). However, in his oral submissions Mr Hockman accepted that there was "no absolute legal rule" that one could never take avoidance or mitigation measures into account at the screening stage. Rather, he submitted that once it was accepted, as it had been accepted in the present case, that avoidance or mitigation measures were necessary, then it would be "difficult" for the competent authority to conclude, without first carrying out an appropriate assessment, that there was no risk that there would be a significant effect on the SPA.

51. The claimant's skeleton argument also contained a number of criticisms of the approach adopted by Mr Colebourn in his evidence at the inquiry, and contended that in agreeing to the measures proposed by Mr Colebourn NE had misdirected itself as to the **Waddenzee** test and had failed to ask itself whether there was a risk of a significant adverse effect. In agreeing with NE, the first defendant had similarly misdirected herself, and moreover, in agreeing with the advice from NE, the first defendant had failed to realise that since NE's advice was based in turn upon its agreement with Mr Colebourn's evidence, the criticisms of that evidence in the Inspector's conclusions applied equally to NE's advice. Thus, the first defendant could not rationally have come to the conclusion that there was no need to consider further the Inspector's conclusions in paragraphs 12.5-12.15 of her report.

52. It was also contended that the first defendant had disregarded a relevant consideration because she had given little weight to the Technical Assessor's report. The reason given in the decision letter for attaching little weight to that report, that its purpose was to inform the South East Plan Panel, was not rational, given that the claimant had relied on the report in its representations to the first defendant.

53. It will be noted that the claimant's grounds of challenge have changed (Mr Hockman would say, "have been refined") since the original grounds in the claim form. Insofar as those changes consisted of alleged errors of law which could be addressed on the face of the documents before the court, none of the other parties objected to them. However, Mr Hockman rightly accepted that since the claimant had not challenged Mr Colebourn's evidence at the inquiry (with which NE had agreed) it could not now argue that such evidence was flawed, save to the extent that the claimant could of course rely upon the criticisms of the evidence in the Inspector's conclusions.

Effect on the SPA: Discussion and conclusions

54. In my judgment, Mr Hockman's concession that avoidance or mitigation measures forming part of the plan or project can, as a matter of law, be considered at the screening stage was correct. Since the point is of general importance and has led NE to participate in these proceedings as an interested party represented by Mr Drabble, I will set out in some detail my reasons for concluding that the claimant's concession was correctly made.

55. The first question to be answered under Article 6(3) or Regulation 48(1) is: what is the plan or project which is proposed to be undertaken or for which consent, permission or other authorisation is sought? The competent authority is not considering the likely effect of some hypothetical project in the abstract. The exercise is a practical one which requires the competent authority to consider the likely effect of the particular project for which permission is being sought. If certain features (to use a neutral term) have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial, screening, stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect on the SPA.

56. No authority is given for the proposition in paragraph 2.6 of the Methodological Guidance that "the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site." If the screening assessment should consider all of the other components or characteristics of the proposed plan or project, why should a particular component or characteristic be ignored because it has been incorporated into the project as a mitigation measure? Article 6.3 and Regulation 48(1) require the competent authority to consider whether the project, not some part of the project (shorn of any mitigating features incorporated within it), is likely to have a significant effect on the SPA. No support for the proposition in paragraph 2.6 of the Methodological

Study can be found in the EC's interpretation guide for Article 6: "Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive 92/43/EEC", which is the guidance referred to in paragraph 14 of Circular 06/2005 (see above). The Circular does not refer to the Methodological Guidance.

57. In **Waddenzee** the ECJ did not consider mitigation measures since none were put forward, and there is nothing in the court's judgment which might suggest that mitigation measures forming part of a project should not be considered at the screening stage (see paragraphs 40-45 of the court's judgment above). The claimant referred to paragraph 71 in the Advocate General's Opinion, where he said:

> "In principle, the possibility of avoiding or minimising adverse effects should be irrelevant as regards determining the need for an appropriate assessment. It appears doubtful that such measures could be carried out with sufficient precision in the absence of the factual basis of a specific assessment."

58. It is not surprising that that passage is not reflected in the court's judgment, because the issue did not arise on the facts of that case. The licence for cockle fishing under consideration did not contain any mitigation measures. The Advocate General was responding, in paragraph 71 of his opinion, to a question which the plaintiffs understood was being asked by the Raad Van State:

> "... whether the possibility of measures to minimise damage could be taken into account as earlier as this stage of the application of Art.6(3) of the habitats directive." (Emphasis added).

To which the plaintiffs answered:

> "However, such measures can be taken effectively only on the basis of an appropriate assessment. In the present case the questions posed in connection with an ongoing government study already show that cockle fishing is likely to have significant effect." (See paragraph 65 of the Advocate General's Opinion).

59. No specific mitigation measures were being put forward, much less were such measures incorporated into, so that they formed part of, the cockle fishing licence. There can be no dispute that the mere possibility that mitigation measures might be devised which might reduce the effect of a project on an SPA would not be sufficient to enable a competent authority to conclude, without an appropriate assessment, that the project would not be likely to have a significant effect on the SPA.

60. The two reasons given for the proposition in paragraph 2.6 of the Methodological Guidance do not bear scrutiny, and in any event do not appear to be directed at the kind of measures incorporated into the appeal proposals in the present case. The fact that, in some cases, the proponent's notion of effective levels of mitigation may vary from that of a competent authority and other stakeholders does not mean that, in those cases where the competent authority does agree with the proponent's assessment of the effectiveness of proposed mitigation measures, such measures should be ignored at the screening stage. If the competent authority does not agree with the proponents of the project as to the likely effectiveness of any mitigation measure incorporated into the project, it will not have been able to exclude the risk, on the basis of objective information, that the project will have a significant effect on the SPA, and therefore will require that an appropriate assessment be carried out.

61. While it is true that "effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported", if the competent authority is satisfied at the screening stage that the proponents of a project have fully recognised, assessed and reported the effects, and have incorporated appropriate mitigation measures into the project, there is no reason why they should ignore such measures when deciding whether an appropriate assessment is necessary. Under Regulation 48(2), the competent authority may ask the proponent of a plan or project for more information about the plan or project, including any proposed mitigation, not merely for the purposes of carrying out an appropriate assessment, but also in order to determine whether an appropriate assessment is required in the first place. If for any reason the competent authority is still not satisfied, then it will require an appropriate assessment. As a matter of common sense, anything which encourages the proponents of plans and projects to incorporate mitigation measures at the earliest possible stage in the evolution of their plan or project is surely to be encouraged. What would be the point, from the proponents' point of view, of going to the time, trouble and expense of devising specific mitigation measures designed to avoid or mitigate any effect on an SPA, and incorporating those proposals into the project, if the competent authority was then required to ignore them when

considering whether an appropriate assessment was necessary?

62. It is also important to appreciate the kind of measures that were incorporated into the package of proposals put forward by the second and third defendants in the present case. The Draft Delivery Plan draws a distinction between "avoidance measures" and "mitigation measures":

> "1.5.7 Measures to avoid or reduce the effects of a development proposal on the SPA (here referred to as **avoidance measures** and **mitigation measures** respectively) can be proposed as part of the planning application and the Council will take these into account in the assessment. Avoidance measures eliminate the likelihood of any effects on the SPA. Mitigation measures would be designed to reduce likely significant effects to a level that is insignificant or in a way that makes them unlikely to occur. It may be that the project could have an adverse effect on site integrity, but conditions, restrictions or other legally enforceable obligations, would ensure mitigation measures can be included in the project to remove the potential for adverse effects on site integrity.
>
> 1.5.8 The difference between avoidance and mitigation measures is not an academic one. If avoidance measures are proposed, and they are considered to be fully effective and guaranteed by way of legally enforceable conditions or obligations, then the proposal is not subject to the further tests of the Habitats Regulations..."

63. In the present case, there was never any question of there being a direct effect on the SPA. The concern was that, when considered in combination with other proposed residential developments in the area, there might be an indirect effect by reason of increased visitor pressure on the SPA as a result of additional, new, residents using the SPA for recreational purposes, including, in particular, dog walking. The purpose of the SANGS was not to lessen the increase in visitor pressure, but to avoid it altogether by drawing some existing users away from the Heath to compensate for those new residents who might use it on occasion (see paragraph 12.9 of the Inspector's Report).

64. As Mr Colebourn explained in his supplementary evidence in response to the claimant's planning witness:

> "1.2 Through a process of extensive research and development the Appellants have put together a very detailed mitigation package whereby any effects, that might have the potential to occur on the SPA, are avoided. This package has been approved by Natural England.
>
> 1.3 HDC do not have any objection to the technical nature of the package, and therefore it can be concluded that if implemented the development at Dilly Lane is not likely to have a significant effect on the SPA."

In response to supplementary evidence produced by the claimant, Mr Colebourn produced further supplementary evidence in which he said:

> "1.8 The Delivery Plan seeks to establish a mechanism for addressing in-combination effects across the SPA. It says that developers can either contribute to the provision of strategic Suitable Alternative Natural Greenspace (SANGS), or can provide their own comprehensive mitigation/avoidance package, and warns that such packages will be rigorously tested.
>
> 1.9 The discussions about the Delivery Plan at the EiP Technical Session on the SPA, through which EPR has been present, have focussed largely on the first of these courses of action; strategic provision of SANGS, and on the evidence base for some of the presumptions about the effects of human recreation on Annex 1 bird species.
>
> 1.10 The Appellants, however, with our advice, have adopted the second course of action. Through a process of extensive research and development the Appellants have developed their own free-standing and very detailed and comprehensive mitigation package, outside the process of implementing the Delivery Plan strategically through SPDs.
>
> 1.11 The measures to avoid effects on the SPA have been researched in great detail

> through survey work on patterns of use relevant to the local situation in Hartley Wintney and the surrounding area... The degree of research undertaken has allowed the Appellants to understand the local effects on the SPA and predict the likely effect of new development at Dilly Lane. Measures have then been further adapted and progressively re-designed to ensure that the package will avoid the development having any adverse effect on the SPA.
>
> 1.12 The package and the underlying research demonstrate that it can be concluded that the Dilly Lane development would avoid any potential effects on the SPA.
>
> 1.13 Natural England has accepted this, and has approved the avoidance measures package. I can assure the Inquiry that NE have rigorously tested our proposals over many months through extensive discussions and meetings, have sought further clarification on a number of occasions, and have now pronounced themselves satisfied.
>
> 1.14 In sum, therefore, the Appellants do not seek to rely solely - or at all - on the strategic mechanisms set out in the Natural England Delivery Plan or any future Supplementary Planning Document that may be prepared..."

65. If the first defendant, as the competent authority, agreed with that conclusion, then there was simply no point in conducting an appropriate assessment. As Mr Drabble pointed out in the joint opinion and his skeleton argument:

> "... if it is established, on an appropriately rigorous basis, that there will be no net increase in visitor numbers, it has been established that the housing development will not produce any effect within the site at all. In those circumstances, carrying out an appropriate assessment would not further matters in any way. The routine characteristics of an appropriate assessment, typically involving survey work within the site to establish ecological base-line conditions, would, even if undertaken, have no effect on the conclusion."

NE's skeleton argument makes the point that although the provision of SANGS is referred to as a mitigation measure:

> "... it is not a mitigation measure designed to mitigate effects taking place within the site (eg controls on methods of working or replacement planting). There are no such effects."

Mitigation measures of that kind, that is to say measures designed to mitigate effects taking place within the SPA, appear to be the kind of mitigation measures with which the Methodological Guidance was primarily, if not exclusively, concerned.

66. In paragraph 42 of its judgment in **Waddenzee**, the ECJ drew attention to the similarities between Article 6(3) of the Habitats Directive and Article 2(1) of Directive 85/337, the Environmental Impact Assessment Directive, which requires Member States to ensure that certain "projects likely to have significant effects on the environment" are subjected to a process of environmental assessment.

67. The Court of Appeal has made it clear that it is permissible for a local planning authority or the Secretary of State to have regard to proposed mitigation measures when deciding, at the screening stage, under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (which implemented the EIA Directive) whether a project is likely to have significant effects on the environment.

68. In **Gillespie v Secretary of State for Transport Local Government and the Regions & Ors** [2003] Env LR 30 ([2003] EWCA Civ 400), Pill LJ said in paragraphs 36 and 37:

> "36 When making his screening decision, the Secretary of State was not in my judgment obliged to shut his eyes to the remedial measures submitted as a part of the planning proposal. That would apply whatever the scale of the development and whether (as in *BT*) some harm to the relevant environmental interest is inevitable or whether (as is claimed in the present case) the development will actually produce an improvement in the environment. As stated in *Bozen*, it is the elements of the specific project which must be considered and all the elements of the project relevant to the EIA. In making his decision,

the Secretary of State is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision. If the judges in the cases cited took a contrary view, I respectfully disagree, though it appears to me that both Sullivan J. in *Lebus* and Richards J. in the present case did not require all remedial or mitigating measures to be ignored.

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."

69. Laws LJ said in paragraph 46:

"46 I would express my reasons for dismissing the appeal very shortly as follows. Where the Secretary of State is contemplating an application for planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA. If then the Secretary of State were to decline to conduct an EIA, as it seems to me he would pre-empt the very form of enquiry contemplated by the Directive and Regulations; and to that extent he would frustrate the purpose of the legislation."

70. Pill LJ returned to the subject in **R (Catt) v Brighton and Hove City Council & Anor** [2007] EWCA Civ 298, which was concerned with the impact of a proposed football stadium:

"31 Relying on a commentary in the Journal of Planning Law, at [2007] J.P.L. 81, on the decision of Collins J. in the present case, Mr Upton [counsel for the applicant] seeks a 'neat distinction' between routine measures and project specific provisions. Neat distinctions may be a comfort to decision makers but carry the danger that they may distract decision makers from their central duty, which is to examine the actual characteristics of the particular project. In the present case, it would be ludicrous to ignore conditions imposed as to the frequency of football matches, the days on which they may be played and the music which may accompany them...

33 This is a very different development from that proposed *Gillespie*. Developments come in all forms and the approach to the screening opinion must have regard to the development proposed. There will be cases, such as *Gillespie*, 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...

35 I repeat my statements in *Gillespie*... that the decision maker is not 'obliged to shut his eyes to the remedial measures submitted as a part of the planning proposal', and that 'in making his decision, the Secretary of State... is not required to put into separate compartments the development proposal and the proposed remedial measures and consider only the first when making his screening decision'. Laws L.J. was considering the facts in *Gillespie* and I do not consider he was asserting a general principle that, only

when remedial measures are 'uncontroversial', can they be taken into account when giving a screening opinion.

36 Having referred to *Gillespie*, Dyson L.J., at [39] in *Jones* [[2004] Env LR 2, [2003] EWCA Civ 1408], stated:

'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.'

37 When forming a screening opinion, the Council were not required to ignore either the conditions proposed to limit the scope of the development or the conditions providing for ameliorative or remedial measures. The consequences of providing the additional seating, and other changes, could not be predicted with certainty but, as Collins J. noted, the Council had extensive knowledge and experience, supported by surveys, of the impact of existing football league and cup matches upon the environment. On the basis of that, and the studies into future impact, they were entitled to assess the likely impact of the additional capacity proposed in the context of the continuing ameliorative measures also proposed and to form the screening opinion they did."

71. Maurice Kay and Wilson LJJ agreed. Unlike an EIA, which must be in the form prescribed by the EIA Directive, and must include, for example, a non-technical summary, enabling the public to express its opinion on the environmental issues raised (see **Berkeley v the Secretary of State for the Environment** [2001] 2 AC 603 per Lord Hoffmann at page 615), an appropriate assessment under Article 6(3) and Regulation 48(1) does not have to be in any particular form (see paragraph 52 of **Waddenzee** judgment), and obtaining the opinion of the general public is optional. Thus, considering proposed mitigation measures at the screening stage under Article 6(3) would not be frustrating the purpose of the legislation by pre-empting any particular form of inquiry, which was the particular concern expressed by Laws LJ in **Gillespie** (above).

72. The underlying principle to be derived from both the **Waddenzee** judgment and the domestic authorities referred to above is that, as with the EIA Directive, the provisions in the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course. If, having considered the "objective information" contained in the EPR Report, and agreed by NE in the Statement of Common Ground, the first defendant, as the competent authority, was satisfied that the package put forward by the second and third defendants, including the SANGS, would avoid any net increase in recreational visits to the SPA (thereby avoiding any increased disturbance to the Annex 1 bird species), it would have been "ludicrous" for her to disaggregate the different elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered without the SANGS, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment.

73. The fact that Regulation 48(6) refers to the manner in which it is proposed that the plan or project is to be carried out, or to any conditions or restrictions subject to which it is proposed that consent et cetera shall be given, does not mean that those matters may not be considered at the first stage under Regulation 48(1), if they are incorporated into the application for planning permission when the competent authority is deciding whether the project for which planning permission is being sought is likely to have a significant effect on the SPA.

74. In **World Wildlife Fund UK Limited v Secretary of State for Scotland** [1999] Env LR 632, Lord Nimmo Smith, having noted that "plan or project" was not defined in the Regulations, said at page 699:

"Regulation 49(1) and (2) speak of it as something for which 'consent, permission or other authorisation' is applied, and in my opinion this means that the plan or project is that which is the subject-matter of an application and can thus be identified by reference to the application. This appears to me to be consistent with the provisions of the 1988 regulations, and in particular regulation 6(2), which I shall discuss in due course. Thus in the present case the 'plan or project' is as set out in CCC's application for planning permission. I therefore reject the suggestion which counsel for the petitioners made at one point that the 'plan or project' included all the conditions to which it was made subject

at the time when planning permission was granted."

75. Lord Nimmo Smith then considered what had to be ascertained under Regulation 48(5) and concluded that Regulation 48(6) enabled proposed conditions to be taken into consideration when considering whether the integrity of the European site would be adversely affected. Lord Nimmo Smith was considering the local planning authority's power to impose conditions, when granting permission, upon the project as described in the planning application, not proposed mitigation measures which had, from the outset of the process, been incorporated into the application itself. Regulation 48(6) merely reflects the reality that in some, perhaps very many, cases where an appropriate assessment has been carried out, changes to the manner in which it is proposed to carry out the project, or to the conditions or restrictions to be imposed in the consent for the project, will be proposed by the proponents or by the competent authority in response to the findings of the assessment. Regulation 48(6) makes it clear, for the avoidance of doubt, that regard must be had to such matters when considering, under Regulation 48(5), whether the plan or project will adversely affect the integrity of the SPA.

76. For all these reasons, I am satisfied that there is no legal requirement that a screening assessment under Regulation 48(1) must be carried out in the absence of any mitigation measures that form part of a plan or project. On the contrary, the competent authority is required to consider whether the project, as a whole, including such measures, if they are part of the project, is likely to have a significant effect on the SPA. If the competent authority does not agree with the proponent's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information (see **Waddenzee** above).

77. That leads me to the second complaint made by the claimant about the manner in which the first defendant dealt with the SPA issue. Mr Hockman submitted that in agreeing with NE's conclusion "that there is not likely to be a significant effect on the SPA" (see paragraph 11 of the decision letter), both the first defendant and NE had failed to apply the **Waddenzee** test; they had merely considered whether a significant effect was likely rather than whether there was a risk of a significant effect (see paragraph 44 of **Waddenzee** above). I do not accept that submission for the following reasons. Both NE, in agreeing to the Statement of Common Ground, and in its letter dated 11th June 2007, following the minded to grant letter, and the first defendant in both the minded to grant letter and the decision letter, used the statutory formulation in Article 6(3) and Regulation 48(1) "likely to have a significant effect".

78. To an English lawyer, a need to establish a likelihood imposes a more onerous burden than a need to establish a risk. The concept of a "standard of proof" is of little if any assistance in environmental cases, but the nearest analogy would be the difference between the balance of probability (more likely than not) and the real risk standards of proof. Since the ECJ's decision in **Waddenzee**, it has been clear that, applying the precautionary principle, significant harm to an SPA is "likely" for the purposes of Article 6 and Regulation 48 if the risk of it occurring cannot be excluded on the basis of objective information. Since the **Waddenzee** test is set out in Circular 06/2005, which was specifically referred to in paragraph 10 of the minded to grant letter, which was in turn incorporated into the decision letter (see paragraph 6 of the latter), and Circular 06/2005 is also referred to in NE's Draft Delivery Plan (paragraph 1.5.3), it is impossible to conclude that, when using the correct statutory formulation, both the first defendant and NE did not appreciate that the issue of likelihood had to be approached on the basis set out in **Waddenzee**.

79. There is nothing in the material before the court which suggests that NE (whose advice was accepted by the first defendant) approached the issue in any other way in its lengthy and detailed discussions with Mr Colebourn, which led eventually to the Statement of Common Ground.

80. Although Mr Hockman made other criticisms of the phraseology used in that statement, for example, the apparently cautious statement that the package of measures was sufficient to "allow a competent authority to conclude", the claimant was in no doubt at the inquiry that NE was satisfied that there was not likely to be a significant effect on the SPA, and any forensic, as opposed to real, doubt as to its position is removed by NE's letter dated 11th June 2007 (see above).

81. The first defendant was entitled to prefer NE's view to that expressed by the Inspector. The fact that the Inspector had expressed "serious doubts" about EPR's conclusion that the measures incorporated in the package, including the SANGS, would avoid any net effect of recreational activity on the SPA (paragraph 12.9 of the Inspector's Report) did not mean that the first defendant was obliged to accept that there were such doubts, or that they could not, as NE had concluded, "be excluded on the basis of

objective information": see, for example, **R (Merricks) v Secretary of State for Trade and Industry** [2006] EWHC 2698 (Admin) at paragraph 6. Merely expressing doubt without providing reasonable objective evidence for doing so is not sufficient.

82. It is important to appreciate that the Inspector was expressing her doubts on essentially the same "objective information" as had satisfied NE. HWAG had submitted a questionnaire and responses in respect of Hazeley Heath (the Inspector's document number 64), but apart from establishing that Hazeley Heath "has an inherent attraction that draws people to it" (see paragraph 9.13 of the Inspector's Report), a matter which was never in dispute, that survey did not add to the objective information prepared by EPR and agreed by NE.

83. The first defendant clearly considered the Inspector's key conclusion in paragraph 12.9 of the Inspector's Report, with which NE disagreed. Once the first defendant decided that she agreed with NE's conclusion, based on the objective information that there would be no net increase in recreational activity on the Heath, and hence no significant effect on the SPA, she did not need to consider further the Inspector's deliberations in paragraphs 12.5-12.15 of her report.

84. Mr Hockman submitted that in deciding that she did not need to consider further the Inspector's conclusions, the first defendant failed to appreciate that, insofar as the Inspector's criticisms of EPR's evidence were valid, they applied equally to NE's conclusions because those conclusions were based in turn upon EPR's evidence. I do not accept that submission. It would have been obvious, even on the most cursory perusal of the Inspector's Report and accompanying documents, that the "objective information" had been compiled by EPR and agreed, after discussion, by NE. Thus, insofar as the Inspector's doubts were justified, they applied equally to NE's advice to the first defendant. On any common-sense reading of the decision letter, the first defendant did not consider that the Inspector's doubts were justified.

85. Lastly, under this heading, I deal with the complaint that the first defendant accorded little weight to the views of the Technical Assessor on The Draft Delivery Plan. The starting point must be the proposition that the weight to be given to the views of the Technical Assessor was entirely a matter for the first defendant's planning judgment. In saying that she gave the Technical Assessor's report little weight on the basis that its purpose was to inform the South East Panel, who would in turn report to her, the first defendant was not unreasonably refusing to give little weight to a document simply because it was a report to another body. The purpose of the report is reflected both in its status and in its subject matter. Considering the former, the Technical Assessor's report was only the first stage of the examination process. The report was circulated, representations were made by NE and others, and the Technical Assessor responded to those representations in his Addendum Report. All of that information would then be considered by the panel, which would reach its own conclusions on the issue and advise the first defendant accordingly. The first defendant would then decide whether or not to accept the panel's report. In these circumstances, the Technical Assessor's report could not be regarded as definitive. Moreover, it was concerned with the efficacy of SANGS as a strategic concept. As the Technical Assessor made clear in paragraph 10 of his Addendum Report dated 13th April 2007:

> "... if one is looking at the circumstances of a specific scheme in detail, rather than at the general principle... it may well be possible to find sufficient objective evidence to demonstrate that a package of mitigation measures, which might include the provision of SANGS, would avoid an adverse effect on the SPA."

That was precisely what was being proposed by the EPR in the appeal package in the present case (see Mr Colebourn's supplementary evidence cited above). For these reasons, I reject the claimant's criticisms, whether as originally formulated or as subsequently refined, of the manner in which the first defendant dealt with the SPA issue.

Ground 2

86. PPS3: Housing came into effect on 1st April 2007, after the Inspector delivered her report to the first defendant. In the minded to grant decision, the first defendant said in paragraphs 19 and 20:

> "The Secretary of State does not agree with the Inspector's assessment at IR12.25-12.26, that the balance of the evidence suggests that housing supply over a five year period will provide a small but significant excess against development plan requirements. She notes the Inspector, like the Council, has made allowance for contributions from the Queen Elizabeth Barracks site, which is subject to inquiry following the Council's refusal

of planning permission. The Secretary of State does not in the circumstances consider that site to be deliverable as defined in PPS3. She also does not have information on the likely level of housing completions delivered by the Council in 2006/07, and the impact that that might have on the average annual requirement for the remainder of the Structure plan period.

The Secretary of State concludes that the housing supply position seems to her to be marginal, and that the Council has not demonstrated a five year supply of specific deliverable sites for housing. In the light of this, and given her conclusions elsewhere in this letter on the impact of the proposal on the Special Protection Area and the benefits of the proposed affordable housing, the Secretary of State considers there are material considerations weighing in favour of a grant of planning permission."

87. The first defendant asked for "up to date evidence concerning whether or not the Council has identified the five year supply of specific deliverable sites for housing for the period April 2007 to end March 2012" (paragraph 21). The claimant and the second and third defendants made detailed representations. In the decision letter the first defendant said in paragraph 13:

"Evidence was provided by Hart District Council on this issue in its response of 14 May. The Secretary of State has paid careful regard to this assessment, and sets out below her own assessment of housing land supply, based on that information, and that provided by Barton Willmore on behalf of the appellants on 11 June."

88. The decision letter then contained a number of tables: table 1 set out the first defendant's view of the 5-year supply figure (854); table 2 set out the supply figures where the claimant and the second and third defendants agreed (557); table 3 then set out the disputed supply figures, giving the views of the claimant, the second and third defendants, and finally the first defendant's assessment. The total figure under this heading was 558 in the first defendant's assessment, of which 420 were provided by one site, the Queen Elizabeth II Barracks site at Church Crookham. In respect of that site, paragraph 14 of the decision letter said:

"14. The Secretary of State has carefully considered the arguments put forward by Hart District Council, and accepts its assertion that, notwithstanding the outcome of the particular appeal proposals currently being heard at inquiry, there is a reasonable prospect of this site delivering housing within 5 years. Evidence provided from the inquiry Statement of Common Ground between Hart and the QEII developer indicates that if a decision to grant the appeal is made, the site could deliver over 700 units by 2012. The Secretary of State accepts as reasonable the assumption that if the current appeal proposals were refused, then 420 units could still be delivered by this site. The Secretary of State does not accept the appellant's argument that the Council's reasons for refusal amount to an 'in principle' objection to the development of this site. In particular, she considers that the issue of impact on the Thames Basin Heath SPA does not transcend other matters. In that respect, she draws attention to the fact that the issue of impact on the SPA is among the matters she has determined in this case."

The figures were then drawn together in table 4 in the decision letter, in which the first defendant concluded that there was a supply of 1,115 units or a 6.52 years' supply.

89. In paragraph 21 of the decision letter the first defendant said:

"The Secretary of State considers that, on the evidence submitted, it would be reasonable to assert that the Council has demonstrated that it has identified a 6.5 year supply of deliverable housing land at this time, and this accords with the advice in paragraph 54 of PPS3. However, the Secretary of State notes that in order to deliver this supply the Council will be dependent on the QEII Barracks site producing some units by 2012. While she finds that it is reasonable to assume a figure of 420 units is likely to be achievable, she is concerned about the consequences should there be delay in bringing this site forward for development. If the timetable set out in the Council's response proves to be over optimistic, then the 5-year supply could be threatened. Her overall conclusion is that although the 5-year supply has been demonstrated, it is fragile and she is concerned about the Council's ability to maintain a continuous five year supply of deliverable sites as advised in paragraph 57 of PPS3."

90. Having considered the provisions of the development plan and PPS3, the first defendant concluded in paragraph 28 of the decision letter:

> "The Secretary of State has considered the greenfield status of the appeal site, and whether allowing the appeal proposals on this site might prevent developable brownfield sites from coming forward. Given her conclusion in paragraph 21 of this letter that the 5-year supply of deliverable sites, while demonstrated, is fragile, and considering the need to maintain a continuous 5-year supply of deliverable sites, she concludes that the development of this site for 170 units would not have the effect of preventing or delaying developable brownfield sites from coming forward."

91. The claimant's sole criticism of this very careful and detailed analysis by the first defendant of the housing supply position is the first defendant's conclusion that, although a 5-year supply had been demonstrated in terms of PPS3, that 5-year supply was "fragile". Paragraph 54 of PPS3 sets out the circumstances in which sites are considered "deliverable" for the purpose of deciding whether there is "an up-to-date five year supply of deliverable sites" in accordance with paragraph 70 of the Circular:

> "To be considered deliverable, sites should, at the point of adoption of the relevant Local Development Document:
>
> - Be Available - the site is available now.
>
> - Be Suitable - the site offers a suitable location for development now and would contribute to the creation of sustainable, mixed communities.
>
> - Be Achievable - there is a reasonable prospect that housing will be delivered on the site within five years."

92. Mr Hockman submitted that since the first defendant had concluded that it was reasonable to assume a figure of 420 units was likely to be achievable at the Queen Elizabeth II Barracks by 2012, it was illogical or unreasonable also to conclude that the 5 year supply was fragile. The first defendant was adding a further test, fragility, which was not referred to in PPS3. In my judgment, the first defendant was doing no such thing; she was merely responding to the particular circumstances of this case, where a very significant proportion of the 5-year supply (420 out of 1115 units, or some 38 per cent of the 5-year supply) was dependent on one site producing units by 2012 and where, despite reasonable assumptions to the contrary, there might be slippage in the timetable put forward by the claimant for bringing the site forward for development. Far from being unreasonable, the first defendant's observation that this particular 5-year supply is "fragile" was eminently reasonable on the facts of these appeals. A "reasonable prospect" that housing will be delivered on a particular site in 5 years may range from a near certainty (insofar as that is possible in an uncertain world), that housing will be delivered, to it merely being more likely than not that housing will be delivered on a particular site. The first defendant's approach merely reflects the wisdom of not putting too many of one's eggs into the same planning basket.

93. It was also submitted that the first defendant had failed to consider the Inspector's conclusion that there would be possible disadvantages in prematurely releasing the main appeal site for housing "through the unnecessary development of greenfield land" (see paragraphs 12.31 and 12.55 of the Inspector's Report). Having concluded that there was a 5-year supply of deliverable sites, the first defendant considered, in accordance with the advice in paragraph 70 of PPS3, whether granting planning permission would undermine the achievement of wider policy objectives. The Inspector's conclusion that harm would be done through the "unnecessary release of greenfield land" was reached in the context of her assessment of policy H4 of the structure plan. The purpose of that policy was "to ensure sufficient housing land is provided throughout the structure plan period to meet identified needs while avoiding the unnecessary use of greenfield land" (see paragraph 12.27 of the Inspector's Report). In paragraph 23 of her decision letter, the first defendant explained why she had assessed the appeal proposals against the more recent policies in PPS3:

> "She concludes that as the appeal site is a greenfield site, and as she has identified a greater than 5 year supply of deliverable housing land, of which the majority of sites are previously developed land, that the appeal proposals are not in accordance with the development plan. However, the relevant policy in the development plan predates PPS3, which is the latest statement by the Government on national policy towards the delivery of housing. The Secretary of State considers that the correct approach to take in this case is

to consider the appeal proposals against PPS3 policies, which supersede those of the development plan."

94. Hence the first defendant's approach in paragraph 28 of the decision letter (above) to the "greenfield issue" raised by the Inspector in her report. For these reasons, there is no force in the second ground of challenge.

Ground 3

95. In the minded to grant decision the first defendant agreed with the Inspector's conclusion that all the proposed improvements to King John's Ride (KJR) were "a necessary and important element of the overall housing scene" (paragraph 23). At the inquiry the claimant had sought a "Grampian" condition prohibiting the commencement of development until works were carried out. The Inspector thought that this requirement was excessive:

> "In order to ensure the housing is served by the necessary infrastructure the improvements need to be in place before the first occupation of the dwellings, not prior to commencement of development. The works would take place on Council owned land and the Council is also able to grant cycle rights. The Council as local planning authority has endorsed the improvements and the planning brief suggests the improvements would be achieved by way of a commuted contribution. The Council as landowner did not make objections to the planning application. On that basis Council consent may be anticipated. To the best of my knowledge the Appellants have also followed the only available procedure open to them to establish whether permission would be required to carry out the works on common land. Therefore there are reasonable prospects of the improvements being secured within the necessary timescale. The Grampian form of conditions put forward by the Council in relation to Appeals A and G would be unreasonable and would therefore fail one of the tests in Circular 11/95. I am satisfied that the planning obligations in the unilateral undertakings offer an appropriate procedure for securing the improvements." (Paragraph 12.34 of the Inspector's report).

96. The Section 106 obligations put forward by the second and third defendants require them to use "all reasonable endeavours" to obtain the claimant's consent as landowner to the proposed improvements: lighting, widening, permitting it to be used as a path by cyclists and creating the two new links. The second and third defendants also agreed to use all reasonable endeavours to obtain, if required, planning permission, consent for works on common land and a licence from NE under the Habitats Regulations. There was no suggestion that NE would object to the proposed improvements and the claimant did not submit that consent would be required under the Commons Act, merely that there was no certainty about that matter (see paragraph 7.18 of the Inspector's Report). In reality, therefore, whether or not various improvements to King John's Ride could be implemented depended on obtaining the council's consent as landowner and the authority able to grant cycle rides. It had not objected to the appeals in its capacity as landowner, but in its representations in response to the minded to grant letter, the claimant maintained its position that the Grampian conditions it had put forward were necessary, and that the obligation to use reasonable endeavours was inadequate to secure the improvements. The representations criticised the obligations on the basis that:

> "... the Undertakings as drafted and submitted to the Inquiry commit only to use 'reasonable endeavours' to secure these improvements. Notably, the Undertakings commit only to use reasonable endeavours to the point initially of first occupation and then, if necessary, to completion of the development. However, if these improvements have not been secured by this time the submitted Undertakings provide for these obligations to cease. Whilst HDC accepts that there is a reasonable prospect of these essential improvements being delivered in accordance with the Undertakings submitted, there is clearly some potential for any or all of these obligations to cease without the essential improvements being secured."

97. The claimant also complained that the first defendant had not explained why its suggested Grampian condition did not comply with Circular 11/95. The explanation should have been obvious, but the first defendant nevertheless provided it in paragraph 36 of the decision letter:

> "36. The Council's proposed Grampian conditions would require the improvements to King John's Ride to be in place prior to the commencement of development. The Secretary of State considers that the need for the identified improvements to King John's

Ride to be in place arises from the point at which the dwellings are first occupied, and considers that requiring the improvements to be in place before development commences is requiring them at too early a stage in the process. She therefore finds this to be unreasonable, and concludes that the proposed Grampian conditions would fail the sixth test of paragraph 14 of Circular 11/95."

98. The first defendant also considered the claimant's criticisms of the obligations put forward by the second and third defendants in paragraphs 33 and 34 of the decision letter:

"33... She accepts that the improvements are a necessary and important element of the overall housing scheme: She has considered the evidence put forward at the time of the inquiry by the Council and the appellants. She finds the proposed improvements to be in line with the planning brief for the site, adopted by the Council as Supplementary Planning Guidance in 2000. The planning brief also allows for the improvements to be promoted by means of a commuted contribution. The Council is the owner of the land and, as such, is able to grant cycle rights. It has also endorsed the improvements as the local planning authority, and it did not object to the planning application in its capacity as landowner.

34. The Secretary of State considers that, in these circumstances, it is reasonable to retain the view that there are reasonable prospects of the improvements being secured within the necessary timescale."

99. Although it was not suggested by the claimant at the inquiry, or in its representations following the minded to grant letter, or even in the claim form, which merely referred to the first defendant's failure to impose "an appropriate Grampian or other condition", Mr Hockman submitted that the first defendant should have imposed a Grampian condition which prevented occupation of the dwellings prior to implementation of the improvement works. Whether it was expedient to impose such a condition was a matter for the first defendant's planning judgment. In the particular circumstances of this case, where the only significant potential obstacle to the implementation of the improvement works was the need to obtain the claimant's consent to them as landowner, it is not surprising that both the Inspector and the first defendant considered that the undertakings offered by the second and third defendants were perfectly adequate.

100. Although Circular 11/95 makes it clear that, as a matter of policy, Grampian conditions should be imposed on a planning permission only if there are at least reasonable prospects of the action in question being performed within the time limit imposed by the permission (see paragraph 40 of the Circular), it does not follow that a Grampian condition must be imposed in all cases where it has been concluded that some action is necessary, and that there are reasonable prospects of the action being carried out within the timescale of the planning permission. Had the first defendant not been satisfied that there were reasonable prospects of the improvements being secured, she would not have been willing either to impose a Grampian condition or to accept the undertakings entered into by the second and third defendants. Once she accepted that there were such prospects, it was for her to decide how the improvements should be secured. Since the ability of the second and third defendants to carry out the relevant action in the present case is largely, if not entirely, dependant on obtaining the claimant's agreement as landowner, and as the authority with the power to grant cycle rights, the first defendant was entitled to conclude that a Grampian condition was unnecessary and that the undertakings entered into by the second and third defendants would be sufficient to secure the necessary improvements. It follows that there is no substance in Ground 3 of the challenge.

A last word

101. For the sake of completeness, I should mention that in Mr Hockman's skeleton argument he submitted that there was no evidence in the decision letter that the first defendant had actually granted planning permission. The decision letter states that the four appeals are allowed, but does not expressly state that the planning permission is granted for the developments that are the subject of the appeals. Mr Hockman drew attention to the powers conferred on the first defendant by Section 79(1) of the Act: on an appeal under section 78 she may allow or dismiss the appeal "and may deal with the application as if it had been made to [her] in the first instance." Wisely, this submission was not pursued in oral argument. It is true that paragraph 39 of this decision letter does not contain the usual form of words "and grants planning permission for..." after "the Secretary of State hereby allows your appeals", but the decision letter has to be construed as a whole and in a common-sense way.

102. Under the subheading "Overall conclusions", paragraph 38 of the decision letter is in these terms:

> "Following her consideration of the further evidence and representations submitted by the parties pursuant to her minded letter of 4 April, the Secretary of State is now satisfied that the Council has demonstrated it has an identifiable five year supply of deliverable housing land, but it is one that is dependent upon timely delivery from a single site. She therefore finds the five year supply of deliverable housing land to be fragile. She also concludes that a grant of planning permission would not undermine the achievement of relevant policy objectives, and that when this is weighed together with those considerations she has identified above which point in favour of granting planning permission, these are of sufficient weight to overcome the proposal's conflict with the development plan."

Having so concluded, it would have been perverse for first defendant not to have granted planning permission. The failure to include a formal statement to that effect in the decision letter was clearly an oversight, but that oversight is of no consequence because the decision letter incorporates the minded to grant decision, in which the first defendant had said that she was "minded to allow the appeals and to grant planning permission subject to conditions..." It also incorporates Annexes 1-4, which set out the first defendant's conditions, and which refer to "the development hereby permitted". In construing the document as a whole, regard may be had to the conditions in Annexes 1-4. Once that is done, there can be no doubt that the first defendant did not merely allow the appeals, she also granted planning permission for the development comprised in the four appeals. It is with some relief that I reach this conclusion since it means that this very lengthy judgment has not been entirely in vain.

Conclusion

103. The claimant's application is dismissed.

104. Right, that really is the end, in more senses than one.

105. Yes?

106. MR Turney: My Lord.

107. MR JUSTICE SULLIVAN: Is it Mr Turney for the Secretary of State?

108. MR Turney: That is correct, my Lord.

109. MR JUSTICE SULLIVAN: Yes.

110. MR Turney: I merely make an application for the first defendant's costs to be paid. I have spoken to my learned friend Mr Hockman and he has given an indication that the application can properly be made for those sums to be assessed at £18,441.25.

111. MR JUSTICE SULLIVAN: Let us just take it turns. Mr Hockman?

112. MR HOCKMAN: My Lord, that is absolutely right. I indicated to my learned friend that if it was appropriate for him to seek costs, as it plainly is, and if he were to apply to your Lordship to assess those costs in that sum, then we would raise no objection, and we do not.

113. MR JUSTICE SULLIVAN: Well, we will take it in stages anyway. The application is dismissed. The claimant is to pay the first defendant's costs. So his costs to be summarily assessed in the sum of £18,441.25. Any more for any more? I am not encouraging people to make any further applications; I am simply asking them whether they have any. No? Everyone keeping their heads below the parapet? Jolly good idea. I would have done as well.

114. Yes, Mr Hockman?

115. MR HOCKMAN: May I ask your Lordship for permission to take the matter further, please?

116. MR JUSTICE SULLIVAN: You may. You simply rely on the arguments you have put forward?

117. MR HOCKMAN: I do.

118. MR JUSTICE SULLIVAN: Well, I hope you will not think it discourteous if I refuse you permission and say that I do not think that there is a real prospect of success for the reasons that have nearly made me hoarse over the last two hours.

119. MR HOCKMAN: Thank you.

120. MR JUSTICE SULLIVAN: Thank you very much indeed. Thank you all.

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