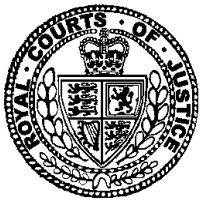

Neutral Citation Number: [2019] EWHC 1974 (Admin)

Case No: CO/1231/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN

on the application of

ELIZABETH WINGFIELD	**Claimant**
- and -	
CANTERBURY CITY COUNCIL	**Defendant**
REDROW HOMES SOUTH EAST	**Interested Party**

- -
- -

Richard Buxton (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Isabella Tafur (instructed by **Legal Services**) for the **Defendant**
Andrew Tabachnik QC (instructed by **Redrow Homes Ltd**) for the **Interested Party**

Hearing dates: 11 & 12 June 2019

- -

Approved Judgment

Mrs Justice Lang:

1. In a claim for judicial review filed on 26 March 2019, the Claimant challenged the decision of the Defendant (hereinafter "the Council"), on 12 February 2019, to grant approval for reserved matters relating to a development at Hoplands Farm, Island Road, Hersden, Westbere, Kent ("the Site") for which outline planning permission was granted on 5 July 2017.

2. The Claimant is a local resident, and the Defendant is the local planning authority. The Interested Party ("IP") is the developer of the Site.

3. On 5 July 2017, the Council granted outline planning permission for a development of up to 250 houses, a neighbourhood centre including medical services, retail outlets and a nursery, a commercial estate, a community building, amenity space and parking, together with 15 ha of ecological parkland.

4. On 12 February 2019, the Council granted approval for reserved matters relating to access, appearance, landscaping, layout and scale in respect of part of the Hoplands Site, namely, the erection of 176 dwellings (Phases 1A and 1B) and for parkland (Phase 3).

5. The southern boundary of the Site is near to the Stodmarsh National Nature Reserve ("Stodmarsh"), separated by the Canterbury to Ramsgate railway line. Stodmarsh is a European designated site and includes the Stodmarsh Special Protection Area ("SPA"), the Stodmarsh Special Area of Conservation ("SAC"), the Stodmarsh Site of Special Scientific Interest ("SSSI") and the Stodmarsh Ramsar wetland site. The Site also falls within the 7.2 km zone of influence for the Thanet Coast and Sandwich Bay SPA and Ramsar wetland site ("Thanet Coast").

6. The Claimant applied for judicial review on three grounds:

   i) The Council failed to undertake a lawful Habitats Regulation Assessment (HRA), pursuant to regulation 63 of the Conservation of Habitats and Species Regulations 2017[1] ("the Habitats Regulations 2017"), prior to the reserved matters decision; and

   ii) The Council has not remedied its failure to carry out a lawful HRA prior to the outline planning permission decision. Although the Claimant did not directly challenge the grant of outline planning permission, as the judicial review time limit had long expired, she asked the Court to intervene to remedy the alleged breach of EU law, by way of declaration or mandatory order.

   iii) The HRA was deficient in relation to recreational pressure, invasive species, loss of functionally linked habitat, and lighting, and in respect of in-combination assessment with other proposed developments.

7. On 2 May 2019, I ordered that the application for judicial review should be heard as a rolled-up hearing.

[1] The Habitat Regulations 2017 came into force on 30 November 2017, consolidating the Habitat Regulations 2010, as amended (under which the outline planning permission was granted).

8. The Site is adjacent to the former Chislet Colliery. The Claimant has also challenged proposed development at the Chislet Site. This claim was heard by me immediately before the hearing in the Chislet Site case, but the two claims were not linked, as the grounds were different.

Planning history

9. The Site is located to the south of the A28, on the southern edge of Hersden village, approximately 6.5 km from the centre of Canterbury. It is 28.74 hectares (71 acres) in size, and comprises open countryside and former farm land.

10. In about June 2015, Quinn Estates Ltd and Invicta Properties Ltd (the previous applicants) applied for a screening opinion for a mixed use development at the Site.

11. On 7 October 2015, the Council issued a screening opinion which concluded that the proposed development fell within section 10(b) of schedule 2 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations 2011"), as an infrastructure project exceeding 150 dwellings and 5 hectares in size. It would be likely to have a significant effect on the environment, because of the characteristics of the site and its location close to designated sites, and cumulation with other development. The Council therefore found that the proposed development was EIA development in respect of which an Environmental Statement was required. The screening opinion added "without mitigation, which satisfies the Council that likely significant effects can be excluded, then an Appropriate Assessment under the Habitat Regulations will be required".

12. On 14 January 2016, Natural England provided written advice on the scope of the Environmental Statement, including cumulative and in-combination effects with other developments. Natural England advised that an Appropriate Assessment could be required under the Habitats Regulations 2010, and recommended that the Environmental Statement should have a separate section addressing impacts upon European and Ramsar sites entitled 'Information for Habitats Regulations Assessment'. It also advised, in accordance with Government Circular 06/2005 that a survey (equivalent to Phase 2), impact assessment and mitigation proposals for Habitats and Species of Principal Importance should be included in the Environmental Statement.

13. On 20 January 2016, the Council provided a detailed scoping opinion, incorporating the consultation responses received. It advised *inter alia* on the assessment required in respect of the Stodmarsh designated sites, and the financial contribution required in respect of the Thanet Coast Strategic Access Management and Monitoring (SAMM) Plan.

14. On 17 February 2016, the previous applicants submitted an application for outline planning permission. The application was accompanied by a detailed Environmental Statement. As well as assessing the environmental effects of the proposed development, it also assessed cumulative and in-combination effects with other nearby development, including the Chislet Site.

15. Chapter 12 of the Environmental Statement assessed the potential effects on water quality and hydrology, including flood risk. Contamination and control of surface water during the construction and operational phases were assessed, and a drainage strategy proposed.

16. Chapter 11 of the Environmental Statement assessed the likely levels of significant effects in terms of Ecology and Nature Conservation, at *inter alia* Stodmarsh and Thanet Coast. Appendices contained an Ecological Baseline Assessment, in accordance with Natural England's advice, and an Ecological and Landscape Management Plan. There was a detailed analysis of the impact of the construction and operational phases. Table 11.9 summarised the residual adverse effects, after mitigation, as mainly negligible and non-significant.

17. As part of the Environmental Statement, the previous applicants provided a lengthy 'Report to inform a Habitats Regulations Assessment' dated February 2016. The Report stated, at paragraph 1.1.2, that, because of the Site's proximity to the designated sites, an HRA assessment would be required, and it set out the assessment methodology, in accordance with the Office of the Deputy Prime Minister circular 06/2005. Stage 2 should examine if the proposals will result in any 'likely significant effects' on the internationally important features of the European sites, either alone or in combination with other plans or projects. Where it is considered that they will not, then no further assessment was necessary and permission should not be refused under the assessment. If any likely significant effects were identified, or where it remained unclear whether effects would be significant, the assessment procedure should follow on to Stage 3. Under Stage 3, a full appropriate assessment of the likely effects of the plan or project had to be undertaken by the competent authority.

18. The Report was informed by previous survey and assessment work relating to the Site and the Chislet Site, and Kent Wildlife Trust was consulted in respect of the Local Wildlife Site at the Chislet Site.

19. The Report analysed the effects of the development on Stodmarsh in respect of direct habitat loss, noise, light and visual impact, cat predation, recreation, air quality and water levels. In-combination effects with other sites, including strategic allocations for housing to the north of Hersden and Chislet, were assessed.

20. The Report concluded, at paragraph 4.5.1, that it was considered unlikely that Stodmarsh would be subject to adverse effects arising from direct habitat loss, water levels, noise or visual impact, cat predation or recreation. Some minor potential for effects was identified as a result of water quality and light disturbance, to be addressed by mitigation.

21. In its consultation response, Natural England considered the Environmental Statement. It did not object to the proposal, subject to conditions. It advised that appropriate financial contributions to the Thanet Coast SAMM Plan should be in place before the dwellings were occupied. A Sustainable Urban Drainage Strategy ("SuDS Strategy") to attenuate surface water run-off and filter pollutants (including oil interceptors) should be implemented to protect the quality of the designated sites, and specific details of this strategy should be provided at the detailed application stage. Kent Wildlife Trust did not object to the proposal either.

22. Both Natural England and the Kent Wildlife Trust were fully supportive of the 15 ha green space, which would offer an important habitat buffer to the adjacent designated sites. It made recommendations to enhance biodiversity.

23. The Officer's Report ("OR") recommended refusal of the application on the grounds that the proposed development was contrary to the Local Plan, as it was in the open countryside and not allocated for development. However, the refusal was not related to the issues in this challenge. The OR addressed ecology and biodiversity and concluded that the scheme would be acceptable, provided that the previous applicants entered into a legal agreement to contribute to the Thanet Coast SAMM Plan. It concluded that an appropriate assessment was not necessary and that the proposed development would not adversely affect the integrity of the designated sites. There were not considered to be any significant cumulative or in-combination effects following proposed mitigation measures.

24. The application was considered by the Planning Committee on 27 April 2017. The Committee decided to grant outline planning permission because of the benefits of the development, subject to the completion of a legal agreement to secure contributions to *inter alia* the SAMM Plan and the imposition of appropriate conditions, as well as mitigation of any air quality impacts.

25. Outline planning permission was granted on 5 July 2017, subject to detailed conditions and an agreement under section 106 of the Town and Country Planning Act 1990 ("TCPA 1990") to secure the payment of the SAMM Plan contribution.

26. There was no challenge to the grant of outline planning permission within the relevant judicial review time limits. The IP acquired the Site on 17 October 2017, upon the expiry of the judicial review time limits.

27. Since the grant of outline permission, a number of conditions have been discharged.

28. Condition 16 (landscape and ecological mitigation plan and ecological mitigation strategy) was discharged in September 2018, following the submission of the Landscape and Ecological Mitigation Plan and the Ecological Mitigation Strategy (14 September 2018).

29. Condition 17 (lighting strategy) was discharged on 11 March 2019. As part of its submission, the IP confirmed that there would be no lighting in the open space in the southern part of the Site, closest to Stodmarsh.

30. Natural England and Kent County Council Ecology were consulted in respect of the discharge of those conditions and raised no objections.

31. The Council has also approved details relating to conditions 11 (surface water drainage), 14 (construction management plan) and 7 (contamination remediation strategy).

32. In December 2017, the IP submitted an application for the approval of reserved matters relating to access, appearance, landscaping, layout and scale for the first phases of development, at part of the Site, namely, the erection of 176 dwellings (Phases 1A and 1B) and for parkland (Phase 3).

33. In April 2018, after the grant of outline permission but before the approval of the reserved matters application, the CJEU handed down judgment in *People Over Wind v Coillte Teoranta* C-323/17; [2018] PTSR 1668. That judgment established, in contradiction to previous domestic authority, that mitigation measures should not be taken into account at the screening stage. They can, however, be taken into account in the third stage of the assessment, in determining whether the project will adversely affect the integrity of the European site.

34. In the light of that judgment, the Council decided to carry out an HRA of the impact of the reserved matters development on the integrity of European sites.

35. On 4 September 2018, the Council sent a draft HRA to Natural England as part of its consultation procedures. On 24 September Natural England sent back its comments. Natural England concurred with the Council's conclusion that, in the light of the SAMM Plan contributions, the proposed development would not have an adverse effect on the integrity of the Thanet Coast designated sites. However, in respect of Stodmarsh, Natural England advised that the proposed mitigation measures were at a conceptual stage and therefore there was insufficient information upon which to determine, beyond reasonable scientific doubt, whether there would be an adverse effect on the integrity of the designated sites.

36. The Council received further reports from the IP which addressed more fully the mitigation measures proposed, in particular, a detailed sustainable surface water drainage strategy (condition 11); a Landscape and Ecological Management Plan and Ecological Mitigation Strategy (condition 16); a construction management plan (condition 14) and a contamination remediation strategy (condition 7).

37. Natural England approved the discharge of the conditions, in the outline planning permission on the basis of these reports. In its comments on the final draft HRA, it confirmed that it now concurred with the Council's conclusion that, with mitigation, the project will have no adverse effect on the integrity of the European protected sites.

38. The OR for the Planning Committee meeting of 5 February 2019 recorded that "Following the submission of additional information from the applicant, Natural England has confirmed that the proposed development is not likely to have an adverse effect on the integrity of the Thanet Coast and Sandwich Bay SPA and Ramsar Site and the Stodmarsh SAC, SPA and Ramsar Site".

39. The Council adopted an HRA of the impact of the reserved matters scheme on the designated sites on 28 January 2019. The HRA carried out a Stage 2 assessment of the likely significant effects of the proposed development on the designated sites, disregarding mitigating measures. It then went on to carry out a Stage 3 appropriate assessment in respect of Thanet Coast, and concluded that because of the mitigation measures funded by the IP's SAMM Plan contribution, the development would have no adverse effect on the integrity of the Thanet Coast designated sites. The Council also carried out a Stage 3 appropriate assessment of the construction and operational effects on the Stodmarsh designated sites. In addition to the Environmental Statement and 'Report to inform a Habitats Regulations Assessment', the Council took into account the further reports provided by the IP, including the Landscape and Ecological Management Plan, the Drainage Strategy, and the Construction Environmental Management Plan. The Council concluded that, with mitigation

measures in place, the development would not adversely affect the integrity of the Stodmarsh designated sites.

40. The Council's HRA was endorsed by Natural England.

41. The OR to the Planning Committee in respect of the reserved matters application recommended approval. It considered the effects of the development on ecology and biodiversity and concluded that the development would not harm the integrity of any designated site.

42. Reserved matters approval was granted on 12 February 2019.

Legal framework

43. Directive 92/43/EEC ("the Habitats Directive") makes provision in article 6 for the conservation of special areas of conservation, which are sites of Community importance designated by Member States.

44. Article 6(3) provides:

> "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."

45. The Habitats Directive is implemented into domestic law by the Habitats Regulations 2017.

46. Regulation 63 of the Habitats Regulations 2017 materially provides, so far as is material:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
> (b) is not directly connected with or necessary to the management of that site,
> must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.
>
> (4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.
>
> ….."

47. Pursuant to Regulation 70 of the Habitats Regulations 2017, regulation 63 applies to the grant of planning permission under Part 3 of the TCPA 1990. Regulation 70 provides, so far as is material:

> "(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); …
>
> (2) Where the assessment provisions apply, the competent authority may, if it considers that any adverse effects of the plan or project on the integrity of a European site or a European offshore marine site would be avoided if the planning permission were subject to conditions or limitations, grant planning permission, or, as the case may be, take action which results in planning permission being granted or deemed to be granted, subject to those conditions or limitations.
>
> (3) Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority is satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject,

> or otherwise) that no development likely adversely to affect the integrity of a European site or a European offshore marine site could be carried out under the permission, whether before or after obtaining approval of any reserved matters.
>
> (4) In paragraph (3), "outline planning permission" and "reserved matters" have the same meanings as in section 92 of the TCPA 1990 (outline planning permission)."

48. Regulation 61 of the Habitats Regulations 2017 defines "the assessment provisions" as including regulation 63.

49. Thus, by regulation 70(3) of the Habitats Regulations 2017, UK domestic law expressly requires an authority to undertake an appropriate assessment before granting outline planning permission, in those applications for planning permission where the assessment criteria in regulation 63 of the Habitats Regulations 2017 are met. There is no equivalent provision in the Habitats Directive, probably because the UK's two-stage consent procedure (outline planning permission followed by approval of reserved matters) does not exist in other EU Member States. I am grateful to Mr Tabachnik QC for bringing this to my attention.

50. Guidance on the interpretation of article 6(3) of the Habitats Directive has been given by the CJEU in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatsscretaris van Lanbouw (Coöperatieve Producentenorganisatie van de Nedelandse Kokkelvisserji UA intervening)* [2005] All ER (EC) 353. The court described the threshold for likely significant effects at [41]:

> "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 of the European Communities, 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."

51. The court considered the content of an appropriate assessment in the following passages of its judgment:

> "52. As regards the concept of 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.
>
> 53. None the less, 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.
>
> 54. Such an assessment therefore implies 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. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in annex I to that Directive or a species in annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed …..
>
> 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."

52. In Case C-258/11 *Sweetman v An Bord Pleanála (Galway County Council intervening)* [2014] PTSR 1092 the CJEU described the two stages envisaged by article 6(3), at [29] and [31]:

> "29. That provision thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the member states to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site ….."
>
> "31. The second stage, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4)."

53. In Case C-461/17 *Holohan v An Board Pleanala*, the CJEU set out the requirements of a lawful appropriate assessment under article 6(3) of the Directive in the following terms:

> "33. Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications of a plan or project for the site concerned implies that, before the plan or project is approved, 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 must be identified, in the light of the best scientific knowledge in the field. The 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. That is so when there is no reasonable scientific doubt as to the absence of such effects (judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 42 and the case-law cited).
>
> 34. The assessment carried out under that provision may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned (judgment of 25 July 2018, *Grace and Sweetman*, C-164/17, EU:C:2018:593, paragraph 39 and the case-law cited).
>
> …..
>
> 43. In accordance with the case-law cited in paragraphs 33 and 34 of the present judgment, an appropriate assessment of the implications of a plan or project for a protected site entails, first, that, before that plan or project is approved, all aspects of that plan or project that might affect the conservation objectives of that site are identified. Second, such an assessment cannot be considered to be appropriate if it contains lacunae and does not contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the plan or project on that site. Third, all aspects of the plan or project in question which may, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field.
>
> 44. Those obligations, in accordance with the wording of Article 6(3) of the Habitats Directive, are borne not by the developer, even if the developer is, as in this case, a public authority, but by the competent authority, namely the authority that the Member States designate as responsible for performing the duties arising from that directive.
>
> 45. It follows that that provision requires the competent authority to catalogue and assess all aspects of a plan or project that might affect the conservation objectives of the protected site before granting the development consent at issue."

54. In *R (Champion) v North Norfolk DC* [2015] 1 WLR 3710 at [41]), Lord Carnwath held that, while a high standard of investigation was required, the assessment had to be appropriate to the task in hand, and it ultimately rested on the judgment of the local planning authority:

> "41. The process envisaged by article 6(3) should not be over-complicated. As Richards LJ points out, in cases where it is not

> obvious, the competent authority will consider whether the "trigger" for appropriate assessment is met (and see paras 41-43 of *Waddenzee*). But this informal threshold decision is not to be confused with a formal "screening opinion" in the EIA sense. The operative words are those of the Habitats Directive itself. All that is required is that, in a case where the authority has found there to be a risk of significant adverse effects to a protected site, there should be an "appropriate assessment". "Appropriate" is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project "will not adversely affect the integrity of the site concerned" taking account of the matters set in the article. As the court itself indicated in Waddenzee the context implies a high standard of investigation. However, as Advocate General Kokott said in *Waddenzee* [2005] All ER (EC) 353, para 107:
>
> > "the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty."
>
> In short, no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority."

55. The relevant standard of review by the Court is *Wednesbury* rationality, and not a more intensive standard of review: see *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174 at [80] per Sales LJ, and *Mynnyd y Gwynt Ltd v Secretary of State for Business Energy and Industrial Strategy* [2018] 2 CMLR 34 at [8(9)], per Peter Jackson LJ.

Grounds 1 and 2

56. Because of the overlap between Grounds 1 and 2, it is convenient to consider them together.

57. The Claimant submitted that the Council acted in breach of EU law by failing to conduct an HRA before granting outline planning permission and impermissibly taking into account mitigation measures when screening the proposed development, contrary to the CJEU judgment in the *People over Wind* case. The effect of the

judgment of the CJEU was to render the grant of outline planning permission a nullity, which could no longer be relied upon. Further or alternatively, when the Council realised its error, it should have revoked the outline planning permission and re-considered the application. Instead, it unlawfully conducted an HRA at the reserved matters stage, when it should have been conducted at the earliest possible stage, before the grant of outline planning permission.

58. The Council conceded that it had erroneously taken into account mitigation measures at the initial screening stage, in reliance upon the domestic authorities of *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) and *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, which had since been overruled by the CJEU in *People Over Wind*. However, the Council submitted that the outline consent was valid unless and until quashed by a Court. It was lawful for the Council to conduct an HRA at the reserved matters stage; there was no requirement to conduct it at the earliest possible stage. The IP supported the Council's submissions.

Conclusions

59. By regulation 70(3) of the Habitats Regulations 2017, an appropriate assessment should be conducted at outline permission stage, where the assessment criteria in regulation 63(1) are met.

60. Following the judgment of the CJEU in *People Over Wind*, the Claimant or another objector could have applied to quash the Council's grant of outline planning permission on the grounds that it erred in (1) taking into account mitigation measures at the screening stage, and (2) failing to conduct an appropriate assessment before granting outline planning permission, when some aspects of the proposed development were likely to have a significant effect on the designated sites, unless mitigated.

61. However, no such application was made within the planning judicial review time limits. Even now, the Claimant has not applied to quash the Council's decision to grant outline planning permission because, as Mr Buxton candidly conceded, any such application for judicial review would have been significantly out of time, and he considered an application for an extension of time did not have any realistic prospect of success. The decision was made on 5 July 2017 and this claim was filed on 26 March 2019.

62. Instead, Mr Buxton sought other ways to challenge the grant of outline planning permission.

63. In my judgment, Mr Buxton's submission that the effect of the judgment of the CJEU in *People Over Wind* was to render the grant of outline planning permission a nullity was both contrary to authority, and wrong in principle. A decision made by a public body is valid unless and until it is quashed: see *Smith v East Elloe RDC* [1956] AC 736, per Lord Radcliffe at 769-70; *Noble v Thanet DC* [2006] 1 P&CR 13, per Auld LJ at [42] to [44], [61]. *Boddington v British Transport Police* [1999] 2 AC 143 is not authority to the contrary.

64. Mr Buxton further submitted that the Court was under an obligation to nullify the unlawful consequences of a breach of Community law, relying upon Case C-201/02 *R (Wells) v Secretary of State for the Environment Transport and the Regions* where the CJEU held:

> "62 By its third question, the referring court essentially seeks to ascertain the scope of the obligation to remedy the failure to carry out an assessment of the environmental effects of the project in question.
>
> 63 The United Kingdom Government contends that, in the circumstances of the main proceedings, there is no obligation on the competent authority to revoke or modify the permission issued for the working of Conygar Quarry or to order discontinuance of the working.
>
> 64 As to that submission, it is clear from settled case law that under the principle of co-operation in good faith laid down in Art.10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law. Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned.
>
> 65 Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment. Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.
>
> 66 The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.
>
> 67 The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).
>
> 68 So far as the main proceedings are concerned, if the working of Conygar Quarry should have been subject to an assessment of its environmental effects in accordance with the

> requirements of Directive 85/337, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment.
>
> 69 In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.
>
> 70 The answer to the third question must therefore be that under Art.10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Art.2(1) of Directive 85/337."

65. Mr Buxton submitted that the Council erred in failing to consider revoking the grant of outline planning permission, relying on *Wells* at [65]. However, the obligation identified by the CJEU was to "nullify the unlawful consequences" of the breach of Community law. While this might require revocation in some cases, the CJEU did not state that revocation was mandatory. The CJEU emphasised that it was for the national courts to determine the appropriate course, applying national procedural rules. These include time limits for bringing proceedings.

66. The Council and the IP submitted that conducting an HRA assessment prior to the reserved matters decision was a lawful way in which to remedy the error made at outline planning permission stage. I accept their submissions.

67. By analogy with case law in the context of Directive 2011/92/EU ("the EIA Directive"), where national law provides for a consent procedure comprising more than one stage (i.e. outline permission followed by approval of reserved matters), the effects of the project on the environment should be identified and assessed at the time of the procedure relating to the principal decision. If the effects were not identifiable until a later stage in a multi-stage planning consent, the assessment should be carried out in the course of that procedure: see *Commission v United Kingdom* (C-508/03) [2007] Env LR 1 at [104].

68. The effects may not have been identifiable at the time of the principal decision because the need for the EIA was overlooked at the outline planning permission stage. Where the need for EIA was overlooked at outline stage, an assessment should be carried out at the reserved matters stage. In *R (Barker) v Bromley London Borough Council* [2007] 1 AC 470, Lord Hope said, at [24]:

> "As the European Court said in para 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. This is because 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, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier. In that event account will have to be taken of all the aspects of the project that are likely to have significant effects on the environment which have not yet been assessed or which have been identified for the first time as requiring an assessment. The flaw in the 1988 Regulations was that they did not provide for an EIA at the reserved matters stage in any circumstances."

69. In light of the *Barker* case, it was wrong to suggest that the only circumstances in which an EIA might be required at reserved matters stage was if the environmental effects of the development were not identifiable at the outline permission stage. EIA may also be required at reserved matters stage where the need for EIA was overlooked at the outline stage: see *Cooper v AG* [2011] QB 976 at [20 – 21] and [92].

70. Applying the principle established in *Barker* and *Cooper*, it may be said that the need for an appropriate assessment under the Habitats Directive was "overlooked" at outline permission stage in this case, albeit for different reasons. At the relevant time, established case-law was to the effect that mitigation measures could be considered at the screening stage: *Hart District Council v SSCLG* [2008] 2 P&CR 16 at [76], endorsed by Sales LJ in *Smyth v SSCLG* [2015] EWCA Civ 174 at [74-77], and followed by Lindblom LJ in *SSCLG v Wealden DC* [2017] EWCA Civ 39 at [20]. This understanding was not corrected until the CJEU published its judgment in *People Over Wind* on 12 April 2018.

71. In my judgment, the Council could lawfully conduct an appropriate assessment at reserved matters stage, in the circumstances of this case.

72. Unlike the EIA Directive, the Habitats Directive has no stated objective that appropriate assessment is expected at the "earliest possible stage". The distinction is that the EIA regime seeks to ensure consideration of relevant information at the first decision-making stage, whereas the HRA regime is focussed on ensuring the avoidance of harm to the integrity of protected sites.

73. In considering a challenge to a core strategy, the Court of Appeal in *No Adastral New Town Limited v Suffolk Coastal DC* [2015] EWCA Civ 88 found that there was no requirement for an HRA "screening assessment" to be carried out "at an early stage", on the basis that article 6 of the Habitats Directive "focuses on the end result of avoiding damage to an SPA", and it was therefore sufficient for any appropriate

assessment to be completed "before the plan is given effect", per Richards LJ at [61] to [69].

74. Moreover, article 6(3) of the Habitats Directive provides that "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". 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 HRA was required.

75. In considering whether the Council could legitimately remedy its earlier error by conducting an appropriate assessment at reserved matters stage, instead of revoking the grant of outline planning permission, I have taken into account that the consequences of revoking planning decisions long after they have been made, and the time limits for challenge have expired, are disruptive and undermine the principle of legal certainty. As Laws J. said in *R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [1998] Env LR 415, at [424], applicants for judicial review must act promptly, so as to ensure that the proper business of government and the reasonable interests of third parties are not overborne or unjustly prejudiced by litigation brought in circumstances where the point in question could have been exposed and adjudicated without unacceptable damage.

76. In this case, the IP acquired its interest in the Site after outline planning permission had been granted and the time for bringing a judicial review challenged had expired. Although building operations have not yet commenced, time and money has been spent in bringing this project to fruition. The Council considers that the development will bring tangible benefits to the community, although local residents, such as the Claimant, take a different view.

77. In my judgment, the Council's decision to remedy its earlier error by conducting an appropriate assessment at reserved matters stage was permissible under EU and domestic law, and it was a proportionate and effective remedy for the breach of EU law, as my findings under Ground 3 demonstrate.

78. Alternatively if my analysis is not correct, I would nonetheless refuse relief in this case. The Court may refuse relief where there has been a breach of EU law, if the substance of the EU right has been complied with: see *Champion v North Norfolk District Council* [2015] 1 WLR 3710, per Lord Carnwath at [54] – [65]; *Canterbury CC & Crondall PC v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211, per Dove J. at [79] – [84].

79. Section 31(2A) of the Senior Courts Act 1981 provides that the Court must refuse to grant relief on an application for judicial review if it appears highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred.

80. I accept the submissions of the Council and the IP that, in this case, the decision would inevitably have been the same, even if a lawful appropriate assessment had been conducted at outline permission stage, namely, that there would be no adverse impact on the integrity of the designated sites, as the relevant European sites, subject to mitigation. Although the Council was not entitled to have regard to mitigation measures at the screening stage, it was entitled to have regard to them at the appropriate assessment stage.

81. For these reasons, Grounds 1 and 2 do not succeed.

Ground 3: The HRA was deficient

82. The Claimant submitted that the Council's HRA was deficient because its assessment, in respect of recreational pressure, lighting, loss of functionally-linked habitat and invasive species did not meet the standards required, and it failed to consider the in-combination effects from the proposed housing development north of the A28 road in Hersden.

83. Although the legal obligation to undertake an HRA rests upon the authority, not the applicant, in cataloguing and assessing all aspects of the proposed development, the Council was entitled to take into account the substantial amount of research and assessment in the 'Report to inform a Habitats Regulation Assessment' submitted by the previous applicants. Regulation 63(2) of the Habitats Regulations 2017, which requires applicants to provide such information as the authority may reasonably require to conduct its assessment, clearly envisages that the planning authority will utilise material provided by applicants for the purpose of its own assessment.

84. By regulation 63(3) of the Habitats Regulations 2017, the Council was required to consult Natural England, as the appropriate nature conservation body, and have regard to its response. The Council was entitled to give considerable weight to the views of Natural England "having regard to their status, responsibilities and expertise as 'appropriate conservation body': *Secretary of State for Communities and Local Government v Wealden District Council* [2017] JPL 625, per Lindblom LJ at [50]. Indeed, cogent explanation is required if the decision-maker chooses not to give considerable weight to the views of the appropriate nature conservation body: see *Hart District Council v Secretary of State for Communities and Local Government* [2008] EWHC 1204, per Sullivan J. at [49]; and *Mynnyd y Gwynt Ltd v Secretary of State for Business Energy and Industrial Strategy* [2018] 2 CMLR 34, per Peter Jackson LJ, at [8(8)].

Lighting

85. The 'Report to inform a Habitats Regulation Assessment' analysed the effects of the development on Stodmarsh in respect of noise, light and visual disturbance.

86. The Report found that, as the Site was only 20 metres north of Stodmarsh, there was potential for disturbance to species associated with the designations, as a result of noise, light and visual disturbance. However, there was existing screening from trees and other vegetation at the boundary of the Site, which would be extended by new

planting, and parkland which would act as an open space 'buffer'. Stodmarsh was separated from the Site by a busy railway line, generating substantial noise and visual disturbance. As the railway line ran along a raised embankment, and was fenced, it formed a partial barrier to noise and visual disturbance from the Site.

87. The Report found that there was potential for adverse effects from light spill into the Stodmarsh designations, notably for the invertebrate communities for which the Ramsar site was designated. Accordingly, the Report proposed measures to avoid light spill into the adjacent Stodmarsh designations. The measures were (1) avoidance of lighting within green infrastructure areas, especially in the parkland to the south and along the boundary; (2) low-level lighting with directional hoods to direct lighting to the roads or buildings to be lit; (3) low pressure sodium lighting to be used; and (4) trees and shrubs to screen against light from roads and housing.

88. The Council's HRA accepted that there was potential for disturbance to species in the designated sites as a result of light. However, it did not find that there were likely significant effects from light at the Site because of:

    i) the substantial buffer of open space between Stodmarsh and the areas of built development on the Site, in which there would be no lighting (as confirmed in the IP's Lighting Strategy submitted to meet condition 17); and

    ii) the existing and proposed trees and shrubs, which would screen light from the developed part of the Site.

89. During consultation, Natural England did not raise any concerns regarding the light and nor did Kent County Council Ecology.

Recreational pressure

90. In respect of recreational pressure from visits by Site residents, the Report found that, because of the railway line, there was no direct access. It was concluded that residents would be unlikely to walk to Stodmarsh because of the nature and length of the walk required. Visits were likely to be made by car, to one of the two major car parks, where there were visitor facilities (access point 5 and 10 in Table 4.5). These destinations were actively managed by the nature reserve for public use, thus minimising the risk of members of the public disturbing wildlife. As the car parks were some distance from the Site (3.4 km and 8.8 km respectively), it was likely that they would be an occasional destination, not a regular dog-walking route. Thus, the Site would not result in more than a negligible increase in visitor numbers to Stodmarsh.

91. Footpath options were assessed, in particular, the footpath from Westbere, over the railway line, which the Claimant particularly relied upon, which was access point 1 in Table 4.5. The assessment was that it was not an attractive choice for residents because it would be necessary to walk along roads to reach the entrance to the footpath which was 1750 metres from the Site, and it would entail a return journey of 3.5 km just to reach the entrance to Stodmarsh. Once at Stodmarsh, there was no circular route available. Parking at the entrance to the footpath in Westbere was very limited, as the photographs showed.

92. The Council's HRA recognised that the increase in residents could lead to recreational pressure on the designated sites, but following its assessment, it concluded that there were no likely significant effects because the railway line was a barrier to movement from the Site directly in Stodmarsh and any visits were likely to be by car to the car parks and access points identified in the Report. These were actively managed by Natural England for public use, and surveys indicated that the majority of visitors were on an occasional day out, and few visitors used them for regular dog walking. Although these reasons were briefly expressed, it is clear that the Council was drawing upon the extensive research and detailed report prepared by the previous applicants, and agreeing with its conclusions. Although the HRA erroneously gave a distance of 6.2 km instead of 3.4 km for the distance to access point 5, I do not consider that error undermined its overall conclusion.

Invasive species

93. The Outline Ecological and Landscape Management Plan, dated June 2016, set out the principles of management of the Site, which included ongoing monitoring to identify and remove any invasive species. Pursuant to condition 16 of the outline planning permission, these outline proposals were finalised in 'The Landscape and Ecological Management Plan, dated September 2018. Appendix 42-3/3 on 'Management Prescriptions: Landscape Management Components' included a requirement to remove invasive species such as Rhododendron, Sycamore etc. as required, from all areas of the Site, and to carry out annual monitoring. The Plan was endorsed by Natural England and approved by the Council on 28 September 2018, when condition 16 was discharged.

94. As there was no evidence to suggest that invasive species would have likely significant effects, I do not consider that the Council was required to make an express reference to it in the HRA. It was not, however, overlooked.

Loss of functionally-linked habitat

95. The Council's HRA concluded that there would not be any loss of functionally linked habitat. It stated, under the heading "Direct habitat loss":

> "The Proposed Development is located outside of the Stodmarsh designations and as such, there would not be any direct loss of designated habitats. In terms of supporting habitat for interest species associated with the Stodmarsh designations, the site is of markedly different character to Stodmarsh and is therefore unlikely to support appropriate habitat for the majority of species associated with the Stodmarsh designations. However, given its proximity to Stodmarsh, the Site could form supporting, roosting or breeding habitat for bird species for which Stodmarsh is designated. This was considered by the ES submitted with outline planning application for the Site (reference CA/16/00404/OUT) and the necessary ecology surveys were carried out, on which Natural England were consulted, and the necessary mitigation was

> secured by condition 16 attached to the grant of planning permission for this application."

96. The Report, at paragraph 4.4.4, explained why there was no functional link, including by reference to breeding bird and wintering bird surveys.

97. Natural England did not disagree with these conclusions at any time. As its April 2016 consultation response on the outline application stated:

> "Green Infrastructure
>
> To the south of this site is the provision of approximately 15 ha of green space. With the in-depth design details of these areas to be developed at the reserved matters stage. Natural England is fully supportive of this and consider it to be a suitable area of green space between the development and designated sites. With the right design and management this space will offer an important habitat buffer to the adjacent designated sites."

98. Condition 16 of the outline planning permission consent (landscape and ecological management plan) was discharged on 28 September 2018. The approved details included an updated Landscape and Ecological Management Plan and an Ecological Mitigation Strategy, which explained the proposed uses and management regime for the green space in the southern part of the Site. Natural England and Kent County Council Ecology were consulted, and advised that sufficient details had been provided to discharge condition 16.

Cumulative effects and in-combination assessments

99. The Report assessed cumulative effects on designated sites arising in combination with other developments. Strategic housing allocations in the draft Local Plan were assessed (which included the proposed housing development north of the A28 which the Claimant alleged was overlooked), as well as the Chislet Site. The cumulative effects were assessed as negligible.

100. The Report's 'Summary and Conclusions' concluded, at paragraph 9.4:

> "Given the nature of the proposals and following implementation of mitigation, including construction safeguards, lighting and drainage design, new habitat and open space provision and contributions to CCC's SAMM in regard to the Thanet Coast, it is considered that detrimental effects, alone and in-combination, will be avoided. On this basis, in the absence of any likely significant effect, there is no need to undertake a formal Appropriate Assessment."

101. The Council's HRA expressly considered the cumulative impact of potential in-combination effects from a wide range of other developments in the area, including Chislet Colliery, and the land north of the A28 in Hersden which the Claimant erroneously alleged had been overlooked.

102. In conclusion, in my judgment, the HRA conducted by the Council was appropriate for the task in hand, particularly bearing in mind that the Council was able to draw upon the detailed research and assessment in the 'Report to inform a Habitats Regulations Assessment', as well as the further reports submitted by the IP. Its findings were complete, precise and definite and there were no significant lacunae. The Council was entitled to rely upon Natural England's endorsement of its HRA, particularly since Natural England had initially raised concerns about the evidence-base provided by the applicants, and those concerns were addressed by the further evidence produced by the IP. Natural England, as the custodian of the Stodmarsh designated sites, was particularly well placed to judge the risks from the proposed development. In my view, the Claimant's challenge did not come close to meeting the high threshold of *Wednesbury* irrationality; it was primarily a disagreement with the Council's exercise of its planning judgment. Therefore Ground 3 does not succeed.

Conclusion

103. In my view, the claim was arguable, as the Council conceded that, because of a change in the courts' understanding of the law, it had applied the wrong legal test under the Habitats Directive and Habitats Regulations 2017. Therefore, permission to apply for judicial review is granted, but the claim is dismissed for the reasons set out above.