Neutral Citation Number: [2023] EWHC 1622 (Admin)

Case No: CO/12/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2023

Before:

SIR ROSS CRANSTON
sitting as a High Court judge
- -

C G FRY & SON LIMITED **Claimant**

- and –

(1) SECRETARY OF STATE FOR LEVELLING UP HOUSING AND COMMUNITIES **Defendants**

-and-

(2) SOMERSET COUNCIL
- -
- -

CHARLES BANNER KC and ASHLEY BOWES (instructed by **Clarke Willmott LLP**) for the **Claimant**
RICHARD MOULES and NICK GRANT (instructed by Government Legal Department) for the **First Defendant**
LUKE WILCOX (instructed by Somerset Council Legal Services Department) for the **Second Defendant**

Hearing dates: 14, 15 June 2023
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 30th June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR ROSS CRANSTON:

INTRODUCTION

1. This case concerns potential adverse effects on the Somerset Levels and Moors Ramsar Site from the claimant's proposed housing-led development on land east of Wellington, Somerset.

2. The claim arises in the context of the issue of nutrient neutrality. In broad terms, this issue relates to the phosphate loading of protected water habitats, leading to eutrophication. This is caused by reasons including agricultural practices and under-investment in water infrastructure. There is a risk of the problem being exacerbated by water generated by new developments which contain phosphates, principally from foul water. The Home Builders Federation states that, due to the unavailability of mitigation options, this issue is holding up the building of no fewer than 44,000 homes in England which already have planning permission.

3. In the present case the Somerset Council ("the Council"), and then on appeal the Secretary of State's Inspector, refused to discharge certain conditions attached to the planning permission which the Council (or at least its predecessor) had earlier granted the claimant developer. That was because there had not been an appropriate assessment under the Habitats Regulations 2017 (the Conservation of Habitats and Species Regulations 2017, SI 2017/1012, as amended). Consequently, certain pre-commencement conditions have not been discharged, and phase 3 of the development has not been able to proceed.

4. The claimant therefore launched this claim for statutory review under section 288 of Town and Country Planning Act 1990 ("the 1990 Act"), challenging the Inspector's decision. As a matter of law the challenge raises issues about the scope and application following the UK's withdrawal from the European Union of the Habitats Regulations 2017 and the Habitats Directive on which it was based. It is on legal grounds that the case was argued and must be decided. It is for others to resolve the significant public policy issues underlying this claim, raised by the Home Builders Federation and the Ministerial Statement, both outlined later in the judgment.

BACKGROUND

Planning permission

5. In December 2015 the Council granted outline planning permission for a mixed-use development of up to 650 houses, community and commercial uses, a primary school and associated infrastructure. Planning permission was subject to several conditions including condition 4 (requiring the submission of a site-wide surface water drainage strategy) and condition 7 (requiring the submission of a foul water drainage scheme). Condition 4 was discharged about a year later.

6. Pursuant to the planning permission the development was to take place in eight phases. Phases 1 and 2 were commenced under separate reserved matters approvals. In June 2020, the claimant obtained reserved matters approval for phase 3, relating to 190 dwellings, which was subject to a number of conditions including: (1) condition 3: tree protection measures (a pre-commencement condition); (2) condition 4: surface water

drainage (a pre-commencement condition); (3) condition 5: a construction environment management plan (a pre-commencement condition); (4) condition 6: external works (a pre-construction condition); (5) condition 7: cycle and footpath network connection details (a pre-occupation condition); and (6) condition 10: materials (pre-construction of any development above damp proof course level).

Natural England advice note, 2020

7. In August 2020 Natural England published their advice note to Somerset's local authorities (including the Council's predecessors) on development in relation to the Somerset Levels and Moors Ramsar Site ("the Natural England advice note"). The advice note referred to the judgment of the Court of Justice of the European Union in Case C-293/17, C-294/17, *Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu v College van gedeputeerde staten Van Limberg* [2019] Env LR 27 (the "*Dutch Nitrogen case*"). In the wake of that case, the advice note read, greater scrutiny was required of plans and projects that will result in increased nutrient loads which may have an effect on Special Protection Areas ("SPAs"), Special Areas of Conservation ("SACs"), and sites designated under the Ramsar Convention. SPAs and SACs are sites designated under the Habitats Regulations 2017. Ramsar sites are not but, as a matter of national planning policy in the National Planning Policy Framework ("NPPF"), they are afforded the same protection as if they were.

8. While Natural England was satisfied that the effects of additional nutrients on the Somerset Levels and Moors SPA could be screened out and so not require appropriate assessment under the Habitats Regulations 2017, the Somerset Levels and Moors Ramsar site had been designated for different natural features:

> "…the interest features of the Somerset Levels and Moors Ramsar Site are considered unfavourable, or at risk, from the effects of eutrophication caused by excessive phosphates. Further, although improvements to the Sewage Treatment Works, along with more minor measures to tackle agricultural pollution have been secured, these will not reduce phosphate levels sufficiently to restore the condition of the Ramsar Site features. The scope for permitting further development that would add additional phosphate either directly or indirectly to the site, and thus erode the improvements secured, is necessarily limited."

9. Accordingly, Natural England advised that competent authorities (which included the Council) should undertake an appropriate assessment under the Habitats Regulations 2017 of the implications of a plan or project, and only grant consent to the extent that the assessment allows the competent authorities to ascertain the development "will not have an adverse effect on the integrity of the site". As to the development types affected, the advice note stated in relation to additional residential units and commercial development:

> "Additional residential units within the catchment are likely add phosphate to the designated site via the waste water treatment effluent, thus contributing to the existing unfavourable condition and further preventing the site in achieving its conservation objectives. Natural England therefore advises that your authority carry out an appropriate assessment of planning applications that will result in a net increase in population served by a wastewater system, including new homes, student and tourist accommodation."

Inspector's decision

10. In June 2021 the claimant sought discharge of conditions 3, 4, 5, 6, 7 and 10 of the reserved matters approval. These conditions required the submission and approval of specific matters that did not go to the principle of the development. The Council withheld approval on the basis that an appropriate assessment under the Habitats Regulations 2017 was required before the conditions could be discharged.

11. In April 2022 the claimant appealed to the Secretary of State and an Inspector was appointed. Before the Inspector the claimant contended that no appropriate assessment under the Habitat's Regulations 2017 was required at the stage of discharge of conditions on reserved matters or, if it was, it should be confined to the scope of what was for consideration in relation to the discharge of the conditions in question.

12. The Council resisted the appeal on the basis that, in line with the Natural England advice note, it was necessary for an appropriate assessment to be undertaken to determine the effect of additional nutrients on the Somerset Levels and Moors Ramsar site. It also submitted a shadow appropriate assessment, dated July 2022. This stated that the proposed development might have a negative effect on the qualifying features of the Ramsar site through the increase in nutrients, especially phosphorous. No mitigation was proposed so it could not be concluded that the project would not adversely affect the integrity of the Ramsar site.

13. The Inspector dismissed the claimant's appeal. He determined that it was legitimate to apply paragraph 181 of the NPPF to give the Ramsar site the same protection in all respects as a European site under the Habitats Regulations 2017. That was because the discharge of the conditions would be an authorising act, as part of the wider consent process, that would allow the realisation of potential effects on the Ramsar site which the Natural England advice note sought to manage. Considering the overarching nature of paragraph 181, this applied regardless of the specific subject matter of the conditions themselves: DL24-26. The Inspector considered that the grant of outline planning permission and reserved matters approval did not have an effect on the scope of any necessary appropriate assessment; the validity of the planning permission was not in question: DL41.

14. The inspector then determined that the requirement for an appropriate assessment in the Habitats Regulations 2017 applied to the discharge of conditions stage. He rejected the claimant's argument that inclusion of specific provisions relating to the grant of planning permission, including outline planning permission, at regulation 70 of the Habitats Regulations 2017, did not diminish the applicability of regulation 63, which was simply a sweep up provision: DL44. Even adopting the claimant's approach that the permission in relation to "consent, permission or other authorisation" in regulation 63 is the planning permission referred to in regulation 70, the concept of "other authorisation" was a broad one. The claimant's approach would create loopholes counter to a purposive approach to the Habitats Regulations 2017: DL45-47.

15. As the competent authority, the Inspector said, he was unable to carry out the necessary appropriate assessment to agree the conditions: DL71. He said that he had considered the other relevant planning considerations, in particular the impact on housing delivery: DL72, 74. However, the unfulfilled requirement for an appropriate assessment was an issue of material significance: DL77. In other words he conducted the balancing exercise

and concluded that in this case the delay in housing delivery was outweighed by the need to protect the Ramsar site.

Secretary of State statement, July 2022

16. In July 2022 the Secretary of State for Environment Food and Rural Affairs issued a Written Ministerial Statement about tackling nutrient pollution and improving water quality. Part of that was to impose a statutory duty on water and sewerage companies to upgrade wastewater treatment works to the highest technically achievable limits by 2030 in nutrient neutrality areas. The impact of new housing was a small proportion of overall nutrient pollution, the statement said, but mitigation requirements had a significant impact on overall house building.

17. The statement added that the government understood the concerns that some local planning authorities had around the impact of nutrient neutrality on their ability to demonstrate they have a sufficient and deliverable housing land supply. While it would be disappointing to developers whose sites were affected, the statement added, the government's position was that:

> "The Habitats Regulations Assessment provisions apply to any consent, permission, or other authorisation, this may include post-permission approvals, reserved matters or discharges of conditions. It may be that Habitats Regulation Assessment is required in situations including but not limited to where the environmental circumstances have materially changed as a matter of fact and degree (including where nutrient load or the conservation status of habitat site is now unfavourable) so that development that previously was lawfully screened out at the permission stage cannot now be screened out…"

Statement by Home Builders Federation, April 2023

18. James Stevens, Director for Cities at the Home Builders Federation, prepared a statement for the court about the claimant's development. He explains how, following Natural England's advice note, the issue of nutrient neutrality has become a serious obstacle for house building in England. It was delaying an estimated 120,000 homes across the 27 catchments currently affected in England, with some 40 percent having already secured (as in this case) outline or full planning permission.

19. Mr Stevens states that the availability of nature-based solutions, the government's favoured mitigation, is extremely sparse. Three of the four Somerset local authorities were opposed to market schemes (buying credits), even if available. Solutions were unlikely to release many of the 18, 234 homes delayed in Somerset. SME house building companies were especially exposed to the issue of nutrient neutrality on their developments.

LEGAL FRAMEWORK

Habitats Directive, article 6(3)

20. The Habitats Regulations 2017 transpose the requirements of Council Directive 92/43/EEC of 21st May 1992 on the Conservation of Natural Habitats and of Wild Flora

and Fauna (the "Habitats Directive"). The directive was first implemented in UK law by the Conservation (Natural Habitats, &c.) Regulations 1994, SI 1994/2716.

21. Articles 6(2) and 6(3) of the Habitats Directive provide:

> "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 …
>
> 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 [overriding public interest cases], 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."

22. The European jurisprudence establishes, first, as with any EU Directive, these provisions could be relied upon directly in the English courts when the UK was a member of the EU to trump domestic law (including the 1990 Act). An EU Directive could also be relied upon directly where it was claimed that the wording of the Habitats Regulations 2017 was too narrow or fell short of achieving all that it required.

23. Secondly, the CJEU adopted a strict precautionary approach to the assessment provisions of the Habitats Directive, so that "competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site": Case C-461/17, *Holohan v An Bord Pleanala* [2019] PTSR 1054, [33]. As Sir Keith Lindblom SPT explained in *R (on the application of Wyatt) v Fareham BC* [2022] EWCA Civ 983, article 6(3) embodies the precautionary principle "and makes it possible effectively to prevent adverse effects on the integrity of protected sites as a result of the plans or projects being considered", citing paragraph 58 of Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* [2005] 2 CMLR 31 *("Waddenzee")*: [9(6)].

24. Thirdly, as the CJEU held in the *Dutch Nitrogen Case*, the appropriate assessment required in the first sentence of article 6(3) not only has to identify "all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site", [95], but it also "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the plans or the projects proposed on the protected site concerned…" [98].

25. Fourthly, the concept of "agree[ing]" in the second sentence of article 6(3) has a broad import so that plans or projects should only be allowed to proceed if the adverse effects have been considered. That follows from CJEU decisions holding that the definition of "development consent" in article 1(2)(c) of the EIA Directive (Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment) is relevant to the meaning of the expression "agree" in article 6(3) of the Habitats

Directive: Case C-254/19, *Friends of the Irish Environment Ltd v An Bord Pleanala* [2021] Env LR 16, [42] and C411/17, *Inter-Environnement Wallonie ASBL v Conseil des Ministres* [2020] Env L.R. 9, [142]-[143]. Although these decisions were based on particular facts, there is no suggestion that the CJEU was limiting the general statement of principle which they enunciate.

EU law and the Withdrawal Act 2018

26. In repealing the European Communities Act 1972, the European Union (Withdrawal) Act 2018 ("the Withdrawal Act 2018") provided in general terms for the application of the same rules and laws on the day after Brexit as on the day before.

27. Section 2(1) provides that, subject to section 5 and schedule 1, EU-derived domestic legislation, as it had effect in domestic law immediately before the implementation period ("IP") completion day (31 December 2020), continues to have effect in domestic law on and after that day. The Habitats Regulations 2017 fall under section 2(1).

28. Section 4 of the Withdrawal Act 2018 provides:

> 4 (1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day-
>
> (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
>
> (b) are enforced, allowed and followed accordingly,
>
> continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).
>
> (2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they…
>
> (b) arise under an EU directive… and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case).

29. Section 5(2) provides for the principle of the supremacy of EU law to continue to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before. The continued application of EU principles in interpreting retained domestic and EU case law is addressed in section 6(3). Section 6(7) defines retained general principles of EU law as "the general principles of EU law, as they have effect in EU law immediately before IP completion day", subject to the provisions set out in that section. In combination sections 6(3) and 6(7) in relation to retained case law preserve the effect of the pre-Brexit case-law of the CJEU in relation to the interpretation of EU law.

Habitats Regulations 2017

30. The Habitats Regulations 2017 continue in English law under section 2(1) of the Withdrawal Act 2018 as EU-derived domestic legislation.

31. The Habitats Regulations 2017 provide that the Habitats Directive is to be construed for the purposes of the regulations as if references to a Member State included a reference to the United Kingdom: reg 3A. The regulations concern the effect on a European site, which as defined in regulation 8 does not include a Ramsar site.

32. Regulation 9(1) provides that the Secretary of State, the nature conservation bodies and a competent authority in relation to the marine area must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the directives (the Habitats Directive and the new Wild Birds Directive). As regards competent authorities, regulation 9(3) provides:

> "9 (3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions."

33. In *Harris v Environment Agency* [2022] EWHC 2264 (Admin) Johnson J held that given its context "have regard to" in section 9(3) meant that the competent authority had to discharge those requirements or be in a position to justify departure from them [87].

34. Part 6 of the Regulations, "Assessments of plans and projects", contains in chapter 1 general provisions. Regulation 62(1) refers to the application of the provisions of chapter 1. It provides that the requirements of the assessment provisions in regulation 63 and 64 apply:

> "(a) subject to and in accordance with the provisions of Chapters 2 to 7, in relation to the matters specified in those provisions; and
>
> (b) subject to regulation 63(7)(c), in relation to all other plans and projects not relating to matters specified in Chapters 2 to 9."

35. Regulation 63 is concerned with the assessment, inter alia, of the implications for European sites. As far as relevant it reads:

> "63(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…
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site…
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given."

36. Parts 2 to 7 of part 6 of the regulations, referred to in regulation 62(1), cover a range of matters - planning permission (part 2), highways and roads (part 3), electricity (part 4), pipelines (part 5), transport and work (part 6), and environmental controls (part 7).

37. Part 2 of the regulations begins with regulation 70. That regulation makes provision for assessment prior to the grant of planning permission:

> "70(1) The assessment provisions apply in relation to—
>
> (a) granting planning permission on an application under Part 3 of the TCPA 1990 (control over development); …
>
> (c) granting planning permission, or upholding a decision of the local planning authority to grant planning permission (whether or not subject to the same conditions and limitations as those imposed by the local planning authority), on determining an appeal under section 78 of that Act (right to appeal against planning decisions) in respect of such an application…

38. By regulation 70(2), where the assessment provisions apply the competent authority may grant conditional permission if it considers that the conditions would avoid any adverse effects on a European site. Regulation 70(3) adds that where the assessment provisions apply, outline planning permission must not be granted unless the competent authority is satisfied that no development likely adversely to affect the integrity of a European site could be carried out under the permission, whether before or after obtaining approval of any reserved matters.

39. The import of regulation 63 of the Habitats Regulations 2017 was considered in *R (on the application of Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin). There a local resident challenged the local planning authority's decision to grant approval for reserved matters relating to a mixed-use development. Outline planning permission had been granted without a habitats assessment. There were mitigation measures in the environmental statement which included a "Report to inform a Habitats Regulations Assessment". After the permission had been granted, the CJEU held in C-323/17, *People Over Wind v Coillte Teoranta* [2018] PTSR 1668 that mitigation measures were not to be taken into account at the screening stage. In light of that decision the local authority decided to carry out an appropriate assessment under regulation 63, which the developer supported. It was satisfactory so the local authority granted approval of the reserved matters. Lang J held that an appropriate assessment under regulation 63 could be carried out at the reserved matters stage, drawing on cases relating to environment impact assessments (EIA). These established that where the need for an EIA assessment had been overlooked at the outline planning stage it should be carried out at the reserved matters stage.

40. *R (on the application of Barker) v Bromley LBC* [2006] UKHL 52 was one of these EIA cases. There the Town and Country Planning (Environmental Impact Assessment) Regulations 1988 referred only to decisions to grant planning permission, but Lord Hope held that the case for assessment might become apparent at the reserved matters stage or where further consideration was necessary due to a material change of circumstances: [5]. By failing to provide for these situations, the House of Lords held, the EIA Regulations 1988 failed to implement fully the Environmental Impact Assessment (EIA) Directive 2011/92/EU because the relevant development consent might be regarded as multi-staged. Lord Hope said that the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted, because:

> "24…it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have to be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an EIA was overlooked at the outline stage…"

41. Lang J applied the principle in *Barker* that it might be said that the need for an appropriate assessment under the Habitats Directive was "overlooked" at outline permission stage in the case before her because of the change in the law brought about by the CJEU judgment in *People Over Wind*: [70]. Thus, she held, the Council could lawfully conduct an appropriate assessment at the reserved matters stage: [71]. After quoting article 6(3) of the Habitats Directive, she added:

> "74…The relevant date is 'the date of adoption of the decision authorising implementation of the project': see *Commission v Germany* [2017] EUECJ C-142/16 at [42]. In a 'multi-stage consent', there is no 'agreement to the … project' until reserved matters consent has been granted; indeed the CJEU described the reserved matters approval as 'the implementing decision' in *Wells* at [52] and *Commission v UK* [2006] QB 764 at [101], [104]. By regulations 63(1) and 63(5), reserved matters consent cannot be granted unless it has been established that the integrity of the European site will not be adversely affected. So an [habitats assessment] was required."

42. In *R (Swire) v Canterbury City Council* [2022] EWHC 390 (Admin), one ground of challenge was that the local authority's decision to approve the masterplan under condition 8 of the outline planning permission was unlawful because there was a failure to comply with requirements for environmental impact and habitat assessments. Holgate J held that the ground failed because it was not irrational for the planning officer to conclude that sufficient information on environmental impact and habitats assessments had been provided in respect of condition 8. In the course of his reasoning, Holgate J said this:

> "94. In *R (Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin) it was held at [72]-[77] that for the purposes of the Habitats Regulations, there is no decision authorising the implementation of the project in the case of a multi-stage consent until reserved matters are approved. Reserved matters approval is the 'implementing decision'. Unlike the EIA Regulations, there is no legislative objective requiring HRA to be carried out at the earliest possible stage. Accordingly, HRA may lawfully be completed at the reserved matters stage, even if not carried out prior to the grant of outline permission. The various attempts by the claimant in *Wingfield* to challenge the decision by Lang J were rejected by the Court of Appeal (as recorded in [2021] 1 WLR 2863)."

NPPF, paragraph 181 and Ramsar sites

43. Ramsar sites are notified to local planning authorities under section 37A of the Wildlife and Countryside Act 1981, pursuant to the UK's obligations under the Convention on Wetlands of International Importance especially as Waterfowl Habitat. They are not covered by the Habitats Regulations 2017.

44. Paragraph 181 of the NPPF states:

> "181. The following shall be given the same protection as habitats sites: (a) Potential Special Protection Areas and possible Special Areas of Conservation; (b) Listed or proposed Ramsar sites; and (c) Sites identified, or required, as compensatory measures for adverse effects on habitats, potential Special Protection Areas, possible Special Areas of Conservation, and listed or proposed Ramsar sites."

GROUNDS OF CHALLENGE

45. The claimant's case in general terms is that the effect of additional phosphate loading resulting from its proposed development was not a material consideration to the determination of the conditions at issue in the case. It was legally irrelevant because it fell outside the specific parameters of what the outline planning permission and the reserved matters approval had left over for consideration under these conditions. The material for the discharge of these conditions was satisfactory, and the only thing preventing their discharge was whether an appropriate assessment of the impact of phase 3 of the development on the Ramsar site from additional phosphate loading was required. There was no nexus between the conditions in relation to phosphates, even with the condition relating to waste water. Nor, on the claimant's case, does the combination the Habitats Regulations 2017 and paragraph 181 of NPPF change that. The Inspector was wrong in his analysis and conclusions.

Ground 1: Inspector misconstrued Habitats Regulations 2017

46. In broad terms ground 1 is firstly, that the Inspector wrongly construed the Habitats Regulations 2017 and should not have applied regulation 63, as he did, to the discharge of conditions on a reserved matters approval. Mr Banner KC contended that regulation 70 was the relevant provision, and it is confined to planning (including outline planning) permission. The grant of approval of reserved matters (as in this case) is not a planning permission: *R (Fulford Parish Council) v City of York Council* [2019] EWCA Civ 2109, [22], per Lewison LJ. Secondly, Mr Banner submitted, there is no legal basis to produce a result contrary to the plain interpretation of the regulations. EU law could not be used to produce a *contra legem* interpretation (citing Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, [2016] 3 CMLR 27, [AG68], [32]). Domestic law had no purchase on this aspect of the case.

47. In my view Mr Banner is correct that on the face of it the assessment provisions of regulation are confined in their application to the planning permission stage and do not extend to the discharge of conditions. The regulations are explicit on the application of regulation 63. Under regulation 62(1)(a), regulation 63 is "subject to and in accordance with the provisions of Chapters 2 to 7", and that language means that regulation 63 is subject to and in accordance with part 2, which includes regulation 70(1). The words of regulation 70(1) confine its remit to planning permission, which as a result of regulation 70(3) includes outline planning permission. On its face regulation 70 does not encompass reserved matters or the discharge of conditions as in this case. The language of regulation 62(1)(b) - "all other plans and projects" – does not take the matter further. The claimant's development is a "planning project" - a chapter 2 planning project under 62(1)(a) - but it is the same project as it was at the time planning permission was granted, not an "other project" as in regulation 62(1)(b).

48. While on a strict reading of the Habitats Regulations 2017 the assessment provisions of regulation 63 do not cover the discharge of conditions, in my view they do apply as a result of firstly, article 6(3) of the Habitats Directive, secondly, a purposive interpretation of their provisions and thirdly, case law binding on me.

Habitats Directive, article 6(3)

49. As we saw, article 6(3) of the Habitats Directive requires that an appropriate assessment should be undertaken before a project is agreed to. In *Harris v Environment Agency* [2022] EWHC 2264 (Admin) Johnson J applied section 4 of the Withdrawal Act 2018 and held that the Environment Agency had breached article 6(2) of the Habitats Directive by limiting its investigation into the impact of water abstraction licences to only three SSSIs in a special area of conservation (SAC) on the Norfolk Broads. Johnson J held that article 6(2) continued to have direct effect in domestic law because its obligations had been recognised in cases decided prior to Brexit such as *Waddenzee*: [90], [94].

50. Mr Banner contended that the Habitats Directive had no status in the UK legal system, except through regulation 9(3) of the Habitats Regulations 2017. The provisions of the European Union (Withdrawal) Act 2018 do not take the argument any further, he submitted, because there is no CJEU pre-existing case law which interprets the Habitats Directive as imposing a requirement to conduct an appropriate assessment at subsequent stages, such as the discharge of conditions on a reserved matters approval. He submitted that *Harris* concerned whether the claimed obligation under article 6(2) had been recognised by the court before Brexit, and it had. By contrast there is no CJEU or domestic case preceding exit day which supports the view that article 6(3) of the Habitats Directive can be relied upon to impose a requirement for an appropriate assessment at the discharge of conditions stage. Unlike *Harris* section 4(2)(b) of the Withdrawal Act 2018 is not engaged in this case given the absence of relevant pre-exit case-law.

51. In my view article 6(3) of the Habitats Directive continues to have effect in domestic law as a result of section 4(2)(b). Johnson J explained in *Harris* that the requirements of article 6(3) were accepted as binding by the CJEU in *Waddenzee*: [90]. Articles 6(2) and 6(3) of the Habitats Directive are closely related, so as to be "of a kind" with one another for the purposes of section 4: [91]. The demands of section 4(2)(b) are therefore met. The section is explicit that the recognition in the case law does not have to be by way of the *ratio* of a case "(whether or not as an essential part of the decision in the case)".

52. Consequently, the requirements of article 6(3) of the Habitats Directive remain part of UK law. That article requires that the competent authorities should not agree a project until an appropriate assessment has been undertaken and it shows that it will not adversely affect the integrity of a site. A planning consent is part of agreeing a project when it is necessary to implement a development. In this case the discharge of pre-commencement conditions was a necessary step in the implementation of the development. An appropriate assessment had not been undertaken up to that point, so consequently the Inspector determined that he could not discharge the conditions prior to one being undertaken. His conclusion was consistent with article 6(3) of the Habitats Directive.

Purposive interpretation

53. Secondly, the Habitats Regulations 2017 demand a purposive interpretation so that the appropriate assessment provisions of regulation 63 apply to a subsequent consent stage including reserved matters applications and the discharge of conditions. A broad and purposive interpretation of the regulations flows from the strict precautionary approach which the CJEU has adopted to the assessment provisions of the Habitats Directive, as explained in the passage quoted earlier from Sir Keith Lindblom SPT's judgment in *R (on the application of Wyatt) v Fareham BC* [2022] EWCA Civ 983. The CJEU has adopted the purposive approach in other cases as well such as Case C-323/17, *People Over Wind v Coillte Teoranta* [2018] Env. L.R. 31, [37]. As Lang J observed in the *Wingfield* case [2019] EWHC 1974 (Admin), "the HRA regime is focused on ensuring the avoidance of harm to the integrity of protected sites": [72].

54. Mr Banner accepted that the precautionary principle is well-established in EU law and applies to the interpretation of the Habitats Directive. However, he submitted that regulation 70(3) of the Habitats Regulations 2017 already embraces the precautionary principle by requiring an assessment at the outline stage to consider the effect on any European site "whether before or after obtaining approval of any reserved matters." Regulation 70(3) answers the assertion that his construction would open up a lacuna in the scheme of habitats assessment. Mr Banner contended that the issue is about the timing not the scope of an appropriate assessment. On his case the scheme of habitats protection in the UK context is for the front-loading of the appropriate assessment, in other words at the permission or outline permission stage. That ensures that habitats considerations are considered at the earliest possible point.

55. Adopting Mr Banner's submissions would open up a lacuna in habitats assessment leading to the possibility that, as here, development would proceed without an assessment being undertaken - the possibility when negative environmental effects were only ascertained only after the first stage in a multi-stage consent process. On Mr Banner's case, although no appropriate assessment had been undertaken, it was now too late for that to occur. In this regard I accept the Secretary of State's submission that the argument for an habitats assessment at the subsequent consent stage is stronger in the context of the Habitats Regulations 2017 than in the EIA context because they impose a prohibition on granting consent unless an appropriate assessment is made, as opposed to the EIA Directive which merely lays down an environmental assessment procedure without prescribing outcomes.

56. A purposive interpretation of the Habitats Regulations 2017 enables regulation 70 to be read in light of ("in accordance with") regulation 63, so that a competent authority must conduct an appropriate assessment before, as regulation 63(1) provides, any consent, permission or other authorisation is given for a project. In a multi-stage consent, consent amounts to taking the implementing decision, as Lang J put it in *R (Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin). In that case and in *R (Swire) v Canterbury City Council* [2022] EWHC 390 (Admin) it was said that there is no agreement until reserved matters are granted: [74] and [94] respectively, quoted earlier in the judgment. I accept the submission of the Secretary of State that the same applies to the discharge of conditions, in circumstances where commencing development in breach of them results in that development not being development authorised by that permission.

57. Mr Banner cited *R (Fulford Parish Council) v City of York Council* [2019] EWCA Civ 2109 to the effect that reserved matters approval is not a planning permission, and that

would include the discharge of a condition on a reserved matters approval. However, a close reading of Lewison LJ's judgment reveals that his conclusion in this regard was the product of the statutory context. I accept the Secretary of State's submission that regulation 70(3) can be read as requiring an assessment at that stage in circumstances where it might otherwise be argued that it is too early in the scheme's development for an appropriate assessment to take place. It is in that respect an extending provision, not a restrictive one. Crucially, it is silent as to what should happen at the reserved matters or condition discharge stage and does not prohibit an appropriate assessment at those points.

The caselaw

58. Mr Banner submitted that there was no caselaw directly in point about refusing to discharge conditions on a planning permission in the absence of a negative appropriate assessment. *R (Barker) v Bromley LBC* [2006] UKHL 52 was an EIA Case, on a differently worded text than in the Habitats Directive and with a differently structured approval process. *R (Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin) involved a different situation, where following the CJEU case the local authority voluntarily undertook an appropriate assessment under the Habitats Regulations 2017, supported by the developer, in association with the grant of reserved matters. Even if Lang J had decided that an appropriate assessment was legally required at the reserved matters stage that was *obiter*. Nothing was said about a requirement to subject conditions attached to a reserved matters approval to an appropriate assessment. As for *R (Swire) v Canterbury City Council* [2022] EWHC 390 (Admin), Mr Banner contended that Holgate J was not considering whether it was a legal requirement of the Habitats Regulations 2017 to subject further approvals, after the grant of planning permission, to an appropriate assessment, as was clear from paragraph [94] of his judgment.

59. In my view *Wingfield* and *Swire* are authority for the proposition that an appropriate assessment can apply at the reserved matters or discharge of condition stage even if there has been a grant of outline planning permission where the subsequent approval is the implementing decision. There is support, as Lang J found in *Wingfield*, in the case law concerning the EIA multi-stage consenting procedure such as *Barker*. There, as we saw, Lord Hope recognised that a material change in circumstances could require an assessment at the reserved matters stage. It will be recalled that in *Friends of the Irish Environment Ltd* the CJEU stated that the meaning of "development consent" was relevant to defining the equivalent term "agree" in the Habitats Directive. All this is retained case law under the Withdrawal Act 2018 concerning the interpretation of the Habitats Directive and the Habitats Regulations 2017. That the facts in *Wingfield* and *Swire* were different is no basis for undermining the principle they established. The common law system would not survive if this were the case, since there will always be a variation, even if slight, in the facts of later cases. That does not preclude the continued application of principle.

Validity of planning permission

60. Mr Banner invoked regulation 86(1) of the Habitats Regulations 2017, which states that that part 6, chapter 2 (with exceptions which are not relevant) is to be construed as one with the 1990 Act. Mr Banner contended that since in this case planning permission had been granted under the 1990 Act the principle of development could not be disturbed by later events, as the Inspector had wrongly decided. There were, he submitted, a variety

of rules in support. In discharging conditions, for example, matters falling for consideration at an earlier stage cannot be revisited: *R(Harvey) v Mendip District Council* [2017] EWCA Civ 1784, [41], per Sales LJ (with whom McFarlane LJ agreed).

61. Mr Banner also invoked the principle that, in approving the details required by a condition, the decision-taker must not misuse their functions to achieve indirectly - and without paying compensation - what would amount to a revocation or modification of a permission already given: *Medina Borough Council v Proberun Ltd* (1991) 61 P & CR 77, 85, per Glidewell LJ. *R (Noble Organisation Ltd.) v Thanet District Council* [2005] EWCA Civ 782 underlined the point in upholding outline planning permission at the reserved matters stage when (it was said) it had been granted in breach of the EIA Regulations. Therefore in this case the valid permission had to be given all the force in law of a regulation 70 compliant permission. If that position was to be altered, Mr Banner referred to the provisions enabling planning permission to be revoked, but only on payment of compensation: 1990 Act, ss.97, 107(1).

62. There are difficulties with these submissions. First and foremost, if there is a conflict between the obligations imposed on the one hand under the Habitats Directive and Habitats Regulations 2017, and on the other the rights recognised under the 1990 Act these have to be reconciled in accordance with established principle. Prior to the UK's exit from the EU, the Habitats Directive and Habitats Regulations 2017 had supremacy over domestic planning law through the European Communities Act. As we have seen, the Withdrawal Act 2018 continues this position. The 2017 Regulations and Habitats Directive are given effect by sections 2 and 4, and the principle of supremacy still applies by virtue of section 5(2).

63. In any event, there is no issue of the continued validity of the claimant's planning permission. Refusal of consent for the discharge of conditions does not invalidate the permission granted. *Proberun* (1991) 61 P&CR 77 concerned local planning authorities not misusing their powers when determining reserved matters applications (or applications to discharge conditions) not with situations where there is a specific statutory direction not to grant consent until the assessment provisions are satisfied. *Noble* [2005] EWCA Civ 782 was a challenge to a planning permission. The position here is different: the claimant obtained outline planning permission subject to the law which at the time provided (on a correct interpretation) that until there was an appropriate assessment, implementing consent would not be granted.

Conclusion

64. The upshot is that the Habitats Directive and Habitats Regulations 2017 mandate that an appropriate assessment be undertaken before a project is consented. That is irrespective of whatever stage the process has reached according to UK planning law. The basal fact in this case is that neither at the permission, reserved matters, or conditions discharge stage has there has been an appropriate assessment. Application of the Habitats Directive and a purposive approach to the interpretation of the Habitats Regulations 2017 require the application of the assessment provisions to the discharge of conditions. The strict precautionary approach required would be undermined if they were limited to the initial - the permission - stage of a multi-stage process.

Ground 2: NPPF, paragraph 181

65. For the claimant Mr Banner contended that paragraph 181 of the NPPF did not enable the Inspector to take into account considerations which were legally irrelevant to those conditions. Phosphate generation was outside the scope of the considerations capable of being relevant to the discharge of the conditions in question relating as they do, as we saw earlier, to tree protection, a construction environmental management plan, estate roads and furniture layout, cycle and footway connections, materials on external surfaces and surface (not foul) water. Material planning considerations in this context are the material considerations defined by each condition itself, not general material considerations like phosphate loading. Mr Banner submitted that policy – in this case in the form of paragraph 181 of the NPPF – could not change that position to make legally relevant what otherwise would be irrelevant, namely, the requirement for a negative appropriate assessment of the wider development. In this regard Mr Banner invoked *Aberdeen City and Shire Development Planning Authority v Elsick Development Co Ltd* [2017] UKSC 66.

66. In *Elsick* a planning authority's supplementary planning guidance provided that new developments should make a financial contribution via a planning obligation towards improvements to the local highway network. That was irrespective of the impact to which the development would give rise. Giving the judgment of the Supreme Court, Lord Hodge held that it was unlawful to make the grant of planning permission dependent upon paying money towards infrastructure unconnected to the development: [42]-[43]. Planning permission cannot be bought or sold: [44]. Inclusion in the development plan could not make such contributions a material consideration if they were otherwise legally irrelevant. "[T]he policy seeking to impose such an obligation is an irrelevant consideration when the planning authority considers the application for planning permission": [51].

67. In my view the situation in this case is not the situation in *Elsick.* The impacts on the Somerset Levels and Moors Ramsar Site and paragraph 181 of the NPPF cannot be said to be irrelevant considerations in this development. The issue is the read-across of the Habitats Regulations 2017 to Ramsar sites as provided by the NPPF in circumstances where the Council's shadow appropriate assessment shows that if the project if permitted it will cause harm to the Ramsar site. As Mr Wilcox for the Council submitted, to understand the scope of the discharge of conditions it is necessary to consider the legal consequences, and in this case one of these would be that a development with a potential impact on a Ramsar site protected by national policy would be authorised by the planning system. That creates the nexus to the NPPF's policy on the protection of Ramsar sites. It is open to the Secretary of State to introduce such a consideration as a matter of national planning policy.

Ground 3: scope of regulation 63

68. Mr Banner submitted that even if regulation 63 applies to the discharge of conditions, it ought to be interpreted in such a way that the scope of the appropriate assessment reflects the scope of the conditions being considered. Thus, for example, in the context of an application to discharge a condition relating to root protection zones for trees, an appropriate assessment would concern any effects on site integrity arising from the range of choices the decision-maker has in relation to root protection zones, given the permission granted (and any conditions already discharged). The appropriate assessment would not consider the effects of the scheme as a whole on the habitat in question.

69. Regulation 63 requires an appropriate assessment to consider the implications of the project, not the implications of the part of the project to which the consent relates. In this regard regulation 63 is consistent (unsurprisingly) with the Habitats Directive, which the CJEU has held requires a full assessment of a project which has not been assessed: Case C-254/19, *Friends of the Irish Environment*. (In my view it does not undermine the principle of that decision that a fresh consent was involved.) This reading is supported by other case law. Thus in *Barker* [2006] UKHL 52 the House of Lords recognised that it was the environmental effects of the development which were to be assessed, not the effects of the reserved matters. And to return to *Wingfield* it was the integrity of the site as a whole which was of concern, so that reserved matters approval could not be given when it was that which authorised implementation of the development. As Mr Wilcox for the Council put it, the thing which is to be the subject of the appropriate assessment is the thing which will be permitted by the authorisation, so that where the decision is the final stage in granting authorisation for a development, it is the development which is to be assessed.

CONCLUSION

70. For the reasons given the claimant's case is dismissed.